locutor should be altered. It is said that the Jury made a mistake, and that they could not well have intended to do what they did. I cannot concur in that view. What they did was to take the price which the property might be supposed to bring in the market, irrespectively of the feu-duty,—to add 10 per cent to this amount on account of compulsory sale,—and then to convert the feu-duty into a capital sum of deduction, allotting the balance to the owner. Now, supposing that the Jury might have adopted a more strictly correct mode of procedure, there is nothing, as appears to me, incompetent in what they did; and the question, as must be remembered, is not whether the verdict is such as we ourselves would have given, but whether the jury have done something clearly beyond their powers. I do not think that this has been made out. There is no rule of law on the subject of this allowance for compulsory sale. It was left to the discretion of the jury to fix it in such a way as they might think right, and they might do so in various ways. They might fix it at a slump sum, without a per centage at all. They might take a per centage on the nett sum, after deducting the feu-duty, and fix such amount of per centage as they pleased. In reality, they took the per centage on the gross sum before the feu-duty was deducted. But for anything we know, had they taken it on the nett, and not the gross sum, they would just have made the per centage so much larger as to come to the same result. We cannot interfere with the verdict on a matter in regard to which the jury were acting within their competency. Whether they were right or wrong in the view adopted is not a question before us, and is indeed a question on which we could not probably pronounce satisfactorily without much more information than we can possibly have.

I am therefore of opinion that on this point the interlocutor of the Lord Ordinary is erroneous.

Agents for Pursuers—Murray, Beith & Murray, W.S.

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

Saturday, January 23.

MUIR *v.* HILL AND KEDDELL.

Expenses — Dismissal of Action—Caution—Bankruptcy—Absconding. An incidental decree for a sum of expenses being pronounced against a pursuer, and he being charged thereon, and thereafter execution of search being returned bearing that he was not to be found in his house in Scotland, "he having absconded to England to prevent said warrant being executed"—motion by defenders to have the action dismissed, or the pursuer ordained to find caution, *refused.*

Muir, resident in Glasgow, brought an action of reduction of a decree-arbitral against Hill and Keddell, contractors, carrying on business in the county of Middlesex, and quarriers in the island of Mull. A proof being appointed for the 9th July 1868, on that day the Lord Ordinary, in respect of the absence of certain witnesses and havers for the pursuer, discharged the order for proof appointed for that day, appointed the proof to be led on a future day, and found the pursuer liable in expenses so far as unavailable by reason of the postponement of the proof. On 17th July the Lord Ordinary decerned against the pursuer for the sum of £27, 18s. 8d., being the taxed amount of the defender's expenses. The decree was extracted, and on 9th September the pursuer was charged thereon. On expiry of the charge, warrant of search and apprehension was granted. Execution of search was returned, bearing that the messenger had searched Muir's dwelling-house, "but notwithstanding of the most strict, diligent and minute search in and through said dwelling-house, he, Muir, could not be found, neither could he be found in Glasgow at any time since the 13th day of November last, during which time said warrant has always been in my possession, he having absconded to England previously to prevent said warrant being executed; his wife also stating that he, Muir, had not been in Glasgow for more than six weeks, and that he had gone to England." The defenders then, on 2d January 1869, moved the Lord Ordinary to have the action dismissed, with expenses; or, failing a decree to that effect, that the pursuer be ordained to find caution for expenses, in respect of his failure to pay the expenses found due by the interlocutor of 9th July, and contained in the decree of 17th July, and dues of extract, and of the pursuer being a notour bankrupt under said decree, and an execution of search produced.

The Lord Ordinary refused the motion, and the defenders reclaimed. After the reclaiming note was put out for hearing in the summar roll of Saturday 23d, the defenders, on Wednesday 20th, were offered payment of the sum in the decree, which offer they refused, on the ground that they were entitled to payment likewise of subsequent expenses.

At the hearing,

CLARK and KEIR, for reclaimers, cited *Samuel*, 6 D. 1259, and *Wight*, 12 S. 535.

SCOTT for respondent.

LORD PRESIDENT—I don't see sufficient reason for altering the Lord Ordinary's interlocutor, apart from the tender of expenses made since the date of the reclaiming note. The question which the Lord Ordinary had to determine was a somewhat delicate one, as all such questions are. It is always a very strong measure to ordain a party to find caution for expenses, or submit to have his action dismissed at once, and it is only done on very sufficient grounds. If a pursuer is totally divested of his estate after coming into Court, by sequestration or otherwise, that is a sufficient reason for making him find caution as a condition of being allowed to follow out his suit. But that is because, in ordinary actions for recovery of money, he is no more *in titulo* to sue. His claim has passed to his trustee; and though, if the trustee will not take up the claim, that may give the bankrupt a right to pursue it for his own behoof, yet the fact that the trustee refuses to take up the claim is a *prima facie* presumption that the claim is unsound. Therefore, in several such cases the bankrupt has been ordered to find caution. But I am not sure that mere bankruptcy has ever been found a sufficient ground for ordaining a bankrupt to find caution. *Samuel* was a very peculiar case. There the bankrupt, being under ultimate diligence, went to the sanctuary, and remained there, and set his creditors at defiance. And therefore the Court, in respect it was admitted that Samuel was presently within the sanctuary, ordained him to find caution within eight days. But the circumstances here are not the same. This man goes to England with this decree against him, and that is the whole state of facts on which the Court are asked to proceed. The execution only

proves that the debtor is not to be found in his own house; in short, that he cannot be found in Scotland, and that the messenger calls absconding. It is possible that it may be so, but it is not certain. I cannot say I am prepared to dismiss the action, or to ordain the pursuer to find caution for future expenses, and, failing his doing so, to dismiss on that ground alone. If I had been in the same position as the Lord Ordinary I should have done as he did.

But I am strengthened in that view by what has followed, namely, the tender of expenses made after the date of the reclaiming note. On the whole matter, I am for refusing the reclaiming note.

LORD DEAS—I think the Lord Ordinary is right. Two grounds are urged in support of this reclaiming note. One is, that when the case was put down for trial, it was postponed on condition of payment of expenses, and these have not been paid. I am not aware that it has ever been found that where there is an incidental decree for expenses, and payment of these expenses has not been made an express condition of going on with the case, their non-payment is a good ground for dismissing the action or ordering caution. The party may have a really good case, but he may be unable to pay these expenses in the meantime.

The other ground is the bankruptcy of the party, conjoined with the fact of his having gone to England. Now, it must be conceded that bankruptcy alone will not do. The principle of ordering caution in such cases is, that the party is divested of his estate. But even there the rule is not absolute. It is a question of discretion. In the case of *Samuel* the Court no doubt held, in respect of the party going to the sanctuary, that that was equivalent to being divested of his estate. But no other case went that length, and if the same case occurred again I should consider it very carefully, and look at the whole circumstances, going on no general rule derived from *Samuel*. The tendency of the law is not to widen the penalty of dismissing an action.

LORD ARDMILLAN and LORD KINLOCH concurred.

Agents for Pursuers—D. Crawford & J. Y. Guthrie, S.S.C.
Agent for Defender—James Webster, S.S.C.

Saturday, January, 23.

SECOND DIVISION.

TOD, PETITIONER.

General Police and Improvement (Scotland) Act 1862—Nobile officium—*Petition.* Circumstances in which the Court declined to exercise its *nobile officium* on the requisition of certain householders of a burgh, who desired to carry the General Police and Improvement Act into operation.

In the action of reduction and declarator at the instance of Anderson and Others against Widnell and Others, Commissioners under the Police Improvement (Scotland) Act for the burgh of Lasswade, the Second Division, on 6th Nov. last, pronounced the following interlocutor:—"The Lords having heard counsel on the reclaiming note for Henry Widnell and Others, recall the interlocutor reclaimed against: Repel the reasons of reduction in so far as regards the interlocutors and proceedings sought to be set aside from the commencement of the said proceedings in December 1862 up to and inclusive of the interlocutor of the Sheriff, of date the 30th May 1866, and assoilzies the defenders from the reasons of reduction in so far as regards said proceedings: Farther, assoilzies the defenders from the declaratory conclusions of the summons, in so far as regards the proceedings, and decern; *quoad ultra*, decern and declare in terms of the conclusions of the summons: Find the pursuers entitled to expenses, and remit to the auditor to tax and report, and modify the same to one-half of the taxed amount."

This was a petition presented by a number of householders of Lasswade, and it prayed the Court —"to grant warrant to and authorise and direct the Sheriff of the county of Mid-Lothian to call a meeting of the householders of the said burgh of Lasswade, as a populous place, to fix the number of commissioners to be elected by the householders to carry the said Act 25 and 26 Vict. c. 101, being 'The General Police and Improvement (Scotland) Act 1862,' into operation within the said burgh; and thereafter to convene a subsequent meeting of the householders in the said burgh for the election of commissioners for the purpose of executing the foresaid Act within the said burgh, such meetings to be presided over by the said Sheriff or any of his substitutes, and to be held after such notice, and to be subject to the like procedure as is provided for by the said Act in regard to the first meeting to be held with respect to the adoption of the said Act.

The respondents submitted that the petition ought to be refused upon three grounds—"*First*, That the Court has no jurisdiction to grant the prayer thereof; *Second*, That the petitioners are not entitled to represent either the other householders in, or the inhabitants of, the village or burgh of Lasswade to whom no notice of the petition has been given, or the applicants for the adoption of the Act, and have no title to present or insist on the present application; and *Third*, Even assuming that the Court has jurisdiction, and that the petitioners have a sufficient title to insist in the application, that your Lordships, in the exercise of your discretion, will deem it inexpedient, in the circumstances, to grant the authority craved."

GIFFORD and A. MONCRIEFF for petitioner.

CLARK and JOHNSTONE in answer.

At advising—

LORD JUSTICE-CLERK—We are asked in this case to appoint commissioners to act in Lasswade under the General Police Act. Two questions arise—(1) whether what is asked is within our competency? and (2) whether a case has been made out such as to render it proper for us to interfere? It is unnecessary to solve both, for if there is no propriety in our interfering, the question of jurisdiction is one more of interest than of use; but it is well to separate these two questions.

Our *nobile officium*, which we possess as a Court of Equity, and as succeeding to some extent to the powers of the Scotch Privy Council, entitles us to interfere in some cases. We have sometimes appointed managers to burghs when the charters have been lost, and the want of managers would have been injurious. In private matters, also, to a certain extent we have interfered, as in lapsed trusts, the appointment of curators to minors, or to take charge of lapsed property; but two things have been always necessary (1) a necessity; and (2) a