suers alleged, and that it was of a temporary and unsubstantial character. He denied that either according to the custom of the district or according to the permission to build given in the letter a grant of the ground on which the house was built was implied, or that Mr M'Intyre so understood the permission granted.

He pleaded, *inter alia*—"(2) The statements of the pursuers are irrelevant and insufficient in law to support the conclusions of the summons. (3) The pursuers have not relevantly averred any contract for the constitution of a heritable right in favour of their brother; and further, such a contract can only be instructed by the writ or oath of the defender, or the writ of his authors. (4) The custom alleged in article 3 of the Condescendence does not exist; and, *separatim*, being contrary to law and unreasonable, cannot be given effect to. (5) The defender and his author never having agreed to give any recompense or compensation, but having merely allowed a precarious possession of the subjects in question, the pursuers cannot maintain the present action."

The Lord Ordinary (Fraser) pronounced this interlocutor—"Allows to both parties a proof of their averments, and to the pursuers a conjunct probation: Further, repels the first plea-in-law for the defender to the effect that 'the pursuers have no title to sue,' in so far as it is stated as a bar to the action being proceeded with, reserving to the defender to insist upon confirmation before extract of any decree in favour of the pursuers."

He added this note—"The plea of the defender of no title to sue is based upon the fact that the pursuers have not obtained confirmation in regard to the particular claim now insisted in. The want of confirmation is no bar to the right to sue, although the pursuers cannot get extract of decree in their favour till such confirmation has been obtained. This will be done, no doubt, after the litigation is ended.

"On the relevancy of the action it is thought that the case comes within the rule laid down and exemplified in three decisions reported by Baron Hume (*M'Tavish* v. *Fraser*, Hume 546; *Clark* v. *Brodie*, Hume 548; *Mackay* v. *Brodie*, Hume 549). It is quite true that the brother of the pursuers had no written title to the ground upon which he built his house; but it is averred that he did build the house upon the assurance of the defender's factor that he would have right thereto. And the doctrine of recompense here comes in to support the claim of the pursuers for the value of the house which was taken from them, contrary to the good faith of the agreement which was entered into."

The defender reclaimed, and argued—The pursuers had set out no valid contract of feu. A contract to give a feu must be constituted or at least proved by writing. Custom cannot control or alter the law. There was not sufficient specification of damage to entitle the pursuer to a proof—Smith's Leading Cases, i. 620, and cases there cited. There could not have been a claim for implement, and there could not therefore be a claim of damages for non-implement.

Authorities—*Bell* v. *Lamont*, June 14, 1814, F.C.; *Lamont* v. *Sinclair*, Jan. 23, 1878, 5 R. 548; *Allan* v. *Gilchrist*, Mar. 10, 1875, 2 R. 597.

The Lords without delivering opinions, varied the interlocutor reclaimed against by appointing the proof allowed to be "before answer," and *quoad ultra* adhered, finding the pursuers entitled to expenses.

Counsel for Pursuers — Gloag — Kermack. Agent—J. H. Jameson, W.S.

Counsel for Defender — Asher — Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 25.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

POWRIE *v.* LOUIS.

(See *ante* p. 533.)

Process—Proof—Expenses—Copies of Evidence for Counsel.

Held, following *Birrell* v. *Beveridge*, 15th February 1868, 6 Macph. 421, that, except in special cases, a charge for copies of evidence sent to counsel to enable them to debate on a proof will not be allowed as against a party found liable in expenses.

When a Lord Ordinary having heard proof intimated his opinion that counsel should be heard thereon after an approaching Christmas vacation, and the speeches on evidence were ultimately made before another Lord Ordinary about two months after the date of closing the proof, the circumstances were *held* to take the case out of the above general rule, and a charge to the extent of one copy of the evidence, for the use of that counsel who was speaker thereon, was *allowed*.

Counsel for Powrie objected to the Auditor's report in this case, in so far as two sums of £11, 8s. each, for copies of the evidence taken at the proof, to enable counsel to debate thereon, had been taxed off and disallowed.

The proof was led before the Lord Ordinary (Craighill) on December 13 and 14, 1880. At its close the Lord Ordinary stated his view that counsel should take time to consider the evidence, and that the case would be put out for hearing thereon after the ensuing Christmas recess. On the meeting of the Court after that recess, Lord Craighill having taken his seat in the Second Division, the case came to depend before Lord Rutherfurd Clark, by whom counsel were heard on the evidence on 16th February 1881.

The objector argued, that the speeches having been delayed on the suggestion of Lord Craighill, and having been ultimately heard by a different Lord Ordinary, the case was one of these exceptional ones contemplated by the Judges, who laid down the general rule on this matter in *Birrell* v. *Beveridge*, February 15, 1868, 6 Macph. 421. Moreover, the evidence was of a kind which necessitated special and detailed criticism, and therefore a deferred hearing, and copies of the evidence.

Replied for Louis—There was nothing here to take the case out of the general rule laid down in

Birrell v. *Beveridge*. The evidence was not intricate; it depended mainly on what took place at certain interviews, at none of which more than three witnesses were present. The Auditor's discretion should not be interfered with; but, in any view, one copy of the proof would have been sufficient, as only one counsel was allowed to address the Lord Ordinary on the evidence.

At advising—

Lord President—I think the general rule laid down in the case of *Birrell* v. *Beveridge* (15th Feb. 1868, 6 Macph. 421) is a very salutary one, and must be adhered to. But while that rule was very distinctly laid down by Lord Deas and myself, we said that there might and probably would be exceptional cases. As regards the case before us, I am not sure that I should have been disposed to hold it as an exceptional one, if counsel had been heard within a day or two of the conclusion of the evidence; for I do not think the evidence was of such a description that any study of it would be likely to lead to a more useful and better discussion than if the speeches had been taken at once. I think it would have been better if the Lord Ordinary had taken them at once. But he did not do so, and apparently contemplated that the case should stand over till after the Christmas recess. That in itself creates a specialty which I think ought not to have occurred, but which was not the parties' doing, but the Lord Ordinary's, and that in some degree necessitated copies of the evidence, for no counsel could be expected to carry the details of a proof in his mind for weeks after it was led.

In addition, we have the fact, which also occurred through no fault of the parties, that the Lord Ordinary who decided the case was not the same as the Lord Ordinary who heard the evidence, and it was therefore necessary to go more minutely into the details of the proof than if the judge had been the same. Putting these facts together—the lapse of time and the change of Judge—I think this may be held to be such an exceptional case as was contemplated in *Birrell* v. *Beveridge*. But it was not necessary that more than one copy of the evidence should be made, vizt., for the use of that counsel who was to address the Lord Ordinary upon the proof. I am therefore for allowing the charge for one copy, and one only.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court allowed the charge for one copy of the notes of evidence.

Counsel for Powrie—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Counsel for Louis—Rhind. Agent—W. Officer, S.S.C.

Tuesday, June 28.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

EARL OF BREADALBANE *v.* COLQUHOUN'S TRUSTEES.

Public River—Navigation—Right of Proprietor of Banks to Execute Operations which would Hinder Navigation.

The proprietor of both banks of a public navigable river *interdicted* at the instance of a superior heritor, in respect of an agreement entered into between them twenty years previously, from erecting a bridge which would interrupt free navigation of the stream, although since the date of the agreement the stream had become so silted up that free navigation was impossible without the execution of extensive deepening operations at the mouth of the river, which operations the superior heritor, in terms of the agreement, had power to execute, but did not allege he was about to undertake.

In the year 1858 John Alexander Gavin Campbell of Glenfalloch, and the then Marquis of Breadalbane, raised a process of suspension and interdict against the late Sir James Colquhoun of Luss, Bart., to have Sir James interdicted from making certain operations upon the banks of the river Falloch, near the mouth of the Arnan or Garabal burn, to which point on that river the steamers of the Loch Lomond Steamboat Company were at that time in use to navigate the Falloch. By a joint-minute of March 16, 1859, the parties to that process intimated that an agreement had been come to by the parties on the matters then in dispute, and the action was taken out of Court accordingly. By that agreement it was provided, *inter alia*, that Sir James might under certain conditions complete the operations against which interdict was sought, that steamers might under certain conditions navigate the Falloch as far as the mouth of the Arnan or Garabal burn, and might land passengers on the estate of Glenfalloch at a point designated in the agreement. Any damage caused to the lands of Sir James in consequence of the turning of the steamers or the surge of their passage was to be compensated by the steamboat company. By the 7th article of the said agreement it was provided that Sir James Colquhoun should be at full liberty to defend the banks of the river by wattling, 'or in any other way that does not interfere with the *alveus* or channel of the river.' In particular, he was to be at liberty to do so in the parts of the river therein specified, on the condition that Lord Breadalbane, and others interested in the navigation of the Falloch, shall be at liberty to erect and maintain poles or marks along that part of the river, so as to show the navigable channel on occasion of flood. By the eighth article of the said agreement it was provided as follows:—'Lord Breadalbane, and others interested in the navigation of the Falloch, shall be at liberty, by dredging or otherwise, to remove the sand, gravel, or other debris which may collect in the river, also the bar at the mouth of the river, and in Loch Lomond, so as to preserve the