we had adopted that word. But there stood two classes of subjects in the person of Alexander Dunn,—the one to which, supposing the titles complete, his heir-at-law would have served as heir-at-law; the other to which, if it had come to service to him, the heir-at-law would have served as heir of provision under protection of that deed. Now the *dominium directum* was acquired by Alexander, and consolidated. I think it is not a perfectly correct view of the case to take in this matter to say that this evacuated the destination in William Dunn's deed. It seemed to me rather to annihilate the estate conveyed by William's deed. There was no substitution in place of it, and no succession substituted to it. The act of a *plenus dominus* who feus out a subject creates a subaltern estate; the act by which it is resigned *ad remanentiam* is to extinguish that subaltern estate, and place matters as they were before; and except in special circumstances, as in the case of Boquhanran, where the Court held they could not allow a party to benefit where he was not intended to be benefitted, that introduced a specialty. But here Alexander Dunn, while he was not on deathbed, but in *liege poustie*, extinguished this estate by resigning it. The titles stood alone in his person. Nobody could have served to it but his heir-at-law, and no power exists that can compel the heir-at-law again to sub-feu. That is the position in which the matter stands, as was plainly indicated by the schedule, and by the description—and we meant to find that, and must now declare it.

Lord Kinloch—I concur in the result arrived at by your Lordships generally.

I would only remark, with reference to some observations which have been made, that I find no difficulty created by the terms of the judgment of the House of Lords. I consider the *plenum dominium* of the lands of Kilbowie to have been undoubtedly comprised within the reductive clause of the former judgment of the Court. It was so, I think, in formal expression, having regard to the shape of the record and the schedules attached to it. It was unquestionably so in substance and sound construction; as the *plenum dominium* of Kilbowie had neither remained settled by William Dunn's deed at the date of Alexander's death, nor in a sound legal sense was contained in William Dunn's deed at all. The judgment so comprising Kilbowie within its reductive clause, remained untouched by the House of Lords. It was proper, as their Lordships thought, to insert a special declaration as to Boquhanran, because on that point the House were introducing either a variation on the interlocutor, or at all events a very necessary explanation of it, bringing distinctly out the intended separation between the *dominium directum* and the *dominium utile*. In regard to Kilbowie, where no such separation was to be made, the judgment remained exactly as the Court below had left it; and exactly what it then imported. The judgment as to Kilbowie did not require either to be varied or explained; and remains now for enforcement, as it did when your Lordships formerly pronounced it. But the judgment being generally expressed, and its meaning being brought into controversy, I can see no objection to the present declaratory action, as called forth by the special circumstances of the case; and in that action I think the pursuer should prevail, so far as regards the conclusions now brought before us.

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

Agents for Defender James Black—J. & R. D. Ross, W.S.

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*Thursday, March* 10.

## FIRST DIVISION.

### CRAWFORD *v.* MAGISTRATES OF PAISLEY.

(*Ante*, vi, p. 683.)

*Expenses—Suspension—Corporation—Burgh Property.* Circumstances in which *held* that a suspender was entitled (1) to his expenses up to the date of the passing of the note of suspension, in respect that he was justified in the circumstances in bringing the action into Court; (2) that he must bear his own expenses thereafter until an interlocutor of the Lord Ordinary refusing the note and recalling the interdict; and (3) finding him entitled to his expenses since the date of the last mentioned interlocutor.

In July 1869 Mr John Crawford brought an action of suspension and interdict against the Magistrates and Town Council of Paisley, of which the prayer was as follows:—"May it therefore please your Lordships to suspend the proceedings complained of; and to interdict, prohibit, and discharge the respondents from taking down and demolishing the Cross Steeple of Paisley, by themselves, or by others acting by or under their orders and authority; or, at all events, from proceeding to take down the said steeple in the meantime, and until it be judicially ascertained, either by the inspection and report of some skilled and impartial architect, or other competent person, or in such other manner as may be determined by the Court, that the said steeple cannot be repaired or made permanently secure and that it is absolutely necessary for the safety of life and property it should be taken down; and, accordingly, to remit to such competent inspector or inspectors, and to determine in accordance with his or their report; and, in any event, to prohibit, interdict, and discharge the respondents from taking down the said steeple until they, as representing the said community of Paisley, have come under an undertaking either to rebuild the said steeple on its present site, or to erect a new one, equally good or better, on another site, to be approved of by the inhabitants or by the Court; and further, and in any view, to find that in the circumstances of the case the present application was reasonable and proper, and that the complainer is entitled to his expenses thereanent from the respondents, as representing the said community; or to do otherwise in the premises as unto your Lordships shall seem proper." After various procedure in the Bill Chamber and the Outer-House (reported *ante*, vol. vi., p. 683), the Lord Ordinary (Barcaple), on the motion of the respondents, remitted to Mr Bryce, architect, to examine the steeple of the Cross of Paisley, and report on its state as to the safety and convenience of the public; and thereafter, on 3d December 1869, having considered the report, granted authority to the Magistrates to take down the steeple, as being in a dangerous state.

A proof of the averments of the parties was then taken before the Lord Ordinary, who on 17th December pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties, and

considered the proof and closed record, Finds it proved that when the Magistrates and Town Council of Paisley resolved to take down the Cross Steeple that was a measure necessary for the safety of life and property, owing to the state of the building and the nature of the soil on which it was founded; Repels the reasons of suspension; Refuses the interdict, and recals the interdict formerly granted, so far as not already recalled, and decerns: Finds the suspender liable in expenses; Allows an account thereof to be given in, and when lodged, remits the same to the Auditor to tax and report."

The suspender reclaimed against that part of the interlocutor finding him liable in expenses.

MAIR for him.

The SOLICITOR-GENERAL in answer.

At advising—

The LORD PRESIDENT—It is certainly very much to be regretted that the expenses in this case are so formidable, and in disposing of the question now before us, how these expenses are to be borne by the parties, we are bound to consider and decide, according to the best light we can get, who is the most to blame for these expenses. Now, the first question is whether there was any justification of Mr Crawford coming into the Bill Chamber with this application for suspension and interdict. The condition of the matter was this,—The Magistrates and Town Council were anxious to widen the High Street, and it was part of their plan in widening that street to take down the Cross Steeple, and rebuild it in another place. There cannot be the least doubt, I think, that on the face of their own minutes the object of widening the High Street was the one object which led them originally to consider the propriety of taking down the steeple. No doubt it also came out that the Cross Steeple was somewhat insecure, and reasonable fears were expressed by people in the neighbourhood that it might fall down. Measures were to be taken to prevent any such disaster; and the Town Council announced that they were to take down the steeple. It was in these circumstances that Mr Crawford, as a citizen of Paisley, interposed, and asked what is contained in the prayer of this note of suspension and interdict. It is said that the Magistrates and Town Council were entitled to deal with this matter according to their own discretion. They were not under any obligation to apply for any judicial authority; and that, if any judicial authority was necessary, the Magistrates had that authority in themselves; and, being clothed with that judicial authority—the jurisdiction of the Dean of Guild—they were entitled to go on by a resolution of the Town Council to do this thing. Now there seems to be a confusion of two or three different ideas in this argument. The first question is, whether a municipal body are entitled to do a thing of this kind without applying for any judicial authority? and that involves a very different question. It must be observed that this steeple is not only the public property of the burgh, but it is inalienable. They cannot sell it, and most unquestionably they can as little pull it down without judicial authority, unless the immediate risk is so imminent as to entitle them to do so for the safety of the community. If the Magistrates assume to themselves to exercise the jurisdiction of the Dean of Guild, they must do it as a Dean of Guild does. They cannot spontaneously exercise that jurisdiction. They must do it on the application of a party; and when one party applies another party may appear to oppose it; and, of course, it would be the duty of the Magistrates, as Dean of Guild, to hear the parties and determine according to what is right. But nothing of that kind is done. I cannot doubt, for my own part, that it would have been quite competent to apply to the Sheriff for authority immediately to take down and remove this piece of inalienable public property, on the ground that it was dangerous, and that the Sheriff would have the jurisdiction to grant such a warrant, and doubtless would have done so. But they did not do that. They proceeded to take measures for the demolition of this piece of public property, having already created the impression on the minds of the public, or some portion of the public, that there was some risk of the steeple falling. But that was not the true motive of their conduct. They had another motive, viz., a desire to widen the street and improve other property in the neighbourhood. Now, it was in these circumstances that this application for interdict was presented. I think that the terms of the prayer of the application are extremely important, and I have not heard from the Solicitor-General any sufficient answer to the argument which I think is properly founded on the prayer of the petition. What the suspender asks is simply interdict against the demolition of the steeple. But then he goes on to suggest very properly an alternative, which, like many alternatives in prayers of this kind, embodies what is really intended by the party making the application. His alternative is this:—"Interdict from proceeding to take down the steeple in the meantime, until it be judicially ascertained, either by the inspection and report of some skilled and impartial architect or other competent person, or in such a manner as may be determined by the Court, that the said steeple cannot be repaired permanently and made secure, and that it is absolutely necessary for the safety of life and property that it be taken down; and accordingly remit to such competent party to inspect and report, and determine in accordance with his or their report." The respondents having proceeded without any judicial authority, the object of this part of the prayer is to have it judicially determined whether it is competent to have it inspected by persons of proper skill. That seems to me a very reasonable demand, and I think the respondents would have been well-advised if, instead of resisting the granting of any interdict, or even the order for answers on this note of suspension and interdict, they had at once consented to proceed in terms of this part of the prayer of the note, and agreed to have it remitted to a man of skill, just in the terms in which it was afterwards made in the month of December; and upon that I don't entertain the least doubt that the Court, in the month of July last, would have brought this dispute to a close in the Bill Chamber without the necessity of further decision. I think the respondents owe it to themselves that this was not done. It is said, no doubt, that some of the statements contained in the application for suspension were offensive to the Magistrates and Town Council. Well, there were some pretty strong statements, but I must say they were not unusual statements in support of an application of this kind; and I don't think public functionaries and public bodies are generally so very sensitive in matters of this kind as to render it quite indispensable for the vindication of their proper authority that they should plunge into a long litigation for the purpose of disproving some

of the statements made in support of the application for interdict. In short, I think the respondents went wrong at this stage in not assenting to the course of procedure demanded by the complainer, and therefore I am of opinion that the expenses of the proceedings in the Bill Chamber ought to be borne by the respondents. But then, after the note was passed, a great deal of procedure took place in the Outer House and down to the time that the Lord Ordinary's interlocutor was pronounced. I cannot say I think either party has just adopted the course best suited to put an end to the litigation or diminish the expenses. There is a great deal of blame on both in that respect; and as regards that part of the expense from the passing of the note down to the Lord Ordinary's interlocutor, I think neither party ought to have any expenses. The remaining portion of the expenses we have to deal with is the expense incurred since the date of the Lord Ordinary's interlocutor. Now, as the complainer has obtained a very serious alteration of the Lord Ordinary's interlocutor—more than a half—I am of opinion he ought to have the expenses incurred since the Lord Ordinary's interlocutor.

LORD DEAS concurred.

LORD ARDMILLAN—I share the regret of your Lordship in the chair that there has been so much, and such persistent and costly litigation, about this matter. The question on the merits has ceased by the removal of the steeple, but we have to decide the question of expenses—a serious question for the parties. The conduct and proceedings of the Magistrates are presented to us, I think, in two different aspects. My feeling is entirely in their favour in one of these aspects, but not entirely in their favour in another. I think the grounds of this complaint originally involved charges against the conduct and intentions of the Magistrates which are altogether without foundation. I think the Magistrates throughout have behaved with the very best intentions; and as they are charged with the responsibility of protecting life and property in that large town—whenever they discovered danger to that steeple, whatever be the cause, whether it had arisen from their own act or the act of their predecessors—whenever the steeple became swaying and pendulous (as was reported by an engineer)—I consider it was their bounden duty to take it down. I think they would have committed a gross breach of duty if, after being informed of its dangerous state, they had allowed it to stand, to the peril of the lieges. Now, there was a petition presented to them by 440 citizens of Paisley, on the 12th of January 1869, in which these citizens stated that the Cross Steeple was in an unsafe condition, and that it was necessary to take immediate action, so that life and property might be preserved. Another meeting was called by public notice, at which a similar resolution was adopted. Now, when the Town Council, who had previously consulted engineers, and knew the state of the facts, received the first of these petitions, they resolved that the steeple should be taken down and removed. A few days afterwards a deputation from the other meeting of the 27th January appeared, and they also urged the Council to take down and remove the steeple; and so they proceeded to do it. It is my opinion that it was their bounden duty to remove it, even if their own operations may have caused the mischief. Another action might lie if they had caused the danger, but the complaint against removing a steeple that is off the perpendicular, and is swaying over the heads of the community, cannot be affected by a statement that somebody, even though it were the parties themselves, had caused the danger. The first question and first duty was to protect the public from danger; and the Magistrates, I think, were right in doing that. But, then, I have next to review the proceedings with reference to the mode of removing the steeple without judicial authority, and with reference to the proceedings in this litigation; and here I would call attention to the fact that Mr Crawford wrote a letter to the Provost on the 10th March 1869, in which he suggested that the authority of the Supreme Court should be interposed before any attempt was made to meddle with the steeple. It is in favour of Mr Crawford's pleas on the question of expenses that he was the first to suggest an application to the Court. That letter lay upon the table. On the 16th April Mr Crawford wrote another letter, again proposing that an application should be made to the Court of Session for a remit to an engineer or architect. Then he presented his complaint, and it is a fact in Mr Crawford's favour that he made the alternative proposal that there should be a remit to an architect, to give an opinion on the subject. It does not appear that the proposal for any remit came from the respondents until December, when the Lord Ordinary ordered it. Had they suggested a remit when the case was in the Bill Chamber, the remit would have been ordered. On this ground, looking to the course of procedure in the lawsuit, as distinct from the duty and the act of the Magistrates, I am not prepared to express the same opinion of their procedure as litigants which I have expressed as regards their conduct as magistrates. As magistrates they acted rightly in not permitting a dangerous steeple to remain; but as litigants, the course they have taken has tended to increase the expenses, and I cannot but concur in your Lordship's view.

LORD KINLOCH—I agree with your Lordship in the chair. I think that the complainer was entitled to come to this Court. The procedure of the magistrates was not satisfactory. I do not mean to make the slightest imputation upon their good faith; for I consider they intended nothing but the best; but still they left matters in a very unsatisfactory condition. I do not inquire whether they should or should not have gone to the Sheriff. There were various other judicial steps that might have been taken, but I do not think it was necessary for them to do anything judicially, in the strict sense of the word. The least they ought to have done, however, was this—they ought to have had the opinion of some such person as Mr Bryce, and then they ought to have framed a formal resolution of the Town Council, setting forth that the continued existence of the steeple was dangerous to the community, dangerous to life and property, and therefore they appointed it to be taken down. Such a proceeding would have been impregnable, but it was not taken, and Mr Crawford was entitled to bring them into Court to have the matter placed on its true footing. I think he wanted substantially to test the security of the steeple. He said a great deal more, and he is about to be punished for having said that great deal more, but undoubtedly what he asked in substance was that

there should be a remit to a man of skill to report whether the existence of the steeple was attended with danger to life and property. I think it is a thousand pities that the remit was not made in the Bill Chamber, for most probably the proceedings would never have gone beyond the Bill Chamber had that been done. Therefore, I agree with your Lordship that Mr Crawford ought to have the Bill Chamber expenses. But when the parties got into the Outer House, I cannot say that Mr Crawford was altogether so well-behaved. He has a great many allegations on the record quite unjustifiable, as that the magistrates were making a mere pretext for the purpose of carrying through a job of their own, and that they had got up the cry of danger with the view of effecting a sale of the steeple. To that extent Mr Crawford was wrong; and, moreover, I think that as soon as Mr Bryce's report was produced, Mr Crawford ought no longer to have shilly-shallied about the matter, but ought to have given up the case entirely, reserving the question of expenses. Therefore, I also agree with your Lordship in holding he is not entitled to expenses in the Outer House; and as to the later expenses, I think he is entitled to these, inasmuch as he has obtained a considerable alteration on the interlocutor of the Lord Ordinary.

Agent for Reclaimer—W. K. Thwaites, S.S.C.
Agent for Respondents—J. Martin, W.S.

## *Friday, March* 11.

### SKINNER *v.* ANDERSON'S TRUSTEES.

*Title to Sue—Conjugal Rights Act* 1861—*Desertion—Order for Protection*—Curator ad litem. A lady who alleged that she had been deserted by her husband, brought an action against the trustees of her mother. She made a motion for the appointment of a *curator ad litem*. *Held* that the most convenient course would be to supersede consideration of the action to enable the lady to obtain an order for protectection under the Conjugal Rights Act.

This was an action at the instance of Elizabeth Anderson or Flann, now Skinner, and her husband, Thomas Flann, against the trustees and executors of the late Mary Anderson, Aberdeen, the mother of the female pursuer. for the purpose of obliging them to pay over her share of *legitim* and dead's part. Shortly after the institution of the action the female pursuer was placed in an asylum. The defenders pleaded that Thomas Flann had no title to sue the present action, in respect that he was not the lawful husband of the female pursuer, George Skinner, her husband, being still alive; and that the female pursuer had no title to sue without the concurrence of her lawful husband Skinner. A proof was allowed of these averments, and on 20th March 1869 the Lord Ordinary (MURE) found it proved that in 1846 Elizabeth Anderson was married to George Skinner, who in 1853 left Aberdeen and went to sea and has never since returned. He also found it not proved that Skinner was dead in June 1864.

Thereafter, in consequence of these findings, the Lord Ordinary found that Flann had no title to pursue the action, and in July 1869 he appointed a *curator ad litem* to Mrs Skinner, who was still in confinement.

In November 1869 Skinner returned to Aberdeen, and intimation of this action was made to him, but he did not enter appearance, and in the meantime Mrs Skinner had left the asylum.

In these circumstances the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, on the motion of the defenders, to have the action dismissed, with expenses, in respect that the pursuer, Thomas Flann has been found to have no right or title to insist in the action; and that George Skinner, the husband of the female pursuer, who has returned to Aberdeen, has not appeared as a party-concurrer in the action; and, on the countermotion to have a *curator ad litem* appointed to the female pursuer; and made avizandum, and thereafter considered the closed record and whole process: Refuses the motion for appointment of a *curator ad litem:* Sustains the first plea in law for the defenders; and dismisses the action; and decerns: Finds the defenders 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.*—The position of the female pursuer in this case is now very different from that in which she was when a *curator ad litem* was appointed to her in July last. She was then in a lunatic asylum, and her husband, though not proved to be dead, was not known to be alive; and if dead, and his death had occurred prior to the 30th of June 1864, she had a clear title to sue, in her own right, for the share of the moveable estate of her father sought to be recovered under the present action. The case was therefore, at that time, one fitted in the opinion of the Lord Ordinary for the appointment of a *curator ad litem*. But the pursuer is now no longer confined in an asylum, and her husband has come home to Aberdeen; and, although intimation of the dependence of this action has been duly made to him, he has not sisted himself as a party. In these circumstances it appears to the Lord Ordinary—having regard to the very decided opinion of Lord Moncrieff in the note to his interlocutor in the case of *Tait*, 4th June 1831, and to those of several of the Judges in the First Division when disposing of the case—that the pursuer has not now any title to insist in an action for the recovery of monies without the concurrence of her husband, to whom these monies, if recovered, would, *jure mariti*, exclusively belong.

"The main ground on which it was concluded that a *curator ad litem* should be named to the pursuer to enable her to proceed with the action, was, that under the Conjugal Rights Act 1861, married women are now entitled to take steps for the protection of property to which they may succeed, against a deserting husband. This, however, is not a proceeding under that Act; and it was not alleged that any such application was in contemplation. When such a proceeding is taken with success, it may be that the pursuer's title to sue such an action as the present will be materially strengthened. But, as at present advised, the Lord Ordinary would not be warranted in assuming that the pursuer must necessarily succeed in showing that she was deserted, and 'without reasonable excuse,' which is essential to her obtaining the protection of the statute."

Mrs Skinner reclaimed.

THOMS and RHIND, for her, pleaded that a *curator ad litem* should be appointed, or otherwise, that in the circumstances the action should be superseded to enable her to take advantage of the provisions of the Conjugal Rights Act 1861.