full; the second appends his signature with words importing an adoption of the statement of the first notary. That is the only exception, if it can be called an exception.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH—I am of opinion, with the Commissary of Banff, that the testament of James Fraser is null for want of due execution; the notary's docquet not having been written by the hand of the notary.

It appears to me the just construction of the statutes, and of the practice which has followed on these, to hold that the notary's docquet is part of the subscription of the notary, statutorily substituted for the subscription of the party. The testing clause of the deed is expressed in the usual form, setting forth that the deed is "subscribed by me, at Port-Gordon, on the 8th day of July 1869 years, before these witnesses, Alexander Clark, mason, and Thomas Hay, farmer, Slackend, near Port-Gordon." There then follow, in place of the subscription of the party, the notary's docquet and signature. I consider these together to form the substituted subscription authorised by the law. I think the docquet must as much be written by the notary as his signature; for I think all equally part of his subscription, and all equally requisite to be written by his own hand. This I conceive the clear conclusion to be drawn from legal principle; and I think it is supported by the practice of the country, as evidenced by the authorities.

It was argued, that where two notaries subscribed, the docquet was only written by one; and that so in the case of the other the principle now contended for was set at nought. But it appears from the authorities that the old practice was for each of the notaries to append a separate docquet; and that the custom of both subscribing one docquet is of modern introduction. The practice is now sanctioned by usage; but is not to be extended; and I do not think affects the principle. The same authorities lay it down that the docquet is in such a case always written by one of the notaries. The case now to be dealt with is a case in which only one notary was necessary, and one only acted. Both principle and practice, I think, require the docquet to be in the notary's own handwriting in such a case.

I would only add, to prevent mistakes, that my opinion is strictly limited to the case actually before us, of a notary subscribing for a party; and does not apply to the case of other notarial acts or attestations. On these I at present give no opinion.

Appeal dismissed.

Agent for Appellants—George Andrew, S.S.C.

Agent for Petitioner—James C. Baxter, S.S.C.

Saturday, February 11.

MAGISTRATES OF GLASGOW *v.* HAY (COMMON AGENT IN THE BARONY LOCALITY).

Process—Teinds—Expenses of Common Agent—Locality—Interim Scheme. Held that the common agent in a process of augmentation and locality was entitled to payment of his expenses after the interim scheme of locality had been made up and approved of, and that he was not bound to wait until the objections had been disposed of and the interim scheme become final.

Farther *held* that the principle upon which he was then entitled to payment of his expenses was the same as that which entitled the ministers to immediate enjoyment of their augmented stipend, and that the rule by which the expenses were to be divided among the heritors was the same as that whereby the augmented stipend was allocated—namely, the interim locality.

And consequently *held* that suspension of a threatened charge on a decree for expenses in name of the common agent was incompetent, any objection to his account common to all the heritors being disposable of at taxation of the account; and any objection to the scheme of division peculiar to individual heritors being necessarily dependent upon the questions raised under the interim scheme of locality.

This was an action of suspension at the instance of the Magistrates of Glasgow of a threatened charge under a decree for expenses, pronounced in favour of the respondent, as common agent, by the Teind Court on 10th June 1870 in the barony process of locality.

It appeared from the statements of parties that in the year 1864 a process of augmentation, modification, and locality had been raised by the ministers of the Barony Parish of Glasgow. Along with their summons the ministers lodged a rental of the parish in which the several rents of each heritor were distinguished. The total rental of the parish was stated therein at £1,224,032, 11s. 11d. By interlocutor of the Court of Teinds, dated 21st December 1864, the whole heritors were held confessed upon the ministers' rental, except Mr Crawford of Milton, and a few others who combined with him in objecting to it on the ground that the building rental or yearly value, and not the agricultural or true teindable value, of their lands had been taken. A remit was made by the same interlocutor to the Lord Ordinary on Teinds to prepare the case. The ministers' rental, except in so far as modified by these objections, which were given effect to by the Lord Ordinary, became the proven rental. The total rental of the parish is stated in the scheme of the proven rental at £1,164,735, 5s. 11½d., and the teind at £232,947, 1s. 2d. 3-10ths. This scheme was approved of by the Lord Ordinary on Teinds on 31st January 1866, and avizandum made with it to the Court. It was found, however, that the proven rental thus made up was altogether useless as a teindable rental, inasmuch as it was simply a copy of the valuation roll of the parish as well as of the burgh of Glasgow, which is not within it, and included an immense number of names of parties who were not liable in stipend, and had never paid any. The complainers, the Provost, Magistrates, and Town Council of Glasgow, are heritors in the parish, and neither they nor any of their co-heritors appeared to oppose the augmentation. On 31st January 1866 the Court of Teinds advised the scheme of the proven rental and the prepared state, and after hearing counsel for the ministers and for the Crown as titular, granted an augmentation of 12 chalders to each minister, to commence with crop and year 1864. A remit was at the same time made to the Lord Ordinary on Teinds to prepare localities. On 22d June 1866 the respondent, William Bremner Hay, who had been elected com-

mon agent, on a competition for the office, by a majority of the heritors according to the proven rental, was confirmed as such by the Lord Ordinary. On 29th June 1866 the heritors were ordained, for the second time, to produce their rights to teinds and valuations, but no rights or valuations were produced by any of the heritors. A remit was, on or about 26th June 1868, made by the Lord Ordinary to the teind clerk to prepare a locality, and, in obedience to this remit, he reported two localities for the first and second ministers respectively upon the 1st March 1870. These localities were, on 4th March 1870, approved of by the Lord Ordinary as interim localities on the motion of the common agent, and on 11th March they were allowed to be seen and objected to as final localities.

On the 10th June 1870 the respondent moved the Lord Ordinary for decree for his expenses as common agent, and of that date the pretended decree sought to be suspended was pronounced in absence. An extract of the decree was obtained by the respondent on 29th July following. By this decree their Lordships, as Commissioners of Teinds, ordained the whole heritors, &c., of the Barony Parish to make payment to the respondent of the sum of £1602, 18s. 9d., being the taxed amount of his expenses as common agent in the process of augmentation and locality up to the date of extracting the interim decree of locality, and that in proportion to their several teind rentals in process and scheme of division made up and certified by the clerk as relative thereto. No appearance was made for the complainers, or, in fact, for the other heritors when the motion for this decree was made, but they attended the auditor at the taxation, and the respondents' account was considerably modified in consequence of their objections. In the scheme of division, which was made up by the teind clerk in terms of the said decree, the whole teind of the parish was stated as being only £30,260, 19s. 6d. 88-60ths, in place of £232,947, 1s. 2½d., as set forth in the proven rental. The teind of the complainers was therein stated at £3482, 10s. 9¾d., and a sum of £184, 9s. 5d. was allocated upon them as their proportion of the expenses of the locality. The complainers alleged that this scheme of division was grossly erroneous and disconform to the teind rentals of the several heritors in process; that it was without warrant in law or in the decree of 10th June 1870, and if adopted as the rule of division, would impose upon them far more than their fair share of the expenses of the interim locality; that it was never submitted to them or their agents, and they have had no opportunity of objecting to it up to the present time; and that it had never been submitted to or approved of by the Lord Ordinary on Teinds or by the Court of Teinds. The complainers farther objected that the expenses had been allocated not according to the proven rental, when their share would have been something like £12, instead of £184, but had been divided according to an interim scheme of locality, against which they alleged several informalities of procedure, and erroneous and improper conduct and gross neglect of duty on the part of the common agent.

They pleaded, *inter alia*—

"1. The threatened charge ought to be suspended as disconform to and unwarranted by the decree of 10th June 1870, on one or more of the following grounds:—(1) That the expenses have not been allocated amongst the whole heritors of the parish according to their teind rentals in process. (2) That the complainers have had allocated upon them a share of the expenses in excess of the proportion effeiring to their teind rental in process. (3) That no share of the expenses has been allocated upon a large number of heritors whose rentals are included in the scheme of the proven rental. (4) That the complainers have had allocated upon them a share of expenses as proprietors of lands, of which they are not proprietors, and for which they are not entered as proprietors in the proven rental.

"2. The decree of 10th June 1870, and threatened charge, ought to be suspended, in respect that decree for expenses in favour of a common agent in a locality is competent only after a final locality has been made up."

The respondent pleaded—"1. The decree sought to be suspended having been pronounced in the Court of Teinds, it is incompetent to suspend it in the Bill Chamber. 2. The said decree being in all respects in conformity with law and practice, as observed in teind cases, the suspension is incompetent and groundless, and should be refused."

The Lord Ordinary on the Bills (MACKENZIE) passed the note upon consignation; and when the case came before him upon a closed record he pronounced the following interlocutor:—

"*Edinburgh, 3d February* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, before answer allows the parties a proof of their respective averments, with the exception of their averments in regard to the practice of the Teind Court, and to the complainers a conjunct probation; and appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—Should it be found necessary, after the proof is led, to ascertain the practice of the Teind Court, as alleged in the record, a remit will be made for that purpose."

Against this interlocutor the respondent reclaimed.

MILLAR, Q.C., and BURNET for him.

SHAND and MACKAY for the complainers.

Reference was made to *Duke of Buccleuch*, November 10, 1868, 6 Law Reporter, 88; *M'Diarmid* v. *Earl of Moray and Others*, March 5, 1862, 24 D. 715; M'Laren's Procedure Acts, p. 584-5; Connell on Tithes, 1, 543.

At advising—

The LORD PRESIDENT—I am not at all prepared to agree with the Lord Ordinary in the course which he has taken in allowing this proof. On the contrary, I am of opinion that there are no relevant grounds of suspension stated here, and that the reasons ought to be repelled, and the letters found orderly proceeded. The position of the common agent in the locality is, in many respects, a very peculiar one, and it became a position of still greater peculiarity in this locality by reason of the very extraordinary circumstances of the parish. We all know the wonderful extent and population of the Barony Parish of Glasgow, and the great difficulty that there must necessarily be in adjusting a locality of such a parish. The first cause of embarrassment apparently arose from the kind of rental upon which the ministers obtained their augmentation. I suppose they had no other means of making a rental, except just taking the valuation of the parish as they found it in the Valuation Roll, and leaving that to be rectified afterwards. If I recollect rightly, when this augmentation was

awarded, special attention was called to that at the discussion, and if the Court had thought that it was possible for the ministers to produce a rental such as we usually have in a rural parish, we should not have proceeded to award the augmentation on the rental which they actually did produce. But when the case came before the Lord Ordinary with a view to the preparation of a locality, I am not surprised to find it stated by the common agent that it was found utterly impracticable to proceed on the footing of the rental at all, and that the first thing that required to be done was to ascertain which were the heritors that had teinds, and, with a view to the making of the interim scheme, which is the first thing to be done, and which required to be done with the utmost possible despatch, in order to give the ministers the benefit of their augmentation—with a view to making that interim scheme, the proven rental had to be very much altered, or rather given up altogether, as the foundation of the scheme, and materials other than the proven rental used with a view to that scheme. The consequence of that, I have not the least doubt, is, that the interim scheme may be open to a great many very serious objections. I think it is highly probable, and there is a well known form by which the heritors who find themselves aggrieved will get redress against the errors of that interim scheme. They will object to the interim scheme, and so far as I can see they can get full redress in that way. They seem to think, from some of the statements that have been made to-day, that the forms of process will not give them all the redress they require, and if that be so, let them resort to the remedy of reduction, if that be competent, and if it be necessary. But in the meantime the interim scheme, liable as it may be to multitudes of objections, and very serious objections, forms a rule for the payment of stipend, and upon that interim scheme the ministers of the Barony Parish must be at present receiving their stipend. In the meantime the common agent, doing the best he can for the heritors in these very embarrassing circumstances, necessarily incurs a very large amount of expenses, consisting to a very great extent of outlays, and that account has been duly taxed by the auditor, and the taxed amount of that account he seeks to get the payment of. Now it surely is not to be said that he is not to get payment merely because this happens to be a very embarrassing and also a very expensive litigation, and one in which, accordingly, the common agent's account is exceptionally large, and consists to an exceptional extent of outlays. Is that a reason for refusing him payment? That seems to be utterly absurd. Now, if he is not to get payment in the way in which the Lord Ordinary in the locality has given it, by a decree for payment, I don't know any other way in which he can get it at present. If he is not to get it in that way he must wait until a final decree is approved of. Now a final decree in this parish may not be approved of in the present generation, and therefore the common agent's grandchildren may be the first to receive payment of this account. That is an absurdity which it is quite impossible for the Court to listen to. If the common agent is to obtain payment of this account at all, he must obtain payment of it just upon the same footing as that upon which the ministers obtain payment of their stipend. The respective liabilities of the heritors in the meantime are fixed by the interim scheme of locality, and it seems to me that the reason, or the reasons, which are given in support of the ministers obtaining in the meantime full payment of their stipends—whatever may be the amount of injustice done as between particular heritors afterwards to be adjusted—applies with equal force to the payment of the common agent in the locality. He requires sustenance just as much as the ministers. He cannot carry on the process without money, and he cannot be expected to lie out of the money he has already expended for behoof of this large body of clients, constituting the whole heritors of this parish. And therefore it appears to me that until the interim scheme of locality is altered the common agent must continue to be paid his expenses by the heritors in proportion to their liabilities as ascertained by that interim scheme. If we were to hold anything else, and if we were to affirm this interlocutor of the Lord Ordinary allowing a proof of the averments on record, it is manifest that we should just in this process of suspension have discussed before us the whole objections to the interim scheme of locality. Now, anything more absurd in practice than that it would be difficult to conceive. All the different questions of teind law which are to be ultimately settled in that process of locality are by this indirect proceeding of a suspension of an interim decree for payment of expenses, to be transferred from the Teind Court to this Court, and disposed of here in the first place, and then, of course, afterwards disposed of in the Teind Court; for the disposal of them here in this suspension would not in the least degree settle the question as in the process of locality. They must be all discussed and settled thereafter again there. That is just one of the results of such a proceeding as the present, which among others goes to show the utter incompetency of what is proposed. In short, it appears to me that the plain and simple view of the matter is, what I have stated at the outset, that so long as this interim scheme of locality stands, it fixes the proportion of liability of the heritors, as heritors and parties in that process of locality, and until it is altered they must pay in terms of that scheme.

LORD ARDMILLAN—I think that a very simple principle, long recognised in the disposal of teind questions, sufficiently solves the question before us. These processes of locality are generally very long-lived, and the laws for the protection of the just rights of the minister always allow to the minister an immediate and indisputable claim to the stipend awarded, leaving the heritors to adjust their rights *inter se* in any way they may. That has always been held to be the law with regard to the minister. Now, I think, as his Lordship says, that the principle is the same with regard to the common agent. If there be any objection to the common agent's account—which is common to every heritor—if it be said that the common agent has charged £100 for what he should have charged only £20, and that that should not be paid to him at all, I think there may be something in such an objection. That is a question of audit, and it may be a question that the auditor would leave to the Court, but if the question is, whether one heritor or another shall pay most to the common agent, or how the relative obligations of the heritors to the common agent are to be adjusted *inter se*, that is not a matter which can at all justify the Court in allowing the common agent in the meantime to be deprived altogether of his remuneration, until after perhaps half a century of litigation, until all the questions among all the heritors in the Barony Parish of Glasgow are

settled. If the common agent were left to get his remuneration at that period only, I don't believe that any of the heritors at present living would have to pay him anything at all.

Lords Deas and Kinloch concurred.

Agents for the Complainers—Messrs Campbell & Smith, S.S.C.

Agent for the Respondent—Party.

Saturday, February 11.

PIRIE & SONS *v.* WARDEN AND OTHERS.

(*Ante*, vol. iii., p. 260.)

Bill of Lading, Master's Liability under—Indorsation after Delivery of Cargo. An action was raised upon a bill of lading by the holders against the master of a vessel for delivery of the cargo, or payment of a sum of money as its value, and as damages. Delivery had been made by the master to other parties, on the instructions and at the risk of the charterer, without waiting the presentation of the bill of lading. *Held* that this was a wrongous act upon the part of the master, and in breach of his obligation under the bill of lading, and that it was no defence to plead that the property of the cargo was really in the charterer, and not either in the shipper or the holder of the bill of lading—(1st), because the question as to the true ownership of the cargo could not be raised in such an action; and (2d) because the charterer was shown to have acted in *mala fide.*

Held, farther, that though at common law the indorsation of the bill of lading does not pass the property in the cargo after delivery, this rule is subject to the limitation that the delivery must be lawful, and consequently the onerous holder of a bill of lading may enforce his demand for delivery at any time, unless the master can show that he has lawfully delivered it to some one else.

This was an appeal from the Sheriff-court of Aberdeenshire for Messrs Alexander Pirie & Sons, paper-makers, Aberdeen, in an action at their instance against Captain John Warden, as owner, or representing the owner, and as master of the ship "Emily and Jessie," of Liverpool, which, at the date of the summons, was lying in the harbour of Aberdeen. The summons concluded for delivery to the pursuers at Aberdeen of a cargo of 140 tons of Esparto, shipped on board the said vessel "Emily and Jessie" at Aquilas in Spain, to be delivered in Aberdeen, conform to bill of lading dated 25th January 1865, signed by the said defender, and endorsed to and held by the pursuers, and which bill of lading was signed in terms of a charter party, dated at Alexandria the 22d day of Nov. 1864, between W. J. Wynands, shipbroker, Newcastle-upon-Tyne, and the said defender; or otherwise, and in the event of the said defender failing to make delivery to the pursuer of the said cargo of Esparto within such space as might be appointed, then for payment to the pursuers of the sum of £1000, as the value of the said cargo, and for loss and damage sustained by the pursuers in consequence of the non-delivery and non-implement of the said charter party and bill of lading.

The circumstances of the case, so far as disclosed in the evidence were, as follows:—

In the course of the year 1864 the pursuers, Messrs Pirie & Sons, had agreed to purchase such esparto as Messrs G. & J. A. Noble, a London firm, could ship them direct to Aberdeen, and in January 1865 an arrangement was made between the two firms, whereby Messrs Pirie agreed to take, and Messrs Noble to supply, a cargo of 150 tons regularly per month. Messrs Noble having through their agents in Spain purchased the cargo of the "Emily and Jessie," which arrived in Aberdeen on 28th February 1865, from the shipper, J. Fernandez Corredor, of Almeria, did, upon 8th March, telegraph to Messrs Pirie & Sons at Aberdeen as follows:—"'Emily and Jessie.' 140 tons Esparto arrived February 28th is for you. Bill of lading by post. 8th March 1865." And upon the same day they wrote more fully:—"We this day sent you a telegram that 'Emily and Jessie,' 140 tons Esparto, arrived February 28th, is for you. We now beg to hand you the bill of lading and charter-party. We heard from our agent, the end of January, that a very good lot was being shipped by one of our friends, and we could not conceive why we had no advice of it, but we now find that as the shipper was come to England, and expected to be here before the ship arrived, he brought the bills of lading with him for the purpose of insisting on the difference in freight, this being unusually low. He has now, we expect, incurred more than that by demurrage," &c. Upon inquiry, Messrs Pirie & Sons found that the cargo of the ship "Emily and Jessie" had been already discharged and delivered by the captain, the defender, John Warden, to another firm of paper-makers in Aberdeen, Messrs Tait & Sons, without the presentation of the bills of lading or other documents. Pirie & Sons at once acquainted Messrs Noble of what had occurred, who accordingly wrote to Tait & Sons as follows:—"London, 10th March 1865.—We have just received advice from Messrs A. Pirie & Sons that you had received a cargo of Esparto *ex* 'Emily and Jessie' destined for them; how you had possession given to you we are not aware. We telegraphed to you this day to pay no one without our authority. Messrs A. Pirie & Sons hold the bill of lading for the delivery, and should have received the grass. We shall, of course, hold the ship and yourselves responsible for the amount, with any charges that may accrue upon it, and have given Messrs Pirie, as holders of the bill of lading, authority to settle for it. Will you write us how you obtained possession?" Messrs Tait replied:—"Inverurie Mill, 11th March 1865.—We are obliged by your favour of yesterday, just received. The Esparto *per* 'Emily and Jessie' was delivered to us by orders from the owner of the vessel, and we shall now hold it till the matter is settled."

The present action was accordingly raised by Pirie & Sons against the master of the ship "Emily and Jessie," founded upon the bill of lading and other documents in their hands.

In explanation of the circumstances of delivery, it was stated, and appeared from the evidence, that the vessel had been chartered at Alexandria on 22d November 1864 by W. J. Wynands of Newcastle, through his agent, Mr Hutchinson. The terms of the charter-party were as follows:—"It is this day mutually agreed between Captain John Warden, owner or master of the British or privileged good ship or vessel, the 'Emily and Jessie' of Liverpool, and W. J. Wynands, as agent to the freighter or freighters, as follows—viz., that the