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

process whenever the summons is executed; that the new Act did not apply, because the new Act dealt with appeals, and this was an advocation; and that, on the failure of the advocator to produce a report from the lawyers for the poor, the respondent was entitled, without putting up protestation, to ask the Lord Ordinary upon that ground to dismiss the action, The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Advocator—Mr W. A. Brown.
Counsel for Respondent—Mr Trayner.
Agent for Advocator—James Bell, S.S.C.
Agent for Respondent—Scott & Mann, S.S.C.

COURT OF LORDS ORDINARY.

Thursday, October 29.

MACKENZIE & CO. *v.* HUTCHISON & DIXON.

Moveable Property—Transference—Auctioneer—Diligence—Arrestment—Poinding.—M gave to F, a creditor, a letter addressed to an auctioneer, empowering him to take certain moveables belonging to the writer and sell them, and pay the proceeds to F. F gave the letter to the auctioneer. *Held* that when the auctioneer took possession of the moveables under the letter, M's control over them ceased, and the auctioneer held for F. *Opinions*—that the proper diligence for other creditors of M to use in the hands of the auctioneer was arrestment, and not poinding.

This was an advocation from the Sheriff-court of Lanarkshire. In January 1865 Metcalf addressed to Hutchison and Dixon, auctioneers in Glasgow, a letter in these terms:—

"Gentlemen,—You are hereby requested to take possession of and sell the whole of my household furniture and plenishing in the cottage occupied by me at Campsie Junction, called Glen Bank or Holly Lodge. You are to use your discretion whether to make the sale at the cottage or to remove the articles and sell them in Glasgow: and I request and authorise you to pay over the free proceeds of the sale to Mr John Finlay, ironmonger, Glasgow."

This letter was given by Metcalf to Finlay, and by him delivered to Hutchison & Dixon, who sold the furniture in terms of the letter. Mackenzie & Co., arresting creditors of Metcalf, now brought this action of multiplepoinding, in name of Hutchison & Dixon, the fund *in medio* being the sum realised by the sale of the furniture, and the claimants being Finlay and also certain creditors of Metcalf, besides Mackenzie & Co., who had used arrestments in the hands of the holders of the fund. The Sheriff (Bell) held that as the letter in favour of Finlay was admittedly granted for onerous considerations, and there was no proof that at the date of the letter Metcalf was notour bankrupt, or in such circumstances as to prevent him from granting the letter, so soon as Hutchison & Dixon took possession of the furniture Metcalf ceased to have any control over it, and the money obtained by the sale was held by Hutchison & Dixon for Finlay, and not for Metcalf; that the arrestments were therefore inept; and that, even supposing Finlay had no vested right in the furniture and value, the arrestments were worthless, the proper diligence in the circumstances being poinding; and preferring Finlay for the amount of his claim.

Mackenzie & Co. advocated.

Young and Shand for advocators.

Clark and R. V. Campbell for respondents.

The Court, while of opinion that the Sheriff had gone wrong in holding that in the circumstances poinding was the proper diligence instead of arrestment, came substantially to the same result as that expressed in the Sheriff's judgment.

Agents for Advocator—J. & R. D. Ross, W.S.
Agent for Respondents—J. Webster, S.S.C.

REGISTRATION COURT.

Monday, October 26.

(Before Lords Benholme, Ardmillan, and Manor.)

APPEALS FROM NORTHERN BURGHS.

JAMES ARCHIE.

Act. Clarke, Shand and Black.
Alt. Gifford and Mackintosh.

Tenant and Occupant—31 *and* 32 *Vict., c.* 48, § 3—*Burgh Franchise—Dwelling-House—Part of a House—Interpretation Clause—Separate Rating. Held* (affirming judgment of Sheriff)—(1) that the occupant of one-half of a house was occupant of a dwelling-house in the sense of the New Reform Act; (2) that not being separately rated to the relief of the poor he had not the qualification for the franchise under the 3d section of the Act.

The first case that came before the Court was that of James Archie, cooper, Cromarty, who appealed against a judgment of the Sheriff of Ross and Cromarty, respecting his claim to be admitted on the roll of voters. The following special case was stated by the Sheriff:—

"At a Registration Court for the burgh of Cromarty, held by me at Cromarty on the 5th day of October 1868, under and in virtue of the Act of Parliament 31 and 32 Vict. cap. 48, intituled 'The Representation of the People (Scotland) Act 1868,' and the other statutes therein recited, James Archie, cooper in Cromarty, claimed to be enrolled on the register of voters for the said burgh, as tenant and occupant of one-half of house in Church Street, Cromarty. The following facts were proved:—(1) That the claimant was, and had been for the requisite period, tenant and occupant of the premises in respect of which he claimed; (2) that there was an assessment for relief of the poor in the parish of Cromarty upon owners and occupants of lands and heritages; (3) that the claimant was not rated to the relief of the poor, either in respect of the premises occupied by him as aforesaid, or in any other character; (4) that the claimant had paid no poor-rates in respect of said premises; (5) that he had never been required to pay such poor-rates, either by demand-note or otherwise.

"Donald Mackenzie, nurserymen in Cromarty, a voter on the roll, objected to the said claim, on the grounds—(1) That a claim to be admitted to the roll as tenant and occupant of part of a house, was not a relevant form of claim; (2) that assuming the claim to be unobjectionable in point of form, the qualification on which the voter claimed was in the circumstances insufficient to entitle him to be enrolled.

"I rejected the claim on the ground stated in the second objection. Whereupon the said James Archie required from me a special case for the Court