occupied by the said Equitable Loan Company, or at some other place to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take the said three emerald and diamond studs, or one or more of them, the property or in the lawful possession of the said firm of William Marshall & Company."

SOLICITOR-GENERAL (MILLAR) and BLACKBURN (A.-D.) for the Crown.

MAIR and REID for panel.

REID, for the panel, stated two objections to the relevancy of the libel. The first was with reference to the first three charges of falsehood, fraud, and wilful imposition. It appeared from the indictment that the prisoner, having received certain goods from Andrew Swan, had come to an arrangement for their payment by granting bills and promissory-notes for the full value of the goods, and not one of these bills had fallen due when, in the month of October last, the prisoner was apprehended. In these circumstances, he maintained that there was not before them a relevant charge of falsehood, fraud, and wilful imposition. To constitute such a charge, it was essential not only that the prisoner should receive the goods, but that there should also be failure on his part to pay for them. It was impossible to say that the prisoner had not intended to pay for the goods until the bills became due. The other objection referred to the charge of theft against the prisoner. It was stated that he received certain studs from Mr Marshall on loan "for a short time," and he had to submit that that was too indefinite. It did not appear that the period during which the studs had been given in loan did not extend beyond the 25th October; and if the prisoner had got them for a time beyond that date, then he did not steal them, as the libel charged him with the theft between 23d September and 5th October.

BLACKBURN (A.-D.) said, in respect to the first objection, that it might be a very good objection to make to the jury, but it did not affect the relevancy of the libel. The essence of the charge of falsehood, fraud, and wilful imposition consisted in the fact that, at the time a person obtained the goods, there was no intention to pay for them, and no doubt it would be an element rendering it difficult in the Crown case to prove that the bills, when given, were not given in *bona fide;* but if they proved that these bills were part of the fraud, then the crime of falsehood, fraud, and wilful imposition would be made good. With respect to the second objection, that too great latitude was taken, he maintained that the averment was specific enough. The goods were lent for a short time, and instead of being returned they were pawned.

LORD ARDMILLAN—What do you call a short time?

BLACKBURN (A.-D.) admitted that the language might have been more specific.

LORD JUSTICE-CLERK—You do not specify the particular purpose for which the goods were given.

BLACKBURN (A.-D.) said he did not think that it was necessary to do so. Receipt of goods on loan was not certainly receipt for the purpose of pawning them.

LORD ARDMILLAN—But it is nowhere said that they were pawned.

SOLICITOR-GENERAL (MILLAR) was also heard in support of the libel, and quoted cases to show that the libel was framed according to precedent.

The Court then retired for consultation, after which,

LORD ARDMILLAN said he was of opinion that the first objection stated was not good. The great difficulty in the prosecutor's case would be to prove that there was no intention to pay these, and that the prosecution had been brought before the bills became due would considerably increase the difficulty. He thought, however, the objection was an objection on the merits. The other objection was one of some nicety; but he was inclined to think that the indictment was incorrectly framed. Three things would have made the libel a good one—if it had been said that the studs were given for a short time for the purpose of inspection; that they were given for a short time that the prisoner might wear them when visiting the lady to whom he was to be married; or if it had been said that they were given for the purpose of being compared with others. It was not, however, stated that the studs were given for any purpose whatever. Then the time in which they were to be returned was not sufficiently specific. Had it been said that they were to be returned immediately, that might have done; but a short time might be one day, ten days, or twenty days. He thought, therefore, that the objection should be sustained.

LORD JERVISWOODE thought the indictment was correctly framed, but he did not wish to press his opinion against the majority of the Court.

The LORD JUSTICE-CLERK concurred with Lord Ardmillan.

The panel pleaded not guilty. Evidence was led. The jury returned a verdict of guilty; and the panel was sentenced to penal servitude for eight years.

Agent for Crown—T. G. Murray, W.S.

Agent for Panel—W. Officer, S.S.C.

COURT OF SESSION.

Wednesday, June 10.

FIRST DIVISION.

ADAMS AND OTHERS *v.* MAGISTRATES OF GLASGOW AND OTHERS.

Interdict—Property—Public Green—Magistrates—Suspension. Note passed to try the question whether magistrates, administrators for public good, were entitled to convert a portion of a public green into part of a public road, and interim interdict granted against the magistrates proceeding with the operations.

This was a note of suspension and interdict at the instance of James Adams and others, designed burgesses of Glasgow, and resident there, against the Lord Provost, Magistrates, and Town-Council of Glasgow, and the Glasgow Board of Police. The complainers alleged that the respondents, the Town Council, had begun to encroach upon the Public Green of Glasgow by operations which would have the effect of throwing above 2000 square yards of the Green into Greenhead Street, which runs along the south side; and this portion of ground, the complainers alleged, would become vested in the other respondents, the Police Board, for the objects and purposes of a public street, and of the Glasgow Police Act.

The Lord Ordinary (MURE) pronounced this interlocutor:—"Passes the note; and, on the condition that the respondents, the Magistrates of Glasgow, find caution for all loss and damage which the complainers may sustain, and may ultimately

be awarded to them, in respect of the occupation of the Green of Glasgow in manner complained of, and to restore the Green to the condition in which it was at the commencement of their operations, in the event of the said respondents being found liable to do so, refuses the interim interdict."

Both parties reclaimed; the complainer against the refusal of interim interdict, and the respondents against the passing the note.

Scott (Sol.-Gen. Millar with him) for complainers.

Monro (Young with him) for respondents.

At advising—

Lord President—The first question is that raised by the reclaiming note for the respondents, whether this note should be passed for trying the questions thereby raised, and the only matter we have to consider is whether there is really a question of law between the parties at all. Now I have not considered the merits of this suspension with the view of forming any opinion on what the ultimate judgment may be; but I cannot help seeing that there is a question of legal right and legal power raised between the parties. That question is, whether the Lord Provost and Magistrates of Glasgow, as administrators for behoof of the community, are entitled to detach a portion of the Green of Glasgow and apply it to the purposes to which it is admittedly to be applied—partly to extension of the roadway of Greenhead Street, and partly to the formation of a footpath along the south side of that road. That is a question which requires serious consideration, and that is a sufficient reason for passing the note. But another question is raised by the reclaiming note for the reclaimers, and that is, whether the Lord Ordinary has done right or wrong in refusing interim interdict? Now the Lord Ordinary has refused interim interdict on condition that the magistrates find sufficient caution for damage which the complainers may sustain, and may ultimately be awarded to them in respect of the proposed operations, and to restore the Green to the condition in which it was at the commencement of the operations, in the event of the respondents, being liable to do so. It appears to me that the Lord Ordinary, in this respect, has fallen into a mistake, for if he meant to make this a condition, his obvious course was not to refuse the interim interdict till caution was found; but the interim interdict standing refused, there is no obligation on the respondents to grant caution, and no means of enforcing the obligation against them. Therefore, in that view, the condition of caution is perfectly futile as it stands; and I think further, that this condition is inapplicable to a case like this. The loss and damage which the complainers may sustain by this piece of ground being taken off the Green of Glasgow during the dependence of this suspension and interdict, is not to be measured by the usual standard, and therefore caution is out of the question. But the second branch of the condition is, that the magistrates shall restore the Green if they are found to be in the wrong. But what is the use of that? If the magistrates are found to be wrong, of course they will restore the ground. They are administrators for the public benefit, and it will be their duty, as well as their inclination, to give effect to the ultimate judgment. And, therefore, as to that part of the interlocutor, imposing this condition, I throw that out of view, as having no real bearing on the question. The simple question is, whether the passing of the note ought to have been accompanied by interim interdict. That is always a question for the discretion of the Court, and the considerations which generally influence the Court are well known. There are two things that suggest themselves to my mind as important. In the first place, it does not appear that there is any hurry in this matter, or any immediate necessity for the performance of these operations, nor does it appear that the immediate widening of this footpath is necessary for the safety of the lieges, or for any other important public purpose. It may as well be done after this question is disposed of as now. No hardship is imposed on any one by its being postponed, On the other hand, there is another consideration—that the performance of these operations involves a very considerable expenditure. We have been informed that the total expense of these widening operations will not be less than £2400. Now, if the operations had been carried so far that the greater part of this money had been expended, and only a small sum remained to complete the work, this would not have gone very far in my mind; but that is not the fact, for it has been explained that not above one-fifth of the money has been expended. It is therefore, I think, most desirable, for the interests of all parties, that interim interdict should be granted, and that these proceedings should be stayed until the question of law is determined. I attach no importance to the remarks as to the motives and conduct of the parties. I take the case on the footing that the magistrates have been actuated by the best motives, and have been doing what they think most expedient for the public interest. And I am not disposed to attribute any improper motives to the complainers. We must deal with both parties as coming here in good faith for determination of the legal question. I am, therefore, of opinion that we must pass the note, and grant interdict in the meantime.

Lord Curriehill concurred.

Lord Deas also concurred. He took the facts on the statement of the magistrates, that the Green had existed for a very long period, and had been used from time immemorial by the public. How it was acquired did not at present appear. It was said this particular part was acquired in 1770, but no title was produced. Whether this piece of ground became in law incorporated in the Green, might be one of the questions to arise afterwards. What the magistrates now proposed to do was not any act of administration—as by making footpaths or carriage drives through the Green, so as to enable the public to enjoy the proper use of it. They proposed to take a substantial part of the Green and embody it in a street lying alongside. On a *prima facie* view it would seem that this would make the ground into part of a public street, under the administration of the Police Commissioners. In the way the argument of the respondents was put, it seemed to be said that what might be done with part of the ground might be done with all. That was a serious and important question, and it was necessary to pass the note. As to the interdict, if the complainers turned out to be right, it would not matter how beneficial the operations were to the rest of the public. Clearly, the addition of this piece of ground to the street must be an important benefit to the proprietors of houses in the street, who seem originally to have built too near the Green, and the question was, whether that error was to be made up by taking this slip of ground and adding it to the street? It might be a benefit to the public as well, and no doubt the

magistrates meant it as such. But if the magistrates were found to be wrong, it would be better that the operations should not in the meantime be done at all. It might be true enough that money had been already expended, but that was no reason for spending more in the same way, and it was clear that the application to have the operations stopped, although a little late in being brought, was not so late as to be incompetent.

Lord Ardmillan absent.

The Court accordingly remitted to the Lord Ordinary to pass the note, and to grant interim interdict against further proceeding with operations for widening the road and forming a footpath on the ground which is part of the Green of Glasgow.

Agents for Complainers—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Respondents—Campbell & Smith, S.S.C.

Wednesday, June 10.

FORBES *v.* CLINTON.

Entail—Destination. An estate was destined to A and the heirs-male of the marriage betwixt A and the entailer's daughter, and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively, whom failing, to the heirs-female of the marriage, &c. On the death of A, his eldest son, B, took the estate. On the death of B without male issue, *held* that the estate descended to B's daughter, as heir whatsoever of the body of B.

In 1811 Sir John Stuart of Fettercairn made an entail of the estate, the destination being to "myself and, failing me, to the heirs-male of my body, whom failing to Sir William Forbes, Baronet of Pitsligo and the heirs-male procreated of the marriage between him and the deceased dame Williamina Stuart or Forbes my daughter his spouse and the heirs-male of their bodies respectively, whom failing to the heirs whatsoever of the bodies of such heirs-male respectively, whom failing to the heirs-female procreated of the said marriage and the heirs whatsoever of their bodies respectively, whom failing to." &c. Of the marriage of Sir William and Lady Forbes there were three sons, the eldest being the late Sir John Stuart Forbes, who succeeded to the estate on the death of his father in 1828. In 1866 Sir John died, and his only child, Lady Clinton, made up titles to the estate, as heir of entail. Her right was now challenged by Sir William Stuart Forbes, eldest son of Charles Forbes, who was the next brother of the late Sir John. Sir William Stuart Forbes pleaded that by the entail heirs-male of the bodies of heirs-male of the marriage of Sir William and Lady Williamina Forbes were entitled to succeed in preference to heirs-female or heirs whatsoever, either of Sir William Forbes or of any subsequent heir of entail. Lady Clinton, on the other hand, pleaded that the succession opened, on the death of Sir John without male issue, to the heirs whatsoever of his body, and the defender, being such heir, was entitled to succeed.

The Lord Ordinary (Jerviswoode) sustained the claim of the pursuer, Sir William Stuart Forbes. Lady Clinton reclaimed, and the case was argued before the First Division and three Judges of the Second.

Fraser and Gifford for pursuer.

Young, Clark, and Lee for defender.

At advising—

Lord Curriehill.—Sir John Hepburn Stuart Forbes, who was infeft as heir of entail in the estate of Fettercairn, having died in the year 1866, the right to that estate then became *in hereditate jacente* of him; and the question is,—Who then became entitled to succeed to him as the next heir of entail in that estate? The answer to this question must be found in the destination in the deed of entail. That entail had been made in 1811 by his maternal grandfather, Sir John Stuart. His intention, as to the order of the succession of the series of the heirs thereby appointed, will be more easily understood by keeping in view what was then the state of his family. He had no son. He had daughters, the eldest of whom, Williamina, had been married to Sir William Forbes, but she was then dead. There then survived three sons of that marriage, John, Charles, and James Forbes. There were also daughters of that marriage. The destination in the entail, so far as it regulated the order of succession among the entailer's descendants, was—(1) to the heirs-male of his body; (2) to his son-in-law Sir William Forbes; (3) to "the heirs-male procreated of the marriage between him and the deceased Williamina Stuart or Forbes, my daughter, his spouse, and the heirs-male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs-male *respectively;* (4) whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies *respectively.*" On the death of the entailer without male issue, Sir William Forbes succeeded to the estate as the first heir of entail, and he possessed it until 1828, when he died, and was succeeded by his eldest son John, as the heir-male of the marriage between him and Lady Forbes. John again (who was called Sir John Hepburn Stuart Forbes) survived until 1866, when he died; and the question as already stated is,—Who was then the party to whom the succession opened upon his death? In order to find the answer to this question in the destination of the entail, it is necessary to see what the position was which Sir John himself had held under that destination. It was that of *the eldest heir-male of the marriage between his parents Sir William and Lady Forbes.* Hence, on his death in 1866, the heir to him under the third branch of the destination would have been the heir-male of his own body, if any had existed. But he had no son, and so there was an entire failure of heirs-male of his body; and consequently, the next heir *to him,* in terms of the sequel of that branch of the destination, was the heir whatsoever of his body. And as he left a daughter, Lady Clinton (who is the defender in the present action), she was the party who was in that position, and to whom, therefore, as I think, the succession then opened. Her Ladyship accordingly, in the year 1866, expede a title to the entailed estate as being then the nearest heir of entail to her father, and she has since possessed the estate in virtue of that title.

The pursuer of the present action is a nephew of Sir John, being the son of his immediate younger brother Charles, who had predeceased Sir John. He had then become the heir-male of the marriage of Sir William and Lady Forbes; and the question now is, whether, in that character, he in 1866 also became the heir of entail of his uncle Sir John?

The pursuer would have been in that position if the third branch of the destination had been an