under crop when the pursuer bought the estate in 1860. It continued to be so in 1861 and 1862, a tillage crop of hay being taken of it in that year. It was laid down in grass in 1863. The designation was in February 1865, when in ordinary course it was not time for the land to be broken up. The evidence shows that the cropping of this portion of the estate was not a new or an occasional thing, but that the land had always been treated as arable. It was in that state when the property was bought by Mr Morrison, the late proprietor, in 1842. He seems to have wished to lay it down as part of his lawn and policy, but from the condition of the land he was obliged to break it up and put it through a course of crops repeatedly during the time he possessed the estate. In 1863 the new proprietor, the pursuer, renewed the experiment of laying it down as a lawn or policy. It appears from the evidence and the plan produced that it is within the ornamental grounds laid out by Mr Morrison in connection with the residence, and that it is within sight of the house.

"If, in 1865, when the designation took place, the pursuer had not wished to keep the ground as a lawn, but had intended to break it up at the usual and proper time, the Lord Ordinary does not think it could have been held that it was not arable. It appears to him that the evidence shows that up to that time it had always been used as arable land, according to the ordinary course of cultivation in the district, suitable to the soil and climate. Neither does he think that the circumstance that the pursuer intends to keep it in grass for the purposes of a lawn, deprives it of the character of arable land with reference to this question. It would be a very hard construction of the statute to hold that land which has always been used as arable until it is required for an exceptional purpose of this kind—more valuable to the proprietor than its agricultural use—should by that change become liable to designation, to the entire defeating of the object for which the change was made. The Lord Ordinary thinks that the principle of the decision in *Bruce* v. *Carstairs*, 30th May 1826, 1 S, 688, fairly applies to such a case. It would be an entirely different case if the land were thrown out of cultivation merely for the purpose of putting it in permanent pasture, as a better and more lucrative system of management.

"The defender brought much evidence for the purpose of showing that, in the opinion of skilled witnesses, the land in question, and apparently all the land in the district, would be more remunerative if permanently used for pasture. These witnesses admit that if cattle are to be kept, there must be cultivation to provide fodder for them, so that it would require a change in the system of husbandry of the district to carry out their views. The Lord Ordinary assumes that these may be correct, but he does not think that they can receive effect in determining whether the land in question is arable or not. He is of opinion that that question must be determined by the existing state of the fact, not by any agricultural theory, which, however sound it may be, is prospective, and founded on improvements and facilities of recent introduction.

"E. F. M."

The defenders reclaimed.

SHAND and ASHER for them.

DEAN OF FACULTY (MONCREIFF), and N. C. CAMPBELL in answer.

At advising.

The LORD JUSTICE-CLERK held that at the time when the statute anent the designation of glebes was passed, there was probably little difficulty in distinguishing what land was arable and what was pasture. What the statute meant by arable land was "infield" land, and what it meant by pasture was "outfield" land, and these terms were well understood, and the two kinds of land easily distinguished. Now, however, the whole face of the country had been changed by the progress of agricultural improvement and other causes, and the only principle which could now be followed, was, that land should be considered arable which had been for a long course of years dedicated to the raising of cereal crops. The Court could not adopt the view pressed upon them for the defenders, that the thing to be looked to was whether the land was naturally more suitable for pasture or for cereal crops. The actual history of the ground was the test, and not any speculative considerations as to what was most beneficial. He agreed with the Lord Ordinary in the result at which he had arrived on a consideration of the evidence.

The other Judges concurred.

Agent for pursuer—John Martin, W.S.

Agents for defenders—Adamson & Gulland, W.S.

Tuesday, November 19.

CATTO, THOMSON & CO. *v.* GEORGE THOMSON & OTHERS.

Bills of Exchange—Accommodation Bills—Onerosity—Writ or Oath. Circumstances in which *held* that although the drawer of certain bills of exchange admitted these to be accommodation bills, the acceptors were not entitled to prove *pro ut de jure* that they were for the benefit of the drawer only and without value.

In this action the pursuers conclude for various sums which they allege are due to them by the defenders on seven different bills of exchange. The defenders called are George Thomson & Son, merchants in Aberdeen; James Chalmers and John Gray Chalmers, both printers in Aberdeen, executors of the deceased William Leslie Thomson, wine merchant and shipowner in Aberdeen, and the said James Chalmers and John Gray Chalmers as individuals. George Milne, agent of the Commercial Bank, trustee on the sequestrated estate of George Thomson, lately merchant in Aberdeen, and now furth of Scotland, is also called for any interest that he may have in the premises. The pursuers made the following statements in support of the action:—The pursuers, Messrs Catto, Thomson, & Company have for many years carried on business as rope and sail-makers in Aberdeen, and the pursuers, James Hall, William Hall, John Catto, and John Duthie junior, are now the sole partners of that firm. George Thomson, merchant in Aberdeen, was also a partner of the firm up to the date of the sequestration of his estates on 30th October 1863. The firm of George Thomson & Son had also for many years carried on business in Aberdeen as wine merchants and commission agents, and were a firm of good standing and repute. This firm had at various times consisted of different partners. Latterly, prior to 1862, the late William Leslie Thomson, wine merchant and shipowner in Aberdeen, brother of the said George Thomson, was the sole partner. He died on 29th January 1862, leaving a will dated 7th January

1862, by which he appointed the said George Thomson and the defenders, James Chalmers and John Gray Chalmers, who were his brothers-in-law, to be his executors; and he requested them to carry on the business after his decease for behoof of his family. The said George Thomson, James Chalmers, and John Gray Chalmers accepted of the office of executors under the said will, and, in terms of the directions therein contained, they continued to carry on the business under the firm of George Thomson & Son, and of which they were the sole partners. The said George Thomson took the active management of the business. He was, and from Jauuary 1862 had been, in use to adhibit the signature of the firm to bills, cheques, and other documents of that nature, and he was duly authorised to draw and accept bills and cheques for the said firm, and to adhibit thereto the signature of the said firm. Among other documents which the said George Thomson subscribed with the Company firm were the various bills set out in the libel, which are signed by the said firm of George Thomson & Son as drawers, and bear to be accepted, per procuration of the pursuers' firm, by William Beverley, their manager. These said bills all bear *ex facie* to be for value received, but in reality no value was received by the pursuers for any of them, and the pursuers were not debtors to the firm of George Thomson & Son in the sums contained in any of these bills, or any part thereof.

The defenders made the following statement:—The pursuers, or the company of Catto, Thomson, & Company, by whom the bills libelled were accepted, and Mr George Thomson, who was their managing partner, and Mr Beverley, who was their managing clerk, well knew, when the said bills were respectively drawn, accepted, and discounted, that they were not drawn on behalf of the executors of the late Mr William Leslie Thomson, or of the trade or business carried on by the said executors as aforesaid, or in the course of said trade or business. They also well knew that the executors had no authority and no occasion to raise money for the purpose of said trade or business by means of accommodation bills or otherwise. They also well knew that the said bills respectively were drawn, accepted, and discounted without the authority or knowledge of the defenders, and that the defenders received no part of the proceeds.

The defenders pleaded, *inter alia*, that the pursuers' averments could only be proved by the writ or oath of the defenders.

The Lord Ordinary (Kinloch) pronounced the following interlocutor:—

"*Edinburgh, 30th January* 1867.—The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the process—Finds that the averment of the pursuers in regard to the bills libelled—that the same, although bearing to be drawn by George Thomson & Son, and accepted by the pursuers, are in reality obligations in which the said George Thomson & Son were the primary debtors, or of which the said George Thomson & Son were and are bound to relieve the pursuers—is an averment which can be competently proved by the writ or oath of the said George Thomson & Son only; and in respect that the pursuers have not adduced or offered evidence by the writ of the said George Thomson & Son to instruct the averment, assoilzies the defenders from the conclusions of the action, and decerns, reserving to the pursuers all competent reference to oath: Finds the pursuers liable in expenses; allows an account thereof to be lodged, and remits to the auditor to tax the same and to report.

"W. Penney.

"*Note.*—The bills libelled are *ex facie* obligations by the pursuers to George Thomson & Son. To throw on George Thomson & Son, contrary to the terms of the bills, the burden of the obligations, requires that the alleged liability should be established by their writ or oath.

"The pursuers obtained a diligence under which they recovered the books and documents of George Thomson & Son. The writings recovered did not establish the averment. At the debate they sought another diligence in order to recover the books and documents of George Thomson as an individual, but these would not be the writ of George Thomson & Son. At the best, they would only be George Thomson's parole testimony expressed in writing. They might bind George Thomson individually, but George Thomson is not a defender concluded against in the present process. The Lord Ordinary did not feel himself warranted to grant such a diligence, and no other documents being specified which could come under the description of the writ of George Thomson & Son, he considered that he was bound to grant absolvitor to the defenders. The pursuers will, of course, still have open to them the recourse of a reference to oath.

(Intd.) "W. P."

The pursuers reclaimed. The following is the prayer of the reclaiming note:—"May it therefore please your Lordships to recal the interlocutor complained of; to repel the second plea in law for the defenders, and find that the pursuers are entitled to a proof of their averments *prout de jure*, and to remit the cause to the Lord Ordinary to proceed further therein as may be proper; or at least to find that the pursuers have offered evidence by the writ of the defenders to instruct their averments, and to remit the cause to the Lord Ordinary to proceed further therein as may be proper; also to find the pursuers entitled to expenses; or to do otherwise in the premises as to your Lordships may seem just."

Clark and Harry Smith for them.

Young and Shand in answer.

The following cases and authorities were relied on—*Blackwood* v. *Hay*, 19th July 1858, 20 D., 631; *Lockhart* v. *Henry*, 5 D., 1014; Clark on Partnership, vol. i, p. 215; Linley i, 213, 16.

Lord Neaves, who delivered the opinion of the Court, pointed out that some questions which had been raised in the course of the discussion, such as whether George Thomson, who was the medium by whom the bills were created, had power to bind the Company of which he was a partner, and whether it could be held there was such an entity as George Thomson & Son, seeing the firm had no partners, were not now properly before the Court. The case of *Blackwood* which had been relied upon had no application to this case, for there was an admission that the bills were accommodation bills. On the general doctrine he was quite clear that the bills, being *ex facie* absolute obligations, the presumption of onerosity could only be set aside by the writ or oath of the acceptors. That disposed of the first part of the prayer of the reclaiming note. But it was said that the pursuers had already offered proof by the writ of the defenders, and that they might get something out of the private books of George Thomson tht would obviate the objection in point of law. He could not see that that

had been done. The question of writ or oath was one of great nicety and delicacy, and he should be sorry on light grounds, or on such averments as were made and had been proved in the present case, to throw any discredit on the valuable *dicta* made by some of the learned judges in the cases referred to. The observations of Lord Medwyn in the case of *Lockhart* were particularly valuable; and, without saying whether or not the writ of one partner might be held to bind the company, there was nothing in the present case requiring the Court to accede to the extension of the principle that was asked by the reclaimers.

The other Judges concurred.

Agents for pursuer—Patrick, M'Ewen & Carment, W.S.

Agents for defender—Cheyne & Stuart, W.S.

Wednesday, November 20.

FIRST DIVISION.

HOPE *v.* LORD ADVOCATE.

Exchequer—Non-Entry Duties—Issuing of Crown Charter A draft charter of confirmation was lodged with the Presenter of Signatures on 15th April. It was not ready to be given out till after Whitsunday. *Held*, in the circumstances of the case, that the vassal was not liable in a half-year's non-entry duties claimed by the Crown in respect that the charter was not ready to be given out till after Whitsunday. *Observed* that neither the date of presenting the draft charter nor the date of completing the charter, can be taken as an invariable rule in giving the amount of duty, but that every case is special.

This was a note of objection for Henry Walter Hope, Esquire of Craighall and Waughton, to the amount of duties marked by the Presenter of Signatures and Queen's Remembrancer on draft charters of confirmation in favour of the objector in the lands of Luffness, Waughton, Saltcoats, Craighall, and Easter Fairney.

It appeared that the last vassal, George William Hope, Esq., died on 18th Oct. 1863. The draft charters of confirmation in favour of the objector were lodged at the office of the Presenter of Signatures on 16th April 1867. It was found that one of the requisite titles was wanting, and that there was an error in the destination. These matters were put right on 1st May. Thereafter, the report by the Presenter of Signatures bore—"The clerk to the Presenter having gone over the new production and made the necessary corrections upon the drafts, the whole titles, along with the drafts, were on Friday, 3d May, sent to the Presenter for revisal. On the 7th of May they were returned from the Presenter revised, and the Presenter's clerk then proceeded to make out notes of the non-entry and other duties payable to the Crown. This occasioned considerable calculation, and, on the 9th of May, notes of these duties were sent to the Auditor in Exchequer for revisal and authentication. In fixing these duties the clerk to the Presenter only charged three and a-half years' non-entry duties, expecting that the drafts might probably be carried through before the term of Whitsunday 1867. But in going over the notes of duties, the Auditor in Exchequer considered it necessary to have evidence whether certain mines and minerals, on the value of the workings of which a duty was payable to the Crown, had been wrought, and, on the 14th May, notice of this having been given to the Presenter's clerk, he on the same day wrote to the objector's agent, requesting to know whether these mines and minerals had been worked, and also requesting him to send the receipt for the last payments of the feu-duties. On the 24th of May the objector's agent sent the necessary information, as will be seen from his letter herewith; as the term had then passed, an additional half-year's non-entry duty became payable."

Mr Hope contended that, as it was not his fault that the non-entry duties were not fixed and paid prior to Whitsunday 1867, he ought not to be charged with the additional half-year's duties.

It was stated in reply for the Presenter of Signatures, that the uniform practice in Exchequer had been followed, and that the original cause of delay lay with the objector. Answers were also lodged for the Commissioners of Woods and Forests.

The Lord Ordinary (Ormidale) held that, in the special circumstances of the case, the objector ought not to be held to have incurred the additional half-year's duty, but did not adopt either, on the one hand, the contention that the date of presenting the draft charter was to be the rule in all cases; nor, on the other hand, that the date when the charter was completed was to be the invariable rule. Expenses to neither party.

The Lord-Advocate reclaimed.

Solicitor-General (Millar) and T. Ivory for him.

Adam in reply.

At Advising—

Lord Curriehill—I concur with the Lord Ordinary.

Lord President—I am of the same opinion. We are told by the Officers of State, that since the passing of the Crown Charters Act it has been the uniform practice in Exchequer to calculate non-entry duties from the date of the charter, and not from the date of lodging the draft, and that a contrary practice would lead to confusion. If by that is meant that under no circumstances whatever can the calculation of non-entry duties be made from any other date than delivery of the charter, the sooner that practice is put an end to the better. It might lead to the greatest hardship if there were any such inflexible rule, and the present case seems to be illustrative of this position. But I am not prepared to assent to the proposition that the date of calculating the non-entry duties is always to be the date of lodging the draft. That would be equally unjust and absurd. We are dealing with a special case, and every such case is special. The facts necessary for our judgment may be shortly stated. The first application on the part of Mr Hope was made on the 16th April, that is, just a month before Whitsunday. And certainly when an application is made for that charter a month before the term, it may reasonably be expected that the charter will be obtained before Whitsunday, and that no non-entry duty will be incurred in respect of the arrival of that term. It is true that here the draft was incomplete. There was a title wanting, and there was also some error in the destination. But it is to be observed that these difficulties,—the only difficulties in the Presenter's office,—were completely removed before 1st May. There was then a full fortnight to give out