twenty years. The tenant had the control of laying them down, and all the benefit during the lease, and he can only recover their value to the landlord at the end of the lease.

LORD COWAN—It is indispensable that we should construe the lease before sending it to a valuator. The meaning is not that the tenant should get the cost of the pipes, but their value to the landlord or an incoming tenant at the end of the lease. I should also say that I do not think this the value merely as old lead. If the tenant elected to lay pipes in order to bring water into the house, he was to be entitled to recover their value as they stood at the end of the lease. It may be that alternative views may arise on the estimate. The Lord Ordinary has overlooked the fact that the lease requires construction.

LORD BENHOLME concurred.

LORD NEAVES—I am of the same opinion. I concur with the Lord Justice-Clerk and Lord Cowan, that the intention was not that the pipes should be taken away to an old iron shop and sold. They were an *opus manufactum* which the tenant was entitled to make, and which was fairly and properly made. The benefit thereby arising is the thing to be valued, and if there has been no deterioration in the pipes the tenant will get the full value.

Agent for Pursuer—Thomas Spalding, W.S.
Agents for Defender—W. H. & W. J. Sands, W.S.

Thursday, November 23.

FIRST DIVISION.

M'GEORGE, COWAN & GALLOWAY *v.* STEELE.

Retention—Relevancy. A vague averment, that the pursuers had failed to restore certain letters entrusted to them, *held* not to constitute a relevant defence in an action for payment of a business account.

This was an action for payment of certain business accounts.

The defender stated that he was, and had been all along, willing to pay the accounts (with a trifling exception), as the same might be taxed, and upon the pursuers restoring to him certain letters and documents which he averred had been entrusted by him to their care.

With regard to these letters, the pursuers, who are writers in Glasgow, averred that they had been produced by them under diligence, and had formed part of the process in the action for which the accounts had been incurred; that they had been borrowed by the opposite agent; that they, the pursuers, had instructed their Edinburgh correspondents to adopt proceedings to enforce delivery, but after some steps had been taken, the defender intimated that he would not hold himself responsible for the expense, and that they accordingly ceased to carry out the proceedings they had commenced.

The answer of the defender to this averment was—"Admitted that the letters were handed by him to the pursuers in the course of his employment of them, and with reference to the matters upon which they were employed as his agents. The defender does not know what afterwards became of them; and does not admit the statements here made. Explained that the defender has lately repeatedly required the pursuers to restore the said documents, but they have failed and declined, and now decline, to do so."

He pleaded—"(1) The pursuers are not entitled to demand payment from the defender of the amount of their accounts against him while they refuse to deliver up the letters and documents belonging to him with which they had been entrusted on his behalf, and the defender should therefore be assoilzied. (2) The defender having offered, and been all along and being now willing, to pay to the pursuers the amount of their accounts as taxed, upon receiving back from them his said letters and documents, the present action was unnecessary, and ought to be dismissed, and the pursuers found liable in expenses."

The Lord Ordinary (JERVISWOODE) found "that the averments set forth on the part of the defender on the record, and on which the first and second pleas in law on his behalf are rested, are not relevant in defence against the conclusions of the present action."

The defender reclaimed, and shortly after consigned the sum claimed.

SOLICITOR-GENERAL and MACLEAN for him.

The LORD ADVOCATE and GLOAG, for the pursuers, were not called on.

Defender's counsel having taken time to consider whether they should amend the record, so as to make their averments more specific, declined to do so.

The Court observed that the defender's statements did not approach to relevancy.

Adhere, with expenses.

Agent for Pursuers—William Ellis, W.S.
Agent for Defender—Alexander Morison, S.S.C.

Friday, November 24.

BRITISH LINEN COMPANY *v.* STEWART AND OTHERS.

BRITISH LINEN COMPANY *v.* DAVIDSON AND OTHERS.

Process—Remit ob contingentiam—*Leading Cause*—48 *Geo. III*, 151, § 9—*A. S. 24th Dec.* 1838, § 6. In any remit *ob contingentiam*, under 48 Geo. III, c. 151, § 9, as the weekly Outer-House Roll of New Causes having been discontinued in terms of the Court of Session Act, 1868; and consequently the A.S. 24th Dec. 1838 being no longer applicable to the circumstances,—*Held* (after consultation with the whole Judges) that the time at which a cause comes before a Lord Ordinary, in the sense of that Act and the Act of Sederunt, must now be held to be the calling of the cause, and the cause first called must be held the leading cause.

John Stewart brought a multiplepoinding, in name of the British Linen Co. as nominal raisers, against himself and William Davidson, as defenders and claimants. A week after this summons was signeted and served, William Davidson brought another multiplepoinding, with conclusions for exoneration, in name of the British Linen Co., and of himself and other parties, against John Stewart, himself, and others, as claimants. Both actions related to two sums of £206, 12s. 7d. and £52, 15s. 2d., deposited

in the British Linen Bank on deposit-receipts in the name of William Davidson and other parties. The multiplepoinding raised by Stewart having been served on a defender out of Scotland, while the action raised by Davidson did not require such service, the latter case was called before Lord Mackenzie one day before Stewart's action was called before Lord Mure. Stewart lodged objections as defences to the action brought by Davidson; and Davidson thereafter lodged similar defences to Stewart's action. The action brought by Davidson was enrolled before Lord Mackenzie for disposal of the objections, one day before a similar enrolment in Stewart's action took place before Lord Mure. The enrolment before Lord Mackenzie was dropped in order that Davidson's counsel might move for a remit of Lord Mure's case. At the first enrolment before Lord Mure, accordingly, his Lordship was moved to remit the action before him to Lord Mackenzie's roll, on the ground that Davidson's action was the leading cause in the sense of 48 Geo. III, c. 151, § 9. No interlocutor whatever had been pronounced in either case. This motion was reported by Lord Mure to the First Division; and after hearing counsel for Davidson and Stewart respectively, and making avizandum, and consulting the other Judges, the opinion of the whole Court was announced by the Lord President as follows:—

Lord President—One of these processes of multiplepoinding is before Lord Mackenzie, as Lord Ordinary, the other is before Lord Mure, both bringing the same fund into Court. The one action is raised by one party interested in this fund, and the other by another party so interested. The British Linen Company's Bank, as holder of the fund, is made sole nominal raiser in one case, and the same Company is nominal raiser, along with the holders of the deposit-receipts, in the other. This, I understand, is the state of the circumstances so far. Now, it appears that both cases were called in the same week, but the case before Lord Mackenzie was called one day prior to that before Lord Mure. The difference of time is slight no doubt, but that does not affect the question. As both these were defended causes, they could not go to any roll of undefended causes; and so, as the weekly Outer-House Rolls have been discontinued in terms of the Court of Session Act of 1868, neither of them could be enrolled before their respective Lords Ordinary in the sense of the Act of Sederunt of 1838. The difficulty, therefore, in determining at what point of time a cause is brought before a Lord Ordinary, in the sense of 48 Geo. III, c. 151, § 9, arises in this cause for decision —the A.S. of 1838 being no longer applicable to the circumstances. From the time a cause is called there is now no occasion to enroll it at all, unless the Lord Ordinary directs it to be enrolled for the purpose of ordering revised condescendences, until it comes to be enrolled to close the record. The case, however, of a multiplepoinding was not contemplated by the Act 1868 at all. But if defences, by way of objections, are lodged, which is the case in both the causes here, then an enrolment does become necessary; and accordingly an enrolment did take place in both cases, and again the first enrolment was before Lord Mackenzie on a Tuesday, that day being Lord Mure's blank day,—the enrolment before Lord Mure taking place on the next day, Wednesday. Now, we have considered the question—what is, within the meaning of the statute of 1808, the earlier cause—with great care, and have taken the advice of the whole Judges on the point, and the opinion which I am about to deliver may be taken as the opinion of the whole Court, given with the object of securing uniformity of practice. We think that under the Act of 1868, and the relative Act of Sederunt of 14th October 1868, and particularly the eighth section thereof, a process must be held to be brought before a Lord Ordinary when it is called. At the calling of the case the *partibus* of the summons is made to specify both the Lord Ordinary and the Division; and when called it is thus within the control of a particular Lord Ordinary. After that it cannot be brought before any other Lord Ordinary. The Lord Ordinary and the Division are both fixed, and the pursuer can make no change. We are therefore of opinion that, in this and similar cases, the action which is first called must, in the sense of the Act 1808, now be taken as the leading cause.

Counsel for Davidson—R. V. Campbell. Agents —Hamilton, Kinnear, & Beatson, W.S.

Counsel for Stewart—Rhind. Agent—William Officer, S.S.C.

Friday, November 24.

BRUCE *v.* SMITH AND OTHERS

Proof—Presumption of Death. Circumstances in which it was held that the legal presumption in favour of life had been overcome by contrary evidence, though the person would only have reached the age of eighty-four at the time in question.

Opinion, by the whole Court, that it was a material point in the chain of evidence that since the date in question more than twenty additional years had elapsed, and still there were no tidings of the party.

The trust-estate of the late Mr James Bruce of Broomhill, who died in 1835, had been the subject of much litigation between his trustees, the husband of his only child Janet or Jessie Bruce or Hamilton, and his brother, and other relations. For the previous reports see 11 D. 577; 17 D. 265; 19 D. 745; 20 D. 473; and 21 D. 972.

The last stage in which this litigation came before the Court was a multiplepoinding brought by the trustees, throwing into Court the whole succession of the truster. In this action several questions were determined, and the right to all Mr Bruce's property decided, with the exception of that to certain valuable property in Calcutta, which appeared to fall into intestacy on the death of himself and his only daughter Mrs Jessie Bruce or Hamilton, and with regard to the succession to which certain questions still remain to be decided. In order to clear away some of the difficulties surrounding these questions, it was found necessary by certain of the claimants, the pursuers of the present conjoined actions, to bring reductions of a deed of agreement entered into by the deceased James Bruce, grand-nephew of the truster, on 26th July 1849, and signed also by his brother William Bruce, one of the pursuers of the reduction, in 1862, whereby they conveyed their rights to the succession of their grand-uncle, the truster James Bruce of Broomhill.

James Bruce of Broomhill, the succession to whose Calcutta estates was in question, left an only child Jessie Bruce or Hamilton, who died in 1847