

proved that the deceased materially contributed to the result by his own negligence, the verdict must be for the defender. The case being left to them with that direction, they had before them evidence both ways as to recklessness on the part of the pursuer, and it was just that kind of balancing between the two cases which was proper for a jury to determine. I have no doubt on this point any more than on the other. I am satisfied with the verdict of the jury, for it was a verdict of a jury on a body of evidence not very clear either way, and it is not for us to interfere. I am therefore for refusing the rule.

The other judges concurred.

Rule refused.

Agent for Defender—Alexander Stevenson, W.S.

Wednesday, January 8.

MILNE HOME AND OTHERS v. ALLAN AND OTHERS (EYEMOUTH HARBOUR TRUSTEES).

Harbour—Eyemouth Harbour Improvement Acts 1797 and 1839—Ballast—Sea-shore. The Eyemouth Harbour Trustees held to have no right of property in the harbour, but a right of administration only, not entitling them to excavate the *solum* of the harbour for the purpose of selling the materials excavated as ballast.

This was an action raised by Mrs Milne Home of Wedderburn, proprietrix of the lands and barony of Eyemouth, with consent of her husband David Milne Home of Wedderburn, and by certain other parties, proprietors of heritable property in Eyemouth, against Thomas Allan and others, trustees acting under the Act 2 Vict., c. 36 (an Act for more effectually repairing, improving, and maintaining the harbour of Eyemouth, in the county of Berwick).

The pursuer, Mrs Milne Home, is heritable proprietrix of "all and whole the lands and barony of Eyemouth, with the town, port, and harbour of the same, comprehending therein the lands and others contained in the ancient infeftments thereof," and further, "all and whole the lands of Eyemouth, Loanhead, as also the said burgh of barony and town of Eyemouth, with the port and harbour of the same, wherever the sea ebbs and flows," &c. In virtue of her Crown charter and sasine, the pursuer alleged that she, and her predecessors, as proprietors and superiors of the barony and of the town, port, and harbour of Eyemouth, have always exercised all the rights and privileges therein stated; and, in particular, (1) right of port and harbour, under which they levy rates and dues on vessels and boats frequenting the port and bay; (2) right to cut and carry away sea-ware or tangle; and (3) right to erect dwelling-houses and other buildings on the shore of Eyemouth Bay and to erect bulwarks for the protection of these buildings against the encroachments of the sea, between high and low water-mark. Moreover, the pursuer and her predecessors, as superiors of the barony of Eyemouth, have, in virtue of their said rights and titles, invariably claimed and exercised a right of property in the sea-shores of the said barony, and that right has been acknowledged and allowed by the feuars and inhabitants of the town and parish, so that when gravel, sand, or stones are wanted from the shore, the superior is applied to for permission to take them, and, on payment of one penny sterling per cart-load, permission is generally granted.

Mrs Milne Home is also proprietrix of certain houses along the beach. The other pursuers are also proprietors of houses on the beach. For some time past, they alleged, considerable quantities of sand and gravel had been removed from Eyemouth beach. The pursuers, from time to time, obtained interdict against various parties so offending. One of these parties defended himself on the ground that he had the authority of the defenders, who maintained a right to take sand and gravel for repairing the harbour works, or for ballast, and, in a correspondence which ensued, the defenders made that claim. This removal of sand and gravel, the pursuers alleged, was productive of great damage to their property. The conclusions of the action were "to have it found and declared that the said defenders, as trustees foresaid, have no right, and are not entitled, either by themselves, or by others acting under their authority or on their behalf, to dig, remove, or carry away sand, shingle, gravel, rocks, stones, or other natural substances or materials, from the sea-beach or sea-shore of the bay of Eyemouth, extending from the mouth of the harbour of Eyemouth northward to the Fort of Eyemouth, and they ought and should be prohibited and interdicted from doing so now and in all time coming."

It appeared that in 1797 an Act was passed for repairing, improving, and maintaining the harbour of Eyemouth. The preamble of the Act ran thus:—"Whereas the port and harbour of Eyemouth, in the county of Berwick, is a place of considerable trade, particularly for the importation of wood, coal, and lime, and is the only port within the county for the exportation of corn or other commodities; and is of singular advantage to the trade and shipping upon the coast, by being of easy access in stormy weather, and so situated that ships taking shelter there can sail at all times and in all winds when it is safe to go to sea: And whereas considerable sums of money have been raised from time to time by subscription, and expended in making two piers, and improving the harbour, the benefit of which cannot be secured to the subscribers or to the public unless a fund be provided for keeping it in repair, and enlarging and improving, when necessary, the piers and quays, and scouring, cleaning, and deepening the harbour, and rendering it more safe and convenient for the trade and shipping." Trustees were appointed, with power to levy dues, to appoint a harbour-master, &c.

In 1839 another Act was passed (2 Vict., c. 36), the preamble of which bore that "Whereas an Act was passed in the 37th year of the reign of his Majesty King George the Third, intituled 'An Act for repairing, improving, and maintaining the harbour of Eyemouth, in the county of Berwick,' by which certain trustees were appointed for carrying into effect the purposes thereof; and whereas the trustees appointed by and under the powers of the said recited Act have proceeded to put the same into execution, and considerable improvements have been made upon the said harbour under the powers by the said recited Act granted; and whereas the trade and shipping of the said port and harbour of Eyemouth have materially increased since the passing of the said recited Act, and the said harbour, from its situation, is of great public utility in affording shelter to all vessels resorting thereto; and whereas the powers and authorities given and granted by the said recited Act have been found inadequate to the present circumstances of the said port and harbour, and it would be of great advan-

tage to the trade and shipping thereof, and to the public at large, if the said recited Act were repealed, and if farther and more effectual powers were given for repairing, improving, deepening, and maintaining the said harbour, and the works therewith connected. . . ." Section 3 enacted that William Foreman Home, of Paxton; William Hay, of Dunse Castle, . . . John Nisbet, fishcurer in Eyemouth; William Allan, merchant there; Richard Turnbull, feuar there; William Forrest, fishcurer in Eyemouth; Thomas Calder, distiller, Gungreen, &c. &c., . . . and the baron or superior of the barony or town of Eyemouth, and the baron-bailie thereof for the time being, shall be and are hereby nominated and appointed trustees for improving, deepening, scouring, cleansing, and keeping in repair the said harbour, and the piers, quays, and other works therewith connected, for the accommodation of the trade and shipping connected with and resorting to the said port and harbour, and also for putting in execution all the other powers given by this Act. Section 14 enacts that the said harbour of Eyemouth, and the piers, quays, and other works therewith connected, shall be and the same are hereby vested in the said trustees, to and for the uses, ends, and purposes of this Act. Section 46 enacts that from and after the passing of this Act, if any person or persons, upon any pretence whatsoever, shall unload or cast out of any ship or vessel, or from any carriage whatsoever, or off or from any quay, yard, place, or ground, any ballast, sand, stones, rubbish, wreck, filth, gravel, coal, ashes, or any other gross substance whatsoever into the said harbour or roadstead, or if any person shall dig or carry away any ballast, sand, shingle, stones, or other thing from within the said harbour, or any part thereof, then and in every such case the captain, master, or person or persons having the command of any such ship or vessel, or other person or persons so offending, shall for every such offence forfeit and pay a sum not exceeding ten pounds, over and above the expense of repairing the damages occasioned thereby.

The defenders in the present action were the trustees acting under the Act of 1839. They maintained, *inter alia*, these pleas:—"The defenders and their predecessors, under and by virtue of the Acts of Parliament, and the whole shipmasters and others frequenting the harbour, having always used and enjoyed the privilege of taking and shipping ballast from the sea-beach or sea-shore in question, the pursuers cannot interfere therewith. The right to take ballast is recognised by the successive Acts passed relative to the harbour of Eyemouth, and by the usage following thereon. *Separatim*, The right to take ballast for the purposes of navigation from the shores being a public right, and having been used from time immemorial at Eyemouth, and for more than forty years by the defenders and by the inhabitants and proprietors in Eyemouth, the defenders, as the Harbour Trustees, and as individuals, are entitled to vindicate the right, and to resist the present action.

The Lord Ordinary (JERVISWOOD) on 11th December 1866, pronounced this interlocutor;—

"The Lord Ordinary having heard counsel, and made avizandum, and considered the record, with the proof allowed before answer, productions, and whole process: Finds, as matter of fact, 1st, That the pursuer, Mrs Milne Home, and her husband for his interest, has right to, and is vested in, the lands and barony of Eyemouth, with the town, port, and harbour of the same, and others, as set forth in the

record, and titles therein referred to; and that the other pursuers are proprietors of subjects in Eyemouth, which are described in the titles thereof as bounded by the sea-shore on the north; 2d, That, under their titles, the said pursuer, Mrs Milne Home, and her predecessors, have exercised and enjoyed the rights, powers, and privileges thereby conferred, and, in particular, have exercised the same as respects the use and enjoyment of the sea-shores within the limits thereof, subject only to the rights and powers of the defenders, acting as trustees under the statute of the 2d Vict., cap. 36, referred to in the fourth statement of facts and in the pleas in law for the defenders; 3d, That, under the provisions of the said statute, the harbour of Eyemouth is vested in the trustees (defenders), 'to and for the uses, ends, and purposes of this Act' only; and that, while provision is made by the same (section 22) to empower the said trustees to take materials from 'any waste or common grounds lying within three miles of the said harbour of Eyemouth, and to use and apply the same in carrying on, executing, and repairing the several piers, jetties, quays, and other works in and about the said harbour, and connected therewith,' no power is thereby conferred upon them to take stones, sand, or other substance from the harbour or elsewhere for the purpose of being applied as ballast for the use of ships frequenting the harbour; or otherwise and further, that, as respects ballast, it is merely provided (section 25) 'that from and after the passing of this Act' the defenders, in lieu of the rates and duties theretofore collected, should receive 'the several rates or duties on goods, wares, and merchandise, and things whatsoever, and on ballast imported into or exported from the said harbour, and also the several rates or duties of tonnage respectively set forth in the schedules (A) and (B) to this Act annexed;' and that in the schedule (A) ballast is entered as follows—'Ballast inward, whether landed or shifted into another vessel, per ton, £0, 1s. 0d. Ballast outward, whether taken out of another vessel or from the quay or shore, per ton, £0, 1s. 0d.' Finds, as matter of law, that the provisions of the statute under which the defenders act do not confer on them any right of property in the *solum* of the harbour, and that they are not entitled or warranted, thereby or otherwise, to use or dispose of any portion of the *solum* thereof for the purpose of supplying ballast to ships frequenting the said harbour: And, with reference to the foregoing findings, repels the defences, and finds, declares, and decrees in terms of the conclusions of the summons: Finds the pursuers entitled to their expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—This case, as it presents itself to the Lord Ordinary, is not free from difficulty. But, on the whole, he is of opinion that the pursuers are entitled to decree. It appears to him to be clear that, under the statute which forms the basis of all right in the defenders, the latter are not vested with any right of property in the shore or harbour of Eyemouth, or in the pertinents thereof. The right of harbour is held under feudal progress, flowing in its origin from the Crown, by the pursuer, Mrs Milne Home. The defenders are truly trust-administrators of that harbour, and, as such, they have considerable powers to enable them to operate improvements in the harbour, and, in terms of the 22d section of the statute, to obtain materials from 'any waste or common grounds lying within three miles of the said harbour, and to use

and apply the same in carrying on and executing and repairing the several piers, quays, and other works in and about the said harbour, and connected therewith.' Nowhere, however, is there statutory obligation laid, or direct power conferred, upon them to provide vessels frequenting the harbour with ballast; while it is important, at the same time, to observe that that article was directly within the contemplation of, and was dealt with by, the Legislature as a fitting article on which to impose dues in favour of the defenders, as trustees of the harbour. This is provided under the 25th section of the statute, and relative schedules. The terms of these schedules appear to the Lord Ordinary to imply that all ballast for vessels frequenting the harbour would be found, like cargoes, by and at the expense of the masters of such vessels; and that, consequently, irrespectively altogether of the mode in which it had been acquired, the trustees were entitled to the statutory dues.

"If, then, the defenders had not statutory powers to supply ballast, it appears to the Lord Ordinary to be clear that they had no power, either under the statute or at common law, to remove the *solum* of the harbour, or any portion of it, for such a purpose. The pursuer is feudally vested in the 'lands and barony of Eyemouth, with the town, port, and harbour of the same,' in the terms more fully set forth in the record, and in the titles themselves. She has, therefore, in a question at least with the defenders, right and interest to maintain her rights in these subjects, to the effect of preventing the removal of the *solum* otherwise or to any further extent than is permissible under and in relation to the provisions of the statute for repairing, improving, and maintaining the harbour.

"Reference was made, in the course of the debate on this matter, to a passage in Lord Stair's Institutes, which has already, in cases analogous to the present, formed the subject of comment. In b. 2, title 1, section 5, it is stated—'So all nations have free passage by navigation through the ocean, in bays, and navigable rivers, and have also the benefit of stations or roads and harbours in the sea or rivers, and have the common use of the shores for casting anchors, disloading of goods, taking in of ballast, or waters rising in the fountains there, drying of nets, erecting of tents, and the like.'

"The expression here used may unquestionably be so read as to imply that the taking of ballast was of the nature of a public right. But, taking the whole passage, it appears to the Lord Ordinary that, while the noble author treats in the first instance of the rights of all nations apart from the assertion and exercise of the right of appropriation of their shores by any particular nation, he does not intend to lay down as law the proposition that the shore is always and must remain public in the sense for which the defenders contend. On the contrary, he proceeds to state in the same passage—'But the use of the banks of the sea or rivers to cast anchors or lay goods thereon, or to tie cables to trees growing thereon, or the use of the ports which are industrial, or stations made by art, or fortified for security, are not common to all men, but public to their own people, or allowed freely to others for commerce, or, in some cases, are granted for a reasonable satisfaction of anchorage, portage, or shore dues, which oftentimes belong to private persons by their proper right, or by custom, or by public grant, but stations in these rivers by casting of anchors remain common, and ought not to be burdened.'

"On the whole, then, the opinion of the Lord

Ordinary is, that the defenders cannot here succeed in their contention; and that the pursuer, in relation to her titles and to the terms of the statute, must prevail in the action, which is directed against the defenders as trustees appointed under its powers."

The Harbour Trustees reclaimed.

GIFFORD and SHAND for them.

LORD ADVOCATE (GORDON) and SOLICITOR-GENERAL (MILLAR) in reply.

LORD CURRIEHILL thought it was not a case of much difficulty. The right of a harbour belonged to the Crown, in trust for the public, but it was one of those rights which the Crown had the power to convey to a subject, with power to levy dues, to be applied to the maintenance of the harbour. The case of *Officers of State v. Christie*, 2 Feb. 1854, 16 D. 454, was an important case on that branch of law. Here the Crown had exercised its right by conveying the harbour of Eyemouth to the predecessors of Mrs Milne Home. His Lordship then read the terms of the grant, and continued—Mrs Milne Home by this feudal investiture is in right of the Crown, and is entitled to exercise the rights of the Crown. She is entitled to levy dues, and she is bound to expend them, as far as necessary, to maintain the port and harbour in proper order. But, as is the case with many ports and harbours in Scotland, more particularly those of general importance, it is necessary sometimes to make improvements beyond what the Crown or its grantee can do by the harbour dues, and it becomes necessary to impose a tax for such purposes. Generally speaking, it is the practice to appoint trustees, as has been done in the present case. This trust was created in 1839 by statute. What we have to attend to is the nature and extent of the powers committed to the trustees. The right which belonged to Mrs Milne Home, as grantee of the Crown, was not taken out of her by this statute. Her feudal right was not transferred to these trustees. These trustees were appointed for stated purposes set forth in the Act. The Act proceeded on a narrative of the great importance of this harbour, and of the necessity of more effectually providing for its improvement and extension. The third clause contains the appointment of the trustees. The person first named is William Foreman Home, the owner of the harbour. Then come the names of the other trustees, "and the baron or superior of the barony or town of Eyemouth, and the baron-baillie thereof for the time being, shall be and are hereby nominated and appointed trustees for improving" the harbour. So that the owner of the harbour was always to be one of the trustees. For what purposes? These, also, we find in the third section. "For improving, deepening, scouring, cleansing, and keeping in repair the said harbour, and the piers, quays, and other works therewith connected, for the accommodation of the trade and shipping connected with and resorting to the said port and harbour, and also for putting in execution all the other powers given by this Act." Here we have the purposes of the trust very distinctly set forth. There is no power given to these trustees to interfere with the *solum* of the harbour for any other purposes whatever, and, in particular, there is no power given them to convert the *solum* into an article of commerce. The 14th section enacts that the harbour and works shall be vested in the trustees for the ends, uses, and purposes of the Act. We have already seen what these are. In this state of matters, the pursuer and certain pro-

prietors of ground along the beach, brought this action, setting forth that the trustees had begun to excavate the *solum* of the harbour for purposes other than those in the Acts of Parliament, and were selling the substance so excavated for purposes of ballast. That just comes to this, that they were making the *solum* into an article of commerce. Now, the conclusions of this action are very broad. [*Reads conclusions.*] I think this claim on the part of the pursuers is too broad, for I am not prepared to say that, if it were necessary for the trustees in carrying out the purposes of the Act, they might not be entitled to dig the *solum* of the harbour. That, however, is hardly disputed by the pursuers. But the defenders contend that they are entitled to excavate the *solum* for other purposes. I am very clear that they are not entitled. They have no powers except those conferred upon them by statute. The powers they are attempting to exercise are not among those conferred, and although the 14th section says that the harbour is to be vested in the trustees, that expression is qualified by saying that it is only so far as to enable them to execute the purposes in the Act. I think we should adhere to the Lord Ordinary's interlocutor with some qualification to make it clear that the judgment will not prevent the trustees from carrying into effect the purposes of the Act.

LORD DEAS—I am also of opinion that, with the qualification suggested by Lord Curriehill, the interlocutor of the Lord Ordinary ought to be adhered to. The first question is, whether the pursuers would have had a right and title to prevent what was proposed to be done, and was in some cases actually done, supposing the Harbour Act had never been passed. I have no doubt of that. They have a grant of port and harbour in the terms quoted, and if there were no Act of Parliament there could be no doubt that they were entitled to protect their right by preventing the *solum* from being carried away or interfered with in the manner now proposed. They would have had both the rights and duties of grantee of a port and harbour—the right to levy dues, and the duty to apply them to the benefit of the harbour. The next question is, does this Act take away from them that right and title, and, more particularly, does it vest in the trustees a conflicting right and title to do the very things which could otherwise be prevented? I am clear that it is the very reverse. The Act rather imposes on the trustees the duty of preventing that from being done. The object of the Act was to vest in the trustees, for the public benefit, the administration of the harbour, but not to vest the *solum* in them as absolute owners. The right and title of Milne Home was not taken away. That being so, there is no more to be said. The interlocutor, with the qualification mentioned, is sound.

LORD ARMILLAN—I am of the same opinion. It is quite enough for the disposal of this case that the harbour and works are by statute vested in the trustees for the administrative purposes set forth in the statute, but are not conveyed to them as heritable property. The right there may be in the trustees to take part of the *solum* in the exercise of their administrative powers may be a different question.

LORD PRESIDENT—The argument of the defenders proceeds on a misconception of the nature of the rights of the grantee of a harbour, and of the effect produced

upon these rights by Acts of Parliament such as we have here. The case of *Christie* mentioned by Lord Curriehill is of great importance. It shows that the grantee of a harbour has the administration of the harbour for the public benefit, and his duties are well defined by the interlocutor in that case, which runs thus:—"Find that the defender, as grantee of the port and harbour of Leven, is not bound, out of the dues and revenue, or otherwise, to extend the said port and harbour: But find that out of the said dues and revenues he is bound to keep the said port and harbour, and its appurtenances, in a proper state of repair, and to furnish all such accommodation to the parties resorting thereto as is proper and suitable to the nature and extent of the said port and harbour in its present state." It is obvious that, there being no greater liability or duty incumbent on the grantee of a harbour than is here expressed, it becomes, in many cases, indispensable for the public interest that other means should be employed for extending and improving the harbour. Many courses have been resorted to for that purpose, and that course which has been followed in the case of Eyemouth is an interesting and instructive example. The extension of the harbour was first set about by voluntary subscriptions. The preamble of the Act of 1797 sets out that "whereas considerable sums of money" [*quotes from preamble*]. It was on that consideration, and for these purposes, that the original powers were granted. What was the next step in the case is shown by the preamble of the Act of 1839 [*reads from preamble*]. The state of matters therefore is, that the grantee of the harbour remained as before the feudal proprietor of the harbour as in right of the Crown, and administrator for the public benefit so far as his original right bound him to administer the dues which he might levy. But then the additional funds raised, first by subscription, and then under the Acts of Parliament, are in the hands of trustees for the purpose of being appropriated to the extension and improvement of the harbour, and the maintenance and repair of those extensions and improvements already made, which the grantee of the harbour was not under any obligation to make. So that the rights of the grantee and of the trustees are quite consistent; and there is no difficulty in understanding the intention of the legislation. The harbour, piers, quays, and other works are vested in the trustees, but I agree with your Lordships that that does not operate any transfer of the right of property, but only conveys a right of administration, the nature and limits of which are ascertained by the Acts; on the other hand, these powers are defined, and the various duties laid upon them for protection of the harbour. The most important clause of this kind is the 46th, which in the first branch enacts [*reads*], and in the second part [*reads*]. It is said that this means that these things are not to be done without leave of the trustees. The clause contains no such words. On the contrary, the prohibition in both branches of the clause is absolute, and if there was a practice of carrying away ballast, that was quite illegal, and could not be fortified as a matter of right by any prescription. By this clause the trustees were intrusted with the duty of preventing that in future, and yet the contention is that they have a discretion to allow it when they please, and so as to make a profit. That is inconsistent not only with the words of the clause, but with the whole scope and spirit of the statute. I agree with your Lordships that it is necessary to qualify our

judgment more cautiously than the conclusions of the summons are expressed.

Agents for Pursuers—Adam & Sang, S.S.C.

Agents for Defenders—Renton & Gray, S.S.C.

Thursday, January 9.

MUIR, PETITIONER.

Messenger-at-Arms—Sheriff-officer. Circumstances in which Court authorised execution of summons by sheriff-officer.

George Walker Muir craved the Court to grant authority to have a summons executed in Mull by a sheriff-officer.

BRAND (for him) stated that there was no messenger-at-arms in Mull, and that, if the summons had to be executed by a messenger-at-arms, it would be necessary to send one from Oban, where there was only one, or from Glasgow or Greenock. Owing to the difficulty of travelling in winter, a fortnight would probably be required for the messenger going to Mull and returning. That would be a great expense, and the delay would be prejudicial.

LORD PRESIDENT—We shall grant authority in this case; but it must not be understood to be a matter of course that all summonses to be executed in Mull are to be executed by a sheriff-officer. The application is rather granted in respect of the season of the year.

Agents for Petitioners—D. Crawford and J. Y. Guthrie, S.S.C.

Friday, January 10.

BIRELL v. BEVERIDGE AND STEEDMAN.

Jus quæsitum tertio—Sale—Missives of sale—Reserved power of redemption. Circumstances in which a claim of *jus quæsitum tertio* repelled.

Birrell brought this action of reduction and declarator against Beveridge and Steedman, in the following circumstances:—On 18th May 1865, Beveridge and Steedman entered into missives of sale of a house belonging to Steedman, and occupied partly by Birrell. The missives contained a stipulation that Birrell was to get a seven years' lease of the premises, and "he will have power to redeem the property at the end of the lease at the same price." The missive was not holograph of Steedman. Shortly after, the intention of the purchaser and seller was altered, and instructions were given that the deed of conveyance, when executed, should contain a provision of lease and power of redemption in favour of Steedman, instead of Birrell. The deed was executed on 24th May. In July 1865, Steedman discharged his right of redemption for a money payment. Birrell now sought reduction of the discharge of the right of redemption granted by Steedman to Beveridge, and declarator that he was entitled to enforce the stipulation in his favour contained in the missive of 18th May. In support of this claim he produced missives, bearing to be dated 10th May, by which Steedman sold the property to him. These last missives were holograph of the parties. The defenders contended (1) that the missives of 10th May were not executed of the date they bore, and (2) that the missives of 18th May were improbable.

A proof was taken.

The Lord Ordinary (ORMIDALE) found that Birrell had failed to prove that Beveridge was, on 18th May, aware that the subjects had been previously sold to Birrell; but found it proved that Beveridge, soon after the 18th, and before he and Steedman arranged the alteration on the agreement, knew that a copy of the missives of 18th May had been given to Birrell, and Birrell was thus made aware of the condition therein in his favour; and held, in these circumstances, that, in point of law, the pursuer Birrell had a right conferred on him by the missives of 18th May, which could not be defeated by any arrangement to which Birrell did not give his consent; and therefore sustained the claims of the pursuer in the present action.

The defenders reclaimed.

Lord Advocate (GORDON) and HALL for them.

GIFFORD and SCOTT, for pursuer, in reply.

LORD PRESIDENT, founding his judgment upon the documentary evidence, held that Beveridge was not proved to have had any knowledge of a previous onerous claim on the part of Birrell; and further, that the pursuer had failed to prove the date of the holograph missives of 18th May.

LORD CURRIEHILL differed, and held, on an analysis of the parole proof, that the existence of the missives of 10th May, at that date, or at least before 18th May, was proved. He thought, further, that the objection founded on the improbable character of the missives of 18th May was obviated *rei interventus*; and held that Beveridge was put into such a position that he ought to have sought information from Birrell as to the nature of his reserved right.

LORDS DEAS and ARDMILLAN concurred with the Lord President.

Interlocutor reversed, and defenders assolized.

Agents for Pursuer—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Defenders—Watt & Marwick, S.S.C.

Friday, January 10.

DOUGLAS' TRUSTEES v. DOUGLAS AND OTHERS.

Heir and Executor—Heritable and Moveable Debts—Relief—Discharge. A testator conveyed his whole estate, heritable and moveable, to trustees, who were to pay all his debts, and, after expiry of his widow's liferent, to convey a certain property of A to a party named, and the residue of his estate to his nephews and nieces. The testator left considerable debts, and, in particular, three heritable bonds over the said property of A. The widow, who was one of the trustees, and who mostly managed the trust, paid off and discharged these bonds. In an action of multiplepounding after the death of the widow, the testator's trustees claiming to treat the amount of the bonds as a debt of the testator which had been paid out of his general estate, held (1) that the trustees were neither bound nor entitled to relieve the disponee of A of the amount of the bonds, to the effect of diminishing the amount of residue payable to the residuary legatees. (2) That, in fact, the widow paid off the bonds out of her own funds,