reference, has relation only to the constitution and subsistence of the obligation itself to furnish the communion elements, and not in any respect to the precise mode in which that obligation was to be fulfilled. Therefore, as it appears to the Lord Ordinary, if the Town-Council do truly and fully provide the elements required for the due celebration of the communion, their obligation is discharged, and the terms of the decree satisfied.

"It cannot, in the Lord Ordinary's opinion, be relevantly alleged that the provision for the communion was in truth meant to cover other expenses which are indirectly connected with its celebration."

The pursuer reclaimed.

GIFFORD and SHAND (MARSHALL with them) were heard for him.

BURNET (MILLAR, Q.C., with him) for the defenders.

The Court adhered.

LORD COWAN regretted that this action had been brought, and that the Court was compelled to decide the question betwixt the parties. The action was for a civil debt, and the question was, what was the defenders' obligation? He could not interpret the expression "use and wont" as having any reference to the quantities of bread and wine. The meaning was, that the defenders were to furnish the elements, as they had been in use to do, so often as the constituted authorities appointed the communion to be celebrated; and he could not doubt that if it were appointed to take place four times in each year instead of twice as at present, or once, as was formerly the case, the defenders would be bound to furnish the elements on each occasion. In this view, the effect of the pursuer's contention might be to restrict the obligation of the Magistrates.

LORD BENHOLME thought that the obligation was not constituted by the decree of the Teind Court, although undoubtedly it contained evidence of what the Magistrates had bound themselves to do. The question was, Does the obligation mean the elements which shall be necessary, or has it assumed the stereotyped form of six dozen of wine? Such stereotyping might operate very hardly on the minister, because at some subsequent time he might be confined to six dozen when he required twice as much. It was said that the minister was entitled to wine for the purposes of hospitality at the manse. That he could not assent to.

LORD NEAVES concurred. He had no doubt this was a civil claim constituted on a civil obligation, not regulated by the Teind Court, or on the principles of that Court. The Court of Teinds had no power to pronounce a decree against the Magistrates, but what passed at the time is recorded in the decree. Now, what was the obligation? It was not pecuniary but specific—to furnish the elements *in forma specifica.* That was an obligation which was originally incumbent on the parson. Afterwards the duty was imposed on the heritors; but, as they often consisted of a number of persons, it became the practice for the heritors to pay to the parson a certain sum of money in name of communion elements, and when this was done the minister was entitled to the full sum of money, although the expense of the elements was less. In this case the duty is undertaken by the Magistrates. It was vain to say that use and wont was to regulate the amount. These words were inserted in order to show how it came to be the case that the Magistrates were to furnish the elements. They had been in use to do so. No prescription can affect the matter. Where the minister receives an allowance from the heritors, and furnishes the elements, he may make a profit. This pursuer wants to make the same profit, although he does not, but there is no warrant for his doing so.

The LORD JUSTICE-CLERK agreed that this was a personal obligation between the Magistrates and the clergyman. In construing it the Court is not to be referred to the practice of the Teind Court two hundred years after 1618, when it was constituted. Before 1618 it was a common thing to modify a stipend without an allowance for communion elements, and the minister was bound to furnish them as often as the sacrament was dispensed. The obligation was necessarily a fluctuating one, and the question was, whether its character had been altered to the effect of fixing the quantities to be furnished? He was clear that it had not.

Agents for Pursuer—Mackenzie, Innes & Logan, W.S.

Agents for Defenders—J. & J. Milligan, S.S.C.

Friday, February 26.

MORDAUNT AND OTHERS *v.* DRUMMOND.

Entail—Act 5 *Geo. IV, c.* 87—*Provisions—Clause of Devolution. Held* that provisions granted under the Aberdeen Act by an heir of entail holding an estate subject to a clause of devolution are available to the grantees when the claim of devolution has come into effect during the lifetime of the granter.

The pursuers in this action were the trustees of the children of the marriage between the late Earl of Kinnoull and the Dowager-Countess of Kinnoull, and the defender was the Honourable Arthur Drummond of Cromlix, heir of entail in possession of the entailed estates of Innerpeffray and Cromlix, in the county of Perth. The object of the action was to enforce payment of a sum of £6360, being the shares of a sum due to the children of the marriage under a bond of provision executed by the Earl, on 12th October 1841, in favour of certain trustees, to give effect to the purposes of a marriage contract previously executed. That contract contained certain provisions in favour of children; but, of the same date, the Earl executed a bond and disposition in security, whereby, in security of the sums so provided, he made over to his trustees the entailed estates of Innerpeffray and Cromlix. Doubts afterwards arose as to the validity of the provision in question, whereupon the Earl granted the bond of provision above mentioned, binding the succeeding heir of entail. There were nine children of the marriage between the Earl and Countess of Kinnoull. The second son was Captain the Hon. Robert Drummond, who attained majority on 22d July 1852. In March 1853 the Earl executed a deed of denuding in favour of this son, and he afterwards was duly vested with the estates. The deed of denuding expressly refers to the bond of provision, and bears that it had been agreed upon between the Earl and Robert Drummond that the bond should form a valid charge against the entailed estates. Robert Drummond, who was never married, died on 1st October 1855, when the succession opened to his immediate younger brother, who completed his title as nearest lawful heir of tailzie and provision to his deceased brother. By the deed of entail under which the

estates of Innerpeffray and Cromlix are held, it is provided that when the same person should happen to succeed both to the estate of Dupplin and the estates of Innerpeffray and Cromlix, and when he had a second or younger son, he should denude himself of the Innerpeffray and Cromlix estates in favour of such son. And it is provided by the said deed of entail that when both the Dupplin and Cromlix estates "shall fall and be settled upon one person, it shall be lawful to the second or younger sons decending of the person succeeding to both of the said estates, when majors, to obtain themselves served, retoured, and infeft in my estate (Cromlix estate) as heir of provision thereto, and the person succeeding to both the said estates his right, retour, and infeftment of my estate shall become void and extinct as if it had not been." The pursuers founded on the Act 5th George IV., c. 87, as giving power to execute the bond of provision in question, and pleaded that the defenders had no title to dispute the validity of the bond of provision, in respect of the terms of the deed of denuding, and of the infeftment following thereon, and subsequent titles. The defenders maintained that the bond of provision was ineffectual to create a charge or obligation against the defender or other heirs of entail in virtue of the clause of devolution contained in the entail, and that the statute did not confer the power alleged by the pursuers. The Lord Ordinary (Mure) repelled the defence. His Lordship added the following

"*Note.*—Had a question similar to that on which parties are here at issue been raised under a deed of entail which, irrespective of the Act 5th Geo. IV, cap. 87, authorised the heirs in possession of the estate to make provisions for their wives and younger children, but contained a declaration that the estate should, in certain events, devolve upon another heir, the Lord Ordinary is disposed to think, upon the authority of the rules which have been laid down as to the powers of heirs of entail in possession, and applied in the House of Lords in the case of *Morton* v. *Eglinton*, 8th July 1847 (6 S. Bell, p. 136), and in this Court in the earlier case of the *Earl of Cassillis* in November 1742 (Craigie and Stuart's Appeals, p. 381), that it would have been held that a provision granted by an heir in possession, from whom an estate might so devolve, would remain valid and effectual although the granter had been denuded of the estate prior to the time at which the bond came into operation.

"The main questions, therefore, which appear to be here raised for decision are—1st, whether the power given by the Act 5th Geo. IV. to heirs of entail to grant provisions is restricted to cases where the entails do not contain clauses of devolution, or obligations to denude? and, 2d, whether, if that be not so, the Act is so worded as to render bonds of provision granted by the heir in possession inoperative, in the event of the estates devolving upon another heir before the death of the granter of the bonds?

"(1.) With reference to the first of these points, the Lord Ordinary is of opinion that the statute contains no such restriction. Its leading provisions are very broad. They confer the right to make such provisions on 'every heir of entail in possession of an entailed estate,' without qualification either as to the time when the provisions may be made, or as to the conditions of the entail under which the estate may be held. And the enacting words being thus express, it appears to the Lord Ordinary to be clear that the right given by the statute so to charge an entailed estate cannot be confined to heirs who are in possession under entails which contain no such clauses as that here in question.

"(2.) The second point is, in the opinion of the Lord Ordinary, attended with more difficulty, as there are provisions in several clauses of the statute which seem in one view to indicate that the death of the granter is the period with reference to which the whole rights and obligations of the heirs were to be regulated; and it was contended that as the late Lord Kinnoul had, long prior to his death, ceased to be the heir in possession of the estate of Cromlix, the bonds granted by him while he was the heir in possession have now no legal effect. These clauses, however, which were strongly pressed in argument on the part of the defender, appear to the Lord Ordinary to have been framed solely with the view of regulating the measure and extent of the obligation created by the bond as in a question with the next succeeding heir, and not with the view of affecting, or in any way qualifying, the right of the heir in possession for the time to create the obligation; and, after repeated consideration of the clauses relied on, he has been unable to find anything in them to warrant him in holding that the validity of bonds granted under the power expressly conferred on all heirs of entail in possession to charge their estate, was to depend upon the contingency of the granter of the bonds remaining in possession up to the date of his death, and to that result the argument mainly relied on by the defender seems necessarily to lead. The existence of clauses of devolution were well known, and their effect upon the position of heirs of entail had been the subject of question prior to the date of the passing of the Act 5th Geo. IV.; and if the Legislature had intended that upon the devolution of an entailed estate bonds granted by the heir of entail in possession, under the powers given by the statute, were to become inoperative in respect of the granter having ceased before his death to be proprietor of the estate, they would, it is thought, have made express provision to that effect, and would not have left so important a matter to be gathered by inference and implication upon a comparison of the expressions used in various clauses of the statute.

"On these grounds, the Lord Ordinary is of opinion that the defences to the main questions raised in the present action are not well founded. And, as regards the claim made by the defender, under his sixth plea in defence, to a share of the provisions sued for, that appears to be excluded by the words of the fourth section of the statute, by which such provisions are confined to children 'who shall not succeed to the entailed estate.'"

The defenders reclaimed.

Solicitor-General and Shand for them.

Clark and Lee in answer.

The Lord-Justice-Clerk, who delivered the opinion of the Court, held that the result of the case of *Montgomerie* was that, till the occurrence of the event which brings the clause of devolution into operation, an heir of entail holding subject to such a clause is in exactly the same position, as regards his powers, as any other heir of entail. That being so, it must be taken as settled that the provisions here in dispute were effectually granted; and the only question was, whether, having been effectually granted, they were voided by the subsequent denuding of the granter under the clause of

devolution? The Court were not prepared to adopt that construction of the statute, or of the maxim *resoluto jure dantis resolvitur jus accipientis.* That maxim only applied in the case of derivative rights flowing from parties whose own rights were in their nature temporary (*e.g.*, tack rights), or in the case where an objection subsisted at the date of the constitution of the derivative right.

Agents for Pursuer—Mackenzie &Kermack, W.S.

Agents for Defenders—Dundas & Wilson, C.S.

Saturday, February 27.

FIRST DIVISION.

WHITE *v.* CALEDONIAN RAILWAY CO.

(*Ante*, v. 250.)

Prescription—1579, c. 83—*Proof, by Writ, of Constitution—Reference to Oath — Railway Company.* Circumstances in which *held* that a pursuer had not proved, *scripto* of the defenders, the constitution of an alleged debt.

Circumstances in which, in an action by a broker against a railway company, a minute of reference to the oath of the defenders *refused.*

James White, stockbroker in Edinburgh, sued the Caledonian Railway Company and the Crieff Junction Railway Company for a sum of £347, conform to account commencing 24th September 1852 and ending 2d April 1855. The claim was made in respect of work done between the dates libelled, and mostly in the last four months of 1852, in the way of starting the Crieff Junction Railway. The action was raised in January 1866. The Court, in February 1868, found "that the account libelled, not having been pursued for within three years after the date of the last item charged therein, had fallen under the operation of the triennial prescription introduced by the Statute 1579, c. 83," and sustained a plea founded by the defenders on that statute.

The pursuer lodged a minute of reference to the oath of the defenders, which was refused by the Lord Ordinary, to whose judgment the Court adhered.

The pursuer lodged another minute of reference, which was refused by the Lord Ordinary. The pursuer acquiesced.

The pursuer lodged another minute of reference referring the constitution and resting-owing of the debt sued for, or any part thereof, to the oaths of the defenders, the chairman and directors of the said Crieff Junction Railway Company, and the secretaries, solicitors, and treasurers, comprehending the parties having power to bind the said company, viz., Carolus James Home Graham, Esq. of Strowan, &c., whereon the Lord Ordinary (Ormidale), on 6th February 1869, pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators on their respective counter-motions, viz., motion of the pursuer to be heard on his right to prove the constitution of his claim *scripto* of the defenders, and motion of the defenders that the minute of reference to oath, No. 145 of process, should in the first instance and now be refused, with expenses: Makes avizandum with the debate on these motions, and whole process." And, on 8th February, this other interlocutor:—"The Lord Ordinary having considered the debate on the respective motions of the parties referred to in the preceding interlocutor, Sustains the motion for the defenders, and, in terms thereof, refuses the minute of reference therein referred to (No. 145 of process): Finds the pursuer liable in expenses since the date when said minute of reference was lodged in process: Allows an account thereof to be put in, and remits it, when lodged, to the auditor to tax and report; and, with regard to the pursuer's motion referred to in the preceding interlocutor, Allows him to be heard in support thereof, if he is still to maintain the same, and the defenders to be heard in opposition thereto.

"*Note.*—By interlocutor of 13th February 1868, the Court decided that the account sued for by the pursuer had fallen under the operation of the triennial prescription, and since then the pursuer has lodged three several minutes of reference to the oaths of the defenders, or some of them, not only of the constitution, but also of the resting-owing of his alleged claim of debt. The first of these minutes was refused by the Lord Ordinary, whose interlocutor was, on reclaiming note, adhered to by the Court; the second minute was also refused by the Lord Ordinary, and his interlocutor of refusal was acquiesced in. The pursuer then put in his third minute, but, in place of supporting it, or withdrawing it, he proposed, after some expenses in connection with it had been incurred, that it should be allowed to stand over till his motion, referred to in the preceding interlocutor, viz., that he should be allowed to prove the constitution of his claim *scripto* of the defenders, should be gone into and finally disposed of. On the other hand, the defenders insisted, and the Lord Ordinary thinks rightly, in terms of their counter-motion, that the pursuer's third minute of reference should be first disposed of. The Lord Ordinary having now accordingly refused the pursuer's third minute of reference, he may, if so advised, enrol the case to be heard on his motion to be allowed to establish the constitution of his claim *scripto* of the defenders; and it is to be understood that the Lord Ordinary has not, in the meantime, determined anything as to the competency of such a proceeding in the circumstances in which the pursuer has, at this stage of the litigation, proposed that it should be adopted."

The pursuer reclaimed.

Fraser for reclaimer.

Solicitor-General (Young) and Johnstone for respondents.

At advising—

Lord President—When this case was before us originally in February 1868, we pronounced an interlocutor in which we found that the account libelled, not having been pursued for within three years after the date of the last item charged therein, had fallen under the operation of the triennial prescription introduced by the statute 1579, c. 83, and therefore sustained the first plea in law stated for the defenders. That was the plea founded on the statute. We pronounced that judgment against the contention by the pursuer that the debt was constituted by writing. If he had been well founded in that contention, the debt would have fallen under the exception in the Act 1579, but we were satisfied that the debt was not of that nature; but, on the contrary, that the employment was on a verbal and not a written contract. The practical effect of that judgment was to limit the mode of proof to which the pursuer could resort, so that he could only prove the subsistence or constitution of the debt by the writ or oath of the party, and now the pursuer contends that he has sufficiently proved the constitu-