general rule. If the defender had insisted on taking up a special point in his case, and going to issue on that, the case might have been different, but that is not so, all that is proposed by him is in the ordinary course.

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

Agents for Defender—Mackenzie & Black, W.S.

Thursday, October 29.

COLQUHOUN *v.* BUCHANAN AND OTHERS.

Salmon-fishing—Salmon Fisheries Act 1867, 25 *and* 26 *Vict., c.* 97*—Roll of Upper Proprietors—Reduction—Held,* on a proof, that certain proprietors of lands on the banks of a river did not possess the qualification required by the Salmon Fisheries (Scotland) Act 1867 to entitle them to be on the roll of upper proprietors of salmon-fishings.

This was an action of reduction and declarator at the instance of Sir James Colquhoun of Luss, Baronet, against John Buchanan of Carbeth, Miss Barbara Govane of Park, Henry Ritchie Cooper of Ballindalloch, and Peter Blackburn of Killearn, and certain other parties. The question at issue was, whether these defenders were entitled to be on the roll of upper proprietors of salmon fishings in the district of Clyde and Leven, as possessing the qualification required by the Salmon Fisheries (Scotland) Act 1867, 25 and 26 Vict., c. 97, sec. 18?

By that section it is enacted that within three months after any bye-law constituting a district to be fixed and defined by the Commissioners appointed for that purpose shall have been published, "the Sheriff shall direct the Sheriff-clerk to make up a roll of the upper proprietors in each district, and the qualification of an upper proprietor shall be the property of a fishing entered in the valuation roll as of the yearly rent, or yearly value, of £20 and upwards, or, if such fishing be not valued on the valuation roll, of half a mile of frontage to the river, with a right of salmon fishing. . . . And the Sheriff shall have power to decide summarily any question arising on any claim to such qualification."

The Sheriff-clerk of Stirlingshire, in making up the roll under the statute, put thereon the names of the defenders, who, or their mandatories, attended meetings of the board, and acted as such members, under protest by the pursuer, who contended that the defenders were not entitled to act.

The pursuer, who is proprietor of salmon-fishings in both the upper and lower divisions of the Clyde and Leven district, now raised this action, asking reduction of the roll of upper proprietors, in so far as it included the names of the defenders, and also reduction of certain minutes of meeting of the board, and declarator that the defenders had no qualification entitling them to be upon the roll.

Defences were given in for Buchanan and Blackburn. The former, as proprietor of Little Carbeth and Dalnair, upon Crown charters, conveying the lands, with clauses *cum piscationibus,* these lands being situated on the Enrick, in the upper division of the said district, and having each, it was alleged, the requisite frontage; the latter, as proprietor of Drumtian and others, of similar situation and extent, with the mills, woods, and fishings of the same," alleged that by themselves and their authors they had been in use for a period of more than forty years to fish for salmon in the Enrick *ex adverso* of their lands by all competent and habile rights, and claimed right to be retained on the roll.

In November 1864 the Court, recalling an interlocutor of the Lord Ordinary, repelled certain of the defences as preliminary, and remitted to the Lord Ordinary to proceed with the cause. A proof was thereafter taken, after which the Lord Ordinary found that the defenders had failed to prove that they or either of them had fished for salmon *ex adverso* of their respective lands by net and coble, or by other competent and habile methods, as alleged by them; Found, therefore, that they held no title sufficient to qualify them to act as proprietors of a salmon-fishing, under the Salmon Fisheries Act, 1867, and accordingly decerned against them, with expenses.

The defenders reclaimed.

LORD ADVOCATE and HALL for reclaimers.

WATSON for respondents.

The Court adhered.

Agents for Pursuer—Tawse & Bonar, W.S.

Agent for Defenders—James Macknight, W.S.

Thursday, October 29.

GILLESPIE *v.* HONYMAN.

Husband and Wife—Action—Reduction ex capite lecti*—Heir-at-law. Held* that a husband was not entitled to compel his wife, proprietrix of an entailed estate, to sue a reduction *ex capite lecti* of a bond of annuity granted by her father, former proprietor of the estate, in favour of her mother.

This was an action raised by William Gillespie of Torbanehill, in the name of "Mrs Elizabeth Honyman or Gillespie of Torbanehill, heiress of entail of the deceased Sir R. B. Johnston Honyman, Baronet, and as such, in possession of the lands and estates of Torbanehill and others, spouse of William Gillespie of Torbanehill, with consent and concurrence of the said William Gillespie, and the said William Gillespie for himself and his own right and interest in the premises," and also as receiver of the rents *jure mariti,* against Dame Elizabeth Campbell or Honyman, mother of Mrs Gillespie, and relict of the late Sir R. B. Johnston Honyman. The object of the action was to reduce, *ex capite lecti,* a bond of annuity granted by the deceased Sir R. B. Johnston Honyman in favour of the defender.

The defender pleaded, *inter alia,* that the pursuer had no right to use the name of Mrs Gillespie in the action, she not having given any authority for such use; and contended that as Mrs Gillespie repudiated the action, it ought to be dismissed, in so far at least as it bore to proceed at Mrs Gillespie's instance.

The Lord Ordinary (JERVISWOODE) sustained this plea, adding the following note:

"The matter which the Lord Ordinary has dealt in the present interlocutor is one of some difficulty, but on the whole, after the best consideration which he has been able to bestow on the able argument which was on both sides submitted to him, and on the decisions in the cases of *Wedderburn's Trustees* v. *Colville,* Jan. 29, 1789, M. 10,426; *Aitkins* v. *Orr,* Feb. 11, 1812, M. 16.140; and *Ferguson* v. *Cowan,* June 3, 1819. which is reported but briefly by Baron Hume (Decisions, p. 222), he has come to the

conclusion that the action ought not to proceed so far as at the instance of Mrs Gillespie. These cases, if held to be authoritative, appear to the Lord Ordinary to go far to support his present judgment, and he may be permitted to add, that had he been obliged to form the opinion here without such guidance, his impression is, that the conclusion to which he must have come would have been the same.

"But while this is so, the Lord Ordinary would not wish it to be held that, in his opinion, it is competent on the part of a married woman to exercise an uncontrolled will in all cases, or, in every state of circumstances, to insist or not in an action to which she is a necessary party as a pursuer. The Court may have power to take into consideration the alleged motives and grounds of refusal, and it is but fair to the parties here that the Lord Ordinary should state that his opinion has in some degree been affected by the consideration that the nominal leading pursuer is set forth in the action as challenging the deed of her own father, on the plea that that deed was reducible *ex capite lecti*—a ground of reduction privative to the heir-at-law, and which may competently be insisted in by the person holding that character, although the capacity of the granter, as respects possession of mental powers, may be complete."

The pursuer reclaimed.

MONCREIFF, D.-F., and PATTISON for reclaimer.

CLARK and BALFOUR for respondent.

The case of *Stevenson* v. *Hamilton*, 1 D., was cited.

At advising—

LORD DEAS—This is a very clear case. I think that, if authorities are necessary, the cases referred to are sufficient to support the view taken by the Lord Ordinary. But there is no need of authority. The principles of law and justice are sufficient in themselves. If there must be any peculiarity in the nature of the pleas which the husband desires his wife to state, there is enough of that here. He asks her to challenge a deed executed by her father, on the technical ground of deathbed, which does not imply the least incapacity in him to do what he did. I am glad to see that he had a desire to provide for his wife, even to the limited extent he has done. I don't think it is reasonable to ask her to challenge the deed on that ground. But more than that, he asks her to challenge a deed in favour of her own mother, giving a small annuity—perhaps, for anything I know, all she had to live on. If circumstances of that kind are necessary, they are to be found in this case.

LORD KINLOCH—I am of the same opinion. This question is settled by the authorities in such a way that I am very far from wishing to disturb them. The conclusion at which the Lord Ordinary has arrived follows, I think, from a consideration of the position of the wife. She is proprietrix of the estate. Her husband is not in any sense the proprietor. No doubt he has by his *jus mariti* a right to the rents after they have accrued, but he is in no sense proprietor. The wife is under curatory, but her husband, as her curator, is not entitled to do anything affecting her estate without her consent. To hold that he was so entitled would be to maintain a position adverse to the first principles of law. The Lord Ordinary has not disposed of the question whether Mr Gillespie may not himself bring this reduction. A good deal may be said as to the peculiarities of his position, but the question now to be determined is, can he compel his wife to sue to such effect that the bond shall not affect the estate at all? I think that, both on authority and principle, the Lord Ordinary is right.

LORD PRESIDENT—There are questions remaining to be determined in this case, and others which remain for determination in the action at the instance of Lady Honeyman, as to which we must indicate no opinion. I am far from saying that your Lordships have done so; I only say that we must be careful to confine ourselves to the question properly before us. This bond of annuity was made a burden on the estate in 1842, by the then proprietor. His heir is entitled to reduce it *ex capite lecti*. His heir is Mrs Gillespie, and she declines to do so, and the question is, whether her husband has a title to compel her to join with him in sueing this reduction against her will? On that question, I entertain no doubt. It is settled by authority, and it is, besides, clear on principle. I entirely agree with the Lord Ordinary.

Agent for Pursuer—H. Buchan, S.S.C.

Agents for Defender—Mackenzie & Black, W.S.

Thursday, October 29.

SECOND DIVISION.

HERRIOT *v.* JENKINSON.

Advocation—13 *and* 14 *Vict., c.* 36—*Juratory Caution—Report of* probabilis causa litigandi—*Protestation for Non-enrolment—Depending Action—Court of Session Act* 1868—*Appeal—Caution. Held* (1) that an action is in dependence whenever the summons is executed; (2) that under the Act 13 and 14 Vict., c. 36, the respondent in an advocation is entitled to get the action dismissed if a report from the lawyers for the poor is not forthwith produced, and that he is entitled to put the case to the roll for that purpose without putting up protestation for non-enrolment; (3) that an offer to find full caution in a depending advocation cannot be affected by the provision of the New Court of Session Act, dispensing with caution in appeals.

A party brought an advocation upon juratory caution, and called the case in the Court of Session on the 12th of May last. In advocations upon juratory caution it is provided by the Act 13 and 14 Vict., c. 36, that the advocator shall forthwith proceed to the *probabilis causa litigandi* reporters and obtain from them a report. In the present case this was not done. On the 24th of October the respondent thereupon put the case to the roll of the Lord Ordinary (MANOR), and moved his Lordship to dismiss the advocation in respect the report required by the statute had not been furnished. In answer to this motion, the advocator offered to find full caution in terms of the proviso of the Act; and in respect of said offer the Lord Ordinary allowed the advocator eight days to find caution. The advocator now reclaimed, and maintained that he was not bound by his offer to find caution, because by the new Court of Session Act caution is abolished in advocations. He further maintained that the interlocutor of the Lord Ordinary was incompetently pronounced, because, if the case was to be ruled by the old procedure, the respondent was not entitled to bring the case before the Lord Ordinary without protestation for non-enrolment, which had not been done.

The Court held that an action is a depending