use of the water prescriptively had by the defender; and he goes on to say that if that prescriptive right is the same as that laid down by the Lord Ordinary, as we must hold it to be, viz., that the dam as it stands at present requires a slap to be made in it to restore it to its previous state; then he thinks that the slap he proposed—4 inches wide and 12 deep—would not materially prejudice the mill, keeping in view the said prescriptive use of water. I think, therefore, that this second report completes and confirms the interlocutor of the Lord Ordinary, and the soundness of the result at which he had arrived before that remit was made; and removes any doubt which might have suggested itself as to the possibility of inflicting, by enforcing the pursuers' rights, a material injury on the efficient working of the mill. I think this is the sound legal result of the whole facts and evidence in the case, but I think it is also a practically just result; because it is quite obvious to me that when this slap shall have been made under the supervision of Mr Stevenson, the owner and tenant of the mill will have as much water, and have their mill as efficient as during the prescriptive period; because it is clear that though the height of the dam was such as it is now, taking it generally, it never extended throughout the whole length through any important period of time, but occasionally, as the Lord Ordinary says, fell into disrepair; and though the slap may have been sometimes occasioned by mere disrepair, it was always such as to facilitate the passage of salmon, and was sufficient for that purpose. Now, Mr Stevenson says that the slap he recommends is not unnecessarily large. In adhering to the Lord Ordinary's interlocutor we are giving full effect to the right created in the person of the proprietors of Monkwood by prescriptive possession. I propose that we adhere to the judgment of the Lord Ordinary, and as all that is to be done is to get the work executed, that we should direct Mr Stevenson to report to us.

Lord Curriehill concurred, and said that the case might be stated in three propositions:—1. The defenders had established a right to a dam by prescription, and were entitled to have it maintained at common law. 2. By the Act 1696, c. 33, the owner of the salmon fishing in that character was entitled to have a slap in that dam-dyke, provided it did not "prejudge the going of the mill." 3. The question came to be, as matter of fact, whether what was now proposed would prejudge the mill. The owner of the mill must show how it would prejudge the mill. The defenders' counsel had admitted that there was no proof by the owner that the proposed slap would prejudge the mill. There was another opportunity of proving that it would do so by the report of Mr Stevenson, but, as his Lordship read that report, it did not appear that there would be any prejudice, at least any greater than had always been experienced.

Lord Deas concurred.

Lord Ardmillan—It is to be regretted that there should have been so much litigation in this matter. There is only one part of the case as to which I have any difficulty, and that difficulty does not make me dissent from your Lordships' judgment. 1. There is no doubt that the contention of the Marquis of Ailsa, that the dam-dyke was not legally placed from bank to bank, is ill founded, and that the defender has established a prescriptive right to a dam-dyke so extending. 2. There is as little doubt that the Marquis is entitled under the Act 1696 to have a slap in that dyke for the passage of salmon. 3. The right of the Marquis to have that slap is qualified by the necessary statutory condition that the slap shall not prejudge the going of the mill. These facts being ascertained, the only point of difficulty is in the question as to the extent and depth of this slap. The Act was for the benefit of salmon proprietors, to give them a right to secure the passage of salmon, but that right was qualified by the obligation not to make such a slap as would prejudge the going of the mill. Now, the prescriptive right acquired by Paterson is, I think, to be considered apart from the effect of accidental disrepair. I think that the dam from bank to bank, and the right to make and maintain it which has been acquired by prescription, is to be viewed without regard to the accidental disrepair of that dam, for the party who has a right to put that dam there, has a right to maintain it efficiently; and so reading the evidence, I have some doubt whether, in giving effect to the amount of prescriptive possession of the water, we are not leaving a little out of view the state of disrepair of this dam. I don't go into the evidence. The Solicitor-General admitted that there was no evidence that the slap would prejudge the mill; but the report of Mr Stevenson says that the proposed slap would not in the ordinary case prejudge the mill, but it would, whenever the water sunk so low as not to pass over the crest of the dam. Now when there is plenty of water there is no difficulty, for then the salmon can pass easily, and the mill work easily, but it would be otherwise, Mr Stevenson thinks, when the water is low. No doubt that opinion is qualified by a reference to the prescriptive possession of the water. My doubt is, that that fact has been overlooked. The result of my opinion would be, that a slap somewhat less deep than that proposed by Mr Stevenson would meet the case.

Adhere.

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

Agents for Defender—M'Ewan & Carment, S.S.C.

Wednesday, November 6.

WILL *v.* ELDER'S TRUSTEES.

Adjudication—Co-obligant—Assignation—Property. Heritable property, belonging to several parties jointly, was adjudged for their joint debt. *Held* that one of the co-obligants was not entitled, on tendering payment of the whole balance due, to obtain from the creditor an assignation of the security in so far as it included the shares of the property belonging to the co-obligants other than himself.

The pursuer in this action was John Will, Broughty-Ferry, and the defenders were the trustees of the late David Elder, flesher there. It appeared that the pursuer and his brothers and sisters were joint owners, in certain proportions, of certain property in Broughty-Ferry. In 1844 David Elder advanced money for behoof of these parties, and in 1852 he obtained decrees of constitution against them, jointly and severally, for the amount due. Thereafter he obtained decree of adjudication, adjudging the whole subjects in security of the

debt. Infeftment followed upon this decree, and Elder, and subsequently the defenders, possessed the subjects and drew the rents, which were applied *pro tanto* to extinguish the debt and interest. A balance was still due to the defenders.

The pursuer, one of the co-obligants in the debt, now brought an action concluding, *inter alia*, that the defenders should be ordained to accept payment from him of the whole balance due to them, and on receipt thereof to assign to him, for the purpose of his operating his relief, the security constituted in their favour by the decree of adjudication. The defenders objected, but offered to take payment from the pursuer of the proportion of the debt due by him, and thereafter to convey to him the security so far as extending over the portion of the subjects belonging to him.

The Lord Ordinary (JERVISWOODE) sustained the plea of the defenders. He thought that the pursuer had no equitable or legal foundation for his demand. The defenders were accountable to other parties besides the pursuer. The pursuer's discharge could not, he thought, free the defenders of all question or liability to account to the other parties whose subjects were embraced within the adjudication; and, if so, the defenders were entitled to hold until called on to denude by the parties in whom the true and radical right was vested, and with whom they were in entire safety to deal.

The pursuer reclaimed.

MONRO and MACKINTOSH for him.

GIFFORD and J. HUNTER in reply.

LORD PRESIDENT—I am not surprised that there is no authority cited to us by the pursuer, for the proposal is perfectly unreasonable. One of several *correi debendi* proposes to the creditor to pay off the balance of debt, and thereupon to obtain as his right an assignation to an adjudication, not of his own estate but of the estate of all the *correi debendi*. Now, what is the position in which the creditor would be placed if he acceded? He would have taken payment of a sum of money, but he would not have got the balance of his debt ascertained in such a way as to be binding on the other debtors, and they might come home and say to this creditor, why you are paid long ago, and more than paid, by intromissions with our estate. That is conclusive of the whole matter. Every demand of this kind must be founded in equity, but there is nothing of that here. I think the Lord Ordinary was right.

The other Judges concurred.

Adhere.

Agents for Pursuer—Hill, Reid and Drummond, W.S.

Agent for Defenders—Wm. Mitchell, S.S.C.

Wednesday, November 6.

SECOND DIVISION.

OAKELEY *v.* CAMPBELL AND OTHERS.

Poor Rates—Collector—Warrant—Justice—52 *Geo. III., c.* 95, §§ 13 *and* 14—8 *and* 9 *Vict., c.* 83, § 88. A collector of poor-rates applied to one of the Justices of the Peace of the county for a warrant to poind and distrain the pursuer's goods, who had fallen into arrears. The warrant having been put into execution, the pursuer brought an action of reduction, and also concluded for damages. *Held* (1) that a warrant to recover rates under the Act 8 and 9 Vict., was a good warrant if signed by one Justice. (2) That an action of damages for a fact done under the Act was excluded by section 88 of the Act 8 and 9 Vict.

The pursuer's goods were pointed and sold for payment of £26 of poor-rates. He brought the present action against the defenders—Campbell, the collector for the parish of Ardchattan, who obtained the warrant; Murray Allan, the justice who signed it; and Carmichael, the sheriff-officer who executed it—concluding for reduction of the warrant and execution, and for damages, laid at £3000. The warrant to poind and sell bore to be granted by Mr Murray Allan, acting as a Justice of the Peace, "as directed by the Statute 8 and 9 Vict., cap. 83, § 88; and 52 Geo. III., cap. 93, §§ 13 and 14." The certificate upon which the warrant proceeded, and the warrant itself, were in the following terms:—

"I, Colin Campbell, collector of poor and registration rates in the parish of Ardchattan and Muckairn, hereby certify that R. B. Oakeley, Esquire, now or lately at Kilmaronaig, stands duly assessed in the amount of £26, 16s. for the relief of the poor, and 11s. 2d. for registration purposes, for the year from 26th May 1865 to 26th May 1866, payable on the 20th day of December 1865. That such assessments are resting and not duly paid by R. B. Oakeley, Esquire, foresaid, a warrant for the recovery thereof is hereby requested in terms of the statute. COLIN CAMPBELL, *Collector*."

"To Mr Duncan Carmichael, jr. sheriff-officer and justice of peace officer for the county of Argyle.—Whereas it appears from the above-written certificate, that the above person named and designed has been duly assessed to the amount of £26, 16s. for the poor of the parish of Ardchattan and Muckairn, and 11s. 2d. for registration purposes, and which should have been paid on the 20th day of December 1865, and that the said poor and registration rates are resting and not duly paid; therefore I, Thomas William Murray Allan, one of Her Majesty's Justices of the Peace for the county of Argyle, do hereby grant warrant for poinding and distraining the goods and effects belonging to the said R. B. Oakeley, Esquire, and for keeping and detaining the said goods and effects for the space of four days in your custody, liable to the payment of the said whole poor and registration rates in arrear by R. B. Oakeley, Esquire, whose goods and effects shall be so poinded and distrained, and the costs to be paid to you as after directed, unless the owner shall redeem the same within the said space of four days by payment of said poor and registration rates due by him, and costs; and further, I hereby grant warrant, after the expiration of four days, to value and appraise the said goods and effects by two persons to be appointed by you, and to sell and dispose of the same by you, at a sum not less than the value, to be applied, in the first place, to the satisfaction and payment of said poor and registration rates owing by the said R. B. Oakeley, Esquire, whose goods are so poinded; and, in the second place, to the payment of your trouble at the rate of 2s. per pound of the said poor and registration rates, unless the owner shall redeem the same by payment to you of the appraised value within the further space of four days after valuation, and for returning the surplus that may remain to the owner of the said goods and effects; and in case no purchaser appear at the sale, for consigning and lodging the said goods and effects in