Now, as I concur in thinking that the pursuers have no present redress by direct action to enforce construction of the wet dock by the defenders, and that the true meaning and intent of these conditions, particularly the 2d, is to afford to the pursuers an indirect compulsitor, then I cannot doubt that it is the duty of this Court to give effect to that condition and that compulsitor.

In the meantime, therefore, I think it sufficient to decern, as your Lordship proposes, in terms of the second and third declaratory conclusions, and also in terms of the conclusion in regard to the Pointhouse road.

LORD KINLOCH—It has from the first strongly occurred to me that the Lord Ordinary has taken too limited a view of the position of the pursuers.

I conceive that, on a sound construction of the disposition by the pursuers to the Clyde Trustees, it must be held that the consideration for the conveyance consisted not merely of the money price, but of the counter stipulations in favour of the pursuers under which the Trustees thereby came. Of these the leading condition was, that the lands conveyed should be used for no other purpose than that of forming "a wet dock or tidal basin;" and, in connection with this condition, the trustees expressly bound themselves that "there should not be erected upon any part thereof any buildings or erections of the nature of public works, stores, warehouses, or dwelling-houses; nor any other erections except sheds, cranes, and others necessary for working a dock, basin, or harbour." It was of essential importance to the value of the pursuers' remaining grounds that these stipulations should be carried out; and accordingly the deed goes on to provide for full access from these grounds, and the houses built on them, to the future wharfs around the dock, and for right to lay water-pipes and common sewers in connection with this dock, and the river in its vicinity.

A difference has now arisen between the parties as to the scope and meaning of these stipulations; such as warrants the interference of the Court to pronounce declaratory findings on the construction of the deed.

I am of opinion that the pursuers are not entitled to have it declared that the trustees are bound, either now or within any definite time which the Court may fix, to construct the dock or basin contemplated. The disposition contains no obligation on the trustees to construct the dock or basin at any definite period, or within any such time as may be fixed by the Court, or other tribunal; and no such tribunal could possess sufficient information to make it at all competent to determine the point. The period of construction of the dock was left, and rightly left, to the discretion of the trustees. And the Court is not entitled, under existing circumstances, to interfere with that discretion, although I think it should avoid any judgment which would absolutely preclude the pursuers from raising the question at an after period.

But although not entitled to a positive judgment to this effect, I think that the pursuers are entitled to a negative judgment to the effect that the trustees are not entitled to use the ground for any other purposes than that of constructing a wet dock or tidal basin, and are not entitled to put any erections on the ground except such as "are necessary for working" such a dock or basin. The pursuers are entitled to such a judgment, by the express terms of the disposition; and it is only by enforcing these stipulations that they can exercise, and legitimately exercise, a *compulsitor* to the construction of a wet dock or basin in the vicinity of their ground, which directly they do not possess.

With regard to the special proceedings of which the pursuers complain, viz., the erection of quays or wharfs on the side of the river unconnected with any immediate construction of a wet dock or tidal basin, and, in combination with these, the devotion of the ground behind to a timber store, I am satisfied that such operations as these are not permitted, but, on the contrary, directly excluded by the disposition.

On the subject of the Pointhouse Road there does not seem any serious difference between the parties. And, on the whole, I am of opinion that the sound mode of disposing of this case is to pronounce substantially such a judgment as your Lordship in the chair suggests.

Agents for Pursuers—Wilson, Burn, & Gloag, W.S.

Agent for Defender—James Webster, S.S.C.

Tuesday, February 2.

HOGG'S TRUSTEES *v.* WILSON AND OTHERS.

Trust—Husband and Wife—Jus Mariti—Codicil. A testator left one-half of the income of his estate to his daughter, excluding by a general clause the *jus mariti* of her husband, and declaring the provision alimentary. By codicil he left the other half of the estate to his daughter, to that extent only altering the trust-deed, and declaring *quoad ultra* that if his daughter predeceased it should remain unaffected by the codicil. On the death of the daughter, who survived the testator, the half of the estate left to her by the codicil was claimed by the husband. *Held* that the exclusion of the *jus mariti* extended also to the provision in the codicil.

Expenses—Judicature Act—Final Interlocutor—Directory Enactment. A final interlocutor was pronounced by the Lord Ordinary on 27th May repelling a claim in a multiplepoinding, and making no mention of expenses. The Inner-House, on 18th November, adhered, giving expenses since the date of the Lord Ordinary's interlocutor. On 22d December the Lord Ordinary, on the motion of a successful party, found expenses due by the claimant whose claim stood repelled by the interlocutor of 27th May. *Held* (Lord Deas diss.) that that finding was incompetent, the Judicature Act, in conformity with previous practice, requiring the matter of expenses to be dealt with at the same time as the merits. But, by express reservation in the final interlocutor, the expenses may be subsequently dealt with.

Hogg, who died in 1847, by trust-deed and settlement dated in 1839, directed his trustees, to whom he conveyed his whole property, to pay equally to his wife and daughter, if they survived him, and to the survivors during their lives, the free income of the estate, declaring that if the daughter predeceased her mother, leaving lawful issue, such issue should succeed to the share payable to his daughter had she survived. On the death of the wife and daughter the whole free income to be paid to the issue. If his daughter left no issue, half of the income was to be paid to any one appointed

by her by any writing under her hand, which might be executed one month after the death of Robert Wilson, her present husband. Failing such writing, the said half was to go to the testator's nephews and nieces then alive, and the other half to any person to be appointed in the event of his daughter dying without issue, to receive the same by any writing under the hand of the testator's wife; which failing, to his nieces and nephews. The deed then provided: "And I do hereby exclude and debar the *jus mariti* and all right of administration of the present husband of the said Grace Hogg or Wilson, my daughter, and of any future husband whom she may marry, declaring that the provisions herein contained in her favour are purely alimentary, and shall not be burdened, gifted, sold, or assigned, transferred, conveyed, or discharged by her in any manner of way, nor shall the same be attached, arrested, assigned, gifted, sold or burdened by her present or any future husband or husbands, or by her, his, or their creditors in any manner of way, and that the simple receipt for the same by my said daughter, without the consent of her present or any future husband, shall be a sufficient exoneration to my said trustees."

By a codicil executed by the testator and his wife, they "in the event of the within designed Grace Hogg or Wilson surviving both of us, alienate, dispone, assign, and convey to and in favour of the said Grace Hogg or Wilson, that half of the proceeds of the heritable and moveable estate within conveyed, which, in certain events within written, is declared to be payable by the within named trustees to any person or persons to be appointed to receive the same by any writing under the hands of me, the said Marion Henchlewood or Hogg, in case I the said Marion Henchlewood or Hogg should survive my husband, and we both do hereby appoint the within named trustees to pay the same accordingly to the said Grace Wilson or Hogg, or her foresaids, as her or their absolute property, in case she, the said Grace Hogg or Wilson shall survive us both, and to that extent only we alter the within deed, it being hereby approved of *quoad ultra*, declaring that in case the said Grace Hogg or Wilson shall die before the longest liver of us, then the within written disposition and settlement is to remain unaffected and unprejudiced hereby."

The wife died in 1856, and was succeeded in the liferent of the estate by the daughter Mrs Wilson. Mrs Wilson in 1866 conveyed her whole estate in trust to certain persons, none of whom accepted, and in consequence a judicial factor was appointed. She died without issue in 1867, survived by her husband.

In this multiplepoinding, raised by Hogg's trustees, Captain Hogg and others, the nephews and nieces of the testator, claimed one-half of the fund *in medio*, in respect of Mrs Wilson having predeceased her husband without issue, and the other half left to her by codicil, as her next of kin, in so far as the same had not been effectually disposed of by her.

Robert Wilson claimed one-half of the fund, as in right of his wife under the codicil. He pleaded —"(1) Mrs Grace Hogg or Wilson, the claimant's wife, having survived her father and her mother, an absolute right to one-half of the proceeds of her father's estate vested in her without restriction or qualification, and having so vested, the same being of the nature of personal or moveable estate, fell under the claimant's *jus mariti*, and belonged to him as her husband. (2) Mrs Grace Hogg or Wilson, the claimant's wife, was not entitled, and had not the power, by *mortis causa* deed or otherwise, to dispose of her said half of the proceeds of her father's estate, or any portion thereof, without the consent of her husband; and her disponees, or the judicial factor on her estate, under the pretended deed of settlement executed by her without such consent, cannot prevail in a claim therefor."

Mackenzie, the judicial factor on Mrs Wilson's estate, also claimed one-half.

Against Robert Wilson's claim it was contended that his *jus mariti* was excluded from the half of the estate left to his wife by the codicil.

The Lord Ordinary (JERVISWOODE), on 27th May 1868, pronounced this interlocutor:—"The Lord Ordinary having heard counsel, and made avizandum, and considered the record in the competition and whole process, sustains the first head of the claim (No. 15 of process) made on behalf of the claimants Captain William Hogg and others, and ranks and prefers the said claimants in terms thereof to one-half of the fund *in medio*, and repels the said claim *quoad ultra*. Further, and with reference to the competing claims stated on behalf of the judicial factor on the trust-estate of the deceased Mrs Hogg or Wilson, and of Robert Wilson, as her surviving husband, finds that the *jus mariti* of the latter is excluded under the terms of the trust-disposition of the deceased William Hogg, and that under a sound construction of the codicil, dated 9th January 1840, the said exclusion is not recalled, but is approved, and remains effectual; and with reference to the said finding, repels the claim stated on behalf of the said Robert Wilson, and sustains the claim for Mr Kenneth Mackenzie, as judicial factor foresaid, and decerns.

"*Note.*—There was room for ingenious argument here, and the Lord Ordinary is satisfied that the questions which present difficulty were fully argued before him. The matter of main importance is, what the intention of the deceased truster and his spouse was, as expressed in the original trust-deed and codicil, or supplementary deed referred to on the record, as respects the exclusion of the *jus mariti* of the claimant Robert Wilson.

"The Lord Ordinary has read the deeds, and considered the whole matter, and the opinion he has arrived at is, that there was originally a sufficient exclusion of the *jus mariti* of the claimant, and that this exclusion was not recalled under the terms of the supplementary deed of 9th January 1840, but was thereby approved."

Robert Wilson having died, his trustees, who were sisted, presented a reclaiming note on 4th June, but the Court, on 18th November 1868, adhered, pronouncing this interlocutor:—"The Lords having heard counsel on the reclaiming note for Robert Wilson's trustees against Lord Jerviswoode's interlocutor of 27th May 1868, adhere to the interlocutor, and refuse the reclaiming note: Find the reclaimers liable in expenses since the date of the Lord Ordinary's interlocutor, and remit the account thereof to the auditor to tax and report to the Lord Ordinary: And remit to the Lord Ordinary, with power to decern for said expenses when ascertained."

Subsequently these interlocutors were pronounced:—"15*th December* 1868.—The Lord Ordinary allows a supplementary state of the fund *in medio* to be seen till Thursday first, the 17th inst.: Farther, Finds the real raisers entitled to the expenses of raising and bringing this action into

Court, and conducting the same out of the fund *in medio*, and remits the account thereof, when lodged, to the auditor to tax and report."

"17*th December* 1868.—The Lord Ordinary approves of the condescendence of the fund *in medio*, No. 11 of process, and supplementary state of the said fund, No. 25 of process: Farther, having heard counsel on the motion to have the claimants, Wilson's trustees, found liable to the claimant Kenneth Mackenzie in the expenses incurred by him since the lodging of his claim, makes avizandum."

"*Edinburgh*, 22*d December* 1868.—The Lord Ordinary having heard counsel, in terms of the preceding interlocutor, Finds the claimants, Wilson's trustees, liable to the claimant Kenneth Mackenzie in the expenses incurred by him since the lodging of his claim: Allows an account of said expenses to be lodged, and remits the same to the auditor to tax and to report."

Wilson's trustees reclaimed.

PATTISON for them.

PATERSON for factor.

MAIR for Hogg and others.

At advising—

LORD PRESIDENT—The objection taken by the reclaimers is, that it was incompetent to find Kenneth Mackenzie entitled to expenses as against Wilson's trustees, and it is a point of some importance.

The case in which that award of expenses was made was a competition between Kenneth Mackenzie as judicial factor on the trust estate of Mr Wilson on the one hand, and Robert Wilson's trustees on the other hand. In that competition there was a closed record, and a claim was stated for Robert Wilson, which is now insisted in by his trustees. Robert Wilson, as surviving husband, claimed to be ranked and preferred to one-half of the fund *in medio*. The Lord Ordinary pronounced an interlocutor on 27th May in these terms:—"The Lord Ordinary having heard counsel, and made avizandum, and considered the Record in the competition and whole process, sustains the first head of the claim (No. 15 of process) made on behalf of the claimants Captain William Hogg and Others, and ranks and prefers the said claimants in terms thereof to one-half of the fund *in medio*, and repels the said claim *quoad ultra*."—That disposes of one claim with which we have nothing to do.—"Further, and with reference to the competing claims stated on behalf of the judicial factor on the trust estate of the deceased Mrs Hogg or Wilson, and of Robert Wilson as her surviving husband, finds that the *jus mariti* of the latter is excluded under the terms of the trust disposition of the deceased William Hogg, and that under a sound construction of the codicil, dated 9th January 1840, the said exclusion is not recalled, but is approved, and remains effectual; and, with reference to the said finding, repels the claim stated on behalf of the said Robert Wilson, and sustains the claim for Mr Kenneth Mackenzie as judicial factor foresaid, and decerns." In so far as regards the claim of Robert Wilson that is a final interlocutor, because it repelled the claim of Robert Wilson, and decerned. There is no finding whatever of expenses as between Robert Wilson and the competing claimants. Against that interlocutor the trustees of Robert Wilson, having by this time been sisted, presented a reclaiming note. On advising that reclaiming note, we pronounced an interlocutor adhering to the interlocutor reclaimed against, and finding the reclaimers liable in expenses since the date of the Lord Ordinary's interlocutor. The case went back to the Lord Ordinary, and, after some other proceedings in the multiplepoinding, there was, on 17th December 1868, a motion made to the Lord Ordinary by Kenneth Mackenzie as judicial factor, on which the Lord Ordinary, on 22d December, pronounced this interlocutor:—"The Lord Ordinary having heard counsel, in terms of the preceding interlocutor, Finds the claimants, Wilson's trustees, liable to the claimant Kenneth Mackenzie in the expenses incurred by him since the lodging of his claim: Allows an account of said expenses to be lodged, and remits the same to the auditor to tax and to report." The question is, whether the Lord Ordinary was entitled to make that finding of expenses against Wilson's trustees, having pronounced a final interlocutor on that claim in May? After an examination of the authorities, I am bound to say that I think this interlocutor cannot be maintained. I think this was a completely final judgment as regards the claim of Robert Wilson. Nothing more could be done. The claim stood repelled, and there was a decerniture accompanying that, and I don't know in what more complete way a party can be put out of Court. We simply adhered, and our interlocutor shows that no motion was made to us to have expenses found due from the time of lodging the claim. At any rate, if such a motion was made, we must have rejected it, but I rather think no such motion was made. The only expenses asked from us were the expenses since the date of the Lord Ordinary's interlocutor, and these we gave to the judicial factor.

It is provided by the 17th section of the Judicature Act, 6 Geo. IV. c. 120, "That in pronouncing judgment on the merits of the cause the Lord Ordinary shall also determine the question of expenses so far as not already settled, either giving or refusing the same in whole or in part; and every interlocutor of the Lord Ordinary shall be final in the Outer-House, subject, however, to the review of the Inner-House in manner hereinafter directed." Section 21 provides, in like manner, "That the Inner-House shall, in deciding the cause, also determine the matter of expenses; and the judgment pronounced by the Inner-House shall, in all causes, be final in the Court of Session." Had these sections stood alone for construction, or for construction for the first time, I should have been inclined to say that they were directory merely; but I am afraid we are driven to the conclusion that these sections of the Judicature Act only express the fixed and invariable rule before the statute was passed, and that that rule was so strict that, after pronouncing a judgment exhausting the merits of the cause, it was incompetent either for the Lord Ordinary or the Inner-House to award expenses by a subsequent interlocutor.

I do not mean to go through the authorities, but there is one case which appears to me, as bearing on the general question, to be very strong, I mean the case of *Clark* (17 D. 306). That was an action of damages for breach of charter-party, and arrestment of a ship, and during the dependence of the action the defender presented a petition for recal of the arrestment of the ship, on the ground of its having been incompetently used. On that application the Court, on the 17th June 1853, pronounced this interlocutor:—"Repel the objections to the competency of the arrestment; and, in respect no objection is stated to the recal thereof on caution or consignation, recal the said arrestments

on caution to the amount of £800 being found, or consignation of that sum, and decern." Consignation followed, and the arrestments were recalled. Then the action of damages was afterwards settled by compromise, by which the pursuers were to receive, in addition to certain bags belonging to them, a sum of money and the whole expenses of process. The money and the taxed expenses were to be paid out of the consigned fund. After all this had been done, the pursuer moved for payment of this sum, and for the expenses connected with the petition for recal of the arrestments. This was objected to, on the ground that the petition had been disposed of by the final interlocutor of 17th June:—"When it was pronounced expenses were not given, and they could not be got now by making a new application to the Court. The proper time for asking them had been when the petition was under consideration; or, if not asked for then, they should at least have been in the action of damages to which the whole proceedings in the petition were subsidiary." The ground upon which the Court went was, that they must treat the petition for recal of the arrestments as a separate process, and they held—Lord Cowan dissenting—that the final interlocutor disposing of the petition having said nothing as to expenses, it was incompetent then to move for them. Lord Cowan thought the case so connected with the petition that the expenses might stand over till the issue of the action of damages. That appears to me to be a very strong application of the rule, and the only argument against that is, that this is a multiplepoinding, and that these clauses of the Judicature Act do not apply to these and other such processes. But unfortunately there is an authority that negatives that argument, *Hamilton* v. *Barnet* (10 S. 426). This was a process of ranking and sale. Objections were stated by creditors to the prepared state, and these objections were answered and disposed of by the Lord Ordinary and by the Inner-House, and nothing was said as to expenses. Thereafter, and apparently very shortly thereafter, the case was enrolled to crave expenses, and Lord Medwyn awarded expenses. Hamilton reclaimed, "pleading that the finding as to expenses was incompetent, as the Lord Ordinary was *functus*, after disposing of the objections and answers without any judgment as to expenses." The Lord Justice-Clerk said—"Here is a regular record made up under the Judicature Act. The case is disposed of by the Lord Ordinary, and comes to the Inner-House, where an order is pronounced, which the common agent was bound to obey, without going to the Lord Ordinary, who was *functus*. I think it was incompetent to entertain the question of expenses." Now, that was a process of competition, one of that class of actions said not to fall under these sections of the Judicature Act, but to be dealt with by subsequent sections of that Statute.

Therefore, on the whole matter, I come to the conclusion that this finding of expenses by the Lord Ordinary could not be pronounced at this stage.

But I desire to guard against any misapprehension as to the practice in the Outer-House. It must be observed that this final interlocutor says nothing about expenses at all. Sometimes a Lord Ordinary in determining the merits of a case, and giving final judgment, finds himself not in a position to determine the question of expenses without further hearing of parties, and therefore, instead of immediately determining the question, he holds it over, reserving it by his interlocutor, or appointing parties to be heard on the question. I am not by any means disposed to question the competency of that procedure. The Lord Ordinary may there be held sufficiently to comply with the rule that the expenses shall be dealt with by the interlocutor disposing of the merits, for the rule goes no farther than this, that after a final interlocutor without saying anything as to expenses, his intention must be held to be to give no expenses to either party; but if he chooses he may make it plain that that is not his intention, but that he means to make expenses the subject of another interlocutor.

LORD DEAS differed. He thought the provision in the Statute was merely directory. The Act merely embodied previous law and practice, by which there was no incompetency in disposing of the question of expenses separately from the merits. The meaning of giving judgment on both questions together was, that it was to be done while the whole case was in the mind of the Court, and before there was any risk of some of the facts being forgotten or misunderstood. Incompetency in this case only meant incompetency in the circumstances. He thought the authorities quite supported this view. In *Clark*, the question of expenses came up after the lapse of a year and a half, after which it might fairly be held that all had been done that was intended. After the Lord Ordinary in this case had pronounced his final interlocutor, there was nothing to hinder him, or any of the parties, from enrolling the case on the question of expenses. The interlocutor of 27th May did not bear that the parties had been heard on the question of expenses; rather that was excluded. The view of the Court would lead to this, that the Lord Ordinary could not make avizandum on the merits without also making avizandum on expenses. The Inner-House here simply adhered, and remitted to the Lord Ordinary. The case went back to him just as it came from him, and if he could put it to the roll on the question of expenses before the reclaiming note, he could do it equally well a week or so after the case goes back to the Lord Ordinary. It is enrolled for expenses, and the Lord Ordinary having all the facts in his mind, deals with the matter, and he could not see any objection to his doing so. The case was not exhausted. As yet there was no ranking, and the whole parties were still in Court.

LORD ARDMILLAN concurred with the Lord President, holding that, while errors, if discovered immediately, might be corrected, there was here so long time between the final interlocutor on the merits and the enrolling on expenses, that the finding of expenses was incompetent.

LORD KINLOCH—I have come, after somewhat anxious consideration, to the same conclusion with your Lordship in the chair.

The Judicature Act provides in express terms "that in pronouncing judgment on the merits of the case the Lord Ordinary shall also determine the matter of expenses." This provision must have effect given to it by the Court. It cannot, I think, on the ground of being merely directory, be put in the position of being never acted on, and things be held exactly the same as if it did not occur in the Act. On the other hand, it must be enforced after a fair and reasonable construction, such as practical exigencies require.

I think effect is given to the enactment if the Lord Ordinary, at the same time with pronouncing judgment on the merits, appoints the case to be enrolled for the purpose of hearing parties on the question of expenses, and the case is so enrolled without delay. It frequently happens that parties have not been heard upon expenses when avizandum is made with the case; and it would be injustice, and might lead to miscarriage, were they not so heard. I think to follow this course will be "determining the matter of expenses" in the sound construction of the Act.

On more general principles, I further think, that if the interlocutor on the merits happens to be silent on the matter of expenses, it will be competent to the party claiming expenses immediately to enroll the case, in order to have the omission rectified. Such a power to correct errors, exercised immediately on their occurring, must be competent to every Court. There are instances of this power being recognised in practice; *Ranken* v. *Kirkwood*, 13th Nov. 1855, 18 D. 31.

In the present case, the Lord Ordinary, by his interlocutor of 27th May 1868, finally disposed of the competition between Mr Mackenzie, as judicial factor on Mrs Wilson's estate, and Mr Wilson. He "repels the claim stated on behalf of the said Robert Wilson, and decerns." This judgment put an end to all litigation on this point on the part of Mr Wilson. He was simply put out of Court. The judgment was an extractable judgment.

The interlocutor said nothing of expenses. If the judicial factor had immediately enrolled the cause, and called the attention of the Lord Ordinary to the point, the omission,—if it was truly a mistake, and not intentional,—might have been corrected. The factor did not do so. A reclaiming note was presented by Mr Wilson's trustees on the 4th June. The eight intervening days were allowed to elapse by the judicial factor without anything being done.

The Lord Ordinary's interlocutor was affirmed on 18th November 1868. Here, again, it was open to the judicial factor to claim the whole expenses of the discussion in the question with Mr Wilson and his trustees. But he seems again to have lost his opportunity; for the interlocutor simply gives him the expenses since the date of the Lord Ordinary's interlocutor, "and remits to the Lord Ordinary, with power to decern for said expenses when ascertained."

The judicial factor allowed another month to elapse before he applied to the Lord Ordinary on the subject of the expenses previous to the date of the Lord Ordinary's interlocutor on the merits. He then, of date 17th December 1868, moved for these expenses; and, the Lord Ordinary having made avizandum, the factor had them found due to him by the interlocutor of 22d December 1868, now under review.

I am of opinion that it was incompetent so to pronounce. It was contrary, as I think, to the enactment in the Judicature Act, however liberally construed. It was contrary both to the letter and spirit of the Act to have a final interlocutor on the merits on 27th May 1868, and an interlocutor on the expenses not till 22d December thereafter. This proceeding, as it appears to me, implies it to be competent for the Lord Ordinary to dispose of the question of expenses at whatever distance of time from the judgment on the merits, which is directly at variance with the statute. There is no hardship in finding this incompetent. It is easy to prevent all ill consequences by the Lord Ordinary, if not prepared to decide on the expenses, appointing parties to be forthwith heard on them. If he omits to do so, and the party does not immediately enrol the cause to have the omission rectified, that party has only himself to blame for the result.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, and the expenses claimed refused to the judicial factor.

Agent for Hogg and Others—James Finlay, S.S.C.
Agents for Factor—J. & A. Peddie, W.S.
Agent for R. Wilson's Trustees—James Somerville, S.S.C.

COURT OF JUSTICIARY.

Tuesday, January 26.

HIGH COURT.

(Before the Lord Justice-General, Lord Deas, and Lord Ardmillan.)

MARTIN *v.* MILROY.

Poaching—25 and 26 Vict. c. 114—2 and 3 Will. IV. c. 68—Aiding and Abetting—Oath of Credulity—Expenses. Terms of oath of credulity which *held* in conformity with statutory requirement. Costs as well as penalty may be awarded against a party convicted under the Poaching Prevention Act, 25 and 26 Vict. c. 114, to be followed by imprisonment in default of payment. Specification of the *modus* of aiding and abetting is unnecessary.

This was a suspension of a conviction under the Prevention of Poaching Act, 25 and 26 Vict. c. 114. The grounds of suspension stated were—(1) That the offence of which the complainer was convicted, as set forth in the complaint, was not an offence under the statute, it not being alleged that he was on the land unlawfully *in pursuit of game*, but merely that the game had been obtained "by Martin going on land, the particular land being to the prosecutor unknown, or by aiding and abetting some person or persons unlawfully going on land in pursuit of game, the particular lands," &c.: (2) That the way in which he had aided and abetted was not stated: (3) That there was no oath of credulity of the kind required by the Day Trespass Act, 2 and 3 Will. IV., c. 68; (4) It was incompetent to imprison the complainer until he paid the expenses found against him, these not being prayed for, and an award of expenses not being warranted by the Poaching Prevention Act.

J. C. SMITH (PATTISON with him) for complainer.

CLARK and KEIR, for respondent, were not called on.

The Court unanimously refused the suspension.

The LORD JUSTICE-GENERAL thought, (1) That though the collocation of the words was not very happy, the meaning was sufficiently plain, being substantially this, the going, whether by Martin himself or by others, unlawfully on land in pursuit of game: (2) That specification of the *modus* of the aiding and abetting was unnecessary, and the complainer in this respect merely followed the practice of all indictments: (3) That the case of *Trayner* differed essentially from the present. Here the oath was made on, not before, the complaint; it bore distinctly that what was contained "in the foregoing complaint" was true, and was