

Wednesday, July 17.

GUILD v. GIBB.

Process—Advocation—Failure to Print and Box.

Advocator having failed to obtemper Lord Ordinary's interlocutor appointing him to print and box, the respondent printed the Lord Ordinary's interlocutor and the note of advocation, and enrolled in the single bills. Case sent to summar roll. Thereafter, in respect of no appearance by advocator, advocation dismissed.

This was an advocation from the Sheriff-Court of Dundee. The note of advocation was lodged with the Clerk of Court on 2d April 1867. The Lord Ordinary, on 18th June 1867, pronounced this interlocutor:—"Allows parties to lodge additional pleas in law in eight days each, and on the same being done, on the motion of the advocator, reports this advocation to the Lords of the First Division, in terms of the statute; appoints him to print the record, proof, and any other papers which may be deemed necessary; and to box the same to the Court, and grants warrant to enrol in the Inner House rolls in common form."

The advocator lodged no additional pleas. He did not print and box. The respondent then, following the procedure in the case of *Dow and Mandatory v. Jamieson*, 18th June 1867 (*ante*, pp. 107, 173), printed the Lord Ordinary's interlocutor of 18th June, and the note of advocation. The case appeared in the single bills.

BERRY, for the respondent, moved the Court to close the record and send the case to the summar roll, with the view of having it disposed of.

THOMS, for the advocator, contended that the motion was incompetent. He cited *Millar v. Logan*, 20 D., 522, and maintained that no additional pleas having been lodged by the parties, the report to the Inner House fell, and the case was still before the Lord Ordinary. The report was conditional, and did not take effect until additional pleas were lodged. He contended that the case of *Dow v. Jamieson* was not an authority in point, the interlocutor in that case not being in the same terms as here.

LORD PRESIDENT—It certainly is very desirable to have some means of preventing an advocator from lying by as this advocator had been doing, and tiding over a session in this way, without taking a single step in his advocation, and I don't see any difficulty from the statute. The Lord Ordinary is directed, if a motion be made to that effect before him, to appoint the record and proof to be printed, and boxed to the Judges of the Inner House, and to report the cause to the Inner House; but it is not on that being done that he is to report, nor on anything being done, in so far as the statute is concerned. And, unless there is some difficulty in the form of the interlocutor here, we are in a position to send the case to the roll. At first sight there does seem some difficulty. The Lord Ordinary allowed parties to lodge additional pleas, in eight days each, and, on that being done, reports to the Inner House. Certainly, taking that literally, the report does not properly become a report until that is done. But looking to the fact that the thing is only allowed to be done, and may be done or not as the parties think fit, this is too strict a reading of the interlocutor. I think the Lord Ordinary intended to allow each party eight days to lodge additional pleas, and after that to re-

port, whether they lodged additional pleas or not. And therefore such condition as there is prefixed to this interlocutor is sufficiently purified by the lapse of time allowed for lodging additional pleas, as well as by the actual lodging of additional pleas. And therefore this report is now an unconditional report, and the case falls under the principle of *Dow v. Jamieson*, which we decided a very short time ago. And therefore I think we ought to send this note of advocation to the roll; and in order to make the remedy practically available to the respondent, it is necessary to put it to the roll immediately; but we may give the advocator all the time we can, consistently with that, to put himself right by printing and boxing the papers. What I propose is, to put it to the roll for Saturday; and if the advocator has not by that time printed and boxed, we shall give judgment against him by default.

The other Judges concurred.

On the following Saturday accordingly the case was put out in the summar roll. The advocator did not appear. The Court, in respect of his non-appearance, dismissed the advocation, with expenses.

Agents for Advocator—Lindsay & Paterson, W.S.

Agents for Respondent—Murray, Beath, & Murray, W.S.

Thursday, July 18.

FIRST DIVISION.

NEWTON v. NEWTON.

Entail—Deed of Locality—Reduction—Deathbed—Reserved Power—Faculty—Terce—Bond of Provision. Circumstances in which a deed of locality and a bond of provision in favour of younger children, executed by an heir of entail, reduced on the head of deathbed.

Bond of Annuity—Entail—Reduction. Circumstances in which held that a bond of annuity executed by an heir of entail was struck at by the prohibition in the entail, and deed reduced.

The pursuer, W. D. O. Hay Newton, succeeded on the death of his father, on 19th November 1863, to the entail estates of Newton. In the following year he raised three actions. The first of these actions was directed against his mother, and concluded for reduction, *ex capite lecti*, of a deed of locality executed in her favour by the deceased Mr Hay Newtown, on 31st October 1863.

The defender did not dispute that the deed in question had been executed by the late Mr Newton on deathbed, but she maintained these pleas:—(1) That the action was excluded by a bond of provision or annuity executed in her favour by the deceased Mr Newton, in terms of the Aberdeen Act, in 1860; (2) that bond was binding on the pursuer, and was valid and effectual, so far as regarded the lands therein described, and in so far as the deed of locality now sought to be reduced affected these lands, the pursuer's title to maintain the action was excluded; (3) the deed of locality had been executed in terms of reserved faculties in the deeds of entail, and was therefore effectual; (4) the plea of deathbed was excluded, in respect that the deed sought to be reduced was granted for onerous causes; and *separatim*, the defender was entitled to maintain the deed to the extent of her right of terce in the lands.

To meet the defence founded on the bond of annuity of 1860, the pursuer brought an action of reduction of that bond, principally on the ground that it was struck at by the prohibitions of the existing deed of entail.

A third action was raised by the pursuer, concluding for reduction, *ex capite lecti*, of a bond of provision executed by the late Mr Hay Newton in favour of his younger children.

In the first action the Lord Ordinary (BARCAPLE) pronounced an interlocutor repelling the pleas of the defender and reducing the deed of locality.

In the second action he found that, "On 17th July 1861 the deceased John Stuart Hay Newton, the father of the pursuer, executed, under authority of the Court, in terms of the 4th section of the Act 11 and 12 Vict., c. 36, a disposition and deed of strict entail of the estate of Newton in favour of himself as institute, and the pursuer and the other substitute heirs of entail therein mentioned; and that the fetters of said entail were thereby imposed on the institute as well as on the substitute heirs of entail: Finds that the said disposition and deed of entail gave power to the institute and heirs of entail to grant liferent infeftments to their wives, by way of locality allenerly, but did not give power to them to grant provisions of the nature of the bond of provision or annuity in favour of the defender, which is sought to be reduced in the present action: Finds that such a bond of provision and annuity is struck at by the prohibitions of the said deed of entail: Finds that the said bond of provision and annuity was executed by the said deceased John Stuart Hay Newton on 13th December 1860, under the power conferred by the Act of Parliament 5 Geo. IV., c. 87, while he possessed the said estate under a former deed of entail, dated 18th June 1724, and that the same remained undelivered, in the possession of himself or his agent at and subsequent to the date when he executed the said disposition and deed of entail in 1861: Finds that in these circumstances the pursuer, as heir of entail, is entitled to set aside the said bond of provision or annuity, as being struck at by the prohibitions of the entail," and therefore reduced the deed.

In the third action the Lord Ordinary also pronounced an interlocutor repelling the defences, and reducing the deed.

The defenders reclaimed.

SHAND for them.

FRASER and GIFFORD in reply.

The judgment of the Court was delivered by

LORD CURRIEHILL—The pursuer succeeded as heir of entail to the estate of Newton on the death of his father, John Stewart Hay Newton, on 19th November 1863. On 31st October preceding, and when on deathbed, that gentleman granted two deeds of provision in favour of his wife and his younger children, in terms of powers to that effect reserved by the deeds of entail. One of them was a liferent by way of locality in favour of his wife over certain portions of the entailed estate. The other was a bond binding the heirs of entail to pay a certain sum as provisions to the younger children. It is not disputed either, on the one hand, that in law these provisions would have been valid and effectual if they had been executed while the grantor was *in liege postie*, or, on the other hand, that in fact the grantor was on deathbed when these provisions were granted. He had previously, on 13th December 1860, granted in favour of his spouse a bond for a liferent annuity of £500 over the entailed estate, in virtue of the powers in Lord Aber-

deen's Act. The pursuer, as heir of entail in the estate, has instituted three actions. One is an action of reduction *ex capite lecti* of the deed of liferent locality. Another is an action of reduction of a bond of liferent annuity, upon which the grantee now founds alternatively, either as supporting the deed of locality of 1863, or, if that deed should be rescinded, as being itself a subsisting and effectual provision. She does not claim both the provisions. And the third is an action of reduction of the bond of provision of 1863 in favour of the grantor's younger children. As the decision of all these actions depends upon the peculiar character of certain deeds of entail which are included in the titles under which the grantor of the deeds under challenge held the entailed estate, it may simplify the consideration of the questions in dispute to premise a brief history of these entails.

1. The first of them is the original entail of the estate of Newton. It was granted on 18th June 1724 by Sir Richard Newton, in favour of the series of heirs therein mentioned. It contains all the conditions prescribed by the statute 1685, for rendering entails effectual. But these conditions are qualified with a clause, "*excepting and reserving always furth and from the said clauses irritant full power and liberty to the said heirs and members of tailzie above mentioned to grant liferent infeftments to their ladies and husbands, by way of locality allenerly, in lieu of their terce and courtesy, from which they are hereby excluded, (of the amount therein specified), and also in provide their younger children, beside the heir, to three years' free rent of the said lands and estate.*" It is of importance to attend to the nature and effect, both of the *exclusion*, and also of the *exception and reservation*, contained in this clause.

On the one hand, the *exclusion* of the terce of widows of heirs of entail was *absolute*. They were in no circumstances to have right to terce. But this exclusion did not operate as a restriction of the powers of *ownership* of the heirs of entail. On the contrary, its practical operation was to enhance the right of each successive heir by freeing it from a burden which otherways would have been imposed upon it *by the law itself*, in favour of his predecessor's widow,—in the same way as, by the law itself, there are imposed on the executors of defuncts who leave widows and children the burdens of *jus relicte* and legitim. As the right of terce is conferred by the law itself, the entailor, Richard Newton, could not have excluded his *own widow* from her legal right of terce. But he had power to qualify the rights which he granted to other parties by the entail by such an exclusion of the terce of widows, in virtue of the principle that when a gift is made under a condition the condition is effectual against the donees if they accept of the gift. And it being a condition of the investitures of every party succeeding to the entailed estate that his widow should not have terce out of the estate, his sasine, which is the very foundation of a widow's claim of terce, did, by its own terms, expressly exclude her claim to such a right. In such cases the exclusion derives its effect, not from the fettering clauses of the entail, but from its being the condition of the gift by the donor to the heirs of entail. This principle was settled, after full discussion and consideration, in the case of *Reid of Hoselaw*, 24th November 1794, M., p. 15,869. In that case an estate had been settled by an entail on a series of heirs, subject to prohibitory and resolute clauses, but these restrictions were not fenced with an irritant

clause, so that the *entail was not a statutory one*. It contained an express power to each heir of entail "to provide a liferent jointure in favour of their wives out of the estate by way of locality only," not exceeding a certain amount, "which liferent locality so to be provided to them is hereby declared to be in full satisfaction to them of all they can ask or claim of the law in name of terce; declaring also that, albeit it should happen any of the heirs of tailzie above specified to fail in providing their wives conform to the above written reservations to that effect, yet the wives shall have no manner of right to the terce." An heir of entail who possessed under that deed died suddenly without having made any provision for his widow, and she claimed her terce, on the ground that she had right to it by law itself, and that she could not be deprived of it by any provision of the entail; but the Court unanimously found "that the pursuer is effectually excluded from her claim of terce by the entail under which her husband possessed the estate of Hoselaw." And the principle of the judgment, as stated in the report, was, that the right of terce, although it was a legal right, might be effectually excluded by a condition of the grant when it was derived from a third party—that, "like the *jus mariti*, it may be excluded by the terms of the grant, which are strictly obligatory on the widows and children of the substitutes, without irritant and resolute clauses." Hence the exclusion of the terce in the original entail of the estate of Newton was effectual. On the other hand, as to the power which was reserved by the above clause in that entail to each heir of entail to make a provision voluntarily to his widow by way of locality, it was entirely *optional* to him to exercise it or not as he might think proper. But what chiefly requires in the present case to be noticed, as to that power, is, that it was merely *an element of the heir's ownership* of the estate. It was an inherent element of the right of property, which belongs by law itself to the owner of land; and the object and effect of the clause I have quoted from the entail was *not to confer on the heirs a power which would not have otherwise belonged to them*; but to prevent that element of their right of property from being affected by other restrictions which were imposed on their right of property; and this object was effected by expressly excepting and reserving the power in question from these restrictions. So much as to the original entail.

2. On 15th June 1842 another entail was executed of a property called Kidlaw. It has not been printed. But it is admitted that it was granted to the same series of heirs, and with the very same conditions as those in the entail of 1724. The same remarks, therefore, are likewise applicable to it.

3. On 17th July 1861 the pursuer's father, Mr John Stuart Hay Newton, executed a deed of entail of the subjects contained in both of the prior entails, excepting certain portions of the estate of Newton called Leehouses, and parts of the pasturelands of Kidlaw and Longnewton, which, by an Act of Parliament in 1833, had been vested in trustees for the purpose of being sold and the price thereof applied in paying for improvements. This deed of entail was executed in conformity with the 4th section of the Entail Amendment Act of 1848. The other parties, whose consent was indispensable to enable the granter to obtain authority for that proceeding, gave that consent only on condition that the deed should be granted under the same condi-

tions as those in the original entail of 1724, and that all those conditions should, by that deed itself, be applied to the estate. Accordingly, the Court authorised the new deed to be granted only on that footing; and by the deed itself the granter disposed the estate to himself and the heirs of entail in the new order which had been agreed upon, under "the conditions, provisions, declarations, reservations, burdens, faculties, restrictions, limitations, and irritancies, which are contained in the *fore-said bond of tailzie, and therein expressed and set forth* in manner aftermentioned, and which, by the said deed of consent, are declared to be applicable, and shall by these presents be applied, as they are now hereby applied, to the lands, barony, and others, before disposed."

By that proceeding the estate was not disentailed. Although the deed consisted of a disposition of the estate, the immediate disponee was the granter himself; and by the clauses to which I have referred to, his own right, as well as that of every succeeding heir of entail, was qualified with the restrictions and with the exceptions therefrom contained in the original entail. Their rights were likewise qualified with the same *exclusion* of the terce of widows, and with the same reservation of the power of providing for them voluntarily to a certain extent, as those contained in the original entail. And accordingly it was made clear that his right to the estate remained identically the same as it had been under his original investiture. There never was a moment of time when either the granter himself was the absolute owner of the estate in fee-simple, or when the exclusion of his wife's right of terce was inoperative.

4 and 5. Two of the remaining entails were granted by the testamentary trustees of the deceased William Waring Hay Newton, of subjects which had formed part of the trust of that gentleman himself. The one was dated 22d November 1862, the other 2d and 30th October 1863. These entails, also, were granted by these trustees under precisely the same conditions, restrictions, exceptions and reservations, in all respects as those in the original entail of the estate of Newton in 1724, and, *inter alia*, with the same exclusion of the right of terce, and the same exception in favour of each owner from the fetters of the entail, of power to grant a liferent provision by way of locality to his widow. As that grant was a donation from a third party, the condition of the gift was of course effectual against all the donees. And no right of terce out of these lands ever belonged to Mr Newton's widow, and his optional right to grant to her a liferent provision in lieu thereof was just an element of his legal right of ownership of the estate.

6. Another of these entails was granted in February and March 1863 by the statutory trustees in whom certain portions of the original entailed estate had been vested by the Estate Act of Parliament 4 and 5 Victoria. The object of that Act having been accomplished by means of a partial sale of those subjects, the remainder was, by this deed, re-invested in Mr John Stuart Hay Newton and the subsequent heirs of entail under precisely the same conditions as those in the original entail.

7. The remaining entail was executed by Mr John Stuart Hay Newton himself on 2d October 1863. The subject of it consisted of a piece of land which was a portion of one of the properties which had belonged to him under the entails before mentioned, but of which he had obtained a disentail on

10th Sept. 1863 in the manner prescribed by the Entail Amendment Act of 1848. And if that disentail had been obtained by him unconditionally, he would, as to this small subject, for a short period before executing this entail have been in the position of having been a fee-simple owner, and if he was then infert, his wife would have been entitled to her legal right of terce, and he would have been unable to deprive her of it by a deed of his own excluding her terce. But such was not his position. He obtained that disentail only in virtue of a transaction with the next three heirs of entail, and by the authority of this Court under the Entail Amendment Act of 1848; and it was a condition of that transaction that as much of the lands disentailed as should remain, after serving certain specific purposes, should be re-entailed on the same conditions as those in the original entail of 1724. That condition was set forth in an authenticated writing granted by Mr Newton to Mr James Webster, S.S.C., as tutor *ad litem* for Mr Francis John Stuart Hay, one of these consenting parties. And accordingly this deed of entail itself proceeds upon the express statement, that it was granted "with reference to the understanding upon which the procedure for disentailling the foresaid lands and others was carried through." And accordingly that entail, like all the others, was granted under precisely the same conditions as those contained in the original entail of 1724.

Having thus traced the general history of the late Mr Hay Newton's titles to his entailed estates, let us now inquire whether there is in them anything which protects from challenge, *ex capite lecti*, the deed of locality which he granted to his wife while on deathbed? She maintains that it is so protected—*first*, because it was granted by him merely in the exercise of a faculty; *secondly*, because it was granted in lieu or satisfaction of a right of terce, and is therefore effectual to the extent of what could have been yielded her by her terce; and, *thirdly*, that it is at least effectual to the extent of the provision which had been made to her by her husband in the year 1860, under the powers of the Aberdeen Act. I shall advert to these pleas in their order.

1. Such a provision, although at its date its grantor is on deathbed, is not challengeable *ex capite lecti* in cases where his title is not that of owner of the estate, but merely a *faculty* which had been conferred upon him by its owner. In such a case the deathbed deed is not prejudicial to the heir of the *granter*, and therefore is not challengeable on the head of deathbed. And if the provision in question had been granted, not by the owner of the estate of Newton, but by some third party who had been intrusted with the power of making such a provision, that provision would not be challengeable, although the party who had granted it in the exercise of such delegated power had been on deathbed at its date. But the person by whom the provision in question was granted was not in that position. He was himself the owner of the estate. And although he had been deprived of some of the powers of ownership by the fetters of the entail, he was not deprived of that power of ownership which enables a proprietor of land, while *in liegie poustie*, to make such a provision in favour of his widow. On the contrary, the deed of entail, while it did restrain him from exercising several other powers of ownership, expressly declared that that power, which consisted in making such a provision for his widow, was excepted

and reserved from these restraints. Mr John Hay Stuart Newton, therefore, granted this deed of provision, not as a delegate of the owner of the estate of Newton, but directly as being himself the owner of that estate, and in the exercise of his powers of ownership thereof, of which he had not been deprived by the entail. But unfortunately he did not exercise that right of ownership while he was *in liegie poustie*; not until he was on deathbed. And from the time he was in that state he became incapacitated, not by the conditions of entail, but by the law itself, to grant any such provision to the prejudice of his heir in the estate. The provision, therefore, is not protected from the operation of the law of deathbed, on the ground that the granter of it was merely exercising a faculty over the property of a third party.

2. When a widow has by law a right of terce out of an estate, a conventional provision in her favour by her husband, as the owner of that estate, is effectual to the extent of such terce. The reason here again is, that, to that effect, the provision is not prejudicial to the granter's heir in the estates. And if the defender had had a right of terce in the estate of Newton, this defence would have been available to her. But she was not in that position. The widows of heirs of entail of the estate of Newton had not a legal right to terce out of that estate, such right having been expressly and effectually excluded by express condition of the rights under which their husbands held the estate, and that condition was embodied in their infestments. Such was unquestionably the predicament of the defender so long as the estate was held under the original entail of 1724, and the feudal investitures following thereon. And such continued to be the case under the entail of 1861 and investiture following thereon of the principal estate; for there never was any one moment of time when the late Mr Newton held the estate under a title which did not effectually exclude any legal right to terce in his widow, or when any right of terce belonged to her in any way. And hence the deed of locality in question, in so far as it was granted over the subjects of these investitures, was not protected from challenge *ex capite lecti*, on the ground that it was a security for a right of terce which belonged by law itself to the defender.

It may be a question of some nicety, whether or not, after the deed of 1861 was granted and completed by infestment, the entail under which the estate was thenceforth held, is to be held as having been created after 1st August 1848 in the meaning of the Entail Amendment Act? I purposely express no opinion on that question, because that question may involve the interests of other parties; and it is not necessary to decide it in this case, considering that, in any view of that question, there certainly never was a moment of time in which Mr Newton's investiture did not effectually exclude a right of terce in his widow, or when he had a power to make a conventional provision in her favour otherways than as owner of the estate.

The same remark is applicable to the provision in question, in so far as it is granted over any of the portions of the estate included in the other deeds of entail; for, as I have shown, there was an equally effectual exclusion of the right of terce in the title of the defender's husband to the subjects contained in all these titles; and consequently the locality in question is not protected from challenge on either of the grounds pleaded by her.

Nor does the small portion of the estate, which

was included in the disentail obtained on 10th September 1863, form an exception to that remark, because, as I have also shown, that disentail was obtained only in virtue of a transaction with or on behalf of the three next heirs of entail; and it was an express condition of that transaction, to which effect was given in the deed of entail authorised by the Court, that the subject thereof should be re-entailed on the same conditions as those in the original entail of 1724, including, of course, the condition that the terce of widows should be excluded. And this part of the estate, as well as all the rest of it, having thus been exempted from liability to terce, the deed of locality is not protected from challenge to any extent whatever, on the ground of its having been a security for a legal right of terce.

3. It remains for consideration, whether the bond for an annuity of £500, which was granted by the late Mr Hay Newton in favour of the defender, on 13th December 1860, in terms of the statute 5 Geo. IV., c. 87, is effectual either to support the subsequent deathbed deed of locality, or as an independent provision? That provision would have been effectual, in virtue of the provisions in the Aberdeen Act, if the granter had continued to hold the estate exclusively on the title upon which it was possessed by him at the date of that bond, and if, moreover, he had never revoked or innovated that provision. But that bond contained merely a *mortis causa* provision, which the granter could render ineffectual at any time by destroying it, by revoking it, or by otherways indicating his intention that it should be inoperative. And, in my opinion, he did so by his granting the deed of 17th July 1861 and by the proceedings under which he obtained authority to grant it. Although the restrictions which were imposed upon the owner's right by the original entails of 1724 and 1842 were continued by the deed of 1861, and some others were added, yet it was expressly declared by that deed that the granter himself, and his heirs of tailzie, should thenceforth "enjoy, bruck and possess the said lands, barony, and others by virtue of this present tailzie, and infeftments, rights, and conveyances to follow hereupon, and by no other right or title whatsoever." This being the case, I think he intentionally evacuated the revocable provision he had made, more than a year before, under the powers in the statute of 5 George IV., because, by the 12th section of the Entail Amendment Act, it is enacted that the former of these statutes shall not be applicable to any entail dated on or after 1st August 1848; and without indicating any opinion as to the effect of the original entails in other respects, yet Mr Newton, having granted this deed in 1861 on the authority and in the terms I have stated, indicated clearly enough that the bond of provision in question was not to take effect. And he did so still more explicitly in the preliminary proceedings under which he obtained authority to grant the deed of 1861. I refer particularly to the affidavit which he made and produced to the Court, as to the burdens which affected the entailed estate. It is dated 4th June 1863; and it sets forth that Mr Newton appeared, and being solemnly sworn and interrogated, deponed, *inter alia*, there are "no provisions to husbands, widows, or children affecting, or that may be made to affect, the fee of the said entailed lands or others, and the heirs of entail." And that he held that provision to be evacuated and inoperative is confirmed by his having, in 1863,

granted the other provision to the defender by way of locality; for by the 12th section of the statute 5 George IV., c. 87, that liferent locality would have been ineffectual if the provision which had been granted by that statute had been effectual.

4. It only remains to advert to the provision which the late Mr Newton made in favour of his younger children. That provision was permitted by the entail, and would have been effectual if it had been granted in *liegie poustie*. But it was granted on deathbed; and no relevant ground has been stated for exempting it from the operation of the law of deathbed. Although power to grant it was excepted from the restrictions in the deeds of entail, yet the effect of that exception was merely to leave the owner of the entailed estates power to exercise his powers of ownership to the effect of making such a provision. But the law itself rendered him incapable of exercising his powers of ownership to that effect when he was on deathbed.

The result is that, in my opinion, the Lord Ordinary's judgments as to all the provisions in question ought to be adhered to.

The judgment of the Lord Ordinary was adhered to.

Agent for Pursuer—James Dalgleish, W.S.

Agents for Defenders—Hunter, Blair, & Cowan, W.S.

Thursday, July 18.

ADVN.—GRANTS V. EARL OF SEAFIELD.

Lease—Power to Plant—Abatement of Rent—Taciturnity. Circumstances in which held that planting had been made by a landlord on his tenant's farm at the request and for the convenience of the tenant, and not under a reserved power in the lease, which conferred a right on the landlord to take ground for that purpose.

This is an advocacy from the Sheriff Court of Morayshire, brought by James Grant, writer in Elgin, and the other trustees of the late John Grant, distiller, Glen Grant, against the respondent, the Earl of Seafield. His Lordship's predecessor, in 1844, granted a lease of the farm of Drumbain, consisting of 241 acres of arable land and 1057 of pasture, to the Messrs Grant. The lease contained the following provision:—"The proprietor is to have power at all times to take off what ground he may see proper for the purpose of planting, the tenant being to be entitled to such deduction of rent therefor as shall be fixed by two or three persons of skill to be mutually chosen." In the same year as the lease was entered to, the tenants addressed a letter to Lord Seafield, in which, after suggesting various improvements, they said—"The farm would be improved by a little planting, and we would afford every facility for doing it if your Lordship approve of it." Subsequent to this letter the proprietor planted a little more than an acre of arable ground and six acres of pasture. In the letter written by Lord Seafield's factor in answer to the tenant's letter suggesting improvements, while all the other topics mentioned were touched upon, nothing was said of the suggested planting. The tenants continued in possession till 1863 and made no claim for abatement of rent on account of the ground taken off, but on the expiry of their lease they made a demand for £47, 12s. 4d., being the *cumulo* amount of the yearly value of the