a certain patrimonial interest of which, by the action of the committee, the pursuers have been wrongfully deprived. How far the mere chance of gaining a prize would be sufficient may be open to doubt. My impression is that the opportunity of competing for a prize is always of some value capable of estimation in money. But apart from this, their exclusion from the exhibition—in which they were to appear, not as amateurs, but as professional florists, anxious for the sake of their business to have their roses and dahlias shown alongside those of other growers—might evidently be injurious to their trade. It would have been a good advertisement whether they succeeded in getting a prize or not, and if they did succeed, so much the better. For these reasons I am unable to affirm the judgment of the Sheriff-Substitute dismissing the action, and although it is too late to pronounce an operative decree, I think the action was properly brought, and the defenders must be found liable in expenses."

The defenders appealed.

At advising—

LORD JUSTICE-CLERK—I think that the petition should never have been presented. If Mr Cocker thought that he was injured by the action of the society, he had his remedy in damages. It was an unprecedented application to the Sheriff-Substitute to ask him to order the society to receive the pursuer's exhibits for a show which was to be held within six days of the application. I see that the Sheriff-Substitute thought that it was an incompetent application, and would not have considered it if the defenders' agent in his Court had raised any question of the competency. Now, I think the view of the Sheriff-Substitute was right, and that the application should be refused.

LORD YOUNG—I am of the same opinion, and that very clearly. If the pursuer has suffered any wrong, then his remedy is to sue for damages. I see no reason why the Court should interfere by ordering specific performance, as it is manifest that such is an impossibility.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court sustained the appeal and dismissed the petition.

Counsel for the Appellants—Guthrie—Dundas. Agents—Henry & Scott, W.S.

Counsel for the Respondents—Comrie Thomson—C. Watt. Agents—Wishart & Macnaughten, W.S.

Friday, July 14.

FIRST DIVISION.

[Sheriff of Dumbartonshire.

GILLESPIE *v.* LUCAS & AIRD.

Railway—Construction—Statutory Powers—Want of Precaution in Conducting Dangerous Operations—Interdict—Railway Clauses Consolidation Act 1845 (8 *Vict. c.* 20), *sec.* 16.

The Railway Clauses Consolidation Act 1845 by section 16 provides that it shall be lawful for the company for the purpose of constructing the railway to do all acts necessary for making the railway, provided always that in the exercise of the powers granted, the company shall do as little damage as can be. Consequently *held* that contractors constructing a railway for a company, under statutory powers, whose blasting operations had done serious damage to adjoining property, and who had failed to show that any precautions had been taken or even considered, were not protected from interdict by said section.

Mrs Agnes Gillespie, Ardmay Cottage, Arrochar, brought an action in the Sheriff Court at Dumbarton against Messrs Lucas & Aird, contractors for the West Highland Railway Company, who under the sanction of the West Highland Railway Act 1889 were constructing a line passing along the hillside above Loch Long, praying the Court "to interdict the defenders (1) from carrying on blasting operations in the neighbourhood of Ardmay Cottage, in the parish of Arrochar and county of Dumbarton, and the grounds attached thereto; or (2) at least from carrying on said operations in such a manner as to injure the said cottage and ground, endanger the persons of people therein, or cause inconvenience or annoyance to the pursuer in her occupancy thereof, and to grant interim interdict."

The pursuer averred that "the said blasting has been and is being conducted in such a manner as to cause damage to the cottage and ground attached thereto, to endanger the persons of the pursuer and others therein, and to inconvenience and annoy the pursuer in her occupancy thereof. The pursuer has repeatedly, on the warning of the defenders, or of their servants, had to temporarily leave the cottage to avoid accident from the blasting complained of."

The defenders explained that the cottage was 510 feet from the railway line and 290 feet below it at the foot of an exceedingly precipitous slope. They stated that the blasting operations complained of were necessary for the execution of the said works, and had been and were being conducted by the defenders in the usual and proper manner in which such operations are conducted. The operations had been within the limits of deviation of the said railway, and in the necessary course of

execution of the railway authorised by the said Act of Parliament.

The pursuer pleaded—"(1) The blasting complained of being an abuse and in excess of the defenders' rights, and the pursuer being prejudiced thereby, she is entitled to the protection of the Court against their continuance. (2) The defenders' said acts being a nuisance, their repetition ought to be forbidden by the Court."

The defenders pleaded—"(1) The application is incompetent. (2) The operations complained of being legal, and conducted in the usual and proper way, and in the necessary course of execution of the works authorised by the said Act of Parliament, cannot be stopped by way of interdict. (3) The action ought to have been directed against the said West Highland Railway Company, and not against these defenders."

The Railway Clauses Consolidation Act 1845 (8 Vict. c. 20) by section 16 provides that "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works. . . . They may do all other acts necessary for making, maintaining, altering or repairing, and using the railway, provided always that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

The Sheriff-Substitute (GEBBIE) allowed a proof before answer, from which it appeared that serious damage had been done to the cottage by showers of stones falling upon and penetrating the roof, that one large rock about a ton in weight had rolled into the garden, and that the house was almost uninhabitable when shots were being fired. The pursuer called as one of her witnesses a quarrymaster, who spoke to covering blasts by means of chains, planks, and brushwood.

For the defenders Kenneth M'Donald, engineer on Inverarnan and Arrochar sections, deponed—"I have the superintendence of the sections at Ardmay. . . The workmen were nearly all hung by ropes from the top when working at this place. It was not practicable to fence the blasts at this place. We could not fence them by stones or brushwood. I doubt if we could prevent the stones from being flung into the air. We could not prevent them rolling down. (Q) Is there any other way you could fence blasts except by chains or brushwood?—(A) No; not practically. (Q) You could not fence it so as to be sufficient to prevent stones going over?—(A) No; I do not think it is possible. It would increase the length of time necessary to do the work by ten times to quarry the rock instead of blasting it. It would also cost ten times more, and even then it would not be safe. *Cross.*—I cannot tell whether the blasting is done in the vicinity of the pursuer's house or not. (Q) What are your future intentions?—(A) The engineer has got to decide how much rock is necessary to take away. We do not know how much he will take off. He may take a great deal or very little. I cannot say that there will not be another shot. The engineer will require to decide what is to be done, and my opinion is a different story. My opinion is that a lot of rock requires to come off yet, but that is not the engineer's. I cannot say what the engineer may consider necessary. . . There may be, in my opinion, a shot or two required yet. It would take ten times longer and ten times more expense to quarry through the rock than to blast it. Of course that is a mere guess, and I would not be surprised if it took fifty times more money and fifty times the length of time. I am also of opinion that even although it was quarried the stones would still roll down the steep ground. I do not think we could have prevented stones from rolling down at a reasonable cost. It would have taken nearer £500 than £50 to have helped to prevent stones coming down. . . I say it is not practicable to cover blasts at all in a place such as this. I never attempted to cover a part of it, because it is not practicable. It could be covered, but at great cost of money and time. Boards might be hung out and the shots partly protected, but that would mean more time."

Andrew Morrison, another engineer in the defenders' service, gave similar evidence.

Upon 15th May 1893 the Sheriff-Substitute found that the pursuer had failed to establish a case entitling her to interdict and assoilzied the defenders.

"*Note.*— . . . From the position of the cottage and the railway line above, it is obvious it would be difficult, if not impossible, to conduct the operations complained of so as to prevent detached pieces of the rock from tumbling down upon the cottage and ground. It can hardly be questioned that the work that is being carried on is under the sanction of an Act of Parliament for a public benefit, and it is almost inconceivable that a public work of magnitude can be executed without inflicting some injury and inconvenience to the rights of private persons. It may be seriously doubted, however, whether in such a case the remedy is by interdict. It rather appears to me that the proper remedy is to be sought under the 16th section of the Railway Clauses Consolidation Act, which provides that in the exercise of the powers granted, the company shall make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers.

"I could understand a possible case being made for interdict where it was alleged the work was carried on in a negligent, reckless, or some other illegitimate way. But this is not the nature of the case the pursuer alleges. She simply states that

the 'said blasting is being conducted in such a manner as to cause damage to the cottage and ground attached thereto, to endanger the persons of the pursuer and others therein, and to inconvenience and annoy the pursuer in the occupancy thereof.' As already pointed out, no large public work can possibly be executed without inflicting injury and inconvenience to neighbours; but the remedy for that is not an interdict, but by way of damages. In short, before an interdict can be granted, the company must be doing something that is illegitimate, and outwith the powers conferred by their Act.

"It is true the pursuer has endeavoured to lead evidence to show that by covering the blast with chains and brushwood, or planking, the operations could be carried on with little risk of injury to herself or her property. Such evidence is inconclusive and unsatisfactory. The localities where such a mode is said to have been adopted may be essentially different from the one here in question. It may be comparatively easy to apply it on a flat surface, and it may be absolutely necessary in a populous place like Bowling or Greenock to use extra and unusual precautions, but it is a totally different thing where blasting must be applied in a quiet rural district to the face of a precipice extending to about 100 yards. One witness suggests a screen might be used. I am not satisfied a screen would be practicable or feasible, at all events its cost would be excessive, and quite incommensurable with the value of the pursuer's property, the yearly rental of which is £14. I have no doubt the defenders have been carrying on their operations in the usual and recognised manner, and have used all ordinary precautions for the safety of the pursuer and her property by specially warning her before blasting took place. It is indeed their own interest to prevent unnecessary injury, for the defenders are well aware that they must give ample satisfaction for all damage that is done.

"On considering the Railway Statutes and the judicial opinions expressed regarding their construction, and the powers thereby conferred upon railway companies, I have become convinced that the pursuer's position is untenable."

The pursuer appealed to the Sheriff (LEES), who upon 13th June 1893 pronounced the following interlocutor:—"Finds that the defenders have failed to take due precautions for the safety of the pursuer and her household, and any precautions whatever for the safety of her property: Finds that in consequence of such failure the lives of the pursuer and her household have been endangered and her property has been injured by the blasting operations of the defenders: Finds that the defenders refuse to alter the mode in which their blasting operations are carried on, or to compensate the pursuer for the injury caused to her thereby: Finds in law that the sanction given by Parliament to construct the railway does not imply that the operations for its construction may be carried on without regard to the safety of the lieges in their person and property, and without due precautions being taken for the preservation thereof. Therefore recalls the interlocutor of the Sheriff-Substitute of 15th May 1893, interdicts the defenders as from 25th June current from carrying on any blasting operations which may cause pieces of rock to reach Ardmay Cottage, until either they satisfy the Court that the mode in which thereafter their blasting operations will be carried on will be in conformity with law, or until they lodge in Court an obligation to the satisfaction of the pursuer binding themselves to compensate her for the injury they have caused and may yet cause her, and decerns, and continues the cause.

"*Note.*—The defenders began their blasting operations in July last, and in spite of remonstrance have persisted in carrying them on without any precautions to keep the pieces of rock from being projected far and wide over the locality. As a result, a piece of rock upwards of a ton in weight lies in the pursuer's garden. The roof has been riddled, and has at present twelve or fifteen holes in it, damp and drafts have come in and caused rheumatism, and the pursuer's husband has died of heart disease. The defenders have neither weighted the rock, as is usual, or fastened it with chains, or erected any screen. Their only precaution for the safety of the lieges has been to blow a horn to warn people to fly from the vicinity. The defenders intend that when the horn is heard the pursuer and her family are to fly from the house to such a distance as to be in safety. It would appear that on one occasion the family had to fly from the breakfast-table three times. Whether the weather was wet or dry, or the ground covered with snow, whether the pursuer's household was well or ill, they were to fly for such safety as they could find when the horn blew. Such safety was difficult to find, for the showers of stones fell even in the loch.

"It is a matter of familiar experience that this can be nearly, if not altogether, obviated by the erection of screens to prevent stones rolling down the hillside, and by weighting and chaining the rock to prevent it being blown over the screen.

"But the defenders contend that as Parliament authorised the railway to be made, it impliedly gave them power to construct the railway in the manner most convenient for them. I do not doubt that a railway company in constructing their line have immunity given to them under circumstances which would entail responsibility on a private individual under the maxim *sic utere tuo ut alienum non lædas.* A railway is presumably made in the public interest, and therefore the gain of the community may require the particular member injured by its construction not only to bear the inconvenience or loss its proximity may cause him, but also the temporary annoyance he may suffer during its construction, and even the loss that may then accrue. But it is trite law that a railway

company in constructing their line are not entitled to refrain from taking precautions to prevent the lieges being injured in their person or property; and the defenders, as English contractors, might at least have known of the decisions of their own courts.

"I understand that the defenders are willing to repair the pursuer's cottage after their blasting operations are over. But I know of no obligation on the part of the pursuer to live in a house till then which is dangerous to health and life. She has even offered to make no opposition to their continuing their operations if the defenders will undertake to compensate her for the loss and inconvenience she has suffered; but this they refuse to do. They say her remedy is to arbitrate with their employers, the railway company. But if she sued the company at common law they would plead they had independent contractors. If she claimed under the Land Clauses Act they would say she could not claim for injury as none of her land had been taken. While if she claimed under the Railway Clauses Consolidation Act they would say that if the damage was necessary she had no claim against them, and that if it was unnecessary her remedy was against the wrongdoers.

"I am of opinion therefore that her claim is against the defenders, and that if she has a claim against them for unnecessary damage, the circumstances of the danger are such that she is entitled to protection by interdict.

"What form the interdict should take has been a matter of much difficulty to me. To interdict all blasting operations would be going too far. Some may be carried on at such a distance, others with so little explosive material that risk may not be caused to the pursuer. Probably many small blasts would not cause the danger that a few large blasts do. The latter are of course more convenient to the company, but it is against them that protection is needed.

"As the pursuer has borne so long with the blasting, to endure it a short time longer will not matter much. For that reason, and to enable the defenders to prepare a plan for conducting their blasting in safety, I have given a short interval before the interdict takes effect. On a minute being lodged stating the plan they propose I shall remit it to a competent engineer to report on *quam primum*. If, on the other hand, the defenders wish to submit my judgment to the review of the Supreme Court, on their putting in a minute that they so desire, I will at once issue a final judgment so as to allow them the opportunity of applying to get the case heard before the Court rises on 20th July.

"I would only add that the precautions I have named, and which I understand are the usual precautions, are not necessarily the only possible precautions. That I leave to the defenders' ingenuity. All I can say at this stage is, that they are bound, in the words of the judgment in *Paterson* v. *Lindsay*, 13 R. 261, to take 'due precautions.'"

A minute having been lodged by the defenders stating that they were desirous of appealing to the Court of Session, the Sheriff on 26th June 1893 pronounced the following interlocutor:—"Recals the interdict granted on 13th June, and in lieu thereof interdicts the defenders from carrying on any blasting operations in the neighbourhood of Ardmay Cottage, in the parish of Arrochar, for the purpose of construction of the West Highland Railway, which may cause pieces of rock to reach said cottage, and decerns: Finds the defenders liable to the pursuer in expenses," &c.

The defenders appealed to the Court of Session, and argued—They were bound and willing to pay compensation for any damage they might do, but they were protected from interdict by the Railway Clauses Act 1845, under which the West Highland Railway Company—whose hand they were—were carrying out this undertaking. A proof had been led, which showed that the ordinary precaution of screens was impracticable. The Sheriff was in error in referring to "familiar experience." The locality here was very peculiar, quite unlike a quarry-face to which the evidence for the complainer applied. The complainer had failed to discharge the *onus* resting upon her of showing that they had failed to take reasonable and feasible precautions. Even if serious damage to this cottage was unfortunately inevitable, that was not to put a stop to the company's undertaking, although it would make them liable for compensation. There was "necessity" here in the sense of the 16th section of the Act.

Argued for respondent—The appellants were only protected from interdict if they were under the Act, and even if under the Act, only if they did as little damage as possible. The company would be interdicted if they acted negligently—*Biscoe* v. *Great Eastern Railway Company*, 1873, L.R., 16 Eq. 636. The damage here was not disputed, and it was for the appellants to show they had taken reasonable precautions—*Port-Glasgow and Newark Sailcloth Company* v. *Caledonian Railway Company*, March 15, 1892, 19 R. 608. She had proved that not only were no precautions taken, but that apparently the question of taking precautions had never been considered by those responsible for these dangerous operations. The appellants were not entitled to use operations necessarily dangerous to life and limb under cover of the Railway Acts. This was apparent from criminal indictments against railway contractors for culpable neglect of duty having been found relevant—Arkley, pp. 432 and 440. The appellants' witnesses did not say precautions were impossible, but only too expensive to be adopted. This was no answer. Saving of expense did not constitute "necessity" under the 16th section of the Railway Clauses Act—*Fenwick* v. *East London Railway Company*, 1875, L.R., 20 Eq. 544, Jessel, M.R., p. 549; *Pugh* v. *Golden Valley Railway Company*, 1879, 48 L.J. Chan. 666. She could not go on living in her house in danger of her life merely

because the railway company would pay compensation when the operations were over. She must have interdict, or means to enable her to live elsewhere.

At advising—

LORD PRESIDENT—There is no doubt that through the operations of the defenders damage to a serious extent is being done to this lady's property; but the answer is made to her otherwise undoubted right to interdict, that the defenders are protected by the 16th section of the Railway Clauses Consolidation Act. That section undoubtedly authorises operations of this kind, although the carrying of them out may cause damage to adjoining proprietors. But then such operations are subject to the condition that the railway company—and here I take it that the defenders are in the same position as the railway company—shall do as little damage as possible. Whether they are here doing as little damage as possible raises the question whether they have taken all reasonable precaution to guard against the damage which but for such precaution would inevitably follow. A proof has been taken, and undoubtedly the complainer must make out her case. But then she has shown that serious damage is being done, and it is the answer to her case which really raises the question before us, whether reasonable precautions to mitigate the damage have been taken or not. Now, in my opinion it is a most salient point that the defenders have not taken any steps to consider whether precautions to avoid the damage could be taken or not. They have put forward two gentlemen who occupy a very humble grade in the hierarchy of this organisation to say that nothing could be done, but conspicuous by his absence is the man who is responsible for the carrying out of these operations. Perhaps there is no such person. So much the worse for the defenders. They have clearly not brought themselves under the protection of the statute, because they have not shown that they have even dealt with the question of reasonable precautions. They do not seem to have considered that question at all. I therefore think the complainer is entitled to interdict unless proposals are immediately made which will remove her interest in insisting upon interdict. I propose that we allow the case to stand over until next week that the defenders may have an opportunity of submitting such proposals.

LORD ADAM—I agree.

LORD M'LAREN—I also agree. It is not disputed that the blasting operations carried on by the defenders would, apart from the authority of the statute, constitute a nuisance entitling the complainer to interdict. The Railway Clauses Act has been pleaded in defence, and especially section 16 of that Act. Now, it is a general principle applicable to such cases that where a statute authorises anything to be done, it also indemnifies the person or company against pecuniary liability for what may be the result of the operation, provided all reasonable means be taken to guard against such damage. That is an implied condition with reference to the working of a railway line as was found in the case of the *Port-Glasgow Sailcloth Company* v. *The Caledonian Railway*. As regards the construction of a line, the condition is not left to implication, but is dealt with in very precise terms in section 16 of the Railway Clauses Act. The company must show that they have satisfied the condition under which alone the power of performing what would otherwise be a nuisance is granted to them. I am not satisfied that the defenders have discharged this obligation, seeing that the only persons they put forward as witnesses are two persons in charge of this section who are themselves in some measure responsible for the method of working, and who are not able to say that any attempt has been made to take precautions against the occurrence of the damage complained of. Other clauses in the Act give the company power to take land compulsorily, and it has been suggested that temporary occupation should be taken of the land upon which these stones have been showered, subject to the usual condition that compensation be given for its use. I agree with your Lordships in thinking that time should be given to the defenders to meet the difficulty by some private agreement.

LORD KINNEAR—I am of the same opinion. It is quite clear that we could not interdict operations undertaken directly under the sanction of Parliament. But the Parliament has not prescribed the precise mode in which these operations are to be carried, although it has said that they shall be conducted with as little damage as possible to adjoining properties. It appears to be the case here that the property and even the personal safety of the neighbouring proprietor has been seriously affected, and it lies with the company to show that they considered the practicability of carrying on these operations without doing such damage, and to satisfy the Court by evidence that danger could not have been avoided by taking precautions.

I think they have failed to discharge that duty, because they have not put their superior officials into the witness-box, to satisfy the Court that the question of precaution was carefully considered. It rather appears that the question was never considered at all. I agree in thinking time should be granted to the company to consider what proposals they will make to the complainer.

The Court accordingly continued the cause.

The appellants subsequently lodged a minute, in which they stated "that without admitting liability, and without prejudice to their claims against the West Highland Railway Company, they offered as a condition of the interdict being withdrawn *ad interim*, and the operations complained of allowed to proceed, to make payment to the respondent

(pursuer) of all compensation which might be found due to her in respect of damage to her property, including compensation for temporary removal therefrom, should that be found necessary by the referee after mentioned by reason of the appellants' (defenders) operations, past as well as future, as the same may be assessed by a referee to be appointed by the Court."

Counsel for the pursuer having expressed their acquiescence in this proposal, the Court recalled the interim interdict and appointed Mr D. A. Stevenson, C.E., referee.

Counsel for the Pursuer and Respondent — M'Kechnie — Clyde. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for the Defenders and Appellants —H. Johnston—Dundas. Agents—Dundas & Wilson, C.S.

Saturday, July 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BLYTH *v.* PURDOM & SON.

Title to Sue—Process—Competency of Action Brought by Deceased's Children and Cautioner of Deceased's Executor-Dative against Persons who had Agreed to Relieve Cautioner.

In 1877 A died intestate leaving pupil children, B the brother of A was confirmed his executor-dative, and C became B's cautioner. By bond of relief D bound himself to free and relieve C of the whole obligations undertaken by him under the said bond of caution and of all claims under the same in any judicatory, and to account for the whole sums of money contained therein to anyone having interest, and to make payment of the same so as thereby to defend and free C from all suits and actions competent against him as cautioner.

In 1892, after B's death, A's children and C raised an action against D for a sum of money, in which they averred B at the date of his death was indebted to the executry estate. *Held* (*dub.* Lord Rutherfurd Clark) that the pursuers had a good title to sue, and that the action was competent.

In November 1892, James Blyth and George Gullan Blyth, the only children and next-of-kin of the deceased Robert Blyth, and Marcus J. Brown, S.S.C., Edinburgh, raised an action against Thomas Purdom & Son, Solicitors in Hawick, as the said firm existed at 22nd December 1892, and Robert Purdom, Solicitor in Hawick, as a partner of said firm and as an individual, and against the trustees of the deceased Thomas Purdom, the only other partner of the said firm, and also against James Blyth, only child of the deceased Walter Blyth, Whitriggs, Hawick, and his tutors and curators, if he any had, to have it declared that the said deceased Walter Blyth, as executor of the also deceased Robert Blyth, was at the date of his death due and indebted to the executry estate of the said Robert Blyth in the sum of £93, 4s., and that the said sum had never since his death been paid, but was still due and resting owing; and to decern the defenders Thomas Purdom & Son, and Robert Purdom, as a partner of the said firm and as an individual, and Thomas Purdom's trustees, to make payment to the pursuers of the sum of £93, 4s. sterling, with interest thereon at the rate of five per centum per annum from 23rd day of December 1892 till payment.

The pursuer averred—"(Cond. 1) The late Robert Blyth, draper in Musselburgh, died there intestate on or about 28th November 1877, and Walter Blyth, sometime farmer, Ettrickhall, near Selkirk, thereafter at Whitriggs, near Hawick, since deceased, was, upon an application at his instance, decerned executor-dative. Marcus John Brown, S.S.C., Edinburgh, became cautioner for the intromissions of the said Walter Blyth, as executor conform to bond of caution enacted in the Commissary Court Books at Edinburgh, to the amount of £597, 15s. 6d. (Cond. 2) Thereafter the said Walter Blyth entered upon the possession and management of the said estates. He instructed his then law-agents to attend to the realisation thereof, and to the payment of the claims against the estate. They did so, and after satisfying all the debts and paying the administration expenses, there remained in their hands a balance of £93, 4s. (Cond. 3) In or about the month of December 1882, being five years after the death of the said Robert Blyth, the said Walter Blyth applied to his said law-agents for payment of the said balance, with the view, as he stated, of applying the same towards payment of a bill for £300 or thereby which he and a Mr Inglis had signed, and which was then current or due and payable, and had been discounted by or through Messrs Thomas Purdom & Son, solicitors and bankers in Hawick. Upon Mr Brown making inquiries he found, and it is now averred, that the deceased Robert Blyth was not a party to, and was not liable under said bill. Having satisfied himself that neither the said bill nor any part thereof formed a claim against the estate of the said deceased Robert Blyth, his firm, as law-agents in the executry, and he as cautioner foresaid, objected to the payment out of the executry funds, and to the handing over of the foresaid balance with the view of its being applied in the manner proposed. (Cond. 4) The said Walter Blyth consulted the said Thomas Purdom & Son, who on his behalf wrote to Mr Brown demanding the money, and subsequently offered in exchange for payment to grant in favour of Mr Brown a bond of relief in respect of the obligations undertaken by him under the said bond of caution. This was agreed to, and accordingly the said firm of Thomas Purdom & Son as a firm, and Thomas Purdom and Robert Purdom, the individual