expressed as to whether a reference to oath would be competent after an examination of the defender in the way proposed.

The defender now objected that before the commission was granted the petitioner should be made to minute a waiver of the right which he had to abandon his action. The Court refused to accede to this request, and granted the prayer of the petition. The most serious objection was the want of specification; but there was a reason for that to be found in the nature of the case. There was a risk of the privilege which the Act of Sederunt had in view being abused, but there was the same risk in the granting of diligences, which was done every day. To refuse such an application as this would be attended with greater danger, and the Court had therefore a choice of difficulties before them. In regard to the objection that the result of allowing the commission might be to enable the petitioner to make out his case, the defender could not fairly complain of this, as it was to be assumed that he intended only to speak the truth, and it was not for the Court to protect him against the consequences of his doing so.

Lord DEAS observed that as the only legitimate use which could be made of this commission was to preserve evidence, any other use was wrong, though, it might be, it was impossible to prevent it. He thought the pursuer had no right to have a clerk present to take down the evidence as it was given, but it should be sealed up without any copy being kept. He knew that it was a common practice to have a clerk present to take down such evidence, but it was wrong. If it was consented to by both parties it might be allowed, but if objected to it should not.

The LORD PRESIDENT said he would reserve his opinion on this point; and Lord ARDMILLAN said that if the practice was to be altered it should be done by a general order applicable to all cases.

Friday, Jan. 26.

FIRST DIVISION.

FARQUHARSON AND OTHERS *v.* FARQUHARSON'S TRUSTEE AND OTHERS.

Trust-Deed—Construction—Power to Sell. Terms of a trust-deed which held neither to express or imply a power to sell an heritable estate.

Counsel for Pursuers—Mr Clark and Mr John Hunter. Agents—Messrs Morton, Whitehead, & Greig, W.S.

Counsel for Defender Duncan—Mr Pattison and Mr Macdonald. Agent—Mr Thomas Ranken, S.S.C.

Counsel for Mr Farquharson of Whitehouse—Mr Patton and Mr Gloag. Agent—Mr John Robertson, S.S.C.

This action was originally raised by the late Robert Farquharson of Allargue and Breda, and is now insisted in by his brother, General Francis Farquharson, as his heir-male, and the trustees under his settlement, against John Duncan, advocate in Aberdeen, sole surviving trustee under the settlement of the deceased Andrew Farquharson of Breda and others. The object of the action is to have it declared that, on a sound construction of Andrew Farquharson's settlement, executed in 1823, his trustees had a power, in the circumstances which have occurred since his death, to burden the fee of the estate of Breda with the debts, legacies, and provisions left by the truster, or to pay off these debts, legacies, and provisions from the proceeds of a portion of the estate to be sold for that purpose. The question has been argued both orally and in writing. To-day the Court gave judgment against the pursuers.

The LORD PRESIDENT—The question before us arises under a trust-deed executed by Andrew Farquharson in 1823. By it he vested his property in trustees for various purposes—the payment of his debts, and of certain legacies, and the paying of the free liferent of his estate of Breda to his widow—and then comes the last purpose, which was in these terms — viz. — "I hereby desire . . . my said trustees . . . as soon after my decease as they possibly can, after payment of all my debts, the foresaid legacies, and such others as I may appoint, and without prejudice to the right of liferent before granted to the said Mrs Ann Farquharson, but subsidiary thereto, to make and execute a valid and formal deed of entail of my whole lands and estate of Breda, particularly before described, . . . settling my said estate upon Robert Farquharson" and a certain series of heirs. The truster died in 1831, and his widow lived till 1856, when she died. He left very considerable debt, looking to the amount of his property; and as the widow enjoyed a liferent, it became pretty clear that little could be done towards extinguishing it during her life. After her death there was, according to the view of the pursuers, little chance of the debts being paid for a long time. The other parties, however, say that they have been already very materially diminished. The parties do not concur on this point. This action was then raised; and it concludes in substance that Mr Duncan, the sole surviving trustee, is bound to make over the estate to the pursuer as first heir of entail, subject to the debts, and alternatively that he is bound to sell so much of the estate as will pay the debts, and make over the remainder. It is maintained by the pursuers that we must grant one or other of these conclusions; and it is said that unless we do so there is no prospect of any heir of entail enjoying the estate for at least fifty or sixty years. The sole surviving trustee resists the action, and so does Mr Farquharson of Whitehouse, a representative of another trustee, now dead. They say that the debts will be extinguished in a few years. But they further say that the trust-deed gives no authority or power to sell. That is the main question. It is pretty plain there is no express power to sell. Is there an implied one? There may be another question — namely, whether the exigencies of the trust are such that a sale is absolutely necessary for their extrication. That is a separate question, but it cannot now be decided in favour of the pursuers, for the parties are at variance as to the facts which raise it. On the first aspect of the matter it is very clear that the maker of this trust expected that his debts would be paid from the rents without the necessity of any sale. But it is said that he miscalculated the state of his finances, and that a sale is now necessary in order that his leading object, which was the payment of his debts, might be accomplished. Cases are referred to in order to prove that the Court have the power asked. I have no doubt of that, if it be possible to gather an implication of it from the trust-deed. I do not discover that in the deed before us. I think the whole scope of the deed is, on the contrary, adverse to such a thing. The truster says the estate is to be entailed when the debts are paid, and when the widow's liferent ceases. That of itself implies that the rents are to be applied to the extinction of debts. Then he authorises certain house property to be sold, but gives not a hint as to the sale of Breda. Again, he contemplates a state of matters under which his heir of entail is to be in possession of a certain portion of the estate but not of the estate itself. He contemplates that the heir is to possess the mansion-house and the farm of Mains. I read that clause as meaning that no rent is to be paid for that possession by the heir of entail. That being so, it is demonstrated that the rest of the rents were meant to be applied in payment of the debts. I think that this putting of the heir of entail in possession of a certain portion of the estate was equivalent to saying that he was to get a portion of the rents, and that the other surplus rents were to go to pay debts. If that had been said in so many words, could we for a moment have listened to the

present demand? I think not. Probably the long survivance of the widow has made this case one of hardship, but this cannot be said to have been unreasonable on her part, and the trustee could not help it. If it should turn out afterwards that the affairs of this trust are in a dead lock, from which a sale of the estate only can extricate them, we may possibly grant power to sell. I reserve my opinion as to that. We have not the facts ascertained which are necessary to decide the point. At present I proceed entirely upon the interpretation of the trust-deed, and, so proceeding, I am of opinion, that we cannot grant either of the decrees asked.

Lord CURRIEHILL—The question on which the parties are at variance is, whether, according to this trust-deed, the truster's debts are to be a burden on the fee or on the rents of the estate. The first and primary purpose is to pay debts, but the deed does not say whether the fee or the rents are to be applied to this purpose. The result of the authorities cited to us seems to me to be that trustees are not authorised to sell lands directed to be otherwise disposed of unless there is an absolute necessity for a sale in order to pay debts. His Lordship then referred to the cases of Erskine's Trustees *v.* Wemyss, 13th May 1829 (7 S. 594, and 4 F. C. 850), Allan *v.* Glasgow's Trustees (2 S. and M'L. 255), Campbell's Trustees *v.* Campbell, 4th December 1838 (1 D. 153) Henderson and Others *v.* Somerville, 22d June 1841 (3 D. 1049), and Graham *v.* Graham's Trustees, 21st December 1850 (13 D. 420). In the last case of Graham, especially, the Court held that, if the purposes of the trust could not be accomplished without a sale, there is an implied power of sale, but that has not yet been made out in this case. The contingency may arise, and therefore we must keep the question open lest it should. I think it is quite clear that the first conclusion, that the truster should be ordained to grant an entail under burden of the debts, cannot be complied with. The trust-deed expressly declares that the entail is not to be granted till all the debts are paid; and also that the trust is to subsist till all the burdens are cleared off. We cannot, therefore, ordain the trustee to execute the entail as concluded for in the first conclusion. The second conclusion fairly brings out the question as to the truster's intention of paying debts out of the fee or out of the rents. This question is one of construction; and I agree that it was not the truster's intention to pay these out of the fee. During the existence of the liferent he anticipated that there would be surplus rents. Who was to get these? Not the heir of entail. They were to go to pay debts and provisions. After the liferent lapsed, he in effect divided the estate, by giving the heir of entail, rent free, the mansion-house, &c.; and the rents of the rest he intended should be applied in payment of his debts.

Lord DEAS—This is entirely a question of construction. The truster had the power to direct his debts and legacies to be paid in any way he thought proper; and I cannot read his deed without holding it clear that he intended the debts to be paid out of the rents. There is a power to borrow money, but none to sell the estate or to entail it under burden either of his debts or his legacies. I think it very clear that the truster miscalculated his wealth; and if there is any perplexity in this case, it all arises out of that. I think if we ever can exercise our *nobile officium* in authorising a sale of this estate, it must be on grounds of necessity, and not of expediency or discretion; but I am very clear that this action does not embrace any such question.

Lord ARDMILLAN—It is not without difficulty or hesitation that I concur. The general presumption of law and reason is that a man's debts are to be charged on the capital of his estate, and it is not to be lightly presumed that they are to be charged only on the rents, the effect of which is, in this case, that the first heir of entail is to pay them. I don't think it is to be presumed that a man intended to make his first heir of entail pay all his debts for the benefit of the succeeding heirs. The question here is one of inferential construction, and I have been led to the same conclusion as your Lordships mainly by the fact that there is in this deed a division of the estate, by which part of it is appropriated to the heir of entail. But for that clause I should have had the greatest possible doubt.

The Court therefore assoilzied the defenders with expenses.

MITCHELL'S TRUSTEES *v.* MITCHELL.

Bill of Exchange — Recourse — Special Agreement — Onus probandi. Held that the *onus* of proving that an indorsee's recourse against the drawer of a bill had been discharged lay on the drawer, and circumstances in which (alt. Lord Kinloch), found that such a special agreement had not been proved.

Counsel for Pursuers—Mr Gordon and Mr Gifford. Agents—Messrs Baxter & Mitchell, W.S.

Counsel for Defenders—The Solicitor-General and Mr Hall. Agent—Mr John Thomson, S.S.C.

In this action the trustees of the late William Mitchell, writer, Cupar-Fife, sued David Mitchell, contractor, residing at Kirkside House, St Cyrus, near Montrose, for payment of £150, "being the amount advanced by the late William Mitchell to or for behoof of the said David Mitchell, and which advance the said David Mitchell became bound to repay, which sum is contained in a bill, dated 25th June 1860, drawn by the said David Mitchell upon, and accepted by Walter Dingwall, then residing at Drumforber, near Laurencekirk, payable three months after date, which bill was endorsed by the defender to the Aberdeen Town and County Bank, and by the said bank to the said deceased William Mitchell." The statements of the pursuers forming the ground of their action were denied by the defender, who pleaded that in retiring the bill Mr William Mitchell did not act for his behoof, and that no engagement was ever entered into by him to repay the money or any part thereof. The question of fact thus raised depended chiefly on a correspondence which took place betwixt the parties and certain admissions made by them, on which they renounced probation. Lord Kinloch assoilzied the defender, and in a note gave the following explanation of the circumstances of the case, and the grounds of his judgment:—

"Walter Dingwall, the acceptor, had, prior to September 1860, fallen into a condition of pecuniary embarrassment. It was agitated amongst the members of his family, and also amongst some of his creditors to apply for a sequestration of his estates under the Bankrupt Statutes. This was thought the more desirable because Walter Dingwall had granted a conveyance or renunciation of his farm of Drumforber, which it was thought a sequestration might afford the means of setting aside, and so a fund be created for equal distribution among his creditors, and the way cleared for his discharge. It was in this condition of things that the defender was brought into contact with the deceased William Mitchell. And it is of great importance to notice what is admitted on both sides in regard to Mr Mitchell's personal relation to the respective parties. The joint minute of admission bears, 'That the late William Mitchell, writer, Cupar, was the friend and agent of Walter Dingwall and William Dingwall, and that it was in consequence of this connection that he opened communications with the defender David Mitchell, with whom he had no previous acquaintance.' In this capacity of friend and agent of Walter Dingwall and of William Dingwall, who was the brother of Walter, the late Mr Mitchell wrote to the defender in the beginning of September 1860, mentioning the state of Walter Dingwall's affairs, and what his relatives contemplated doing. The correspondence continued down to 26th September, two days before the bill in ques-