the same footing as if the letter had never been signed. I consider it clearly established, both by the correspondence with Applecross, and the oral communications with Ord, that so soon as Mr Jamieson's opinion, to the effect that the parents could not restrict the capital payable to their children, was communicated to Mr Fowler, he threw aside the letter of 8th December 1827 as no longer to be rested on. And although, for a time, he talked of a new letter limited to the matter of interest, he alike abandoned all thought of this. He was satisfied with his arrangements otherwise (whatever may now be thought of these arrangements), and intentionally left the rights of Ord and his wife to remain on the footing expressed in their marriage-contract. This being my conviction on the proof, I cannot adhere to the Lord Ordinary's interlocutor. I consider the defender entitled to absolvitor.

Having this view on the primary question in the case, I find it unnecessary to consider some of the questions ably argued before us. In the view which I take, it is, of course, out of the question to impute fraud to the defender, who was only, in that view, taking payment of what was truly due to him. But it is right that I should say that in no view whatever could I have imputed fraud to the defender, but, at the very utmost, only a misconception of his legal position. Again, as to the alleged ignorance, on the pursuer's part, of the existence of this lettter of 8th December 1827 at the time of making the settlement of 1843, and down to a short time prior to raising the action in 1870, I see no ground to question the accuracy of his statement that he did not know of this letter till a comparatively recent period. A nicer question might arise, Whether it was not so within his means of knowledge as to deprive his ignorance of all legal efficacy in the present question? On this point a great deal has been said, and a great deal more might be said, unfavourable to the case of the pursuer. But it is unnecessary to enter into the question. For, whether done ignorantly or knowingly, I think it must be held that the pursuer was not paying anything but what was due by him; and therefore is not entitled to repayment to any extent whatever.

Lord Deas, after observing that even if the Lord Ordinary's interlocutor was right in its result, he should be very clearly of opinion with their Lordships that there was no room for any charge of fraud or bad faith on the part of the defender, stated that he had arrived at a conclusion opposite to that of the Lord Ordinary, on the following grounds,—viz., that the letter of 8th December 1827 was in its terms a tentative letter, which contemplated on the part of Raddery, who took it, that it might not be carried out, and next, that there was sufficient evidence that he resolved not to carry it out.

In regard to the admissibility of the correspondence between Raddery and his agent, his Lordship said—"A question has been suggested as to the competency of the correspondence between Raddery and his agent, and it is said to be open to the objection of confidentiality. I am not disposed to think that any such objection applies. I do not think that either that objection or the case generally stands in the same position as if Raddery had brought an action of this kind in his own lifetime. If Raddery had done that, we should then have had his own evidence that he construed the letter differently from what the evidence now leads us to hold that he did. Until Raddery died, the evidence in favour of the construction of that letter which I am disposed to adopt, was not complete. But his death, without going back upon the matter in any way, completes that evidence, and the question now is, in what mind did he die? In what mind was he in 1827 and 1828, and did he die in the same mind? Now, in that question it would be a very strong thing to say that this correspondence cannot be looked at, because it was confidential between him and his agent. If we were to hold that, we would not be holding it in favour of Raddery, or of any plea that there is any reason to suppose he would have maintained. We would be using it against him, to prevent his intentions taking effect. In a question of this kind I cannot hold that the objection taken by the heir is precisely the same thing as the objection taken by the party himself. I think it is very different. The question is, what was Raddery's view, and what was his intention? for that is the intention which we are to follow out. I am not prepared to say that even if all that correspondence were out of the case, the necessary result would be that the pursuer would succeed. There would be a great many things to be considered even then, before we could arrive at that result. But, no doubt, the case is very much clearer when all that is taken into view, and when I look at the whole of that evidence taken together, I confess I have no doubt at all upon the matter of fact which alone is in dispute, namely this, that from the time that Raddery took that obligation, contemplating that he might either insist or no on carrying it out by a formal deed, he had resolved not to follow it out in that sense, and, if it be so, there is no ground in fact to support this action."

The Lord President concurred.

The Court recalled the interlocutor of the Lord Ordinary, assoilzied the defender from the whole conclusions of the summons, and found him entitled to expenses.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.
Agents for Defender—Adam & Sang, W.S.

Friday, March 15.

MAGISTRATES OF ABERBROTHOCK *v.* DICKSON.

Personal and Real—Real Burden—Burgage Holding—Feu-duty.

The magistrates of a royal burgh "sold, alienated, and in feu-farm disponed," certain parts of the burgh muir, to be holden of the Crown in free burgage, for service of burgh used and wont, and for payment to the magistrates and their successors of a feu-duty, and duplication thereof at the entry of each heir and singular successor. *Held*, in an action by the magistrates against a singular successor of the original disponee, in whose titles the obligation to pay the sums before mentioned was engrossed, that the attempt to ingraft a feu-duty on a burgage holding was not an effectual creation of a real burden, but that the defender, as proprietor for the time being

of the subjects, was personally liable for the said payment.

Observations by the Court on what is necessary to constitute a real burden.

Expenses—Outer-House. The defender took no objection to the Lord Ordinary's interlocutor till the case had been advised on the merits, when he objected to that interlocutor in so far as it found no expenses due to either party, and moved for the whole expenses in the cause. *Held* that the motion was too late as regarded the expenses in the Outer House.

This was an action at the instance of the Magistrates of Aberbrothock against James Anderson Dickson, banker in, and late provost of, Aberbrothock.

The summons concluded for declarator that certain lands in Aberbrothock, which were purchased in 1860 by the defender, and which had at one time formed part of the common muir of Aberbrothock, were disponed in feu-farm by the Magistrates and Town Council of the burgh in favour of Hercules Ross, his heirs, successors, and assignees, to be holden of His Majesty in free burgage for service of burgh used and wont, and for rendering and paying yearly to the Magistrates and Council the annual feu-duty of £39, 5s. 8¼d., and for payment of the further sum of £39, 5s. 8¼d. at the entry of each heir and singular successor, and that these payments were constituted and still form real burdens on the subject; and whether the same should be declared real burdens or not, for declarator that in virtue of certain writs the subjects are held by the defender for the payment of the said yearly feu-duty and casualty. There was also a conclusion against the defender for payment of the sum of £39, 5s. 8¼d. due by him on his entry on 12th June 1860, with interest thereon.

By disposition, dated 14th February 1861, the Magistrates and Council of Aberbrothock sold, alienated, and in feu-farm disponed, four lots of the common muir of Aberbrothock, to be called Paradise, to and in favour of Hercules Ross, his heirs, successors, and assignees whomsoever, "to be holden of His Majesty and his royal successors in free burgage, for service of burgh used and wont, and rendering and paying yearly to us and our successors in office or assignees the sum of £39, 5s. 8¼d. sterling in name of feu-duty . . . as also to pay to us and our successors in office or assignees the like sum of £39, 5s. 8¼d. at the entry of each heir or singular successor to the foresaid four lots of muir, as often as the same shall happen, and that besides and over and above the said yearly feu-duty; providing and declaring always, as it is hereby expressly provided and declared, that if two years' feu-duty shall lie and remain unpaid, and be allowed to run into the third, then these presents shall become void and null, and of no force or effect whatever." The subjects, by various transmissions, came to be vested in the defender, who was infeft in the same, conform to instrument of resignation and sasine recorded in the burgh register 12th July 1860. The obligation to pay the so called feu-duty and duplication thereof was inserted in the same terms in the defender's title as in the original disposition to Ross, except that the proviso in case of two years' payment running into arrear was omitted.

Mr Dickson, since he acquired the subjects, regularly paid the annual sum of £39, 5s. 8¼d., but he did not pay the like sum due at his entry. He, however, offered to do so in the present record, on condition that the Magistrates should depart from their other claims.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 25th November* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, productions, and process—Finds the obligation for annual payments, and duplications thereof at the entry of each heir and singular successor, contained in the defender's titles, is binding upon the defender; finds that, although the defender has regularly made the annual payments of £39, 5s. 8¼d. due by him since his entry on 12th June 1860, he has not paid the sum of £39, 5s. 8¼d., or duplication, due by him on his entry; therefore decerns against the defender for the said sum of £39, 5s. 8¼d. due by him on his entry to the subjects libelled on, with interest thereon at the rate of 5 per cent. per annum from the date of citation on the summons till paid; assoilzies the defender from the declaratory conclusions of the summons; finds expenses due to neither party, and decerns.

"*Note.*—The defender's lands are, as is admitted by the pursuers, held burgage. In addition to the burgh services used and wont, the pursuers stipulated in the original grant for an annual payment to them (improperly called a feu-duty) of £39, 5s. 8¼d., and for payment of a like sum, or duplication, on the entry of each heir and singular successor. But these payments, which are to be made to the pursuers, not as representing Her Majesty, but for behoof of the common good of the town of Arbroath, are not declared in the titles to be real burdens upon the subjects, and they are not constituent parts of a burgage holding. They are, in the Lord Ordinary's opinion, only due in virtue of the mere personal condition or obligation which was imposed upon the original acquirer of the subjects, and which has by the titles been transmitted to and adopted by the defender, so that he now holds the subjects under that condition or obligation. The defender is therefore entitled to be assoilzied from the first declaratory conclusion, by which the pursuers seek to have it found and declared that these payments were constituted and form real burdens on the subjects in favour of the pursuers and their successors in office; *Magistrates of Perth*, Dec. 18, 1830, 9 S. 225, and July 11, 1835, 13 S. 1100.

"The Lord Ordinary is also of opinion that the defender is entitled to be assoilzied from the second declaratory conclusion, by which the pursuers seek to have it found and declared that in virtue of the defender's titles the subjects were and are "now holden" by him "for the rendering and payment" to the pursuers and their successors in office of "the yearly feu-duty and periodical casualty" libelled on. The defender holds the subjects of Her Majesty in free burgage for service of burgh used and wont, and not for rendering and paying off any yearly feu-duty and casualty. No doubt the condition in the titles to make payment of the annual sum and duplication therein mentioned to the pursuers and their successors is obligatory on the defender, and the Lord Ordinary has so found. But that does not, in the Lord Ordinary's opinion, warrant decree of declarator in the terms concluded for.

"The defender did not in his defences dispute his personal liability for payment of these sums, and before the summons was raised he had paid the whole yearly sums due by him. But he had

not paid the sum due for his entry on 12th July 1860. Had the defender tendered payment of this duplication before the summons was raised, the Lord Ordinary would have found him entitled to expenses; but having only done so after his defences should have been lodged, the Lord Ordinary considers that expenses should be found due to neither party."

The pursuers reclaimed.

SOLICITOR-GENERAL and MARSHALL for them.

WATSON and BALFOUR for the defender.

At advising—

LORD PRESIDENT—This action is brought against the defender as proprietor of certain subjects in the Common Muir of Aberbrothock, known as Paradise. The first conclusion of the summons is that certain money payments, one annual and the other occasional, which were first stipulated for in the original disposition of the subjects by the Magistrates to Hercules Ross, were constituted and still form real burdens upon the subjects in favour of the Provost, Magistrates, and Council of the said burgh, and their successors in office, The second conclusion is, that whether the same be declared real burdens or not, it should be declared that the subjects are held by the defender for the payment to the Magistrates of the said sums. Then follows a petitory conclusion against the defender, for payment of a certain sum, which is called a casualty. It appears that the defender has been in use to make the annual payments, but refused to pay this "casualty." The Lord Ordinary has given judgment against the defender so far as regards this payment, but in regard to the declaratory conclusions he has assoilzied the defender. The defender does not reclaim against the part of the judgment ordaining him to make payment of the sum. The Magistrates have reclaimed, and maintain that the payments stipulated for in the titles are real burdens on the subjects, or if not, form the *reddendo* of the tenure, for that is what their second conclusion comes to.

The case depends on an examination of the titles. The money payments in question appear for the first time in the disposition by the Magistrates to Hercules Ross, by which they disponed the subjects "to be holden of His Majesty and his royal successors in free burgage, for service of burgh used and wont." The holding is plainly a burgage holding, but the disposition proceeds—"and rendering and paying yearly to the said Magistrates and Council, and their successors in office or assignees, the sum of £39, 5s. 8¼d. stg., in name of feu-duty . . . as also to pay to the said Magistrates and Council, and their successors in office and assignees, the like sum of £39, 5s. 8¼d. at the entry of each heir and singular successor." Then follows a proviso that if two years' feu-duty shall lie and remain unpaid, and be allowed to run into the third, then these presents shall become void and null. The subjects conveyed by this disposition have come by various transmissions to be vested in the defender. The only difference in the title of the defender and in that of the original disponee is, that in the defender's title the last mentioned proviso is omitted. It is almost unnecessary to say that what the Magistrates attempted to do was to create at once a burgage holding and a feu-holding, and it is as unnecessary to say that this was impossible. The holding is a burgage holding and nothing else. They attempted to create a feu-duty, *i.e.*, to put the proprietor holding of the Crown in free burgage in the position of being liable in a feu-duty to the seller, who happened to be the Magistrates, but might have been any one else. The creation of a feu-duty is impossible. Still it is said that the payments may have been created a real burden. The argument which was used for the reclaimers was, that although it is necessary for the creation of a real burden that it should be declared such in the titles, still this does not need to be done in express terms—there are no *voces signatæ* which must be employed—and if it appears to be the plain intention of parties from the words which they have used to make the payment a real burden, it will be given effect to. If this doctrine be sound, then it follows that when parties make an unsuccessful and abortive attempt to create feu-duty, because they are evidently attempting to create a feu-duty, which is a real burden and something more, they shall be held to have created a real burden. In short, an abortive attempt to create a feu-duty is to be held as an effectual creation of a real burden. There is a fallacy in this argument. The parties attempted to make this payment a feu-duty, a *debitum fundi*, something more than a real burden. Any attempt to attach it to the land as a feu-duty is abortive. I think that the doctrine on which the argument is founded is a little misunderstood. It is represented as a question entirely of intention, whether the parties had it in their minds to create a real burden, however ill they have expressed their intention. I cannot recognise any such doctrine. I quite admit that the words "real burden" need not be used, but that there must be equivalent words appears to me indispensable. An obligation to pay money either in one sum, or annually, or occasionally, can only be made to affect the land by being made a real burden on the land, independent of the personal obligation of the party. That is not to be spelt out of a deed. It must be distinctly there. We are not to construe a deed of this kind as if it were a will, where we are entitled to resort to all means, and to a certain extent even to conjecture, to discover the intention of the testator. This is the doctrine of a whole series of cases—*Martin* v. *Paterson*, June 22, 1808, Mor. App. "Personal and Real," No. 5; *M'Intyre* v. *Masterton*, Feb. 3, 1824, 2 S. 559 (N.E.)

It seems to be sometimes imagined that the decision in *Tailors of Aberdeen* v. *Coutts* impinged upon this settled doctrine of the law of Scotland. It is too readily taken for granted that it was a case upon real burdens. The matters dealt with in that case were rather conditions of the right. They were conditions particularly applicable to an urban tenement. The true question was, whether it had been effectually provided, so as to be a condition of the grant, that houses of a certain description should be erected, that an iron railing and foot-pavement should be made, with various other provisions of the same character. All these were held to be perfectly effectual. But they were of a totally different character from the obligation to pay money. I know of no authority that obligations to pay money, either in one sum, or annually, or occasionally, can be made to affect the land, as distinct from the personal obligations of the granter, otherwise than by declaring them real burdens, or words plainly importing the same thing. I am therefore of opinion that the Lord Ordinary is right in assoilzing the defender from the first conclusion of the summons.

The second conclusion is still more untenable—that this subject, held in free burgage of the

Crown, is to be also held for payment of a feu-duty to the sellers, is, in other words, that the subject is at once a burgage and a feu-holding.

The first finding of the Lord Ordinary is a little vague. I think that the obligation is binding on the defender, *as owner for the time being of the subjects*. It is better that this should be expressed in the finding.

Lord Deas—I concur. I shall not repeat what I said in *Stewart* v. *Duke of Montrose*, Feb. 15, 1860, 22 D. 803. That a feu-disposition of burgage subjects can be granted, I have no doubt, but here the Magistrates attempt to create a holding at once feu and burgage, and I do not hold that, because they wished to create a feu-duty, they have effectually created a real burden. To create a real burden the words "real burden," or equivalent words, must be used, and in the proper clause, *i.e.*, the dispositive clause. You are not to spell out from the deed generally the intention of the parties.

Lord Ardmillan—I am of opinion that in the disposition by the Magistrates in 1811 there is a valid and effectual personal condition and obligation, in respect of which the defender was bound to pay the annual sum therein called a feu-duty, and is bound to pay to the pursuers the sum concluded for as a casualty on entry to the subjects. But I am of opinion that the pursuers have not instructed sufficient grounds to support the conclusion for declarator that the annual duties, termed feu-duties, or the sum called a casualty in the disposition and in the summons, are "real burdens on the subjects."

The tenure set forth in the disposition of 1811 is "to be holden of His Majesty and his Royal successors in free burgage, for service of burgh used and wont." Of course that burgage tenure under the Crown for burgh service cannot be converted into a feu-holding by the insertion of a clause of separate reddendo in the form of feu-duty to the Magistrates, who are the disponers. The Magistrates are not the superiors, nor was Mr Ross, who was the original disponee, nor is Mr Dickson, now coming in place of Mr Ross, the feudal vassal of the Magistrates. Of this I think there can be no doubt. The Magistrates are disponers, but not superiors. Mr Ross (succeeded by Mr Dickson) was disponee, but not feudally vassal. The investiture is on the burgage holding,—the Crown is superior, and the reddendo is burgh service.

The opinion of Lord Corehouse, and the decision of the Court in the case of the *Magistrates of Perth*, in December 1830, and again in July 1835, is to my mind conclusive of the question up to that point. It is not as a proper feu-duty—not as an incident of the feudal holding—that the sum sued for can be recovered. To that extent and effect the authority of the case of the *Magistrates of Perth* remains unimpaired by the decision in the case of *The Tailors of Aberdeen* v. *Coutts*, in the House of Lords on 3d August 1840.

But, although not a feu-duty, nor a proper condition of the feudal investiture, it is said that the annual sum claimed, and also the casualty, are real burdens on the subject; and this view is said to be supported by the decision in the case of *Coutts*.

I do not think that the pursuers can support this declaratory conclusion by the case of *Coutts*. The opinion drawn by Lord Corehouse is the foundation of the decision in the case of *Coutts*; but the opinion of the same distinguished Judge is also the foundation of the decision in the first case of the *Magistrates of Perth*. The truth is, that in so far as regards the creation of the investiture, and the constitution of the relation between superior and vassal, and the incompetency of attaching a feu-holding from the Magistrates to a burgage tenure under the Crown, there is no antagonism or inconsistency between the two decisions. As I read both judgments, the attempt to engraft a feu-holding on a burgage tenure is contrary to the settled principles of law, and cannot succeed.

But, even assuming this, the pursuers still maintain that these annual payments, and also the duplicand on entry, are created real burdens, of the nature of annual rents. I do not doubt that this creation of a real burden is possible, if done by distinct declaration. But I do not think it has been effectually done in this case. They are not declared to be real burdens; they are not payable "furth of the lands;" the clause of irritancy on failure to pay is not directed to be engrossed in the sasines, and is actually not within the immediate title of the defender. Neither in express words, nor in any language unequivocally declaring intention, have these pecuniary obligations been declared real burdens; and when the fact of burgage tenure and the incompatibility of "feu-duties" is borne in mind, I cannot admit that mere implication is sufficient.

We cannot conjecture or imply a matter so important as the creation of a real burden. It must in some words or other be expressed. It is not so expressed. Accordingly, without again referring to the authorities on which we had much argument, and which your Lordship has explained so clearly, I have only to add that I agree with your Lordship, and with Lord Deas, in the opinions just delivered.

Lord Kinloch—There are some things in this case not susceptible of any doubt.

It is unquestionable that the defender holds his property simply by a burgage-holding. Any apparent attempt to combine a feu-holding with a burgage is plainly ineffectual. The property was burgh property, being part of the town moor; and it was disponed "to be holden of His Majesty and his royal successors in free burgage for service of burgh used and wont." Although, therefore, the property was also said to be "in feu-farm disponed" and "rendering and paying yearly to us and our successors in office or assignees the sum of £39, 5s. 8¼d. in name of feu-duty" every year, with a duplicand at the entry of each heir and singular successor, it is plain that this attempted twofold holding was wholly incompetent and ineffectual; and the holding remains burgage, and this only.

The defender, who has made up a title to the property, does not dispute his liability to make payment of the annual sum called feu-duty, and of the other sum called double feu-duty for an entry. And it does not seem susceptible of dispute that every successor so making up a title will be equally liable, as on a personal obligation, to pay specific sums of money, inherent in the right so taken up.

But what the pursuers demand is, that the Court should declare these to be real burdens on the subjects, that is, payable out of the subjects, and enforceable by real diligence. The payments, it will be observed, are by the title to be made "to us and our successors in office, or assignees." And the result of success by the pursuers, whether ex-

pressly sought or not, would be to establish a ground-annual or rent charge, not necessarily connected with the tenure, but assignable to any one, with the quality of being in any assignee's person a real burden, leviable by real diligence.

I think it settled by the opinions in the well-known case of the *Tailors of Aberdeen* v. *Coutts*, that to establish a real burden it is not necessary that it should be declared such in express terms, but that it may be constituted by words distinctly importing its imposition. But I do not think that the present case comes within the rule of the authority. Although it may not be necessary to declare a real burden in express terms to be such, there must be *habile* words used for the purpose of operating the intention. This is not done in the present case, which attempts to reach the result, not by the imposition of a real burden standing independent of tenure, but by the creation of a feu-right, of which a feu-duty and duplicand are set forth as elements. It may be guessed that the parties intended to make these payments real burdens, but only because they have used the word "feu-duty," thereby referring to a payment which is commonly considered such. I do not think that this satisfies the requirement of the reported case. It is not the creation of a real burden by clear and distinct words, though not imposing it in express terms. It is an attempt to create an illegitimate tenure, of which feu-duty is an element; and when this attempt is foiled, to set up the feu-duty as a real burden apart from all tenure. This I think inadmissible. When the attempt to make a feu-holding fails, all the incidents of the holding must fall to the ground. The pursuers cannot make one thing, and when that is found ineffectual, then, by a sort of pantomimic procedure, convert it into another. They cannot change a feu-duty, which is only effectual as an incident of a feu-holding, into a wholly different real burden, which is effectual apart from all tenure. The pursuers, in short, have not made the thing which they aimed at, but have made something else which does not suit their purpose, and which they cannot now transform into the other.

What the pursuers now seek to establish is a totally different thing from a feu-duty; it is a ground-annual, not payable to a superior, but payable out of the lands to any appointed creditor. I shall not inquire whether the pursuers would have succeeded had they used the word "ground-annual" in place of "feu-duty." I am not prepared to say, after the opinion in the *Tailors of Aberdeen*, that a ground-annual distinctly imposed would require, for legal effect, to be expressly declared a real burden; though it commonly is, and will always be most safely declared so. The answer to the pursuers is that they have not created a ground-annual, but attempted to create a feu-duty; and when the thing cannot be sustained as a feu-duty, it cannot subsist as anything. They did not make a ground-annual, and cannot therefore have such sustained.

I am of opinion that the Lord Ordinary's interlocutor should be in substance adhered to.

After the case had been advised, counsel for the defender objected to that part of the Lord Ordinary's interlocutor finding no expenses due.

The Court—The motion is too late. We can give you expenses since the date of the Lord Ordinary's interlocutor. It should be known, if it is not already known, that when a party intends to reclaim only against the part of the Lord Ordinary's interlocutor dealing with expenses, he must bring it under the notice of the Court before the case is advised on the merits. It is different from the case of a party who has been unsuccessful on the merits in the Outer House, for he cannot anticipate that the Lord Ordinary's judgment will be reversed.

The Court recalled the interlocutor of the Lord Ordinary in so far as it finds that the obligation for annual payments and duplications thereof at the entry of each heir and singular successor contained in the defender's titles is binding on the defender, and found in lieu thereof that the defender, as proprietor for the time being of the subjects, is personally liable for the annual payment and duplication thereof; *quoad ultra* adhered; and found the defender entitled to expenses since the date of the Lord Ordinary's interlocutor.

Agents for Pursuers—G. & J. Binny, W.S.
Agents for Defender—Webster & Will, S.S.C.

Saturday, March 16.

SCOTT AND CAMPBELL, APPELLANTS, (IN SEQR. THOMAS COUPER).

Bankrupt—Discharge—Consent of Creditors—19 *and* 20 *Vict. c.* 79, § 146.

Held that the clauses of the 146th section of the Bankruptcy Act, which require—(1) that the trustee shall prepare a report upon the conduct of the bankrupt before it shall be competent for the bankrupt to present a petition for his discharge, or to obtain any consent of any creditors to such discharge, and (2) that "such report shall be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by other direct reference in any consent to his discharge,"—are imperative, and not directory merely. And that where the consents had preceded the trustee's report, the bankrupt's discharge could not be granted.

This was an appeal from the Sheriff-court of Edinburgh (Sheriff-Substitute Hallard) in a petition for the discharge of a bankrupt after the lapse of eighteen months from his sequestration. The bankrupt had obtained a report from the trustee in his sequestration, and also the consent of a majority of his creditors in number and value.

The Sheriff-Substitute found the petitioner entitled to discharge.

Two of the creditors, Thomas Scott and Robert Campbell, being dissatisfied with this deliverance, appealed.

They objected—(1) The creditors' consents were given before the report of the trustee was prepared—contrary to the 146th section of the statute. (2) The creditors' consents do not refer to the trustee's report, as required by the said section. (3) The trustee's report is not properly dated, nor referred to distinctly in the proceedings for the bankrupt's discharge.

M'Kechnie, for the appellants, referred to *Dickson's Trustees* v. *Campbell*, 5 Macph. 767.

At advising—

Lord President—I think the objection fatal, and cannot at all acceed to the contention of the