of these persons being prejudiced by anything we do now. The disposition was granted in 1842, and recorded in the Burgh Register of Glasgow, and whether a good prescriptive title can be made out or not, there has certainly been possession since that time contrary to the granter and his representatives, and therefore there seems very little practical probability of their being hurt by its tenor being now declared. I think we may give decree notwithstanding the unsatisfactory nature of the evidence as to the possibility of finding out who the representatives of the granters are.

LORD ADAM—The documents of which the tenor is sought to be proved are a disposition dated so far back as 1842, and the instrument of sasine following upon it, and the only adminicle produced is an extract from the Burgh Register of Glasgow of the sasine. Now, so far as the sasine whose tenor is sought to be proved is concerned, we have the very words of the original sasine, and there is no question therefore that the adminicle is sufficient for that deed. As regards the disposition, it stands in this position. According to the old form of a disposition all the clauses peculiar to the particular disposition in question are in the sasine which has been recorded, and it is only when we come to what I may call the clauses of style that we are told that these are added, not from any document bearing on this right, or because of anything peculiar to this deed, but merely according to the forms in use generally in similar cases. In this way a complete disposition is made out. It appears to me that that process is perfectly legitimate, I mean to add clauses in the way we are told that these were added, and, because I am satisfied that they are in the usual form then in use, I think that is sufficient. I am disposed therefore to think that the tenor of the disposition is also sufficiently proved. I further agree in what Lord Kinnear has said on the other points in the case.

I may add that I do not recollect that it has before been held sufficient to call the heir-at-law and representatives of the granters without naming them. In my opinion calling them in such terms is no better than not calling them at all, and I think the summons would have been just as well framed if they had not been called in these terms as defenders at all, and it had been stated in the condescendence that it had been impossible to ascertain who the heir-at-law and representatives were. I agree with Lord Kinnear that in these circumstances any judgment we pronounce will not be *res judicata* in a question with these persons.

LORD M'LAREN—The avowed object of this action is to set up a title by prescription to the heritable property in question; therefore it is quite right that the grounds of application and proof should be carefully examined. I should have thought that a great deal might be said for the view that there was already a prescriptive title, because although the charter is not extant, there are two sasines, the first of which is dated at a period greatly exceeding forty years, and the record of the sasine in the Burgh Register of Sasines at Glasgow is as good as the original unless challenged in a reduction improbation on the ground of forgery.

But no doubt the object in all these cases is to get a marketable title, and for the reasons given by Lord Kinnear I am of opinion that decree should be granted.

The LORD PRESIDENT concurred.

The Court granted decree in terms of the conclusions of the summons.

Counsel for the Pursuers — Alexander Taylor. Agents—T. & W. A. M'Laren, S.S.C.

Wednesday, January 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

NIVEN *v.* BURGH OF AYR.

Discharge—Probative Writ Declaring Loan Paid without Express Words of Discharge.

An action was raised by a creditor in a debenture bond against the debtor for payment of an instalment of the loan. The debtor founded upon an *ex facie* probative document, endorsed on the debenture, in these terms — "I, A B, in consideration of the sum of £100 now paid to me by C D [the debtor], being the balance of the contents of this debenture, and all interest due thereon, and I bind myself and my heirs, executors, and successors to warrant this discharge at all hands, and I have delivered up this mortgage to C D.—In witness whereof," &c. The debenture had, as matter of fact, been delivered up to C D.

Held (*rev.* judgment of Lord Stormonth Darling) that this document, being tantamount to a discharge, must be reduced before the pursuer could obtain decree in her action.

This was an action raised by Miss Agnes Niven, Ayr, against the Provost, Magistrates, and Council of Ayr, concluding for payment of £100, being part of the sum contained in a debenture for £400 granted by the defenders in favour of the pursuer and her sisters on 1st April 1890.

The defenders averred that the amount of the debenture had been repaid by them in instalments to Matthew M'Kissock, who acted on behalf of the pursuer, and with whom the pursuer admitted that the debenture and interest warrants had been lodged. The defenders also produced and founded on five receipts endorsed on the debenture, and dated respectively, 18th March 1892, 19th September 1892, 13th April 1893, 11th November 1893, and 15th May

1895. These receipts, with the exception of the third, all bore to be signed by Miss Niven, and to be duly tested. The third was signed by M. M'Kissock "for and on behalf of, and as authorised by the said Agnes Niven."

The last was in the following terms—"I, Agnes Niven, in consideration of the sum of £100 sterling now paid to me by the Provost, Magistrates, and Council of Ayr, being the balance of the contents of this debenture, and all interest due thereon, and I bind myself and my heirs, executors, and successors to warrant this discharge at all hands, and I have delivered up this mortgage to the said Provost, Magistrates, and Council.—In witness whereof, &c.

"A. NIVEN."

The debenture had as a matter of fact been delivered up to the Magistrates.

With reference to these receipts, the pursuer averred that in the first two and the last two the pursuer's signiture, as well as those of the witnesses, was a forgery, and with reference to the third she averred that no authority was ever given by her to M'Kissock to uplift any part of the principal of the debenture. "No part of the principal sums contained in the said debentures has ever been paid by the defenders to the pursuer or her sisters, or to anyone authorised by them, or any of them, to receive payment thereof on her or their behalf. M'Kissock had no authority to hand the debentures to the defenders, and the pursuer was not aware until he absconded that that had been done. The said sum of £100 alleged to have been paid to M'Kissock on 13th April 1893 is the sum sued for in this action. It is due and resting-owing to the pursuer under said debenture for £400. All claims for payment of the remainder of the sums contained in the said debentures are reserved. The defenders are called upon to lodge them in process."

The defenders pleaded, *inter alia*,—"3. The pursuer having granted to the defenders on 15th May 1895 a valid discharge for the £400 contained in the debenture of 1st May 1890, is bound to reduce said discharge before suing for payment of any part of the said £400."

On 30th November 1898 the Lord Ordinary (STORMONTH DARLING) repelled the third plea-in-law for the defenders, and allowed the parties a proof of their averments.

Opinion.—"The only question to be decided at this stage is that raised by the defenders' third plea-in-law, viz., Whether the pursuer is bound to reduce the so-called discharge of 15th May 1895, before suing for payment of any part of the sum of £400 contained in the debenture, No. 274. I repel that plea, because the writing in question is not a discharge. It has no discharging words. I shall therefore allow a proof."

The defender reclaimed, and argued—The Lord Ordinary was wrong. The document of 15th May 1895 was to all intents and purposes a discharge, and therefore must be reduced before the pursuer could proceed with her action. The defenders were entitled to have the whole matter disposed of at once, and not piecemeal as the pursuer seemed to threaten.

Argued for the pursuer—If the document of 15th May were truly a valid discharge, it must be reduced. But it was no such thing. It was not a conclusive and valid discharge; it contained no formal discharging words; at the most it was a piece of evidence; and therefore reduction was unnecessary—Shand's Practice, p. 640. The question at stake here was purely one of practice.

LORD PRESIDENT—I am unable to agree with the Lord Ordinary in the view which he takes of this document, which, in order to adopt a neutral term, I shall describe as the document printed last in the appendix.

The pursuer sues under these circumstances. She is not possessed of the document which gives rise to her claim. It is possessed by her debtor, and her debtor produces not only the bond but along with it the document printed last in the appendix. Now, that document is a probative writ under the hand of the pursuer, and while it does not contain express words of discharge, it is at all events a declaration under her hand that this lady has received all the money which is due to her under the bond, and that she has handed over the bond to her former debtor. Now, the document being probative, it seems to me to contain a complete acquittance of the liability under the bond. The Lord Ordinary says quite justly that it does not contain words of discharge, but at the same time it has the legal effect of a discharge, if a creditor acknowledges by a probative writing that she has received all that is due to her, and that the possession of the bond by the debtor is through her act in consequence of her having so received payment. It appears to me that such a document if not properly called a discharge has all the force and effect of a discharge, and accordingly that this action cannot proceed without this document being got out of the way. As Mr Guthrie has intimated that he proposes to bring a reduction, I think that the proper course will be to remit to the Lord Ordinary to sist procedure to allow of an action of that kind being brought.

LORD ADAM concurred.

LORD M'LAREN—I should have thought that as soon as it appeared that the defence was in part rested upon a probative deed bearing to be an extinction of the obligation on which the action was founded, the pursuer would at once put herself in a right position by repeating a summons of reduction. That would be a very simple and inexpensive proceeding, because it does not involve opening up the record, but merely serving the summons and lodging it in process. I think that is a necessary and proper step, even in the most advanced view of simplicity, for without a summons it is impossible that a decree can be given in favour of the pursuer upon that particu-

lar question. However, as your Lordships are content to leave this point open to consideration, I am willing that the case should go back to the Outer House.

LORD KINNEAR—I am entirely of the same opinion. I think a probative writ by which a creditor under her hand acknowledges to have received payment of her whole debt, and in respect thereof to have delivered her document of debt to her debtor, is in law a discharge. It may be described, as your Lordship has observed, by some other term. But that it is a discharge in law, and may be properly called a discharge, I cannot say that I entertain any doubt. But whether it is properly called a discharge or not, it clearly presents an obstacle to the pursuer's demand, and until that obstacle is swept away she cannot possibly recover payment of her money, for as long as this document stands that would mean that she is entitled to have her debt paid twice over.

The Court recalled the interlocutor of the Lord Ordinary, and "in respect the pursuer states her intention to bring a reduction of the deed dated 15th May 1895," remitted to the Lord Ordinary to sist process in order that this might be done.

Counsel for the Pursuer—Guthrie, Q.C. —Cook. Agents—Kinmont & Maxwell, W.S.

Counsel for the Defenders—Balfour, Q.C —Hunter. Agent—James Ayton, S.S.C.

Wednesday, January 18.

FIRST DIVISION.

KESSACK *v.* KESSACK.

Process — Jury Trial — Veritas — Order of Leading Evidence.

Ruling per Lord President that where *veritas* is pleaded by the defender in an action of damages for slander, the pursuer is entitled to reserve his whole evidence on the question of justification until the defender has closed his proof.

Expenses—Jury Trial—Veritas.

Where a defender in an action of damages for slander, in which several distinct issues are submitted to the jury, pleads *veritas* and fails on the counter issue, he will be found liable in expenses, even though the pursuer be unsuccessful on some of the issues.

This was an action of damages for slander raised by Robert Murdoch Kessack against Alexander Kessack. The damages were fixed at £1000.

The slander complained of was contained in a letter written by the defender to the pursuer on 9th July 1898. The following was the passage founded on by the pursuer:—"Perhaps you will answer me the following questions—Did you ever write to me when I was in Glasgow offering me £50 to set fire to the Princess Theatre, Leith, or have I dreamt it? Did you ever tell me that you set fire to the Black Bull Inn, Inverness? Did you ever tell me that you wrecked the schooner 'Cheviot?" Did you ever tell me that you stole a sheep while in Cromarty Frith with the schooner 'Cheviot?' I could ask you a few more questions, but I refrain from doing so meantime. You will of course understand that I do not say you did any of these deeds. I simply ask you the questions."

The pursuer averred that the said letter was intended to represent that the pursuer had invited the defender to commit fire-raising, and that the pursuer had been guilty of fire-raising and other crimes. The pursuer also averred that on 11th January 1898 the defender had produced a copy of the letter, and read it over to a third party.

The defender averred that the pursuer had committed the crimes referred to in the letter, and, *inter alia*, pleaded *veritas*.

The following issue and counter-issues were adjusted:—"1. Whether on or about 9th July 1898 the defender wrote and sent to the pursuer a letter in the terms contained in the schedule hereto annexed, and whether the said letter is of and concerning the pursuer, and falsely and calumniously represents, and was intended by the defender to represent, that the pursuer had incited the defender to commit the crime of wilful fire-raising, and that the pursuer had admitted to the defender that he had been guilty of the crimes of wilful fire-raising, and of wilful destruction of a ship, and of theft, or of one or more of them? Or (1) Whether in or about the month of February 1888 the pursuer offered the defender a sum of money to set fire to the Princess Theatre, Leith? (2) Whether in or about the month of March 1884 the pursuer told defender that he had set fire to the Black Bull Inn, Inverness? (3) Whether in or about the month of April 1877 the pursuer told defender that he had wrecked the schooner 'Cheviot' in the Cromarty Firth? (4) Whether in or about the month of April 1876 the pursuer told defender that he stole a sheep when he was with the schooner 'Cheviot' in the Cromarty Firth?" There was also a second issue, with counter-issues, as to the reading of the letter by the defender to a third party.

At the commencement of the trial on 30th December the pursuer intimated that he proposed, subject to the approval of his Lordship, to prove merely the publication of the slander to begin with. He suggested that thereafter the defender should lead evidence in support of his counter-issue, and that then the pursuer should adduce evidence to meet the defender's substantive case—*Scott* v. *M'Gavin and Others*, June 25, 1821, 2 Murray, 484, *per* Lord Chief Commissioner Adam, 489.

The defender objected to the course proposed, and maintained that it was contrary to the usual practice.

The LORD PRESIDENT allowed the pursuer to follow the procedure suggested by him, but reminded him that the evidence he led