years. It appears that the pursuer wished after his father's death to induce his mother Lady Riddell to abate her provision of £1000 a-year. For this purpose a memorandum was prepared by Mr Barstow on the part of and with the knowledge of the pursuer; and in that "memorandum of rental and burdens," immediately following "Lady Riddell's jointure £1000," is "Mrs Cunliffe—interest of £6000, at 9 per cent., £240." This view of the "burdens" was intended to induce, and actually did induce, Lady Riddell to relieve the pursuer by abating £400 a-year of her provision. I cannot for a moment imagine that either Mr Barstow or the pursuer intended to deceive Lady Riddell into compliance by representing as a burden what they knew was not a burden. On the contrary I am satisfied that they believed the £6000 to be really a burden, as being a good provision to Mrs Cunliffe, well secured on the estate by the new entail. Therefore if the first and most extreme view stated by Mr Mackenzie is put aside as untenable, as I think it ought to be, there is in the conduct of the parties and the nature and circumstances of the procedure enough to show that the clause giving power to make provision to the extent of £6000 was fairly and effectually introduced into the new entail. But a second question arises. The deed complained of here is a marriage-contract, a deed of a peculiarly onerous character. At the date of this contract the former entail was at an end, and the estate stood on the investiture under this deed of entail. The marriage-contract, with the provision for the daughter of Sir James Riddell of £6000, was not in contravention of that entail. Nay, more, it was in accordance with its intent and its provisions. I am quite satisfied of the *bona fides* of the marriage-contract trustees and of Mr and Mrs Cunliffe. They were parties to this mutual contract, they accepted the provision, and became onerous creditors in the obligation, holders of a feudalised security. On what ground can that provision for a child, granted under circumstances which render it especially onerous, be reduced? Is it because the estate was entailed? Nay, but the entail permits it. The entail does not fetter beyond the prohibitions, and this provision is not prohibited. I say nothing in regard to a case of fraud or *mala fides* such as has been in the argument supposed. These defenders were in *bona fides*, and they are onerous creditors. It is not justice to their case even to illustrate it by putting the case of fraud or *mala fides*. There is nothing of the kind here. Accordingly I am, apart from the separate question in regard to the entail, of opinion that the provision of £6000 in the marriage-contract of Mr and Mrs Cunliffe cannot be reduced on the grounds here stated, and thus the defenders, who alone have appeared, ought to be assoilzied.

The Court recalled the Lord Ordinary's interlocutor, and in place thereof assoilzied the defenders who had appeared, with expenses; and in respect the pursuer did not insist on any judgment in regard to the absent heirs of entail, dismissed the action *quoad* them.

Agents for Pursuer—Hamilton & Kinnear, W.S.
Agents for Defenders—Hope & Mackay, W.S.

SECOND DIVISION.

PETITION—SCOTT.

Process — Divorce — Oath of Calumny. Circumstances in which the Court remitted to a commissioner to take a pursuer's oath of calumny in an action of divorce before the summons was called.

The petitioner, who was a sailor, brought a divorce against his wife. The action was not yet called in Court. He was about to proceed on a voyage which was likely to be of one year's duration, and would accordingly not be in the country when his oath of calumny would fall to be taken. In these circumstances he craved the Court to allow the oath to be taken during vacation before the Lord Ordinary on the Bills, or to appoint a commissioner before whom it might be taken, the deposition to lie *in retentis* until the case was duly called and enrolled.

J. A. CRICHTON supported the prayer of the petition, and relied on the cases of A. B. *v* C. D., 16 S. 1143, and Potts, 2 D. 248, as authorities in respect of which it should be granted.

At advising—

The LORD JUSTICE-CLERK—There are two objections to the taking of this oath of calumny in the manner proposed—(1) that it is premature; and (2) that it is proposed to take it before some other person than the Lord Ordinary in the divorce process. Now, as to the second objection, the case reported in the 16th vol. of Shaw is a good authority, because there the objection was taken that the 36th section of the Act provides that the Lord Ordinary shall administer the oath of calumny, but notwithstanding the Court granted a commission, the party being resident in India. The other objection is that the proposed step is premature, the case not being in shape according to statute. But there is authority in the case of Potts for that also. No doubt the oath was there taken before the Lord Ordinary who was to be the Lord Ordinary in the divorce process, but it might readily have been otherwise. Taking these authorities together, I think we may grant a commission to take this oath that it may lie *in retentis* until the action is called before the Lord Ordinary, due notice being first given to the defender, and proof that such has been given produced before the commissioner.

The other Judges concurred.

The Court accordingly appointed a commissioner in terms of the prayer of the petition.

Agents for Petitioner—Webster & Sprott, S.S.C.

Thursday, July 12.

MACVICAR *v.* THE HERITORS OF MANOR.

Teinds—Minute of Surrender—Decree of Valuation. A surrender of teinds by an heritor in a process of locality refused to be sustained in respect the amount of his teinds was not ascertained by the decree of valuation on which he founded, and could not be ascertained without a process of division.

This is a question in a process of augmentation and locality at the instance of the minister of the parish of Manor against the heritors of the parish. In the process Mr Tweedie of Quarter made the following condescendence and surrender:—

1. The condescender, the said James Tweedie, is heritable proprietor of the lands of Hallmeadow, town of Manor, Glenrath, Hallmanor, Castlehill, Welshhouses, and mill lands of Manor, lying in the said parish of Manor, together with the teinds, parsonage and vicarage thereof, conform to—(1) Extract registered disposition and assignation by the trustees of his father the late Thomas

Tweedie of Quarter in his favour, dated 17th November, and registered in the Books of Council and Session 3d December 1856; and (2) instrument of sasine following thereon in his favour recorded in the General Register of Sasines at Edinburgh 3d December 1856.

2. By decreet of valuation at the instance of James Burnet of Barns against the Earl of March and the ministers of the parishes of Peebles and Manor, dated 16th July 1729, No. 36 of the present process, the teinds of the said lands belonging to the condescender, along with the teinds of the lands of Barns, Hasswellsykes, Over Glack, and others, now belonging to William Alexander Forrester, Esq,, of Barns, and of the lands of Woodgrievington, and two-third parts of Bonningtoun, in the parish of Peebles, now belonging to Sir Adam Hay of Haystoun, Bart., were valued as follows, viz. :—

	Money. £ s. d.	Victual, Meal. B. F. P. L.
1. The lands of Barns, Hasswellsykes, two-thirds of Over Glack, and one-quarter of Woodhouse, the lands of Hallmeadow, Templehouse, Town of Manor, Bonningtoun, Woodgrievington	306 10 8	1 2 1 2
2. Glenrath	186 13 4	...
3. Hallmanor	106 13 4	...
4. Castlehill and Welshhouses	73 6 8	3 0 3 0
5. Mill Lands of Manor	...	3 0 3 0
	673 4 0	4 3 0 3
Deduct for Woodgrievington and two-thirds of Bonningtoun, in the parish of Peebles	96 11 1	1 2 1 2
Scots,	576 12 11	3 0 3 0
Sterling,	48 1 0	3 0 3 0

By minute of agreement dated 24th December 1838, entered into by the condescender's father the said Thomas Tweedie, the said William Alexander Forrester, and their author, this valued teind was divided as follows :—

	Money. £ s. d.	Victual, Meal. B. F. P. L.
Mr Forrester's lands,	13 2 9	0 0 0 0
Mr Tweedie's lands,	34 18 3	3 0 3 0
	48 1 0	3 0 3 0

3. By decree of locality of the stipend to the minister of the said parish of Manor in 1806, the portion thereof allocated upon the said lands now belonging to the condescender Mr Tweedie and Mr William Alexander Forrester, and then belonging to their predecessor Mr Burnet of Barns,

	Money Stg. £ s. d.	Meal. B. F. P. L.	Barley. B. F. P. L.
was,	27 13 5	10 1 1 1	10 1 1 1

By the minute of agreement mentioned in the preceding article, this stipend was divided as follows :—

	£ s. d.	B. F. P. L.	B. F. P. L.
Mr Forrester's lands,	13 2 9	0 0 0 0	0 0 0 0
Mr Tweedie's lands,	14 10 8	10 1 1 1	10 1 1 1
	27 13 5	10 1 1 1	10 1 1 1

4. The valued teind of the condescender's lands as mentioned in article second is—

	£ s. d.
Money sterling,	34 18 3
Meal, 3 b. of, 3 p. at average of fiars prices, @ 17s. 10d. 11-12ths p. boll,	2 14 10
	37 13 1

The stipend as mentioned in the preceding article is—

	£ s. d.	
Money,	14 10 8	
Meal, 10 b. 1 f. 1 p. 1 l. @ 17s. 10d. 11-12ths p. boll,	9 4 11	
Barley, 10 b. 1 f. 1 p. 1 l., or 7 qr. 4 b. 0 pt. 1 g. @ 32s. 3d. per qr.	12 1 11	
		35 17 6
Surplus teind,		1 15 7

Which surplus teind is liable to be exhausted in the event of a slight rise in the fiars prices.

SURRENDER.

The condescender is willing to surrender, and now hereby surrenders, to the minister the valued teinds above specified of his lands in the parish, and protests that he shall not be liable for any share of expenses to be incurred in the locality.

The Lord Ordinary (Barcaple) approved of the minute of division and the surrender for Mr Tweedie.

The minister reclaimed.

BALFOUR (MILLAR with him) argued for the minister that the proposed surrender could not be sustained. By the decree of valuation founded on, the teinds of lands in two separate parishes,

Peebles and Manor, and of lands in the latter parish belonging to different proprietors, were valued *in cumulo*. The amount of the *cumulo* valuation effeiring respectively to the lands in the parishes of Peebles and Manor, and to the different parcels of land in the latter parish, had not been ascertained by any degree of division, or fixed by any deed binding upon all parties interested. In order to bring out the amount of teind proposed to be surrendered Mr Tweedie, in the first place, allocated a certain amount of the *cumulo* valuation upon the lands in Peebles, and then allocated the remainder upon lands in Manor alleged to belong to him and Mr Forrester respectively. Both these allocations were unwarranted, and the latter was erroneous in respect that by the minute of agreement upon which it proceeded a portion of the *cumulo* valuation was allocated upon lands which the minister maintained were not included in the valuation. The amount of teind proposed to be surrendered had thus not been ascertained by any competent process to be, and in point of fact it was not, the true amount effeiring to Mr Tweedie's lands mentioned in the decree of valuation. Further, the effect of approving of the minute of agreement and sustaining the surrender, as the Lord Ordinary had done, would or might be to prejudice the pleas of the minister with respect to the lands which he maintained to be unvalued.

CLARK (with him LEE), for the heritor, argued that by the minute of surrender Mr Tweedie surrendered his valued teind, whatever the amount of that might be, and that no question as to whether certain lands were or were not valued could be prejudiced by the surrender being sustained. Further, the allocation of the *cumulo* valuation set out in the minute was correct, and was arrived at upon *data* furnished by the decree of valuation. The decree contained a narrative of the proof led as to the value of the several parcels of land, the teinds of which were valued *in cumulo*, and the proportion of the *cumulo* valuation effeiring to each parcel of land was ascertained by taking one-fifth of the proved value of such parcel, and making allowance for the proportion of certain cot houses estimated as effeiring thereto.

The Court intimated an opinion that the proposed surrender could not be sustained, and continued the case till a future day in order that Mr Tweedie might have an opportunity of lodging a minute of surrender in such different terms as might obviate the objections to the minute then before the Court.

Mr Tweedie accordingly lodged a minute of surrender, making no mention of the minute of agreement, but simply narrating his titles to the lands and the decree of valuation, surrendering in general terms the valued teinds of his lands, and protesting that neither he nor his successors should be liable for any expense that might be incurred in the present or any future process of locality.

Counsel for the minister objected to the minute that it did not show the amount of teind surrendered, that it was incompetent to surrender an unascertained amount of teind, and that the result of sustaining the surrender now proposed would be to leave the minister to litigate at his own expense all the questions which might arise either with the parish of Peebles or with the other heritors of Manor as to the allocation of the *cumulo* valuation.

Counsel for Mr Tweedie argued that a heritor is entitled to surrender upon a *cumulo* valuation, leaving it to the minister to ascertain the amount of teind so surrendered; but the Court refused to adopt this view, and pronounced an interlocutor whereby they "recal the interlocutor reclaimed against, and in respect the amount of the heritor's teind is not ascertained by the decree of valuation founded on, and cannot be ascertained without a process of division of the *cumulo* valuation contained in the said decree of valuation, refuse to sustain the surrender and decern; and find the minister entitled to expenses since the date of the Lord Ordinary's interlocutor."

Agents for Minister—W. H. & W. J. Sands, W.S.

Agents for Mr Tweedie—Mackenzie & Kermack, W.S.

BILL CHAMBER.

(Before Lord Benholme.)

APPEAL—CUNNINGHAMS *v.* KNOX.

Bankruptcy — Vouching of Creditor's Claim. A trustee having admitted a claim insufficiently vouched, a remit made to him on appeal to require further evidence of it.

The estates of T. H. Simpson were sequestrated on 26th September 1865, and James Knox, the respondent, was elected trustee. Robert Hunter, an uncle of the bankrupt, claimed as a creditor to the extent of £816, 14s. 4d., which sum was made up of £779, 19s., being the amount of a bill dated in 1863, and interest due thereon, and the amount of an open account. He produced no other vouchers of his claim than the bill and the account. The trustee admitted the claim.

J. & J. Cunningham, creditors of the bankrupt, appealed against the trustee's deliverance, founding upon sections 49, 50, and 126 of the Bankruptcy (Scotland) Act 1856.

The Lord Ordinary on the Bills, having ordered a record to be made up and closed, pronounced the following interlocutor, which has become final:—

Edinburgh, 4th April 1866.—The Lord Ordinary having heard counsel for the parties, and considered the closed record, recals *in hoc statu* the deliverance of the trustee appealed against, and remits to the trustee to allow the claimant to produce additional evidence in support of his claim, and to proceed thereon as shall seem just: Finds the respondent liable in expenses, and remits to the auditor to tax and report.

(Signed) H. J. ROBERTSON.

Counsel for Appellants—Alex. Moncrieff. Agents—White-Millar & Robson, S.S.C.

Counsel for Claimant—W. M. Thomson. Agent—Robert Finlay, S.S.C.

(Before Lord Mure.)

APPEAL—CUNNINGHAMS *v.* KNOX.

Bankruptcy—Vouching of Creditor's Claim. A trustee having admitted a claim insufficiently vouched, a remit made to him on appeal to require further evidence of it.

This was a similar appeal to the preceding. The claimant, whose claim had been admitted by the trustee, was Alex. Simpson, a brother of the bankrupt. His claim amounted to £469, 13s. 1d., which consisted of an alleged open account due to him by the bankrupt, extending from 1859 to 1863. The appellants alleged that the claimant produced no voucher in support of his claim other than the copy account, and that the trustee did not require further evidence in support of it before admitting it. The trustee denied this statement, and explained that he had satisfied himself of the