"If," said his Lordship, "a manufacturer is found to have spent a capital sum, greater or less, in erecting or buying a mill or other manufactory, it may, I think, be fairly presumed that he has done so taking into account all the advantages and disadvantages of the site, and that weighing everything he has seen his way to obtain an annual return commensurate with the capital which he expends."

No doubt considerations such as those to which I have been referring must be resorted to in the fixing of a fair rent with discrimination, and speaking generally, in a case of this kind only when there is no more satisfactory mode of determining the rent, but in the present case I do not think that in the circumstances the Valuation Committee can be said to have erred either because they had regard to the recent transactions of the letting and sale of the subject of valuation, or because they used the information so obtained towards the determining of the rent which it was their duty to fix. They explain that the appellant in the evidence adduced for him "had not given any good reason why the yearly value of the subject in question should be reduced below the rent hitherto paid by him for many years and entered in the valuation rolls of the county for the past twenty-one years, and which rent in the absence of contrary evidence, and in view of the purchase price paid by the appellant, must be taken to be the yearly rent or value which the subject might be reasonably expected to let from year to year."

On the whole I have come to these conclusions—That so far as appears the Valuation Committee have not erred in any matter of principle, that no sufficient reason has been shown for interfering with their decision upon the facts, and that accordingly the appeal ought to be dismissed.

LORD HUNTER concurred.

The Court were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellant—MacRobert, K.C. — Cooper. Agents — Macpherson & Mackay, W.S.

Counsel for the Assessor—D. P. Fleming, K.C. — Normand. Agents — Mackenzie & Kermack, W.S.

COURT OF SESSION.

Friday, January 11.

FIRST DIVISION.

[Lord Constable, Ordinary.

ACCOUNTANT OF COURT *v.* WALLACE'S CURATOR.

Process—Decree ad factum præstandum—Refusal to Implement Order of Court to Discharge Bond and Disposition in Security in Terms of Joint-Minute—Authority to Clerk of Court to Sign and Deliver Deed.

A claimant in an action of multiplepoinding, who held a bond over heritable property the price of which formed the fund *in medio*, agreed by joint-minute, to which the Lord Ordinary interponed authority, to discharge the bond. He subsequently refused to sign and deliver the discharge. The balance of the fund *in medio* was not sufficient to meet the expense of the ordinary judicial procedure for clearing the title. On the Lord Ordinary reporting the case verbally to the Court, the Court on production of a written acceptance by the purchasers of the heritable property of the sufficiency of discharges signed by the Clerk of Court to clear their title, *authorised* the Clerk of Court to sign and deliver the discharge in place of the bondholder.

James Walker Inglis, Accountant of Court, *pursuer and nominal raiser*, brought an action of multiplepoinding against Charles Williamson, Chartered Accountant, Aberdeen, *curator bonis* of Marian Jane Wallace, *real raiser*, Elizabeth Smith Wallace, whose address was unknown, Edith Evans Wallace, and others, including Robert Smith Wallace, insurance inspector, Aberdeen, *defenders*.

The following narrative of the circumstances of the case is taken from the opinion of the Lord Ordinary (CONSTABLE) annexed to an interlocutor of 5th April 1923:—"The fund *in medio* in this case consists of the balance of the price of two houses which belonged to three sisters in equal *pro indiviso* shares, and were sold by order of the Court in an action of division and sale, the proceeds being deposited in bank in name of the Accountant of Court. The net amount consigned is £1319. Claims on the fund have been lodged for two of the sisters who were beneficially interested in the property—Miss Marian Wallace and Miss Edith Wallace. Miss Marian Wallace, who has been *incapax* for many years, is represented by a *curator bonis*. No claim has been lodged for the third sister Miss Elizabeth Wallace, whose present address is not known. Claims for a preferential ranking have also been lodged for various creditors, including the superior for arrears of feu-duty, a firm of law agents who assert a lien over the titles, and Robert Smith Wallace, a brother of the owners, who held two bonds over the properties and who claims payment of the principal sums due thereunder and arrears of interest thereon, and repayment of disbursements for feu-duty, rates, and income tax in respect of the property. There are also various riding claims, including claims by the Aberdeen Town Council and Aberdeen Parish Council for arrears of rates and assessments. The principal question discussed before me was the relevancy of the averments made by the *curator bonis* of Miss Marian Wallace with regard to the claim of Robert Wallace. Before considering these averments it will be convenient to give a short account of the history of the property. It belonged to the mother of the recent owners, and on her death in 1893 it was liferented by her husband, who died in 1908. One of the

houses, No. 47 Waverley Place, was occupied by Mr Wallace senior and his family, and after his death his family remained in occupation. In 1909 Miss Marian Wallace was removed to an asylum, and thereafter Robert Wallace and Miss Edith Wallace continued to occupy the house until they were ejected in 1922 after the judicial sale of the property. The other house, No. 49 Waverley Place, was apparently never let. In May 1907 Robert Wallace acquired right to two bonds over the property for £350 and £200 respectively, and he now claims interest thereon from Whitsunday 1909 to Martinmas 1922, amounting to £371. He also claims that he paid feu-duty and rates and assessments in respect of the properties from 1908 to 1915, and income tax in respect thereof from 1908 to 1916, amounting in all to £204, of which £55 represent occupiers' rates. It appears from the claims for the superior, the Town Council, and the Parish Council that no feu-duty or parish rates have been paid since 1915 and no burgh assessments since 1916. The *curator bonis* to Miss Marian Wallace says that on his appointment in 1918 he found that the property had been neglected, that no attempt was being made to let the vacant house, and that the superior was threatening to irritate the feu. He accordingly deemed it necessary in the interests of the ward to raise an action of division and sale, under which the property was at length realised. The net result is that after occupying along with his sister one of the houses for fourteen years and allowing the other house to remain unlet, Robert Wallace now comes forward with an accumulated claim for arrears of interest and disbursements in which no credit is given for any benefit or return received from the property during the period, and which will sweep up nearly the whole net proceeds which have now been realised from it. The circumstances seem to call for the closest scrutiny of the claim in the interest of the ward. Miss Edith Wallace takes no exception to the claim, and is indeed represented by the same agents and counsel as her brother. It appears from the articles of roup in the action of division and sale that the property was sold free of incumbrances. In these circumstances the *curator bonis* does not dispute that subject to the qualifications after mentioned Robert Wallace has a preferential claim for the principal and interest due under his bonds. But in the first place it was admitted by counsel for Robert Wallace at the hearing, though it is not admitted in the pleadings, that the claim is subject to deduction of the claim No. 13 in the printed record, which is founded on an adjudication of the bond for £350 [at the instance of James Parker Niven, solicitor, Edinburgh]. In the next place the *curator bonis* maintains that the claim is subject to deduction of rents received, or that ought to have been received, by Robert Wallace from the property and of loss caused by him on the realisation thereof. The pleas to this effect are founded on the following averments :—It is said that after acquiring the two bonds over the property Robert Wallace took possession of and managed and controlled the same. In June 1908, before the death of Mr Wallace senior, his curator proposed to let 49 Waverley Place and put up a notice-board for that purpose, but the notice was twice removed by Robert Wallace, who was thereupon interdicted from doing so. Notwithstanding the interdict he thereafter removed a third notice-board which was erected and was fined for breach of interdict. Shortly thereafter it is said Mr Wallace senior died, and Robert Wallace was left in undisputed control and management of the property. He and his sister Edith Wallace continued to occupy the house No. 47 Waverley Place, and No. 49, though it could have been easily let at a rental of £40 or thereby, was allowed to stand empty and to fall into decay. When the action of division and sale was raised he and his sister though they lodged no defences deliberately and persistently obstructed the proceedings by refusing to allow the reporter and intending purchasers access to the houses notwithstanding repeated orders of the Court to do so, and by placarding the houses with notices that the sale was against the wishes of the proprietors and bondholder. The obstruction to the inspection of No. 49 Waverley Place was obviated by an order from the Court to break into it and substitute a new lock and key, but the consequences of the illegal resistance to the inspection of No. 47 Waverley Place was that the house had to be sold without inspection, and though equal in value to the other house it realised £350 less. In consequence of these actings the Lord Ordinary in dealing with the expenses of the action of division and sale found that part thereof, amounting to £80, was incurred by Miss Edith Wallace's failure to comply with the orders of the Court, and ordered that amount to be debited exclusively against her share of the proceeds."

The action was ultimately settled by joint-minute to which the Lord Ordinary interponed authority on 18th and 20th July 1923. By the fifth clause of the joint-minute it was provided — "That Robert S. Wallace and James P. Niven shall execute and deliver to the real raiser discharges in common form for the amounts of their respective interest in the bonds for £350 and £200 referred to in their claims . . . and that the expenses of the execution of the said discharges as taxed shall be ranked on and be payable out of the fund *in medio* in priority to the said £600. If Robert S. Wallace does not sign and deliver such discharges, then the £600 payable under head four hereof shall be charged, *secundo loco*, with the expenses as taxed incurred by claimant the *curator bonis* in clearing the record of the said bonds to the extent such expense is referable to such failure of the said Robert S. Wallace to sign and deliver such discharges."

On 16th November 1923 the Lord Ordinary having been informed at the bar that Robert Smith Wallace refused to sign and deliver discharges of the bonds, ordained him to do so within six days. This order was duly

served upon Robert Smith Wallace but he failed to obtemper it. On 14th December the Lord Ordinary appointed the agent for the real raiser to intimate to Robert Smith Wallace his Lordship's intention on 19th December 1923 to report to the First Division his failure to obtemper the order.

On 19th December 1923 the Lord Ordinary reported the case verbally to the First Division, and expressed the opinion that in view of Robert Smith Wallace's persistent refusal to obtemper the orders of the Court authority should be granted to the Clerk of Court to sign the discharge in his place. His Lordship stated that he had accordingly reported the case in order that the Court might, if so advised, grant the authority in the exercise of its *nobile officium*, it being in his opinion beyond his powers to grant such authority. He pointed out that the fund *in medio* was the price of property sold under the orders of the Court, that it had been consigned in the hands of an officer of the Court, and that the Court was therefore under a duty to see that no obstacle was put in the way of the purchasers getting a clear title. He further pointed out that the share of the fund falling to Robert Smith Wallace would not be sufficient security for the expenses of an action of declarator to clear the title. His Lordship referred to the following authorities:—Graham Stewart on Diligence, pp. 231 and 847; *Sinclair* v. *Staples*, 1860, 22 D. 600, *per* Lord Cowan at p. 606; the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), sec. 18; *Whyte* v. *Whyte*, 1913, 2 S.L.T. 85; *Ruthven* v. *Ruthven*, 1905, 43 S.L.R. 11; *Hendry's Trustees* v. *Hendry* (where an order was pronounced though the case is not reported on this point), 1916, 53 S.L.R. 757, at p. 760. Counsel for the real raiser moved the Court to grant authority to the Clerk of Court to sign the discharge, and referred to the following authorities:—*Guthrie* v. *Chrystal, Irvine, & Duncan*, 26th November 1913 (unreported), where the Clerk of Court was authorised to sign transfers of shares which a company was ordained to register, and Scots Style Book, vol. iv, p. 452. No appearance was made for Robert Smith Wallace.

At advising—

LORD PRESIDENT (CLYDE)—The question which arises on Lord Constable's report has reference to the terms of a joint-minute in an action of multiplepoinding. The fund *in medio* consisted of the consigned price of certain property which had been sold in a process of division and sale; and one of the terms of the joint-minute was that the amount of two bonds which constituted burdens on the property should be ranked on the fund, and on the other hand that the two bonds in question should be discharged by the bondholders in whose favour the ranking referred to was made. The difficulty which has arisen is caused by the obstinate refusal of one of the bondholders to carry out his obligation to sign a discharge. The joint-minute itself was the subject of the interposition of judicial authority, and the refusal of the recalcitrant bondholder to implement its terms is therefore at once a breach of his obligation under the joint-minute and a defiance of the order of the Court which followed upon it. The question is whether the refusal of the bondholder to grant the discharge can and ought to be overcome by giving authority to the Clerk of Court to sign it.

The question is not the same as that which has not infrequently arisen in the Outer House in connection with the arrestment of shares or the arrestment of a ship (see *Sinclair* v. *Staples*, 1860, 22 D. 600, *per* Lord Cowan, at pp. 605, 606; Stewart on Diligence, p. 231); and it was therefore proper for the Lord Ordinary, instead of disposing of the matter himself, to report the case to the Division, whose powers in a matter of this kind are wider than those available in the Outer House.

There is no doubt that an intervention such as is now proposed is not in the circumstances of the present case the only means of carrying the joint-minute as judicially authorised into effect, for there are well-known forms of legal procedure by resort to which it would be possible to clear the property of the bonds. Furthermore, such an intervention is not admissible without due regard to the fact that the purchasers of the property—who are not parties to the multiplepoinding or to the joint-minute—have an interest (in the matter of the title by which they are to acquire the property) which might be prejudicially affected—or at least not satisfied—by a discharge of the bonds granted in the manner proposed. Now as regards the first point, it has been explained to us—and it is indeed clear from the circumstances of the case—that there is not available from the balance of the fund *in medio* which still remains, or from the interests therein of any of the parties concerned who could be asked to bear the burden of resorting to the ordinary judicial procedure, funds sufficient to make resort to that procedure a practicable course. It would have been the natural thing to put the burden of the expense of clearing the title and discharging the bonds upon the person who is recalcitrant—indeed the joint-minute contains a clause to that effect—and if the value of the ranking given him had been such as to meet the expense, that would have been the proper course. But the balance of the fund *in medio* available to satisfy that ranking (along with the rest) is too small for the purpose, and there is no prospect of recovering those expenses otherwise than out of the recalcitrant person's share of the fund *in medio*. In these circumstances it seems to me that we are justified in using our powers to carry into effect a joint-minute which has had judicial authority interponed to it and represents the decree of the Court, and to prevent it from being annulled or defied by the obstinacy of one of the parties to it. With regard to the second point, it is necessary I think to make sure that no difficulty will arise in connection with the division and sale and the rights of the purchasers thereunder to get a proper title. Accordingly before we

send the case back to the Lord Ordinary with authority to allow the Clerk of Court to sign the discharges, we must have before us in writing evidence that the purchasers in the division and sale are willing to accept a discharge of the bonds by the Clerk under the authority of this Court as sufficient to clear this title. That will mean not merely a letter bearing their authority and approving generally of such a discharge, but it must bear direct relation to a draft revised on their behalf. Further, it will be necessary that the discharge itself shall be approved by the Lord Ordinary when the case goes back to him.

LORD CULLEN—I concur.

LORD SKERRINGTON—I concur.

LORD SANDS—I also concur.

Letters written by or on behalf of the purchasers in accordance with the requirements stated by the Lord President having been lodged, the Court pronounced this interlocutor:—

"... In view of the intimation to said claimant of the intention of the Lord Ordinary to report the matter to this Division on said 19th December last, and of there being no appearance by him or on his behalf on said date, and having also seen and considered the holograph letters ... written by or on behalf of the purchasers of the subjects Nos. 47 and 49 Waverley Place, Aberdeen, agreeing to accept such discharge ... if signed by the Clerk of Court on his being specially authorised by the Court to sign the same as being valid and sufficient to all intents and purposes as if the same had been executed and delivered by the said Robert Smith Wallace himself, Authorise and empower John Cairns, Depute-Clerk of Session, to sign the said discharge in place of the said Robert Smith Wallace, and to deliver the same to the agent of the real raiser and decern: Find the claimant and real raiser Charles Williamson (Marian J. Wallace's curator) entitled in terms of article 5 of the joint-minute... to the expenses incurred by him in consequence of the said Robert Smith Wallace's failure to sign the said discharge out of the sum of £600 sterling mentioned in article 3 of said joint-minute ..."

Counsel for the Real Raiser—J. A. Christie—W. A. Murray. Agent—James P. Niven, S.S.C.

Saturday, January 26.

FIRST DIVISION.

INLAND REVENUE *v.* WEMYSS.

Revenue—Super Tax—Assessment—Income Arising from Ownership—Income Arising from Occupation—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *secs.* 5 (1), 19, *and* 27 (1)—*Conditional Occupation, subject to Discretion of Trustees of Trust Property, by Beneficiary Liferenter.*

A testator directed his trustees to maintain and keep in repair his residence and its appurtenances, and not to let them unless in their opinion it should become necessary and expedient to do so, and that so long as they deemed it expedient to retain them in their own hands unlet, the house and appurtenances were to be occupied by his widow (his second wife) while she survived, or until she should relinquish her right of occupancy in favour of the testator's son, which she was given full discretion to do on the son attaining twenty-five years of age. On her death or on her relinquishing the occupation the trustees were to hold the property in trust for the "liferent use" of the son so long as his mother (the testator's first and divorced wife) remained alive, the son to have the right to occupy it so long as the trustees found it expedient to retain it in their own hands unlet. In the event of the son allowing his mother (the testator's first wife) to live on the estate the trustees were to cease to allow him the liferent. The trust was to continue until the trustees had been able to reduce the debts affecting the testator's estate to a certain sum. The testator's widow relinquished her liferent and the son occupied the properties in terms of the trust throughout the financial year ending 5th April 1920. *Held* that in these circumstances the son had a merely personal privilege of residence, and must be considered to have no income in the sense of the Income Tax Acts in respect of said subjects, and accordingly that the annual value of the mansion-house, offices, policies, and shootings did not form part of the income of the son for the purposes of super tax.

Revenue—Super Tax—Marriage-Contract Trust—Income of Beneficiary—Beneficiary Entitled to Income from Shares up to Limited Amount—Surplus Income Applied to Pay off Charges on Trust Estate, thereby Increasing Value of Provisions.

By his antenuptial marriage contract a husband who was vested under his father's settlement in a reversionary right to shares which were burdened with certain charges, one of which had been created by himself, conveyed his whole right in the shares to the marriage-contract trustees, subject to a