necessary to have a discussion upon the account. I certainly think that the regular and satisfactory course would have been to get the account audited before he modified the amount, because otherwise it was quite possible that the amount which he awarded as a modification might be more than the whole expenses. I therefore perfectly concur with your Lordship in remitting back to him with the view that he may get the account audited, which he is quite entitled to do, or have its amount otherwise ascertained at sight of the parties, and then, if he shall think that the expenses should be borne by the party whom he proposed to hold liable for them, he will report his opinion of new, and state the amount which that party ought to pay.

Lord ARDMILLAN—I have nothing to add. I entirely concur in what your Lordship has said.

Expenses reserved.

Agent for Pursuers—W. S. Stuart, S.S.C.

Agent for Defenders—James Somerville, S.S.C.

Tuesday, March 5.

SECOND DIVISION.

George Patton, Esq., having on Friday last presented her Majesty's letter appointing him Lord Justice-Clerk and President of the Second Division of the Court, and having thereafter passed his probationary trials and taken the customary oaths, took his seat to-day on the bench as Lord Glenalmond.

SOFIO *v.* GILLESPIE AND CATHCART.

Jury Trial—Commission. Motion for a commission to examine the pursuer of an action which was to be tried by jury *refused*.

In this case issues were adjusted some time ago, which were set down for trial. The pursuer being resident in Messina,

CLARK and STRACHAN to-day moved for a commission to examine witnesses resident abroad, including the pursuer.

SCOTT, for the defenders, objected in so far as the motion asked the examination of the pursuer on commission.

The Court granted commission to examine witnesses other than the pursuer, but refused the motion *quoad* him. The pursuer was bound to attend the trial in this country and give his evidence at it.

Agent for Pursuer—James S. Mack, S.S.C.

Agent for Defenders—A. K. Morison, S.S.C.

Wednesday, March 6.

SMYTH *v.* WALKER.

Diligence — Adjudication — Letters of Horning — Superinduction—Erasure—Prescription. In a challenge of an adjudication on the grounds that certain words had been filled up after having been left blank in the letters of horning when they were signeted, and that there was an erasure in the execution—Held that the averments did not affect essential matters, and diligence sustained. *Question*—whether the documents were "grounds and warrants" which cannot be challenged after lapse of twenty years.

This was an action of reduction, improbation, and declarator, count and reckoning payment, against Mr Walker, who, on a bond for £300, had in 1837 adjudged the subject of his security in absence, from the pursuer's parents, and its object was to reduce that bond and all the diligence which had followed thereon. The pursuer had alleged forgery, and as he did not abandon that ground of action, the Lord Ordinary (Jerviswoode) ordered him to lodge issues. These issues, when lodged, only raised a question as to certain superinductions in the letters of horning, and an erasure in the execution thereof. The defender therefore craved absolvitor, at any rate as regards all the writs impugned, except the horning, and also as regards it, because, after the lapse of twenty years, the prescription of the warrants of an adjudication prevented any such challenge; and even if such challenge were competent, the superinductions and erasure were not of essential words, and were not such as to cast the diligence. The Lord Ordinary reported the points so raised.

MILLAR and WEBSTER for pursuer.

GIFFORD and THOMS for defender.

At advising,

LORD JUSTICE-CLERK — This case, depending since 1862, was instituted by the pursuer, David Smyth, as heir of his deceased father Alexander, and of his deceased mother, for the purpose, in the first place, of setting aside a bond over property belonging to his deceased father, together with an adjudication led in virtue of the bond against the subjects; also, to set aside a decree of the Magistrates of Dundee, in a process at the instance of the defender, the object of which was to obtain a count and reckoning with the deceased mother of the pursuer, as in possession under a prior bond, of part of the subjects, and, as was alleged, of the other portion of the subjects; and, lastly, a decree of declarator against Mrs Smyth in the Court of Session in absence, finding that Mrs Smyth's former security had been extinguished.

In reference to the reduction of the right of the defender, the bond and disposition in security, which was granted by the deceased Alexander Smyth in favour of Robert Chrystal for a sum of £300, and the various steps of the progress by which the right passed from Robert Chrystal into the person of the defender are called for. These constitute the first six writs called for. The eighth call is for the horning and poinding, the execution of charge and execution of denunciation; and the ninth is for the decree of adjudication.

There are no grounds assigned, at least there are none insisted on, for impeaching the validity of the original bond, and nothing directed against the validity of the instruments of transmission, by which the defender came to be in right of the bond. The pursuer's challenge is truly directed against the letters of horning and subsequent procedure.

The first objection taken is that the letters of horning, when signeted, were blank in the description of the residence of the party who was to be charged in virtue of the letters, and the pursuer offers to instruct that the blank was filled up after the signeting and before recording. A similar objection is taken to the word "sasine," and to the words "in favour of," which are a portion of a description of one of the links in the progress.

The first answer of the defender is, that the letters of horning, being "warrants" of the adjudication, which adjudication is *in se* complete, cannot be called for, or, if exhibited, cannot be looked at with a view to set aside proceedings

after the lapse of twenty years. The letters of horning are dated in October 1835; the execution of charge, 14th December of that year; the denunciation, in February 1836; and the adjudication itself, in May 1837. Taking the last date, there has elapsed a period greater than that of the consuetudinary prescription of twenty years. The defender further disputes the relevancy of the ground of challenge, denying that the letters of horning are open to objection even upon the assumption of the truth of the allegation that the words said to have been inserted between the signeting and the recording were really so inserted.

The pursuer maintains that the letters of horning are here not mere warrants or accessories of judicial procedure, but truly grounds of debt, inasmuch as the accumulation of debt and interest into a capital sum, itself bearing interest, was of the nature of a creation or constitution of a debt to the extent to which the quality of bearing interest was conferred upon what, being itself interest, was incapable in law of bearing interest without an accumulation.

This question appears not to be unattended with difficulty, as is an ultimate question dealt with between the parties as to the extent to which the objection, if well-founded, would go. It has appeared to me that it is not necessary, in the present case, to determine that question, being of opinion, upon the best consideration which I can give to the matter, that the objection to the letters of horning, even if it were true that the words referred to by the pursuer had been actually inserted between the signeting and recording, is not sound.

I hold that these words were in themselves immaterial, and I fail to find any allegation which can bring the case under the category of a tampering with the signeted writ by the defender, or by any party whose act he is said to have authorised. The allegation is one as to a simple fact. An addition is said to have been made to a part of the letters forming the blank, but the pursuer does not undertake to prove the party who made it, nor any single matter unconnected with the simple fact. It may have been made for aught that is averred in the Record Office, and by a party whose act can in no sense whatever be represented as the act of the defender.

Are the alleged alterations material? It is impossible to say that an absolutely insignificant word being inserted by a party who might be unconnected with the defender could vitiate the instrument. If the alteration was immaterial, leaving the whole substance of the letters entire and complete without them, and introducing no contradiction between different parts of the instrument, I do not see how it can operate as a ground of reduction of the diligence.

The portion of the letters in which the addition occurs is in a narrative of something said to have been done by Alexander Smyth. He is said to have granted a bond for £300, and to have executed a disposition of certain subjects in Dundee. This portion of the letters is merely narrative. The important portion of the letters is where the messenger is directed to command and charge "the said Alexander Smyth." The designation of Alexander Smyth is to be sought for in the preceding part of the instrument, as it appears to me if the preceding part of the letters affords complete elements for identifying Alexander Smyth, it is sufficient. Now the Alexander Smyth so spoken of was late--*i.e.*, at one time or formerly—a merchant in Dundee, but he is also described as granter of the disposition in security over two shops, one facing the cross, the other on the west side of the High Street, the second being part of a great tenement of land there, and both described by their occupants at the date of the bond, and therefore as proprietor of these subjects. The place of present residence is not a guide to the messenger. Where it is introduced in description it is an element of identification only. The messenger must find out for himself where the party charged resides, and serve at the true place of residence at the date of the service. I think the description complete without the addition, and therefore I hold the addition which is not inconsistent with the truth or the remaining portion of the instrument immaterial.

The words upon the fourth page of the print are similarly immaterial.

I agree that the links connecting the party who is to charge the original creditor must be set out. The first connecting link is very explicitly stated on page 2, E F. The party is said to have acquired right, *inter alia*, by a cognition and sasine in favour of Peter Chrystal.

The reference is precise. In the portion of the letters 4 B, the "said" documents are said to have been shown and to have "testified" to the Lords of Session. The word *said* applies to each of the specified articles and to the "cognition." There is no other previously referred to, and "said cognition" must mean the only one previously mentioned. But this is not all, for in the close of the instrument there is a separate recognition of the fact that that very instrument had been exhibited to the Lords. "Because the Lords (p. 5, B) have seen the instrument of cognition and sasine in favour of Peter Chrystal."

Two cases were cited—1st, Eglinton *v.* Flowerdew, 20th July 1849, 11 D. 1486; 2d, Wilkie against Flowerdew, 5th March 1850, 12 D. 818. Neither is in point. In Eglinton's case a blank in the date of a completed title was filled in by the insertion of a date actually posterior to the date of the summons in which the blank occurred, and in the other the alteration was in an essential matter.

Proof of such allegations at such a distance of time, and with a possession assumed and held during the ancestor's life and continued since for so long a period and unchallenged is most unfavourable. This observation would probably apply more legitimately in weighing the evidence when led than in refusing to admit it, but it is satisfactory to find that there are grounds for rejecting it.

Further, in the execution it is said that the three initial letters of the word Alexander are written upon erasures. The name occurs twice in the execution. The messenger leaves his copy of charge with the said Alexander Smith "within his dwelling-place at Croll's Rocks in or near Dundee," the word being entire. The letters if not read would not prevent a party reading it from knowing the true name. The subsequent reference corrects it. In giving this opinion I do not acknowledge that after twenty years the execution can be impeached.

It thus appears to me that the defender is entitled to absolvitor in so far as relates to the various documents sought to be recovered from him as instructing his right to the bond and disposition in security and to the adjudication.

Lord COWAN concurred. He was rather of opinion that the letters were grounds, and not warrants, as but for them there was no authority

for the accumulation of interest, for which the adjudication had been led.

Lord BENHOLME concurred with the Lord Justice-Clerk, but reserved his opinion on the question of prescription.

Lord NEAVES concurred with the Lord Justice-Clerk, but desired to learn whether any of the other deeds sought to be reduced were now impugned.

It having been stated that the challenge was confined to the questions disposed of, the Court assoilzied the defender from all the reductive conclusions, and found him entitled to expenses from 6th December 1866, when the case was last in the Inner House, reserving all other questions, and remitting them to the Lord Ordinary.

Agent for Pursuer—W. Officer, S.S.C.
Agent for Defender—William Miller, S.S.C.

SECOND DIVISION.

M'FARLANE AND SON *v.* TURNER.

Issues—Reparation—Breach of Contract—Wrongful. The pursuer of an action of damages for breach of contract is not obliged to put in issue that the breach was "wrongful."

This was an action of damages for breach of contract. The defender had engaged to serve the pursuers for three years as a commercial traveller, during which he obliged himself to devote his whole time and attention to promote the interests of his employers, and not to "engage in any other business for himself or for behoof of any other person." The pursuers were, on the other hand, to pay him a salary and allow him certain commissions on orders.

In September 1865 the defender left the service of the pursuers, who thereafter brought the present action against him, alleging that he had in breach of his engagement, and during its currency, deserted their service, and also that he had engaged in business in the same line and diverted custom from the pursuers.

The defence was a denial and a statement that the pursuers had themselves broken the agreement by failing to employ him as a traveller, and requiring him to perform duties different from those for which he was engaged, and also by not having paid him the stipulated commission.

The case was reported on issues by the Lord Ordinary (Kinloch).

The pursuers proposed the following issue :—

"It being admitted that on 3d May 1864 the pursuer and defenders entered into the argument No. 7 of process—

"Whether, during the currency of the said agreement, the defender did in breach thereof desert the service of the pursuers, and engage in business for himself, or for behoof of some other, to the loss, injury, and damage of the pursuers?"

Damages laid at £1000 sterling.

The defender at first proposed counter issues, but eventually withdrew them, and contended that the pursuers were bound to insert "wrongfully" in their issue. The pursuers objected, and the Lord Ordinary reported the matter to the Court. His Lordship indicated a view adverse to the defender's contention, and suggested that the time of the alleged desertion might be made more specific.

On the suggestion of the Court, the pursuers broke up the proposed issue into two, and fixed the date of the alleged desertion at September 1865. Their Lordships were unanimously of opinion that the pursuers were not bound to insert the word "wrongfully."

The issues for the pursuers as finally adjusted are as follow :—

"1. Whether, in the month of September 1865, during the currency of said agreement, the defender did in breach thereof desert the service of the pursuers to the loss, &c.

"2. Whether, during the currency of said agreement, the defender did in breach thereof engage in business for himself, or for behoof of some other person or persons, to the loss, &c."

The defender was found liable in expenses.

Counsel for Pursuers—Mr Young and Mr MacLean. Agents—White-Millar & Robson, S.S.C.
Counsel for Defender—Mr Fraser and Mr Strachan. Agent—J. S. Mack, S.S.C.

Thursday, March 7.

SECOND DIVISION.

RICHARDSON *v.* FLEMING.

Proof—Competency of Evidence. Held (1) that a call for all titles and plans relating to the subject in question was too wide; (2) that a pursuer having anticipated the defender's case when leading his proof in chief, he was not entitled to ask questions in his conjunct proof which he had already put when leading his proof in chief; but (3) that he was entitled to lead conjunct proof in regard to matters which he had not so anticipated.

In this action, raised by Sir John Stewart Richardson of Pitfour against Mrs Fleming of Inchyra, for declarator of sole right to the salmon fishings opposite to Cairnie, part of the lands and barony of Pitfour, the defence set up is that, although there is no doubt of the existing boundary between the estates, the defender has possessed from time immemorial on a title of excambion a part of the river which is opposite to the pursuer's lands. The case was before the Court to-day on appeals taken by the parties in the course of leading the proof.

CLARK and LEE for pursuer.

YOUNG and GLOAG for defender. The following were the points decided :—

(1) That a call by the defender on the pursuer to produce all titles, plans, &c., relating to the fishings claimed by the defender was too wide, and was therefore inadmissible, it being necessary, before such a call should be acceded to, that a special case should be stated.

(2) That the pursuer having anticipated in great measure, when leading his proof in chief, the case of the defender, which was disclosed on record, he was not entitled, under his conjunct probation, to resume his examination in chief by putting questions to the witnesses which had already been put. He had led substantive proof to meet the defender's case, and he could not now be heard to plead that such proof was incidentally led.

(3) That, so far as the evidence taken under the conjunct probation related to matters which the defender had made subject of proof, and which the pursuer had not anticipated, it was admissible.