not that of the proprietor. The second issue must be disallowed entirely. Until the complainers have proved forty years' possession they are only in progress of acquiring a title, and without a title of some sort, complete in itself, they cannot acquire a possessory judgment.

The Lord Ordinary (BARCAPLE) reported the case, adding the following note :—

"In the proposed admission, reference is made to the description of the barony of Earlshall, belonging to the complainer, Colonel Long, in a Crown charter of 1815 The respondents object that the earliest title founded upon in the record is Colonel Long's own infeftment in 1824. The Lord Ordinary does not understand that the descriptions are alleged to be different, the necessity for founding upon a Crown grant being the reason for reverting to the earlier title. There seems to be a difficulty as to this in the present state of the record. But the Lord Ordinary is disposed to think that, if necessary, an amendment in this respect may be allowed, on the principle that it is only specification of the complainers' titles, and consistent with the general averments in regard to them now on the record. The complainers' second plea founds expressly on their Crown charters.

"The respondents maintain that the issues should put the alleged possession as having been exclusive. This appears to have been recently disapproved of in cases of ordinary property, especially where the word 'property' has been introduced into the issue. But the case of mussel-fishing is peculiar in this respect. The question is between the party alleging a private patrimonial and exclusive right, and a portion of the public, who allege that the public have not been precluded from taking mussels, according to what is the ordinary usage where there is no private grant.

"Another question is as to the mode of possession which must be proved, and whether that ought not to be specified in the issue. The Lord Ordinary is not aware that the right claimed in such cases has been treated as anything but a right to take the fish, conferred upon a private proprietor by grant from the Crown. Thus, Mr Bell (Prin., 646), says, 'a right to take oysters, mussels,' &c., which are fixed to the spot, is effectual 'where expressly granted.' It cannot vary the nature of the right, that the grant is not express, but by implication.

"Again, Lord Corehouse said, in the *Duke of Portland* v. *Gray*, 11 S. 14, 'it is settled law that a right to fish oysters and mussels in the sea from the scalp or bed to which they are attached may be appropriated.' As the Lord Ordinary has always understood, it is solely in virtue of a grant of fishings, followed by possession, that it is maintained that the right can be acquired by implication in a case such as is here presented by the complainers.

"If mussels are attached to ground, the *solum* of which is private property, the right to take them may be in the proprietor, as the right to fish for trout in a stream is in the proprietor of the lands through which it runs. But the Lord Ordinary does not understand the complainers to assert a right to the *solum* of the shore to which the mussels are attached. The scalps are said to be situated on the shores, wholly or in great part opposite to their lands. The only right alleged seems to be the right to take mussels in virtue of what is substantially a clause *cum piscationibus;* and it would seem to follow that the only possession by which it can be established is the actual exercise of that right. In this respect, such a case altogether differs from the ordinary case of disputed boundary, or part and pertinent, and is identical with that of salmon-fishing, which is certainly not a part or pertinent of lands. The object of proving prescriptive possession in such a case is to explain the meaning in which the term fishings are used.

"The respondents dispute the right of the complainers to take the second issue as to seven years' possession. Reference was made to the cases of *Hunter* v. *Maule*, 5 S. 238, and *Saunders* v. *Hunter*, 8 S. 605. The Lord Ordinary thinks the objection well founded. A charter with a clause *cum piscationibus* does not in his opinion give a title of any kind, either to salmon or mussel-fishing, until it is set up by prescriptive possession. If until that is done it is no title at all, it cannot be a title of possession to found a possessory judgment.

"The proposal of the complainers is, that on the assumption that they shall fail to prove prescriptive possession, they shall be allowed to prove that they began seven years ago to exercise the right claimed by them—that is, to exercise it *sine titulo*. The question is of importance, both because it seems to apply equally to the law as to the title to salmon-fishings, and because, if a proprietor is entitled to such a possessory judgment against members of the public, or a party holding a competing right, he seems to be equally entitled to it against the Crown, his alleged author, in virtue of a grant, which *presumptione juris* does not contain the right claimed."

At the discussion in the Inner House, the second issue was abandoned by the complainers, and the argument mainly turned on the question whether the first issue should contain the words "exclusive possession." Reference was made to the case of *Dempster*, where the First Division, in 1863, had adjusted an issue in a similar case, and which contained these words. The Court resolved to consult the other Division on the terms of the issue. The Court adjusted the issue as follows :—

"Whether, for forty years previous to 1867, or for time immemorial, the pursuers and their predecessors, proprietors of the lands and others foresaid, had exclusive possession of the fishing of mussels from the scalps or beds lying to the north of the *medium filum*, or central base line of the river or water of Eden at low-water of spring tides, between the points marked A and B respectively on the plan, No. 9 of process, or any part thereof?"

Agents for Complainers—Dundas & Wilson, C.S.
Agent for Respondents—Andrew Beveridge, S.S.C.

Friday, May 29.

THE CITY OF GLASGOW LIFE ASSURANCE COMPANY *v.* STIVEN AND MYER.

Commissary—Confirmation—Executor qua Creditor —Foreign Judgment. Held that a document, bearing to be an office copy of a judgment pronounced for debt against an English debtor by one of the superior courts of England, and appearing to be stamped on each page with the seal thereof, was, if authentic, *prima facie* evidence of the constitution of the debt, and sufficient to entitle the creditor to obtain from the Commissary confirmation as executor creditor of the debtor; and proof of authentication allowed.

In a multiplepoinding raised in the name of the City of Glasgow Life Assurance Company, Stiven and Myer competed for the contents of a policy of insurance for £1000, effected by the deceased Joshua Tattan with the Assurance Company upon his own life.

Stiven produced a decree of confirmation of the Commissary of Edinburgh, confirming him as executor *qua* creditor to the defunct. The policy of insurance was given up in the inventory. The Commissary's decree proceeded upon a petition, which set forth that Stiven was a creditor of the defunct to the amount of £422, "contained in and due by a judgment of the Court of Exchequer of Pleas in England," to which money, "together with the said judgment, the petitioner has now right by deed of assignment in his favour . . . . conform to office-copy of the said judgment, duly stamped with the seal of the said Court."

Stiven pleaded:—In virtue of his confirmation as executor-creditor, proceeding upon the said judgment of the Court of Exchequer, which is, by the law of England and of Scotland, a liquid document of debt, the claimant William Stiven is entitled to be ranked and preferred to the whole sums payable under the said policy for £1000.

Myer pleaded:—The confirmation founded on by the claimant and real raiser, William Stiven, being inept and insufficient as a title to the contents of the policy claimed by the present claimant, in respect that the debt on which it bears to proceed was not constituted in Scotland, the said William Stiven cannot complete with the present claimant in regard to that part of the fund *in medio*.

The Lord Ordinary (KINLOCH) pronounced the following interlocutor:—"Finds that the confirmation by the said William Stiven, as executor-creditor of the deceased Joshua Tattan, was irregularly expede, being founded on a document insufficient to constitute the alleged debt; and that the said William Stiven is not entitled to claim in said competition by virtue of his alleged title as executor-creditor foresaid."

His Lordship added the following note: —

"The claim of Mr William Stiven to the proceeds of the policy for £1000 on the life of Joshua Tattan is mainly rested on an alleged confirmation as executor-creditor of Mr Tattan.

"It is trite law, that to entitle a creditor to carry through such a confirmation he must produce a document constituting his alleged debt, or else must take the proceedings (including a constitution of the debt) prescribed by the Act 1695, c. 41. Mr Stiven, in his proceedings for confirmation, produced neither bond, bill, nor decree of a Scottish court. What he produced was the document No. 52 of process, which is described as an office-copy of a judgment recovered in the Court of Exchequer in England. This may, for aught the Lord Ordinary knows, be sufficient evidence in England of a judgment such as alleged; but the document is not such as, without further evidence to support it, a Scottish court can recognise. It is expressed in what is a strange tongue in the courts of this country. It contains no decree such as a Scottish court is in use to grant. It has no attestation by clerk, registrar, or notary, certifying it to be what is alleged. Its whole validity is said to depend on a stamp put on each sheet, which may be proved to mean something, but without proof means nothing at all, or only affords a variety of in conclusive guesses.

"The Lord Ordinary cannot sustain the document as of itself, and without corroborative evidence, sufficient to constitute a debt. A foreign judgment at best requires proof of its authenticity and effect. The books exhibit cases in which even judgments of *prima facie* genuineness were found deficient in authentication—(*Robertson* v. *Gordon*, 15th November 1814, Fac. Coll). The test of the inadequacy of the document is found in the obvious circumstance that the Lord Ordinary could not even now recognise it as a valid judgment without proof being led in support of it. But this circumstance is conclusive to show that it is a document on which confirmation could not pass, for the document necessary for that purpose must be one which, on its face, and without extrinsic evidence, constitutes a debt in the eyes of a Scottish court. The case would of course have been altogether different had the claimant obtained a decree-conform from the Scottish court,—a course which is of common occurrence where the object is to prosecute Scottish diligence, such as the confirmation as executor-creditor in substance is.

"Mr Stiven founded largely on the circumstance that he produces an *ex facie* valid confirmation, standing at present unreduced. But in a process of competition, such as a multiplepoinding is, the rival claimants are entitled to investigate the correctness of each other's title or diligence exactly as in a reduction."

Stiven reclaimed.

CLARK and BALFOUR, for him, argued:—To obtain confirmation as executor *qua* creditor, some decree or writing is necessary; but it need not be a document on which diligence can follow. A bill is sufficient, though not protested; therefore, a decree-conform is not necessary, the only use of which is to obtain execution in Scotland of the decree of a foreign court. The Lord Ordinary rests his judgment on the ground that he could not recognise this as a valid judgement without some further proof in support of it. But it is doubtful whether any deed will of itself identify the grantee with the deceased. Every liquid document is examinable. But such questions are excluded from the Commissary's consideration. There was *prima facie* evidence upon which he was bound to proceed.

SOLICITOR-GENERAL and CHEYNE, for Myer, answered:—The creditor requires to instruct his debt, and there is no evidence that this is a proper decree. It has no signature, no certificate of a notary-public that the seal is the seal of court, or that the writing is a true copy. The language is unintelligible. But for the Statute 14 and 15 Vict., c. 99, such a decree would not be receivable as evidence in another court of England, and that Statute does not apply to Scotland. Evidence in support of the document should have been led before the Commissary.

The following authorities were quoted:—

Stair, 3, 8, 63; Ersk., 3, 9, 35; Bell's Comm. 2, 85; *Sinclair* v. *Frazer*, July 14, 1868, M. 4532; *Frizel* v. *Thomson*, June 9, 1860, 20 D. 1176; *Whitehead* v. *Thomson*, March 20, 1861, 23 D. 772; *Gill* v. *Anderson*, April 16, 1858, 3 Macq., 180; *Southgate* v. *Montgomery*, February 9, 1837, 15 S. 507.

Stair 1, 18, 6; Ersk 3, 4, 16; Bell's Comm. 1, 734; Taylor on Evid. (4th ed.) 2, 1298; Dickson, Evid., Sect. 1284; Alexander's Pract., 94; *Whitehead* v. *Thompson*, *ut sup.*

At Advising—

LORD COWAN—The competition in this case, which involves important questions to be decided on in-

ternational principles, relates to the sums contained in two policies of insurance effected on the life of Joshua Tattan, an Englishman, with the City of Glasgow Life Assurance Company, the nominal raisers. The interest of the claimant Stiven arose thus:—He acquired right by assignation to an alleged judgment for debt pronounced in England against Tattan, during his life, in the Exchequer of Pleas. After Tattan's death, and with the view of attaching the sums in the policy, he founded upon this judgment in the Commissary Court of Scotland; and, no opposition having been offered, he obtained decree as executor *qua* creditor of the deceased Tattan; and having thus obtained a title, he raised the present multiplepoinding.

The Lord Ordinary, however, has found that "the confirmation was irregularly expede, being founded on a document insufficient to constitute the alleged debt;" and he explains in his note that he considers it not such a document as, "without further evidence to support it, a Scottish Court can recognise." Now, I entertain no doubt that the document was one which the Commissary was bound to look at and consider as evidence, into the validity and sufficiency of which he might have inquired had any opposition been made. And now that the validity of the document is questioned in this Court, I see no difficulty in that inquiry still being made.

There are two questions to be considered—1. Whether the document produced be sufficient evidence that such a judgment was obtained in the English Court? 2. If so, whether, upon the judgment, the Commissary was warranted in granting executry-dative? If the objection to the authenticity of the document is insisted in, there must be inquiry before the first question can be answered. In the face of the express averments of Stiven (Cond. 2) that this is a properly authenticated copy of a judgment of the Court of Exchequer of Pleas, I think the Lord Ordinary has fallen into error in holding that all inquiry into the truth of these averments must be excluded. I think that inquiry is competent; and further, that if it be shown that this copy of a judgment would be receivable as evidence in England, and that it is in truth, as it is alleged to be, a good extract of the English judgment, as we would call it, under the official seal of the Court, then, *ex comitate gentium*, it is equally so here (*vide Southgate* v. *Montgomery*, 15 S. 904). The judgment itself, on its merits, may be examinable, and be only *prima facie* evidence of the debt. That is a different matter.

As to the second question, production of a decree of a Scotch Court, obtained against the debtor himself, is sufficient to prove the constitution of a debt, and to entitle the creditor to confirmation as executor-dative *qua* creditor. The Act 1695 does not apply to a party who has obtained such a judgment during the lifetime of the deceased; but only to his creditors who have failed to do so, and to creditors of his next of kin who desire to attach the estate to which their debtor has become entitled. Now, on the same principle, if this document be proved to be good evidence of the judgment of the Exchequer of Pleas, which would be received as such in the Courts of England, I think the Commissary was entitled and bound to look upon it as proof of a constituted debt, as much as a decree of the Court of Session—no objection having been stated to the debt thereby constituted. The Commissary's decree only enables the party to reach the estate of his debtor by the diligence of the law. The diligence does not attach the debtor's person; and all that is required is a title sufficient to attach estate in Scotland. Its effect on the merits in this competition is a different matter.

The case of the *Marchioness of Hastings*, 14 D. 489, fixed this important principle, that the Commissary is bound to regard letters of administration obtained by next of kin to a domiciled Englishman; and to grant confirmation to the mother of the defunct producing such letters, although not his next of kin by the law of Scotland. In that case the Commissary had refused to confirm, there being no precedent for such a course, but this Court remitted to grant confirmation as prayed for. I do not see why a creditor, who has got a judgment of an English Court constituting his debt against his debtor, should not obtain from the Commissary, on very much the same principles, that confirmation as English creditor, without which he cannot attach his debtor's effects situated in Scotland.

Lord Benholme—This is an important, but scarcely a doubtful question. I conceive that such a constitution of a debt as will entitle a party to decree of executry from the Commissary may well be found in a judgment of an English superior Court. The competing party here may, no doubt, insist on further proof of the authenticity of the document. It is well settled in England what evidence is required there, and I should deprecate our refusing to accept evidence of the judgment which would be sufficient there. I do not say we know what the English rules are, but I observe it is stated in Phillips and Arnold on Evidence (i, 464), that the seals of all the superior Courts are among the matters which are judicially noticed without any proof being required in respect to them; and that was our own practice in early times. We must presume that they are properly protected from forgery. We are not to reject further evidence now, because it was not offered at a stage when the document was not impeached, though all parties were edictally called. For the Commissary to refuse to recognise this alleged judgment as a *prima facie* constitution of a debt would have been contrary to the principles of international law.

The proceeding as to executry-dative resembles adjudication in so far that, though constitution is required, it need not be such constitution as would warrant diligence against the person. For example, a holograph writing is a sufficient basis for either. It is certainly a good constitution of a debt till it is impeached. It carries a presumption of genuineness, yet it does not prove itself if it be impeached.

Lord Neaves—I concur with your Lordships. This is an English succession, but the aid of the Scotch consistorial courts has been invoked to uplift the funds. The moveable estate of a person who dies is in the hands of the Commissary as coming in place of the bishop. It must be taken up by confirmation, either by a successor or a creditor. If a successor appears, there is no room for creditors. But if there is no successor, then the creditor is admitted, but only upon adducing proof of his interest by showing his debt. If he has a liquid document of debt, he needs no new proceeding; he does not require to avail himself of the provisions of the Act 1695. The Commissiary will give him administration at once.

In this case Stiven produces a judgment obtained against his debtor (who was domiciled in England) during his lifetime, in the form of an alleged English

decree. This would not be a warrant for every kind of diligence. Some diligence proceeds upon Signet letters at once, and in such cases it is necessary to have first obtained a decree of a Supreme Court having a Signet, or a *fiat* of this Court upon a bill, either of which entitles any Writer to the Signet to expede horning. But some diligence proceeds by action, as poinding of the ground and adjudication. And adjudication, especially adjudication against a living debtor, presents a close analogy to the proceeding we are considering. It is competent to adjudge at once on a liquid document without any constitution. An unprotested bill is sufficient, though it would not be a foundation for horning. So is an English penal bond, as was found in the *York Building Company* cases.

Why then should an English decree in proper form not be a sufficient basis for this diligence of confirmation? It would be unreasonable to disregard it. The creditor could do no more than constitute his debt against an English debtor in an English Court, and when driven to resort to confirmation here by the accident of there being funds due by a Scotch debtor, every facility should be given for such a supplementary proceeding.

The party may of course object to the evidence or authenticity of the judgment if he pleases; but to exclude this decree altogether would be a strong proceeding, tending to treat our English neighbours as outer barbarians. We should be placing ourselves beyond the pale of that courteous intercourse which should subsist between civilised countries, and especially between this Court and an English Court in the same island, and subject to the same sovereign.

Lord Justice-Clerk—I entirely concur with your Lordships. I think that the Lord Ordinary's finding is not very logically connected with the views expressed in his note. Assuming that the document before us is an English judgment in a form in which it would be received as evidence in the English Courts, it seems to be to me clear that it is a sufficient *constitution* of the debt. A party who has obtained a judgment of a competent court against his debtor, which liquidates the debt, has done all that can well be required to constitute that debt. It is surely *constituted* by a judgment so obtained; and it would be unjust to require him to constitute it of new in Scotland against the unrepresented estate of his deceased debtor. I agree with your Lordships that a document may be a sufficient basis of confirmation, though not in a form in which the creditor could at once obtain execution.

It is a different question whether this document would, in point of fact, be received in the English Courts as instructing a judgment of the Exchequer Court of Pleas, and, if that is disputed, we must have inquiry. Assuming that that inquiry results in its being ascertained that any English court would receive this document as evidence of a judgment, I cannot go into the view that the Commissary was not entitled, without taking proof as to its authenticity, to grant confirmation to Mr Stiven. *Prima facie* and presumably, the document was a good decree. It bears a seal of a Supreme Court, it purports to be an office copy of a judgment, and it contains a very formal narrative of judicial proceedings terminating in a judgment founded on a verdict. The case of the English penal bond, referred to by some of your Lordships, which has been held a sufficient basis for an adjudication, is, in my opinion, directly in point, for in adjudications a liquid document of debt or a decree is required, and a penal bond is not probative *per se* in Scotland.

The Court, on 7th February 1868, pronounced this interlocutor:—"Recall the said interlocutor: Find that the document No. 52 of process, purporting to be an office-copy of a judgment of the English Exchequer Court of Pleas, to the effect set forth therein, was, if authentic, *prima facie* evidence of the constitution of the debt alleged to be now due to claimant Stiven, and was thus a liquid document of debt, on which the Commissary was entitled and bound to proceed in the confirmation for which he applied as executor-creditor of the deceased Joshua Tattan; but, in respect that the authenticity of the document is denied on record, continue the cause till Tuesday next, that parties may be heard as to the proper mode of ascertaining this disputed matter; reserving all questions of expenses."

Thereafter, the parties having agreed to take the opinion of English counsel as to the effect of the document, the Court pronounced the follow interlocutor:—"Approve of the case for the opinion of English counsel, as adjusted by the parties; and, of consent of both parties, appoint the said case, No. 63 of process, with the document therein referred to, being No. 52 of process, to be laid before Mr George Mellish, Q.C., for his opinion thereon; and appoint case and opinion, when obtained, to be lodged in process *quam primum*."

Mr Mellish's opinion was to the effect that, except in the same court and in the same cause, the document would not be receivable unless either certified by the keeper of the original record to be a true copy, or sworn to as correct by a witness who had compared it with the original.

To-day the Court, on the analogy of the course which had been followed in reduction of services, held that the executor might still supply the necessary proof of authentication.

Agent for Stiven—James Webster, S.S.C.
Agents for Myer—Stuart & Cheyne, W.S.

Friday, May 29.

MONTGOMERY CUNNINGHAME *v.* BOSWELL.

Loan—Abandonment—Taciturnity—Interest. Circumstances in which *held* that there was no presumption from taciturnity and lapse of time that a claim for a sum given in loan was meant to be abandoned, and that interest was due on the principal sum in absence of any stipulation to the contrary.

This was an action brought by Sir Thomas Montgomery Cunninghame of Corsehill, as executor-dative of the late Hon. Mrs Leslie Cuming of Skeldon, against the Dowager Lady Boswell, as executrix of the late Sir James Boswell of Auchinleck. The summons concluded for payment of the sum of £2000, said to have been advanced to the late Sir James Boswell by his aunt, the late Mrs Leslie Cuming, on 30th January 1829, together with interest at 5 per cent. since the date of the advance. The loan was instructed by holograph receipt granted by Sir James of the date in question, and which was found in Mrs Leslie Cuming's repositories on her death in 1863; and the questions raised were two,—(1) whether the circumstances, including the long period which had intervened without any demand being made for payment, presumed abandonment or discharge of the debt?