THOS. GRAHAM, Appellant.—*Gifford—Wedderburn—Alison.* No. 53.
JAS. GRAHAM, Respondent.—*Warren—Sugden—Robertson.*

Mutual Contract.—An estate having been left to a natural son, on condition of not marrying a certain lady, under a penalty of forfeiture in favour of the testator's brother, who was in India; and having made a compromise with the attorneys of the brother, (knowing that they had no authority to do so,) by which he agreed to marry and forfeit on condition of payment of one half of the value of the estate; but reserving to the brother to say whether he would put any value on the mansion-house and political interest of the estate; and having married, and decree of forfeiture being pronounced against him in favour of the brother, (who hitherto was ignorant of the transaction); and the brother having afterwards taken possession and paid the stipulated value, but declined to put any value on the house and political interest; and the son having declared that he had no legal claim against him; but thereafter having brought an action against him for one half their value, and the Court of Session having valued them, and decerned against the brother, the House of Lords reversed the judgment.

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2D DIVISION. Lord Craigie.

THE late George Graham, Esq. was proprietor of the estate of Kinross, extending to about 245 acres, on which there was a large mansion-house. The remainder of the estate consisted entirely of superiorities, containing about £10,000 Scots valuation, and yielding a revenue of feu-duties to the amount of about £1200. Mr. Graham had no lawful issue; but he had a natural son, the respondent, by a French lady. His heir-at-law was his brother, the appellant, Mr. Thomas Graham, who resided in India. Mr. Graham having educated and brought up the respondent as if he were his lawful son, executed several deeds of settlement in his favour; but having discovered that he had formed an attachment to a Miss Muter, of which he disapproved, he, on the 27th of July 1801, executed a trust-settlement, by which he recalled the former deeds, and conveyed his estate to trustees, (one of whom was the appellant); 'declaring always that 'these presents are granted by me in trust only, for the use and behoof of myself during my own lifetime; and at my death, in the 'event specially after mentioned only, for the use and behoof of 'James Graham, my only son in life, procreated betwixt me and 'Mrs. Genevieve Piquet, now deceased, formerly of the parish 'of St. Hyppolite, fauxbourg St. Marcel, and city of Paris, 'and the heirs male or female lawfully procreated of his body; 'whom failing, for the use and behoof of any future heirs 'male or female that may be lawfully procreated of my own body; 'whom failing, the said Thomas Graham, my brother consan-'guinean, one of my said trustees, and the heirs lawfully pro-'created of his body.' But declaring, 'That whereas the said 'James Graham, my son, has for this some time past formed

March 5. 1823. ‘ or threatened to form a matrimonial connexion with Miss ——
‘ Muter, daughter of Mr. —— Muter of Annfield, much con-
‘ trary to my wishes or intention; and that it is my fixed deter-
‘ mination, if he either already has formed or shall hereafter
‘ form such connexion with that lady, or with any other lady, ex-
‘ cept Miss Anna Maria Graham, eldest daughter of the said
‘ Thomas Graham, my brother consanguinean, without my con-
‘ sent, or the consent of the majority of my said trustees sur-
‘ viving and accepting at the time, that the said James Graham
‘ shall take nothing under the present settlement, he being thereby
‘ in such event expressly excluded and debarred from any share
‘ of my said estates, real and personal; therefore the said trustees
‘ shall only denude in favour of the said James Graham, my son,
‘ in the event of his having married, excepting as said is, with
‘ my consent, signified in any way, or marrying with the consent
‘ of a majority of my said trustees surviving and accepting at the
‘ time, previously had and obtained in writing, and no otherwise;
‘ and in the event of his dying unmarried, or marrying without
‘ consent as aforesaid, (excepting as said is,) the said trustees
‘ shall, immediately after either of these events happening, de-
‘ nude of my foresaid lands and whole other estates, real and
‘ personal, in favour of the next person appointed to take under
‘ the substitution before set down, who shall be at liberty to enter
‘ into the possession of the said landed and personal estate in the
‘ same way as if the said James Graham had never been men-
‘ tioned in this deed; he and the heirs of his body procreated of
‘ any marriage, without consent as aforesaid, being hereby totally
‘ excluded from taking any thing in virtue of this deed, except-
‘ ing such payments, by way of a reasonable annuity, which my
‘ said trustees are to be the judges of, which he may have ac-
‘ tually received previous to the marriage.’ On the 11th of December 1801 Mr. Graham died, and the respondent then applied to the trustees in this country to consent to his marriage with Miss Muter, but they declined to do so. On the 16th of July 1802 he wrote to the appellant in India, stating, ‘ that as the
‘ trustees are steady in refusing their consent to my marriage
‘ with Miss Muter, and Dr. Moir has declared his opinion also
‘ against it, so that your and Colonel Park’s consent would not
‘ now have any effect in my favour, farther than satisfying the
‘ world that those who may be supposed to have the greatest
‘ respect for my father’s memory do not consider such consent as
‘ any dereliction of that sentiment; but, as matters now stand,
‘ I have proposed a compromise, and this seems at least not to be

'disapproved of by my trustees, as you will see mentioned in their 'minutes enclosed. Being determined, if I can save as much of 'my fortune as will ensure a competence, to fulfil my engage- 'ments to Miss Muter, if you, as the next in succession, will give 'me one half of the free property, whatever it is, at the date of 'your succession, I will marry, and forfeit in your favour. To 'one to whom I have always been taught to consider as possessed 'of generosity and justice, I need not urge much to recommend 'this partition. The object of it is honourable; and it would 'make me happy, and add from £15,000 to £20,000 to your 'fortune, which, I hope, might complete your independence, and 'enable you to return to your native country and your friends. 'I name no particular sum as the price of my forfeiture, because 'it is not quite certain what the value of the estate may be; but 'if a fair division takes place, there can be no difficulty, as, if it 'is worth £10,000, I would on that footing get £5000; if worth '£40,000, I would get £20,000. You could not lose, and my 'object behoved to be attained.' March 5. 1823.

In a communication which was made by the appellant to his co-trustees, before he had received the above letter, he stated that he did not conceive that they had the power to consent to the respondent's marriage with Miss Muter; and that, even if they had, still, as it was plainly contrary to the wish of the late Mr. Graham, he could not assent to it.

Previous to this time, the appellant had constituted a Mr. Templar and others as his attorneys in London, for the recovery of his debts in Britain; and on the 7th of September 1802 the respondent, after some communings, and being aware of their limited powers, addressed this letter to them:—'Having formed 'my resolution relative to the succession of my father's pro- 'perty, and having determined rather to marry the lady of my 'choice, with a part of the inheritance, than enjoy the whole 'without her, I hereby offer to incur the irritancy contained 'in my father's trust-deed, and forfeit thereby all right in the 'succession to his estates, provided you, as the attorneys of 'my uncle, Mr. Thomas Graham, will take upon you to pay to 'me a sum equal to the value of the half of my father's whole 'property, heritable and moveable, as the amount of that value 'shall be determined at the date of my marriage and consequent 'forfeiture. In order to ascertain that amount, I hereby agree 'to refer the same to the opinion of William Adam, Esq. of 'Blair-Adam, who, from his friendship for both parties, and the 'vicinity of his estate to the estate of Kinross, must be a most 'desirable referee.'

March 5. 1823. This letter was transmitted by the respondent's agent, Mr. Campbell, to Mr. Templar, who, on the 8th of the same month, returned this answer:—'I received your letter enclosing Mr. 'James Graham's proposals. I cannot say they meet my ap- 'probation in the shape sent me. My objection is not to the 'sum demanded, but the way it is to be paid. To value the estate 'as if a purchaser were to take it, is and must be hostile to the 'interest of Mr. Thomas Graham. I do not view this in the 'light of advantage to him; it is a mere whip syllabub, as pro- 'posed, all froth and no substance. I beg to propose this amend- 'ment—the house is a drag-chain, and will cost £4000 or £6000 'to put it in repair.—My proposal is as follows:—Mr. G. Graham's 'debts in the first place to be paid, and all mortgage debts of 'course.

'The remainder of the personal estate to be then divided,— 'a moiety to each.

'The moveables, such as plate and linen, to be equally divided, 'and each sell or retain his moiety.

'The net rental of the estate for the last seven years to be 'ascertained from Mr. Graham's factor, in which shall be included 'any lands Mr. Graham kept in hand, but the house of Kinross 'shall not be valued. This net rental shall be divided.

'I hope my proposals are sufficiently clear to be understood, 'and as the demand made so far exceeds what the attorneys were 'given to expect would be demanded, there can be no difficulty 'in Mr. Graham's acceding to them. My mode does not lessen 'his demand, but only fixes the precise mode by which the estate 'shall be valued; for I still retain my opinion, if the valuation is 'to be fixed by any other criterion, Mr. Thomas Graham is better 'without it, because it may induce him to come home expecting 'an income to live on out of the estate, when he will only find 'himself encumbered with a large old house going fast to decay, 'and a few cocks and hens from the feu-duties. Being a land- 'holder, I too well know what imaginary rents are. I have pro- 'posed the average, and Mr. John Græme's accounts will exactly 'ascertain them, and I have fixed the price of them at twenty- 'five years purchase.' On receiving this answer, the respond- ent, on the 17th of September, again wrote to the appellant's at- torneys in these terms:—'The mode in which I propose the 'transaction with my uncle should be carried into execution is 'this—Upon receiving a missive letter from you, agreeing to 'pay me a sum equal to half the value of the heritable property, 'and to deliver to me one half of the whole personal property as

'it stands, I shall accomplish my marriage with Miss Muter March 5. 1823.
'without delay, and will thereby, in terms of my father's settle-
'ment, forfeit his property. By that act, my uncle instantly ac-
'quires a right to the estates, real and personal, and the trustees
'should convey the same to him. But in order to make matters
'quite clear, and prevent the trustees from raising any objections,
'you, by your attorneys in Scotland, will, immediately on my
'marriage, raise an action of declarator before the Court of Ses-
'sion in Scotland for having it declared, that, in terms of the
'trust-deed executed by the deceased George Graham, the pro-
'perty now belongs to Thomas Graham, and that the trustees
'should denude in his favour. I think that by Christmas this
'might be concluded, and then the trustees, who have been put
'in possession by the conveyance in their favour executed by my
'father, will be obliged to give a warrant for putting Mr. Thomas
'Graham in possession. Thus he will acquire a right instantly
'upon my marriage, and his right will be legally completed in
'point of security by the conveyance by the trustees. There are
'some other steps necessary for completing the right, so as to
'enable my uncle to vote and be elected a member of Parliament,
'which Mr. Campbell will explain; but he will be secured in the
'possession by the steps I have mentioned. As to my security,
'as soon as Mr. Keith and Mr. Adam have determined what the
'amount of my half of the heritable part of the property shall be,
'you, as my uncle's attorneys, after his right is made up, can grant
'me securities upon the estate for the same, bearing interest from
'the date of the marriage; these securities not to be moveable
'without your consent, till the lapse of a limited time to be fixed
'by Mr. Adam. The insurance on my uncle's life, being a se-
'curity in which all are interested, together with all other inci-
'dental charges, I have no objection to their being paid out of
'the total property, so that each shall pay a half; and in con-
'sideration of your paying me, or securing me in the half as soon
'as it is ascertained, I, for your security, bind myself and my
'heirs, in case my uncle should succeed in a suit for repayment
'of said half, to relieve you of the same, in so far as you might be
'liable for your interference. This is the plan hinted at in my
'letter of the 7th current, and to which I refer.'

Some objections, however, having been made by the attorneys with regard to the house and political interest at a meeting which they had with the respondent, on the date of the above letter, he subjoined to it the following explanation:—'Since writing the 'above, I so far alter my proposal, that, in terms of your request,

March 5. 1823. 'I agree to leave the value of the house of Kinross, and of the 'political interest attached to the estates, entirely out of view at 'present, referring these to my uncle himself, either as he shall 'give you directions in reply to your communication to him, or as 'he shall determine their value when he returns to this country. '—In the possible event of death, I shall agree to accept of the 'sum arising from the insurance of £20,000, as the amount of 'my compromise.' On the following day, being the 18th of September, the appellant's attorneys wrote to the respondent and his agent this letter:—'As, according to the law of Scotland, Mr. 'Thomas Graham, or his attorneys for him, can be put in posses- 'sion of the estate, so that he can sell or dispose of it at his own 'pleasure, we have no hesitation to say, in reply to your letters of 'the 7th and 17th instant to us, as his attorneys, that we are ready 'to accept on his behalf of the terms you propose; videlicet, after 'paying, according to the will, all debts and encumbrances, to ac- 'count with you subsequent to the forfeiture and surrender to 'him, Thomas Graham, of all the late Mr. George Graham's 'estates, for one half of the value of the whole, this value to be 'determined by Mr. William Keith, under Mr. William Adam's 'approval, as our sole referee, of course liable to all claims that 'may hereafter be made within a reasonable time to be limited 'by Mr. Adam. It will be necessary for our security, as agents 'to Mr. Thomas Graham, to require the affidavits tendered by 'yourself and Mr. Campbell.'

In consequence of this arrangement, the respondent married Miss Muter on the 4th of October.

The trustees of the late Mr. Graham thereupon raised an action of declarator of forfeiture against the respondent; and on the 25th of January 1803 decree was pronounced without opposition, finding the respondent's right forfeited, and the estate to belong to the appellant.

This compromise and this decree took place before it was possible to have any communication with the appellant in India on the subject. On the 8th of April 1803 he wrote to the respondent, stating, that 'I had the pleasure, only a few days 'ago, of receiving your favour of the 16th of July last. The 'proposal therein contained, of forfeiting on condition of re- 'ceiving half, having been already acceded to by my attorneys, 'and confirmed by me, it becomes unnecessary here to go further 'into the consideration of it, than to assure you that I have de- 'rived infinite satisfaction from the reflection that they have 'acted in this business in a manner so consonant to my own

'disposition and sentiments, and I shall rejoice if you shall have 'reason to consider me as having been in any shape instrumental 'to the completion of your happiness. You would learn by my 'letters to my dear Mrs. Graham, that, had you incurred the for- 'feiture of Kinross without previous stipulation, it was my desire 'that your situation should be made comfortable. I am better 'pleased, however, that matters have been arranged in the way 'they have, as it obviates the risk to which you might have been 'exposed from whim, caprice, or any change of sentiment on my 'part, while it secures to me, without question, the enjoyment of 'what you have surrendered.' He also added, 'That having little 'doubt of the information given to me some days ago by Mr. 'Anstruther being correct, when he read an account of your mar- 'riage of the 10th October, I beg leave to offer you and Mrs. 'Graham my most sincere congratulations on the occasion, with 'best wishes for a long enjoyment of that domestic felicity only 'to be found in the marriage state. I trust the day is not far 'distant of having the happiness of assuring you personally how 'much I am your affectionate uncle.' Subsequent to this, the appellant sent a new power of attorney, with more extensive authority than he had formerly given, and to settle with the respondent. In his communications, however, to the attorneys, he stated that he did not conceive that any value should be put on the mansion-house and the political interest of the estate. March 5. 1823.

In prosecution of the compromise, a submission was made to Mr. Adam; and the parties (in consequence of the death of Mr. Keith) requested Mr. Selkrig, accountant, to ascertain, 'so far 'as you are able, from the best evidence you can obtain, what is 'the real value of the estates of Kinross, Lochleven, and Cleish, 'the houses in Edinburgh, and all the other heritable property 'belonging to the deceased George Graham, and conveyed by 'him to certain trustees, conform to trust-deed and settlement 'dated the day of ; but excluding from such 'valuation the house of Kinross, and political interest attached to 'the estates, except in so far as a Crown holding is preferable, in 'the general case, to a holding of a subject.' Mr. Selkrig accordingly made a report, estimating the value of the feu-duties at about £30,000, but excluding from his valuation the mansion-house, and the political interest arising from the freehold qualifications afforded by the estate. On considering this report, Mr. Adam, on the 16th of August 1805, issued this award:—'I per- 'fectly approve of the principles on which Mr. Selkrig has esti- 'mated this property, and I think the parties should take the

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On the 26th of March 1806 a meeting took place with a view to a settlement between the respondent and the appellant's attorneys, when he addressed to them this letter:—‘ As the ‘ accounts between my uncle, Thomas Graham, Esq. and my- ‘ self, so far as respects the heritable property of my late father, ‘ George Graham, Esq. of Kinross, are now finally settled, and ‘ mutual discharges ready to be granted by you, as my uncle's ‘ attorneys, and myself; and as it appears to be your wish to have ‘ some information respecting my ideas of the points reserved ‘ in the submission to Mr. Adam, viz. the value of the house ‘ of Kinross, and the political interest of the estate, I have no ‘ hesitation in declaring that I have no legal claim on my uncle, ‘ Thomas Graham, Esq. for either of these subjects; but that, in ‘ terms of my agreement with my uncle's former attorneys, they are ‘ to be referred entirely to my uncle himself.’ Accordingly, a mutual discharge was executed, by which ‘ the said attorneys on ‘ the one part, and the said James Graham on the other part, do ‘ hereby mutually exoner, acquit, and discharge each other of the ‘ foresaid docqueted account, and whole articles therein contained, ‘ import and effect of the same, as well as all claims competent to ‘ them or either of them, or their constituent, in virtue of the ‘ foresaid reference, in so far as regards the said whole heritable ‘ property belonging to the said deceased George Graham, Esq. ‘ of Kinross.’

The appellant returned from India in 1808, and thereupon took possession of the estate of Kinross, and resided with his family in the mansion-house. Having declined to allow any thing on account of the house and the political interest of the estate, the respondent, in 1815, raised an action against him before

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the Court of Session. In the summons he stated the nature of his father's trust-deed, the compromise made with the appellant's attorneys, the respondent's marriage, and the decree of declarator of forfeiture; and that, 'in terms of the original 'agreement entered into by the missives, and explanatory post-'script above recited, and of the report and valuation made in con-'sequence thereof, and of the mutual discharge above recited, it 'thus appears, that although the pursuer was to receive from the 'defender the just and equal half of his father's whole estate and 'property, heritable and moveable, yet the value of the mansion-'house and pertinents, and of the superiority and political in-'terest attached to the estate of Kinross, and also to that part 'of the deceased George Graham's property lying in the county 'of Fife, have never been valued or ascertained.' He, however, did not allege that the attorneys, with whom the compromise had been made, had power to enter into it, nor that it had been sanctioned and approved of by the appellant before the decree of forfeiture, or that he had subsequently done so. The conclusion of his summons was, that 'it ought and should be 'found and declared, by decree of our Lords of Council and 'Session, in either of the Divisions of the said Court, that in terms 'of the aforesaid missive letters, of date the 7th, 17th, and 18th 'days of September 1802, and postscript thereto above men-'tioned, the pursuer is justly entitled to one half of the true 'value of his deceased father's whole property, heritable and 'moveable, of whatever nature or extent the same may be; and 'that, in ascertaining the value of the heritable property as afore-'said, the value of the mansion-house, offices, pigeon-house and 'others connected therewith, and the additional value of the green 'avenue or pleasure-grounds as an appendage thereto, and also 'the value of the superiority, and political interest arising there-'from, all pertain to and make part of the heritable estate of 'the said deceased George Graham; and the value of all which 'not having hitherto been either ascertained or paid for by the 'defender, our said Lords ought and should allow a proof to be 'taken of the true worth and value of the said remaining whole 'heritable estate, and parts, pertinents, and appendages thereto 'belonging, and thereafter fix and ascertain the just and true 'amount of the value thereof, and find and declare that the pur-'suer, in terms of the aforesaid transaction entered into between 'him and the attorneys of the defender, and of the forfeiture by 'him of the estate of Kinross, and other heritable property in 'the defender's favour, and possession following thereon, is en-

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Various defences were stated by the appellant; and particularly, that, from the nature of the agreement, it was left entirely to his discretion to say, whether he would allow any value for the house and political interest, or not; that he had declined to allow any value; and that it was not competent for a Court of Law to affix any value to political interest derived from the possession of superiorities.

Lord Craigie, before answer, remitted to 'Messrs. Alexander 'Duncan and James Thomson, writers to the signet, to state 'what, in their opinion, would have been the value of the 'mansion-house on the estate of Kinross, and of the political 'influence attached to the estate in the year 1808, when the 'defender returned from India to Britain.' His Lordship at the same time issued this note:—'The Lord Ordinary is of 'opinion, that by the agreement concluded between the pursuer 'and the defender's trustees, to which the defender afterwards 'acceded, the pursuer was entitled to one half of the value 'of the lands and estate of Kinross, as the same should be 'estimated by certain persons therein named, with one exception 'only as to the mansion-house, and the political influence attached 'to the estate, upon which a value was to be put by the defender 'himself.

'The Lord Ordinary is further of opinion, that, in virtue of 'the reference thus made to the defender, he was not authorized 'to put an elusory value upon the subjects, and, least of all, to 'refuse to put any value at all upon the subjects; or, in other 'words, to appropriate to himself, without any recompense, what, 'as stated by the pursuer, would have yielded several thousand 'pounds, if the estate had been exposed in the ordinary way; and 'what renders such a proceeding particularly exceptionable is, 'that, with the concurrence and approbation of the defender and his 'trustees, the valuators formerly employed had rated a part of the 'subjects falling under the reference to them at a lower sum than 'they would otherwise have done, on account of its connexion with 'those upon which the defender was to put a value. The Lord Ordi-'nary, however, has not pronounced any interlocutor upon the rele-'vancy of the pursuer's claim, having delayed this till the report 'of Messrs. Duncan and Thomson has been obtained, so that he 'may at once give a determination upon the whole matters in 'dispute.'

Against this interlocutor the appellant reclaimed; and the Court, on advising his petition with answers, 'recalled the interlocutor complained of, and found that, by the transaction 'entered into between the pursuer and the attorneys of the defender, and afterwards approved of by the defender, it was referred to the defender himself to put a value upon the house 'of Kinross, and the political interest attached to the estates, 'on his return to this country; that the defender was bound 'to put a value on the said subjects; and ordained the defender, 'before further procedure, to put in a special condescendence, 'signed by himself, of the value he put on the said subjects 'at the period of his return from India.' To this interlocutor their Lordships afterwards adhered, and refused leave to appeal. March 5. 1823.

The appellant having lodged his condescendence, the Court appointed the respondent to give in a condescendence as to what he averred was the value; and thereafter, on advising memorials relative to the political interest, found that 'it was expedient in 'this cause to send an issue or issues to be tried by a Jury, in 'terms of the statute, as well with regard to the value of the 'political interest, as to the value of the house.' The following issues were accordingly sent to the Jury Court:—

'1. What was the value of the mansion-house and offices upon 'the estate of Kinross, at the time the defender succeeded to the 'said estate, under the transaction with the pursuer?

'2. What was the surplus value of the policy or pleasure-'ground about the said mansion-house at the time aforesaid, over 'and above the value accounted for under the reference to Mr. 'Adam, and consequent settlement?

'3. What was the value of the superiorities and political in-'terest upon the said estate, and those lying in the county of 'Fife, to which the said defender succeeded in virtue of said 'transaction, at the time the defender so acquired right to them?'

These issues having been tried, the Jury returned this verdict:—'That in respect of the matters of the said issues 'proved before them, they find, in regard to the first issue, that 'the value of the mansion-house and offices upon the estate of 'Kinross, at the time the defender succeeded to said estate under 'the transaction with the pursuer, was £5000 sterling. In regard 'to the second issue, find that there was no surplus value of the 'policy and pleasure-ground about the said mansion-house, at 'the time aforesaid, over and above the value accounted for under 'the reference to Mr. Adam, and consequent settlement; and, in

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'regard to the third issue, find that the value of the superioritics 'upon the said estate, and those lying in the county of Fife, 'deducting the value of the feu-duties, casualties, and services 'already paid for, to which the said defender succeeded in virtue 'of said transaction, at the time the defender so acquired right 'to them, was £7845. 8s. sterling.' In consequence of this verdict, the Court found, 'That the pursuer is entitled to receive from 'the defender one half of the said sums, amounting to £6422. 14s. 'sterling, and decerned accordingly;' and thereafter, on advising memorials as to a claim by the respondent for interest, their Lordships found, on the 14th of May 1819, 'That, under the whole 'circumstances of this case, the sum of £6422. 14s. sterling found 'due to the pursuer, and decerned for, should bear interest from 'and after the term of Martinmas 1808;'—found the pursuer entitled to his expenses, and decerned accordingly.*

Against these judgments the appellant appealed, and contended,—

1. That as his attorneys (with whom the respondent voluntarily transacted suo periculo) had no authority to enter into the compromise, the appellant could not be bound by it to any greater extent than that to which he had consented:—that he had declined to give anything on account of the house and political interest; and, besides, as it was left to his discretion to say whether he would allow anything for them, it was not competent to compel him to do so.

2. That the summons did not allege that the appellant had ever consented to the transaction with the attorneys, but merely averred that he had entered into possession by virtue of that transaction, and of the decree of declarator, which was not qualified with any condition that the appellant should pay any thing to the respondent, and was of itself a sufficient title; and therefore the summons did not state any cause of action which could warrant the decrees that had been pronounced.

3. That the agreement was in itself of such a nature as a Court of Law could not enforce, being an attempt to defraud the will of the truster.

4. That political interest was not a subject on which a Court of Law could put a value; and that, in interpreting the contract, the Court was not entitled to assume that by political interest was meant the superiorities; and that, even if it were so held, it could not have been the intention of the parties that these supe-

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* Not reported.

riorities, independent of the feu-duties, (of which the respondent had received one half,) were to be valued; because it was not possible to convert the superiorities into money, and at the same time to reserve the feu-duties.

5. That the Court were not entitled to send an issue to the Jury Court to estimate the value of the superiorities, seeing that the agreement referred specially to 'political interest,' and the interlocutor, by which it was found expedient that the case should be tried by Jury, was limited to 'political interest;' and besides, that the verdict merely estimated the value of the superiorities, without saying anything as to the political interest, so that no answer had been made as to the point on which the Court made the remit: And,—

6. That, at all events, as the sum decerned for had not been ascertained and constituted till the verdict of the Jury, it was not consistent with law to find the appellant liable in interest prior to that period.

To these pleas it was answered,—

1. That the appellant, both by his letters and by his acts and deeds, had sanctioned and homologated the transaction with his attorneys generally, and he was not now entitled to object to it; and therefore, if he refused to put a value on the subjects, as to which he was made the arbiter, a Court of Law was entitled to interfere and do justice.

2. That although it was not expressly stated on the face of the summons that he had sanctioned the agreement, yet it was substantially so averred there, and expressly on the record of the process.

3. That the agreement was perfectly legal; and it was extremely doubtful whether the condition imposed in the trust-deed on the respondent was effectual in law; and if it was not valid, the agreement was undoubtedly unobjectionable.

4. That by political interest the parties meant the value of the superiorities, which of themselves, and independently of the feu-duties, and as giving an elective franchise, had a commercial value, and accordingly were daily sold and bought.

5. That, in remitting the case to the Jury Court, the words 'political interest and superiorities' had been used synonymously, and as explanatory of each other; so that there was nothing inconsistent between the interlocutor and the issue, nor between the issue and the verdict: And,—

6. That as the appellant ought, on his arrival from India, to have put a value on the subjects, and paid the one half to the re-

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In the course of the discussion at the Bar on the above points,

The LORD CHANCELLOR asked—What is the letter you say contained what the law would call a ratification? The letter in 1803 does not prove that the appellant knew that the marriage had actually taken place, and that the respondent had at that time forfeited.

Mr. Sugden.—At the bottom of the original letter of 5th April 1803, it appears that he approved of the marriage.

LORD CHANCELLOR.—Suppose that to be so; but could any Court be a party to an agreement, because he afterwards approved of the marriage—that marriage taking place without his knowledge—and at any rate, whatever may be the feelings among parties, nothing can be clearer than this, that where a trustee and devisee set about together to disappoint the will of a testator, it should be as clear as daylight what is meant, before a Court ought to interfere. It is impossible in the nature of the thing, that, when he wrote in 1803, he should know of the marriage. Then the question upon that letter will be this:—Supposing he had given his consent to the marriage antecedent to the marriage, and it took place upon that antecedent consent, and so taking place he was bound; yet, if it had not been had before the marriage, would he have been bound at all?

Mr. Warren.—I will state the words of the letter which are not printed. It is stated that he approved of the whole transactions. The letter is dated the 8th of April 1803, from Calcutta, part of which is set out at the bottom of page 6. In that letter there are these words:—'Having little doubt of the information 'given me some days ago by Mr. Anstruther being correct, when 'he read an account of your marriage of the 10th October.'

LORD CHANCELLOR.—Take this along with you. You yourself state in your Case, that, before any communication could reach the appellant, the marriage took place.

Mr. Warren.—That is so, certainly.

LORD CHANCELLOR.—Then the question would arise—Suppose Mr. Thomas Graham had agreed, before the marriage, that the forfeiture should not operate wholly, could he, or could he not, have insisted that it should, after it had taken place?

Mr. Warren.—I apprehend that might depend upon the terms of the letters subsequently written. His words are, 'Having 'little doubt of the information given me some days ago.'

LORD CHANCELLOR.—That is subsequent to the marriage taking place. March 5. 1823.

Mr. Warren.—It is not in the printed Case, my Lord; it is a letter of the 8th of April 1803, part of which is in the printed Case. But what I am going to read is not, and it is this:—'Having little doubt of the information given to me some days ago 'by Mr. Anstruther being correct when he read an account of 'your marriage of the 10th October, I beg leave to offer you 'and Mrs. Graham my most sincere congratulations on the occa-'sion, with best wishes for a long enjoyment of that domestic fe-'licity only to be found in the marriage state. I trust the day is 'not far distant of having the happiness of assuring you per-'sonally of how much I am your affectionate uncle, Thomas 'Graham.'

LORD CHANCELLOR.—I suppose nobody will deny that if, before that letter was written, you had brought an action in the Court of Session to implement this agreement, you could not have succeeded. Will that letter give you such a right?

Mr. Warren.—He wrote it with a view to all the preceding transactions, and writes it as confirmatory of the transactions entered into by his attorneys with his nephew.

In reference to the question as to the political interest,

The LORD CHANCELLOR observed:—Without prejudice to any observation on the law of Scotland, let us see what the law of England would be. Suppose two persons had made an agreement, each to purchase the political interest of the other; and from the agreement it should be clear that the political interest was to have a value set upon it, and set upon it by the individual himself; and taking it that the law of England is that which we suppose it to be—not meaning to say it is, or it is not:—if the individual would not put a value upon the political interest, would any Court put a value upon political interest? But an issue has been here directed to find what is the value of the superiority and the political interest; and the verdict states only the superiority; but the verdict does not go to the whole of the issue.

In regard to the objection as to the terms of the summons,

The LORD CHANCELLOR observed:—In the first place, I would ask you to be kind enough to look at your summons. It proceeds upon this, that this Mr. Graham was in India, and that these persons were his attorneys, who could not, without his previous authority or subsequent authority, enter into such a transaction as this for him. The agreement, you will observe, is in September 1802. This gentleman marries immediately after-

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wards, and then there is a long period before it was possible that Mr. Thomas Graham could know anything in India of the matter. Then there is an action of declarator, raised in the Court of Session, stating to that Court there had been a forfeiture of the estate, which action is followed by a decree of forfeiture so early as January 1803. Now I should be glad to know the effect of that. The estate is forfeited, and a decree of forfeiture is pronounced in January 1803, previous to April 1803; and of course I suppose nobody can say, that when Thomas Graham, the appellant, wrote the letter in April 1803, he was cognisant of the fact that there was that action and forfeiture. I wish, therefore, to know —however honest and proper the agreement might have been in a moral point of view—whether Mr. Thomas Graham could be compelled to act under that agreement, entered into by his attorneys? It is stated in the summons, 'that the said Thomas 'Graham is now in possession, in virtue of the aforesaid transac-'tion and agreement.' But if that was the transaction or agreement, and if he could not be recognised as being acquainted with the nature of this agreement between these two parties, could your client, under this testator's will, and after the decree of forfeiture, have gone to the Court to rescind this decreet; and if not, could that decree be a ground for carrying into effect any part of the agreement?

Mr. Sugden.—The action was raised by the trustees under that agreement.

Lord Chancellor.—But they had a right to sue; and if, in the execution of their duty, they had a right to sue, and to call upon the Court to have a forfeiture declared, then the question is—Whether, after such a transaction, the Court will interfere as to any part of such agreement? The first thing is, to get rid of the want of the allegation in your summons of the subsequent approbation of the agreement.

Mr. Warren.—It appears by the letter of April 1803 that the whole of these transactions must be considered as ratified by Thomas Graham, for he takes his share of moveables.

Lord Chancellor.—He did; but that was by virtue of the decree, which had passed without his knowing anything of it.

Mr. Warren.—He would not perhaps know what were the terms, though he knew of the thing that was to be done. I am not sure whether your Lordships mean that something more ought to be stated.

Lord Chancellor.—I do not think his approbation is sufficiently shown in the summons. You are called upon to make such an allegation in the summons, and not to act upon moral representation; and besides, this is an agreement between two

persons claiming under this will, in direct fraud of the testator's intention—a legal fraud, but still in its nature such, that the claim made upon the effect of such transaction should leave nothing in doubt. March 5. 1823.

Mr. Warren.—I was upon this point, whether such an action could be maintained. There is a case which has never been overruled in Pere Williams:—Two agreed to divide the property by a will. I am aware that case has been doubted, but it has never been overruled.

Lord Chancellor.—There is a case where two persons agreed, that if a testator left unto one of them the whole of his property, and which the testator did, meaning the other should have none, they would divide it. In that case of Pere Williams, the agreement was held to be a good agreement, but in subsequent cases it has been stated that the Court would not accede to that doctrine. Suppose this had been an agreement free from all observation, you might have gone into the Court of Session; instead of which, the Court of Session proceeds upon this as a forfeiture—as an unsanctionable breach of the testator's will, and in consequence shifting the property of the testator's estate.

Mr. Warren.—Upon that I should say, that it was for the appellant, if he chose, not to take advantage of it, by allowing a forfeiture to be made in the way in which it appears to have been made, and to content himself by taking such portion as he was allowed to take.

Lord Chancellor.—You were in too great a hurry to be married. You were in so great a hurry, that you got married before it was possible you could know what had been proposed by persons who were called his attorneys. That is not the whole of this transaction. After this takes place, a suit is immediately instituted to make a forfeiture. The appellant could not have known of the suit, or the decree of forfeiture. Then you state nothing in your summons of subsequent approbation, though you talk about it. The next question is, whether that amounts to a legal obligation to repel fraud?

Mr. Warren.—Your Lordships know the summonses in Scotland are not drawn so strictly as pleadings in this country.

Lord Chancellor.—The question is, whether you can enforce it?

Mr. Warren.—That is supposing it to be an objection which the Court must take, it not having been taken by the defender below.

Mr. Attorney-General.—I take the objection, and so I opened it.

March 5. 1823. *Mr. Warren.*—I am talking of the forfeiture—not that to which my learned friend alludes. It is a different question whether the contract could be enforced: it is one thing to know whether you would allow an action to be brought in consequence of the forfeiture.

Lord Chancellor.—There is another way of putting it. Take your summons from the beginning to the end, it contains no allegation of subsequent approbation, except that this gentleman is in possession of the estate by virtue of these transactions. There is no letter written to that effect. But because he takes possession of the estate which has been forfeited, would that ratify the acts of his attorneys, arising out of a marriage to which he was no party? Then comes this question: If you have not alleged subsequent approbation, independent of his taking possession, whether the summons contains any cause of action whatever? But if the summons contains no cause of action, there can be no judgment. If, then, the only cause of action which is laid in the summons is, that this person, in consequence of this agreement and transaction, took possession of the estate—if they have produced a decreet of forfeiture in his favour, and he was not a party to these transactions previously—what was there to hinder him taking possession of the estate? He has a right to say, they acted as my attorneys, but for this purpose they were not my attorneys. This young gentleman has married, and here has been a decreet of forfeiture. I was no party to the marriage; and the attorneys had no authority from me to sanction the marriage; and I will take possession. Here is a judgment in my favour.

Mr. Attorney-General.—It is stated that it was by virtue of the decreet he took possession.

Lord Chancellor.—That is exactly what I state.

Mr. Sugden.—How could it be otherwise?

Mr. Warren.—There is certainly no allegation of subsequent approbation upon the face of the summons. That cannot be denied; but that did not appear to be an objection in the Court below, either to the Judges or to the counsel.

The House of Lords 'ordered and adjudged that the interlo-'cutors complained of in the said appeal be, and the same are 'hereby reversed.'

Lord Chancellor.—My Lords, there is a very singular case which was before your Lordships a few days ago, in which Thomas Graham, Esq. of Kinross in the county of Kinross, is appellant, and James Graham, the illegitimate son of the late George Graham, Esq. of Kinross, is respondent. This was an action brought by the respondent to have paid to him,

as the son of the late George Graham, the sum of £15,000; and that demand arose out of the following circumstances: A Mr. George Graham, since deceased, was the unlimited proprietor of the estate of Kinross in Kinross-shire. Mr. James Graham, the respondent, was his natural son. He had formed an attachment to Miss Muter of Annfield, from which his father apprehended that a marriage might follow. Of this attachment the father disapproved, and he intimated his unalterable prohibition of such a connexion; and in order to prevent it, on the 27th of July 1801 he executed a trust-disposition and settlement, by which he conveyed his whole estates and effects, heritable and moveable, in favour of his trustees, Thomas Graham the elder, who was a gentleman at that time in India in the service of the East India Company,—Colonel Alexander Park,—Robert Graham, now Moir, a physician in Stirling,—John Anstruther of Arditt, advocate,—John Græme, writer to the signet; and John M'Glashan, writer in Edinburgh,—and the acceptors, and survivors or survivor of the acceptors; 'declaring always, that these presents are 'granted by me in trust only for the use and behoof of myself during 'my own lifetime, and at my death, in the event specially after men- March 5. 1823.

'tioned, only for the use and behoof of James Graham'—that is, his natural son—'my only son in life procreated betwixt me' and a lady whom he mentions, 'and the heirs male or female that may be lawfully pro-'created of my own body; whom failing, the said Thomas Graham, my 'brother consanguinean'—that is, the gentleman who is the appellant, 'and 'the heirs lawfully procreated of his body.' Then there follows this:—'That whereas the said James Graham, my son, has for this some time 'past formed or threatened to form a matrimonial connexion with Miss 'Muter, daughter of Mr. Muter of Annfield, much contrary to my wishes 'or intention; and that it is my fixed determination, if he either already 'has formed or shall hereafter form such connexion with that lady, or 'with any other lady except Miss Anna Maria Graham, eldest daughter 'of the said Thomas Graham, my brother consanguinean, without my 'consent, or the consent of the majority of my trustees surviving and ac-'cepting at the time, that the said James Graham shall take nothing 'under the present settlement, he being thereby in such event expressly 'excluded and debarred from any share of my said estates, real and per-'sonal: Therefore the said trustees shall only denude in favour of the said 'James Graham, my son, in the event of his having married, excepting 'as said is, with my consent signified in any way, or marrying with the 'consent of a majority of my trustees surviving and accepting at the time, 'previously had and obtained in writing, and no otherways: And in the 'event of his dying unmarried, or marrying without consent as aforesaid, '(except as said is,) the trustees shall, immediately after either of these 'events happening, denude of my foresaid lands and whole other estates, 'real and personal, in favour of the next person appointed to take under 'the substitution before set down, who shall be at liberty to enter into 'the possession of the said landed and personal estate, in the same way 'as if the said James Graham had never been mentioned in this deed,

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'he and the heirs of his body procreated of any marriage without con-
'sent as aforesaid being hereby totally excluded from taking anything in
'virtue of this deed, excepting such payments, by way of a reasonable
'annuity, which my said trustees are to be judges of, as he may have
'actually received previous to the marriage.'

My Lords, George Graham, the author of this settlement, died on the 18th of December 1801, at which time the respondent had made an offer to marry Miss Muter, which, it is stated, he could not in honour withdraw.

During this period the appellant was in India, and after his father's death, the respondent James Graham endeavoured to obtain the consent of the trustees to his connexion with Miss Muter, inasmuch as he conceived, that if he could obtain their consent, he would not forfeit the estate. The trustees, however, thinking themselves bound to attend to the wishes of the testator, refused to give their concurrence. In consequence of this, the appellant having certain attorneys in London, namely, Mr. George Templar, Mr. Nathaniel Middleton, Mr. Richard Johnston, and Major John Hume, applications appear to have been made to those attorneys of the appellant, and transactions to have taken place between the respondent and those attorneys;' with respect to the entering into which transactions, and the final agreement which was the result of them, it appears to me to be perfectly clear that those attorneys had no authority whatever to enter into that agreement, which by its own force could bind the appellant not to take advantage of the forfeiture, if the respondent committed one. However, my Lords, it appeared that the respondent set about making a compromise with the appellant's attorneys, to secure to himself one half of the value of his father's property; and he wrote to those attorneys, who were unauthorized, as it appears to me, for this particular purpose, a letter, dated 7th September 1802—[His Lordship then read the letter, see ante, p. 367.]—The attorneys of the appellant, as the Cases upon your Lordships' table state, 'were clear 'that two things should be excluded from the valuation;' and then follows the statement which raises the real question in this cause, 'that 'there should be excluded from the valuation, as being subjects which 'no way augmented the value of the estate, the house of Kinross and the 'political interest attached to the estate.' The Cases then proceed to state why that house ought not to be made the subject of valuation, and why the political interest should not be made the subject of valuation. I need not trouble your Lordships with stating at length that which has been so often stated—the nature and effect of these letters; but, after a good deal of correspondence, in which there are expressions which are made on both sides the subject of much discussion, Mr. Keith, to whom the value of this property had been referred, having died, and Mr. Selkrig having been nominated by Mr. Adam in his room, a report was made by Mr. Selkrig, of which there is an abstract in the papers, followed by remarks which relate to the mansion-house at Kinross, and the political interest arising from the qualifications, and the eventual benefit to be de-

rived from that property. I ought indeed to mention the fifth article which is excluded—'the casualties or compositions payable upon the en-'tries of heirs and singular successors of vassals on the estates.' March 5. 1823.

On considering that report, the following award was pronounced by Mr. Adam:—'I perfectly approve of the principles on which Mr. Selkrig 'has estimated this property, and make the division according to this va-'luation; and I decide, according to the powers vested in me, that they 'do make the division accordingly; and I do not consider that any of 'the articles stated in the remarks should be allowed to constitute any 'part of the value.' Some of the articles mentioned, your Lordships observe, are the mansion-house of Kinross, and this thing called political interest. 'I make one exception, however, to this generality. I consider 'that the avenue and green of Kinross house should be valued as grass, 'and not for tillage. Subject to this deduction, my award is, that the value 'put by Mr. Selkrig be the value on which the parties are to transact.'

My Lords, a great deal of correspondence follows after this, which seems to close, or nearly close, with a letter which strikes me with being of great importance in this cause. It is a letter dated the 26th of March 1806, which is addressed, 'To the Attorneys of Thomas Graham, Esq.' and is in these words:—'Gentlemen—As the accounts between my uncle, 'Thomas Graham, Esq. and myself, so far as respects the heritable pro-'perty of my late father, George Graham, Esq. of Kinross, are now finally 'settled, and mutual discharges ready to be granted by you, as my uncle's 'attorneys and myself; and as it appears to be your wish to have some 'information respecting my ideas of the points reserved in the submission 'to Mr. Adam—namely, the value of the house of Kinross, and the poli-'tical interest of the estate,—I have no hesitation in declaring that I have 'no legal claim on my uncle, Thomas Graham, Esq. for either of these 'objects; but that, in terms of my agreement with my uncle's former at-'torneys, they are to be referred entirely to my uncle himself.'

My Lords, I observe in passing, that there are various missives between these parties, up to this date, which have various expressions and passages in them, to which criticism may impute different meanings. But the real question, I apprehend, here is, what the parties meant? And I know of no better way of considering this, than by looking at the clear expressions in which the party states what is his own view upon the subject.

My Lords, it is only necessary to mention to your Lordships, that, excluding these subjects, the attorneys did agree—certainly without authority, but nevertheless what they did agree to might afterwards be sanctioned by the party interested—they did agree to a value being set upon those other subjects and matters in discussion in the transaction, and to the appellant receiving a moiety of the value. I do not take notice of the circumstance of their want of authority, except so far as that want of authority goes to matters to which the appellant did not agree.

My Lords, as soon as the agreement, so far as understood between the parties, had been made—but, though so far understood, there is an express letter by which the respondent undertakes to indemnify the trustees,

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in case the appellant should afterwards call upon them in consequence of the forfeiture about to be incurred—Mr. Graham, the respondent, married the lady long before it was possible that a communication could be received from India by the appellant, and thereby incurred the forfeiture; and having incurred that forfeiture, the appellant appears to have heard of the fact of the marriage some six months, I think, after the agreement had been entered into. But it was quite impossible that at that time he could have heard there had been a decree of forfeiture in the Court of Session; for the parties applied to the Court of Session, and stating this forfeiture, they called for a declaration of the forfeiture; and the Court proceeded upon this as a bonâ fide transaction, and on the respondent having incurred a forfeiture. The Court, to carry into effect the will of this testator, if I may describe him as such, did (and they could do no otherwise) declare this a forfeiture, and that the estate belonged to the appellant.

My Lords, the appellant afterwards came to England; and, for nine years after his return to England, no demand of the sort made in the suit which I am about to mention was made by the respondent—to be allowed to participate in the value of the house at Kinross, and what is called the political interest. But, at the end of nine years, an action was raised by a summons, on which some observations have been made in the hearing, but on which I do not mean to trouble your Lordships; for, in my view of the case, it ought to be decided entirely upon the evidence, which sets forth the demand of the respondent himself, that he had no legal claim whatever to participate in the value of those subjects. I will however just remark, that the summons states the gentlemen in England to be attorneys of the appellant, which they certainly were, but not attorneys authorized for this purpose at all; and states the decree to have been obtained from the Court of Session, as a decree that was due upon an acknowledged forfeiture, without one single syllable stated to the Court as to the agreement under which this forfeiture had been made—an agreement obviously entered into to defeat the disposition of the testator. It simply states, without entering into particulars, that this gentleman, the appellant, entered to possession by virtue of that decree; and then it prays that those matters may be made the subject of valuation—I mean the political interest and the house at Kinross, the respondent himself putting a value upon them of £15,000.

My Lords, the correspondence that was referred to for the information of the Court of Session, is stated in different parts of the papers; and I take leave to observe in this place, that we are often extremely misled by the summons, if we do not bear precisely in mind the nature of these summonses. In our part of the island, where the general issue is pleaded, you give in evidence any thing which can be considered as evidence in defence; but if you are proceeding rather more as the Court of Session proceeds than in our Common Law Courts—that is, as a Court of Equity—you must in your bill in Equity, (which is analogous to a summons in the Court of Session,) if you mean to take up the circumstances, state a great

number of circumstances which you are left in these cases to find out, not from the record, or that part of it called the summons, but from allegations and admissions here and there dispersed through a variety of papers. March 5. 1823.

My Lords, I pass over the nature of this suit, as it respects the circumstances, with saying no more upon it than this, that where a suit is brought for the purpose of carrying into effect such a claim as that which is made on the part of the respondent, (in this case the pursuer in the Court of Session,) one thing, I think, one may venture safely to state, that, considering the nature of the suit, and the nature of the questions that arise in it, it is absolutely incumbent upon such a pursuer to leave no doubt whatever with respect to what were the facts of the case, and what was the legal meaning of the agreement. In the first place, this is a suit proceeding on a contrivance to destroy the disposition of the testator entered into between the two objects of his bounty;—in the next place, it is founded on a decree which the Court of Session had been called upon to make, for the purpose, apparently, of carrying into effect that disposition, but without its being intimated to the Court of Session that the very purpose for which they were applied to, was to defeat the very object which was the prayer of the application;—and, in the last place, whatever may be said upon the subject, it may be stated at least as a very delicate sort of proceeding, suing in a Court of Justice, to carry into effect an agreement for the value of political interest. I do not state these objections to the proceedings as decisive; but I think they call upon your Lordships to see that the party clearly makes out his case.

The suit proceeded upon the ground, that the appellant was bound by agreement to part with the house of Kinross and the political interest upon certain terms:—that he had no option whether the political interest and the mansion-house of Kinross should or should not be subjects of valuation; but that it was left to himself entirely to say what the value should be, it being nevertheless incumbent on him to permit a valuation to be made; and then the Court of Session say, according to cases which have been determined, that in as much as he would put no valuation upon these subjects, they, the Court of Session, will take upon themselves the execution of that duty; that as he would not put a value on subjects of which he was bound to permit a valuation, the Court of Session must put that value—and the respondent professing, that if any thing like a reasonable value had been put upon the subjects, he would have been content. For the purpose of this cause, it does not appear to me at all necessary to enter upon a discussion of that view of the case; because the way in which I look at this question is this—I first of all say that the respondent, who is here the pursuer, was bound, in a case of this nature, to make out facts that left no doubt whatever as to the matter of fact upon the mind of the Court;—in the next place, that those attorneys had no right whatever to bind the respondent;—in the third place, that it comes to this, How far has the appellant adopted or not adopted their acts? The appellant contends that he was (and nobody can deny that he was) in circumstances in which he might have said (and indeed the respondent admits it by giving an in-

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demnity which the supposed attorneys in this country called for,) that the appellant was under no obligation whatever to concur in such an agreement as this; and it is a fact indisputable, that the decree of forfeiture had actually passed before he could hear of the matter. He might nevertheless bind himself, though it is difficult to say what consideration he could have for binding himself under such circumstances. In the letters which passed both before and after, as I before observed, there are expressions which may be construed, some of them as importing that he was to set a value upon the premises, and that that value the respondent was to permit. Others of those expressions import that he was, if he thought proper, to make them the subject of valuation: or, in other words, that this young gentleman meant to refer to his honour and his good pleasure whether these matters should or not be the subject of valuation. Then, my Lords, is it not a much safer thing for your Lordships to proceed upon the construction this party has himself put upon his correspondence, than upon the construction put by counsel at your Lordships' Bar? Look at the facts. The fact is, that the appellant was in England nine years, without his making any such claim,—and that in 1806 he expressly said, I have no legal claim upon my uncle. If he had no legal claim upon his uncle, the expression imports that his uncle was under no legal obligation to permit any valuation to be made of those subjects. Therefore it does seem to me, that, upon the effect of the evidence taken altogether, without entering into any very nice questions, these interlocutors of the Court of Session cannot be supported.

My Lords, I can easily conceive that this is a case in which this young gentleman, having engaged his heart to this young lady, and feeling it a matter of honour to marry her, may expect some exercise of feeling on his behalf. Persons in judicial situations—perhaps the older we are, the more we think about that—may feel very strongly in favour of the demand of this young man. But that will not do; because, in Courts of Justice we have no right to enforce by rules of law such considerations. Upon the whole, I think it my duty humbly to advise your Lordships to reverse this judgment.

Appellant's Authorities.—(6.)—2. St. 1. 25; 2. Ersk. 1. 25; Miln, July 19. 1715, (1759); Leslie, Feb. 9. 1765, (1761); Smith, Feb. 6. 1810, (F. C.); Ramsay, Jan. 10. 1673, (2925); Nesbit, July 10. 1707, (1769); Elliot, Jan. 21. 1767, (550.)

LEAKE,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 3.*)