that gentleman reported that the whole of the estate was not included in the summons, a supplementary action was brought to which similar defences were lodged by the Messrs Macbeth. Lord Young, acting for Lord Mackenzie, conjoined the actions upon 19th May 1875, and afterwards, upon 7th July, issued an interlocutor finding that the subjects included in the supplementary action should also be sold. Against these interlocutors of Lords Mackenzie and Young, approving of a sale, the defenders reclaimed.

Argued for them—The defenders are entitled to insist upon a division in virtue of their rights as *pro indiviso* proprietors, assuming that the subject possessed is physically capable of division. They are not barred by the reports of Mr Kirkwood, as the remit to him was "before further answer," and there was therefore a reservation of any objections on their part.

Argued for pursuers—The reports of Mr Kirkwood are conclusive upon the subject of the expediency of a sale, and the defenders cannot now object to them. A division cannot be insisted upon if it be prejudicial to the estate.

Authorities—*Brock* v. *Hamilton*, Jan. 27, 1852, reported as a note to *Anderson* v. *Anderson*, Mar. 17, 1857, 19 D. 701, Stair iv. 3, 12, Bell's Com. i. 62–3, Justinian's Institute, 6, 20; *Bryden* v. *Gibson*, Feb. 4, 1837, 15 S. 487; *Craig* v. *Fleming*, March 14, 1863, 1 Macph. 612; *Dickson* v. *Monkland Canal Coy.* H. L., June 29, 1825, 1 W. and S., 636; *Wilson* v. *Struthers*, Feb. 10, 1837, 15 S. 523.

At advising—

THE LORD JUSTICE-CLERK—The only question in this case is whether the property admits of a reasonable division so as to protect the just interest of all concerned. What Lord Mackenzie did was to make a remit to an able man of skill to report, and he reported that in the circumstances such a division was next to impossible. I imagine that that is conclusive upon this question.

If it be the fact that it is next to impossible to divide this property, there must be a sale. But it is right that Mr Macbeth, who is insisting upon a division, should have an opportunity of bidding at the sale, and I propose that we should make a remit to proceed in the cause with the view of allowing the parties to bid at the sale.

LORD ORMIDALE — As to the competency of an action of division and sale at the instance of a joint proprietor, there can be no doubt; it would be impossible to maintain that it is not competent. The joint proprietors are not bound to remain in the union against their will. But the question is, upon what principle is such a union to be dissolved? It was maintained that if it was physically possible to divide the subject there must be a division, but I think, looking to the authorities, and especially to the case of *Fleming*, that where a division cannot be made having a just regard to the interests of all the parties concerned, it cannot be insisted upon. It is always a matter of degree. Such a division might in some cases cause great sacrifice, and here it is reported to us that it is not practicable. The interests of Mr M'Laren's clients, who are of opinion that the property should be preserved, will be sufficiently protected by their having an opportunity of purchasing at the sale, and I understand that your Lordship would approve of a clause in the articles of roup to the effect that any one of the parties may appear at the roup and bid.

LORD GIFFORD—I agree with your Lordships. I think that in this case the proper remit has been made. The true criterion is the interest of all concerned, for almost any subject is capable of division. It has been determined by a fit and proper person that it would be inexpedient in the circumstances to divide this property, and it appears to be next to impossible to adjust the interests of the various parties on the theory of a division. But it is quite competent for a *pro indiviso* proprietor to appear as an offerer at the sale. Allow me, however, to add this, to prevent misunderstanding, Mr Macbeth appears here in two capacities, but he can only bid in his individual character.

LORD NEAVES was absent.

The Court pronounced the following interlocutor:—

> "The Lords having held counsel on the reclaiming note for Daniel Macbeth and another against Lord Young's interlocutor of 7th July, 1875, refuse said note, and adhere to the interlocutor complained of, and remit the cause to the Lord Ordinary to proceed with the same: find the reclaimers liable in expenses since the date of the interlocutor complained of, and remit to the Auditor to tax the same and to report, and to his Lordship to decern for the expenses now found due."

Counsel for Pursuers — Balfour — Wallace. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Defenders — Dean of Faculty (Watson)—M'Laren. Agents—J. & A. Peddie, W.S.

Saturday, November 27.

SECOND DIVISION.

[Bill Chamber.

CLARK *v.* HAMILTON & LEE.

Process—Suspension of Charge—Lis alibi pendens.

Suspension of a charge upon an extract-decree having been brought upon the ground of an error in the messenger's execution, the charge was abandoned, and while the question of the expenses in the suspension was still undisposed of, a second charge was given proceeding upon the same warrant. In a suspension of this second charge, *held* (*dub.* Lord Justice-Clerk) that as the first was withdrawn as a charge for payment, the second was competently brought.

Messrs Hamilton & Lee, stockbrokers, London, under a decree of the Court of Session, in January 1875 charged John B. Clark, solicitor, Mauchline, for payment of the sum of £494, 13s. 6d., together with interest, expenses of process, and dues of extract. The charge bore to be dated 1st *December* 1865, and required payment to be made within fifteen days after date. On 6th April 1875 Clark was imprisoned upon a warrant follow-

ing this charge, and he remained in prison until suspension and liberation was applied for by him, when he was liberated of consent of the agents of the chargers. The following letter was written by them to Mr Clark's agent—"We have to intimate to you that, while denying your client's allegations in regard to the charge given him, our clients are not disposed to have a litigation on the subject, and therefore they pass from and abandon the charge complained of, and all that has followed upon it. But they maintain their plea against the competency of the suspension, and will crave that the note be refused, with expenses. If your client chooses to abandon the suspension, our clients will not object, on his paying them the expenses they have hitherto incurred, as these may be adjusted between us.

"D. & W. Shiress."

Lord Craighill, Ordinary on the Bills, passed the note of suspension and liberation, and thereupon the process became a depending process in the Court of Session. Lord Young, before whom the cause was brought, on the motion of Mr Clark, allowed a proof to both parties. Messrs Hamilton & Lee reclaimed against Lord Young's interlocutor to the Second Division, pleading that the suspender's pleas involved the matter of a messenger's execution, and that that could not be challenged except in a process of reduction.

The following interlocutor was pronounced:—

"*Edinburgh, 5th June* 1875.—The Lords having heard counsel on the reclaiming note for Hamilton & Lee against Lord Young's interlocutor of 19th May 1875, in respect the suspender proposes to bring an action of reduction sist further procedure *in hoc statu.*"

The respondents, upon the ground that the extract decree was not challenged in the suspension, applied to the Court to have the sist recalled, and in accordance with their application the Court, after hearing counsel, pronounced the following interlocutor:—

"*Edinburgh, 19th October* 1875.—The Lords having heard counsel on the motion for the respondents: In respect there is no relevant statement on the record affecting the grounds and warrants of the charge libelled, refuse the suspension in so far as regards the grounds and warrants of the charge. *Quoad ultra* continue the cause."

An action of reduction of the charge and all following thereon was accordingly brought by Clark, and, when the present question arose, it had not been disposed of. In the meantime Messrs Hamilton & Lee passed from the first charge, and proceeded with a second charge upon the same extract decree against Clark, who immediately brought a note of suspension of this second charge in the Bill Chamber. As regards the first charge, the only question undisposed of was that of expenses.

On 3d November 1875 the Lord Ordinary on the Bills (Lord Rutherfurd Clark) pronounced the following interlocutor:—"The Lord Ordinary having considered the note of suspension, with the answers and productions, refuses the note, and finds the complainer liable to the respondents in expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax and report."

The complainer reclaimed.

Argued for him—The chargers having previously given a charge for the same debt on the same grounds, and the validity of that charge being now the question in a process in dependence before the Court, the giving of a second charge was oppressive and incompetent. *Lis alibi pendens.*

Argued for respondents—The note having been presented without caution or consignation, ought to be refused. The validity of the extract decree charged upon not having been impunged, and the charge complained of in the former suspension having been passed from and abandoned, the present charge was competently given, and the suspension ought to be refused, with expenses.

Authorities—*Aitken* v. *Dick*, July 7, 1863, 1 Macph. 1038; *Wilkie* v. *Yeaman*, Jan. 24, 1828, 6 Sh. 421; *M'Aulay* v. *Brown*, Feb. 16, 1833, 11 Sh. 411; *M'Lennan* v. *Dewar & Son*, Dec. 23, 1843, 6 D. 553; *Peattie* v. *Stodart*, March 9, 1838, 16 Sh. 906.

At advising—

Lord Justice-Clerk—The original charge in this case was challenged on the ground that the messenger's execution bore to be dated on a day which had not then, and has not even yet arrived. After hearing parties on that question we allowed the suspension to stand over till a reduction was brought calling the messenger.

It was unfortunate that we should have been compelled to take that course when the charge itself was not to be insisted in. But as the matter of expenses remained to be decided, we had no alternative. We have now another charge on the same warrant, and another suspension of this second charge on the ground that the first suspension is still undisposed of. Matters are certainly not in a satisfactory position. My doubt is whether a charge can be said to be abandoned so long as it is insisted in to any effect whatever. The respondents refuse to pay the expenses of the first suspension though they have abandoned the charge as a charge. The suspension is therefore still in Court, and the charge insisted in to the effect of opposing decree for expenses; in fact, I am not sure that the respondents do not even still claim their own expenses.

Now, I have great doubts upon the authorities whether it is competent to give a new charge while a suspension of a former charge on the same grounds and warrants is still in Court undisposed of, and I should myself be disposed to pass the note.

Lord Gifford—The suspender's objection here is that there is a previous charge still insisted in to a certain extent. The objection is technical, for the charge itself has been abandoned unconditionally, and it can no longer be said that there are two charges the validity of both of which is maintained. It can only be said that the question of expenses in the first suspension still remains to be decided. It would be far too technical to hold that, merely because the question of expenses in the first suspension has not been disposed of, therefore a second charge cannot proceed. The first suspension stands refused so far as regards the grounds and warrant of the charge, in respect that no relevant ground affecting them has been stated, and after that, and the voluntary withdrawal of the charge by the charger, I can see no objection to the second

charge. I can indeed imagine a case where there would be real *lis alibi pendens* when the question raised under the first suspension and interdict would come again on an objection to the second charge. In such a case an abandonment of the first charge without the first suspension being disposed of might not warrant a second charge. But that is not the case we have before us.

Lord Ormidale—This case has got into a most embarrassed condition. The first charge is one which cannot be maintained. The Lord Ordinary has found to that effect in a reduction of the messenger's execution. His interlocutor has still to be submitted to review. In the meantime we are pressed for judgment in the suspension of a second charge; that second charge proceeds upon the same warrants as did the first, but these warrants stand unimpeached, and the Court has found by express interlocutor that the first suspension was not intended to affect the ground of the charge at all. Now, because the first charge is standing so far as regards the question of expenses in the first suspension, the charge itself having been departed from as a charge, it is contended that this second charge is incompetent for the purpose of obviating payment of what appears to be an undoubted debt. I am of opinion that in the circumstances the second suspension is quite competent. There was a number of cases quoted to us in support of the opposite view, but they appear all to turn on the point of *lis alibi pendens* as the ground on which it was held that this second charge could not be maintained. None of the cases are in point here, where the first charge was withdrawn as a charge for payment before the second charge was given. It would, I think, be a denial of justice to the charger were we to pass this note without caution; and the very fact that the suspender is, as acknowledged by his counsel, unable to find caution, is reason itself sufficient on the part of the charger in losing no time in taking what steps he can to recover his debt. In respect therefore of no caution, I think this note should be refused.

The Court adhered.

Counsel for the Defender—J. C. Smith. Agent—John Macmillan, S.S.C.

Counsel for the Respondent—Trayner. Agents—D. & W. Shiress, S.S.C.

Tuesday, November 30.

SECOND DIVISION.

[Lord Curriehill.

NORTH BRITISH RAILWAY CO. *v.* LINDSAY AND OTHERS.

Compensation—Lands Clauses Consolidation Act—Railway Company.

A railway company served notice of their intention to take for the purposes of their railway a certain portion of a farm. Notice was served upon the tenants in possession, and afterwards upon the firm of the landlords' agents, who had, in answer to an application from the company, intimated their readiness to accept service for him. When the clerk of the company served this notice upon the agents he was informed by one of the firm that the tenants in possession had renounced their lease of the farm, which had been re-let to a new tenant for a number of years. The lease to the new tenant had only been signed by the landlord upon that day, although executed by the tenant two days earlier. The new tenant subsequently lodged a claim with the company for compensation, and the company thereafter brought a suspension of certain proceedings at his instance. *Held*, that as against the company he could have no claim for compensation, in respect (1) that he had failed to prove that prior to the date upon which the notice to take was served there was a completed contract of lease between him and his landlord, and that (2) no right could be created after that date to the prejudice of the company.

Observations upon the effect of a notice that lands are to be taken compulsorily under statutory powers.

Observations per Lord Justice-Clerk upon the doctrine of *tantum et tale*, and the position of a purchaser acquiring lands in virtue of statutory powers.

The North British Railway Company brought a note of suspension and interdict against David Salmond Lindsay, farmer at Wormit, Fifeshire, Peter Christie, also a farmer in Fifeshire, and John Heatley Dickson, land-valuator at Saughton Mains, Edinburgh. The object of the Company was to stay proceedings in an arbitration under the Lands Clauses Consolidation (Scotland) Act, 1845, for settling a claim for compensation made against them by Mr Lindsay—Messrs Christie and Dickson being the arbiters nominated. The claim made by Mr Lindsay rested upon the ground that the company had taken compulsorily, for the purposes of their railway, part of the farm of Wormit, of which he was the tenant.

The Company pleaded in support of their note of suspension that Mr Lindsay was not the tenant in possession either at the time when their notice to take the lands was served or when they entered into possession, and that when their notice was given his lease had not been executed by the landlord and delivered. They also maintained that both Mr Lindsay and his landlord were aware prior to the execution of the lease that the Company required and were ready to take the lands.

The Lord Ordinary passed the note, and afterwards, upon 23d March 1875, a proof was taken, when the following circumstances were established.

In 1871 the North British Railway Company, in virtue of their powers under the Tay Bridge and Railways Act, 1870, served a notice upon Mr Wedderburn, of Wedderburn and Birkhill, the proprietor of the land in dispute, intimating the Company's intention to take a certain part of his property. Notice was also served upon Mr Blair, tenant of that part (being the farm of Wormit), under a lease of nineteen years expiring at Martinmas 1882. The land required by the