bears to be granted "for the causes specified in a back-bond of the date hereof;" and it is contended that this qualifies and destroys the absolute character of the disposition. I consider this contention untenable. There is no incompetency in referring to a separate writing for a narrative of the causes and considerations leading to the execution of an absolute conveyance. The conveyance is not the less absolute on that account. The deed is not in a worse predicament than if it had borne to be granted "for certain good causes and considerations," without further explanation. The disponee under that deed is still absolute proprietor on the face of the records. The reference to the back-bond may, or may not, according to circumstances, be an element of evidence in a question of *bona fides*. But there is no question of *bona fides* now raised; but simply of feudal title. And the feudal title is, I think, not affected by this clause.

2. I am next of opinion that the feudal title in the subjects will be well conveyed to the purchaser by Dr Duncan, as now in room of Ferguson's trustees. Dr Duncan is exactly as in their case feudal proprietor, and the only feudal proprietor on the face of the records. The case might have been different had the back-bond granted by Ferguson's trustees to Howe been recorded in the Register of Sasines; for this would have reduced the right of Ferguson's trustees on the face of the records to that of disponees in security. But the bond not being recorded, they were absolute owners on the records, and entitled to deal as such with any *bona fide* purchaser. I cannot doubt that Ferguson's trustees could give an effectual disposition to such a purchaser. They might in this be acting fraudulently by Howe, their disponer; but all objections at Howe's instance would be effectually cut off by Howe joining as a concurrent party in the disposition. In substance the title now offered is the same as if it was a disposition by Ferguson's trustees, with the concurrence of Howe as co-disponer.

3. I am further of opinion that the right remaining to Howe in the subjects, after his *ex facie* absolute disposition to Ferguson's trustees, was well transmitted to John Duff, the present seller's constituent, by Howe's deed of assignation, dated 5th June 1838, followed by intimation to Ferguson's trustees on 6th July thereafter. In the matter of feudal title Howe's disposition to Ferguson's trustees, with the infeftment following, operated entire divestiture so far as Howe was concerned. He possessed no right thenceforth except a *jus actionis* against Ferguson's trustees, entitling him to insist for a re-conveyance. It was by such a re-conveyance that the feudal right to the subjects fell to be raised up in his person. This right against Ferguson's trustees, I think, he well and effectually conveyed in 1838 by deed of assignation, followed by intimation to the trustees. A feudal disposition to the subjects would have been inconsistent with the position in which he stood. If it had any effect at all, it would have been by force of the disposition containing an assignation to the personal right; which an assignation to writs and evidents would have sufficiently been. More accurately, as I think, in the state of the title at the time, he conveyed the personal right by his intimated deed of assignation.

4. Finally, I am of opinion that no risk whatever is run from any claim by the creditors in Howe's sequestration. The sequestration did not issue till 8th May 1840. The assignation is dated and was intimated about two years previous. Howe's right was thus carried out of his person so as not to fall under his sequestration. Howe's right was at any rate only a personal one;—it never from the first had been anything else; and it is difficult to see how the creditors could take it, except *tantum et tale* as it stood in Howe himself. But I do not think it necessary to enter on what is always a delicate question in this connection. It is sufficient that Howe's previous deed, completed by intimation, prevented the attachment of the sequestration.

The practical result is, that the title now offered will convey to the purchaser the whole right in the subjects; the feudal title as transmitted from Ferguson's Trustees to Dr Duncan; the personal right of reversion as validly conveyed by Howe to John Duff, and now vested in Robert Duff, whose right to hold the place of John has not been controverted. The question put to us is therefore, as I think, to be answered in the affirmative.

No expenses were allowed, either in this special case or in the suspension out of which it arose, and which it was to be held as settling. The Court held that though expenses should be given against a purchaser making a frivolous objection, yet in such a case as this, where the validity of the title had been doubtful, even though the seller had ultimately succeeded in making out that the title was sufficient, the fairest way under the circumstances was not to allow expenses.

Agent for Company—William Archibald, S.S.C.
Agent for Duff—Henry Buchan, S.S.C.

Wednesday, December 15.

SECOND DIVISION.

M'GREGOR *v.* MACFARLANE AND OTHERS.

Right of Way—Suspension and Interdict—Statute Labour Road — Mansion-house and Policies.
Circumstances in which *held* that a proprietor had failed to establish that certain occupants of a farm were not entitled to use a road passing in front of his mansion and through his policies as a continuation of a statute labour road, in which there was admittedly a right of way.

This is a question of right of way, the parties being Mr M'Gregor of Glengyle, on the one hand, and the tenant on the farm of Portnellan and Coilachra, in the parish of Callander, and his brother and two nephews, all residing there, on the other. Mr M'Gregor sought interdict against the respondents from passing along the private road within the complainer's policies leading up to the mansion-house of Glengyle by themselves, or with horses and cattle; also against their passing through or driving cattle and sheep through the ornamental ground or shrubbery in front of the mansion-house; and against breaking or interfering with a gate placed by him at the entrance to the road in question. The respondents, on the other hand, maintained that the road to which this suspension is directed is part or a continuation of the statute labour road leading from Callander along the north and east side of Loch Katrine, by Portnellan and Glengyle, round the head of the loch to Stronachlachar, and thence to Inversnaid and Aberfoyle.

After a proof, the Lord Ordinary (MURE) pronounced the following interlocutor:—"The Lord

Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, Finds that the respondents have failed to prove that the road through the lands of Glengyle, from the iron gate situated about two hundred yards to the eastward of the mansion-house of Glengyle, and leading through the complainer's policies past the front of the said mansion-house, and from thence to the ford at the Dow of Glengyle, is a public road or right of way from Callander to Inversnaid and Aberfoyle: Therefore declares the interim interdict perpetual, and decerns, reserving to the respondents to establish in any competent process that they have right to a road or passage for foot passengers, and also for sheep, cattle, and horses round the head of Loch Katrine, through the lands of Glengyle by the ford at Tomnamaun; or from the said ford up to and along the left bank of the water of Glengyle, through the ford at the Dow of Glengyle, and from thence to Stronachlachar, either as a public road or as a servitude road for the use of the respondents' farms, and to the complainer his defence as accords: Finds the complainer entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report.

"*Note*—It is distinctly established in evidence that the respondents and their servants on two different occasions forced open the iron gate on the road leading into the complainer's policies, and past the front of his residence, notwithstanding the remonstrance of the complainer's family and manager, and of a request on their part that the respondents would in the meantime make use of the road by the back instead of that leading through the shrubbery by the front of the house; and the ground on which the respondents assert their right so to act is, that the road in question is the continuation of a statute labour road leading along the north and east side of Loch Katrine by Portnellan and Glengyle round the head of the loch to Stronachlachar, and thence to Inversnaid and Aberfoyle, so that the main question thus raised for decision upon the proof is, Whether the respondents have established that the road they so forced their way into and used in front of the complainer's house is a public road which had been improperly closed and obstructed by the complainer?

"Parties appear to be agreed that the road from Callander is statute labour up to the March of Glengyle, and there is evidence that it has ocasionally been repaired at the expense of the statute labour funds even after it enters the lands of Glengyle; but there is, on the other hand, no evidence to instruct that any part of the road leading up to the complainer's house, from the fence at which the iron gate in question was erected, and thence down to the Dow of Glengyle, was ever dealt with as a statute labour road, and from that ford to Stronachlachar all the witnesses are agreed that it is at best a mere track or footpath, by which cattle and horses can with difficulty get along. This road, however, though not statute labour, may still be a public road or right of way, and the question is whether there is evidence sufficient to instruct that it is so.

"In dealing with that evidence the Lord Ordinary has not attached much weight to that of parties who occasionally passed to and from Glenfalloch, because there is plainly no acknowledged public road or right of way between Glenfalloch and Glengyle. It is, moreover, not alleged on record that there ever was such a road, and any people who may have come down that way, other than the friends and neighbours of the late proprietor of Glengyle, appear to have been interrupted and directed off the property by the way most convenient for him, so that during his proprietorship the passage to and from Glenfalloch appears to have been completely stopped.

"Apart from that evidence, then, and putting aside that as to smugglers, beggars, and parties travelling from house to house with things to sell, who generally find their way along private as well as public roads, the proof appears to the Lord Ordinary to come to this, that for a long series of years certain farmers on the north side of Loch Katrine, and more especially the tenants of Portnellan and Coilachra, have been in use, as occasion required, when shifting or selling their stock, to send or bring them round by the head of the loch, through the lands of Glengyle; and it is in evidence that the stock so shifted or sold occasionally passed in front of the house of Glengyle. But the great preponderance of the evidence, in the opinion of the Lord Ordinary, goes to show, (1) that this stock belonged either to neighbours or intimate friends of the proprietor of Glengyle, who had his permission to use the road, or to parties dealing with them; and (2) that while those neighbours and friends went past the house, and generally called on their way, the servants and stock were sent down by the Ford of Tomnamaun, or, as some of the witnesses call it, by the Lower Ford or Laigh Road, which was the nearest way, and so crossed the water at a considerable distance from the house.

"The respondent himself says that "the beasts commonly took the nearest cut," viz., the track by the ford, and which, besides being nearer, was the road which, in the circumstances, they might naturally be expected to go by instead of the road close in front of the residence of the proprietor, which few proprietors would, it is thought, be inclined to allow.

"The late proprietor of Glengyle accordingly, and his son, are quite distinct to the effect that the place where the river, when in its ordinary state, was crossed was at the lower ford, and that he never allowed any one to use the road by the front of the house to the ford at the Dow of Glengyle except as a favour, or when the river happened to be in flood; and in this their evidence appears to the Lord Ordinary to be corroborated by that of other witnesses, who have for long been acquainted with the localities in question.

"On these grounds the Lord Ordinary has come to the conclusion that the respondents have failed to establish the defence which they have set up against the present complaint, and that the interdict must be continued. Whether they have right to a passage through Glengyle by the ford at Tomnamaun, or by the ford further up the river, cannot in his opinion be competently disposed of in this process, which relates to their claim to pass through the policies and by the front of the house. He has, however, inserted a reservation in the interlocutor in order to keep that question open, and to show that he has dealt exclusively with the more limited question raised in the record."

The respondents reclaimed.

SHAND and KEIR for them.

D.-F. GORDON and G. C. CAMPBELL in answer.

The Court (Lord Benholme delivering the leading judgment) were of opinion that, looking to the two classes of evidence that were available in such

cases, viz., the evidence of parties residing in the immediate neighbourhood of the subject in dispute, and the evidence of the general public, the defender had failed to establish the exclusive right for which he contended. The right of the public, therefore, to use the road in question had been established; but the Court expressed no opinion except as to that particular part of the road passing in front of the suspender's mansion-house through his policies, to which the prayer of the suspension was directed.

The interlocutor of the Lord Ordinary was accordingly recalled, and the note of suspension refused.

Agents for Suspender—M'Ewen & Carment, W.S.

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

Wednesday, December 15.

ROBERTSON *v.* DUKE OF ATHOLE.

Declinature—Ratione suspecti judicis—*Allegations of Enmity—Corruption—Relevancy—Proof—* 31 *and* 32 *Vict., c.* 100, § 72. *Held* (1) that a plea of declinature, *ratione suspecti judicis*, resting on allegations of enmity and corruption that were known to the party proponing the plea from the outset, could only be stated *in initio litis*, and after litis-contestation had taken place was incompetent. (2) Averments of enmity and corruption which held not relevant. (3) Circumstances in which, after final judgment, party allowed to lead proof in terms of section 72 of the Court of Session (Scotland) Act 1868.

This appeal, the merits of which involve a question as to the sale, delivery, and price of timber, between Mr Robertson of Dundonnochie and the Duke of Athole, was disposed of to-day. The summons was raised in August 1868, the record was closed in March 1869, and the case stood on 12th April on an order for proof, when Mr Robertson stated a declinature to the jurisdiction of Sheriff Barclay, and left the Court. The pursuer thereupon led his proof in absence of the defender, and the Sheriff-substitute having advised the case, pronounced judgment against the defender, who appealed to the Court of Session. The defender when the case was first called appeared personally in support of his appeal, and, after hearing him, the Court, on 10th November, appointed him "to lodge in process within fourteen days the plea of declinature now stated at the bar, and a condescendence of the facts and circumstances on which he proposes to support it." The appellant condescended as follows:—

"1. That in the month of June last year a feeling came to be strongly entertained by the inhabitants of Dunkeld that the exaction of pontage on the bridge there over the Tay was illegal, in respect that the powers given to the respondent under the Dunkeld Bridge Act of Parliament had expired. This feeling was shared in by the appellant; and in exercise, accordingly, of what he conceived to be his legal rights, he, in February 1868, frequently passed and repassed the bridge without paying pontage, although demanded. No complaint was brought against him for these actings. The growth of this feeling in the community led to the formation of two local parties—the one party consisting of those who were servants or dependents of the respondent, and who professed to entertain the opinion that the exaction of pontage was legal; the other party, including the whole remaining inhabitants of the locality, openly maintained that such exaction was illegal. The appellant was throughout in favour of the latter view. Sheriff Barclay has exhibited from the first a strong leaning in favour of the pontage exaction, and has, in the most marked manner, evinced a prejudice against the appellant. This prejudice has been more particularly displayed by the Sheriff-substitute in his judicial capacity, in dealing with matters wherein the appellant was concerned, and which prejudice has amounted to a corruption of his judicial office.

"2. On or about the 15th day of June 1868 the appellant, in presence and hearing of the Earl of Kinnoull and Sheriff Barclay, jocularly remarked to the former that the appellant proposed calling out the Earl and others for the purpose of throwing the pontage gate at Dunkeld Bridge down the River Tay; and as the said Earl was by no means offended at the said proposal, the Sheriff became greatly incensed at the said remark, and immediately replied to the appellant that "he"—the Sheriff-substitute—"would count with him for it if he got a chance."

"3. On or about the 24th day of July 1868 certain parties, being those favourable to the respondent and to the exaction of the said pontage, presented Sheriff Barclay, or his wife, with a money gratification of £500 sterling. The appellant believes and avers that the said gratification was presented as a reward to the said Sheriff-substitute for his judicial and extrajudicial exertions in the respondent's interests, and those of his party, and as an inducement to him to continue these exertions on behalf of the pontage, and other like services to the said party in the country; and the appellant further believes and avers that the said inducement produced the said effect desired.

"4. On or about the 6th July 1868 the appellant intimated to the authorities that as the penalties incurred by the parties passing over the bridge and refusing payment could not be exacted, he proposed merely doing as much damage to the gate as would render him liable for the other penalties provided by the Dunkeld Bridge Act. To this intimation no answer was made; and, after allowing some days to elapse, he went to the gate and displaced some decayed spars—the damage done being so trifling as not to require the services of a carpenter for its repair. For this trivial matter the appellant was brought before Sheriff Barclay, who took his declaration, and committed him to Perth prison on a charge of malicious mischief. The appellant at the time protested that the Sheriff's conduct was oppressive, and an unwarrantable invasion of his civil rights; but Sheriff Barclay excused or justified himself by remarking, "The Chieftain is getting too important a personage in the North; he is bothering the Duke's people about the bridge accounts, as well as exercising too much power over the minds of the people in this county, *and we must give him a check.*"

"5. On Saturday evening, the 18th July, Sheriff Barclay having obtained the service of twenty-five soldiers of the 42d Royal Highlanders, seventy special constables, and fifteen county constables, proceeded to Dunkeld of his own accord, and without any solicitation from those in charge of the peace ordinarily, and for no other reason than to involve the appellant in a breach of the law. Sheriff Barclay personally sought after the appel-