plea, adding this note:—"The Lord Ordinary, in pronouncing the preceding interlocutor, has proceeded on the footing and principle that, as the trust-deed by Miss Martin contains a general direction to the trustees in the outset for payment of debts, it was the duty of the trustees to devote, in the first instance, the general estates of the truster towards the fulfilment of that direction, and that it was not within the power or right of the trustees to apply the subject of a special bequest to the payment of debts, so as to defeat the intention of the truster as respected each bequest.

"Applying this principle here, the Lord Ordinary assumes that the fact of the trustees having uplifted and applied the sums contained in the heritable bond to the payment of debts, cannot affect the question of succession to the truster's estate, in accordance with the terms of the deed of trust; and if it be the rule of law, as the Lord Ordinary holds, that bequests or legacies of sums of money are, apart from special direction, a direct burden upon the executry or moveable estate, he is at a loss to understand on what footing it can be successfully maintained for the claimants, the Messrs Young, that in this instance the £3000 and £5000 bequests are here to be charged as a burden primarily against the heritable estate. There is not an expression in the deed which will suffice to lead to that conclusion."

The executors reclaimed.

LORD-ADVOCATE (GORDON) and J. M'LAREN for them

ASHER (GIFFORD with him) in reply.

LORD CURRIEHILL—I concur with the Lord Ordinary, and on a very simple ground.

The question is one as to the succession of Miss Anne Martin, aunt of the beneficiaries, and that question must be determined on the state of matters as at the time of her death, for she died intestate, and at that time the whole of her property consisted of a claim on Miss Janet Martin's trust-estate. As I understand the matter, at that time all the debts of that trust-estate had been paid off, but these two burdens of £3000 and £5000; and, as I see from the record, these were paid off in a few weeks after her death, and they were so paid by funds which had been realised and were in the hands of the trustees, without encroaching on the heritable estate, or making it available for that purpose in any way. At the time of Miss Anne Martin's death, her claim on the trust-estate was for the residue which then remained, and which consisted, to a very considerable extent, of heritage, and, to some extent, of moveables. There was a debt owing to the legatees, but the right of the legatees was moveable, and not heritable, in their person. There were ample funds in the hands of the trustees to pay them. The right to the heritable estate, which she was entitled to get made over *in specie* at the time of her death, remained entire, subject to no burden. Though there was a personal debt, there were ample funds to meet it. The trustees might have paid off these debts before her death, for they were authorised to wind up the estate. The principle of the case seems to me to be this, that the claim on that estate consisted of subjects partly heritable and partly moveable. There was a burden of debt, but it was a moveable debt payable out of her moveable funds, and therefore at the date of her death, the *jus crediti* of the heir was unburdened. I think, therefore, that the Lord Ordinary is right.

The other Judges concurred.

Agent for Reclaimers—A. Stevenson, W.S.

Agents for Respondents—H. & H. Tod, W.S.

Thursday, February 6.

SECOND DIVISION.

OGILVIE *v.* BOATH.

Location—Admission—Quantum valeat. *Held* that when there is a contract of location admitted, but the price is either not fixed or cannot be ascertained, the *quantum valeat* must rule the rights of parties.

This was an advocation from the Sheriff-court of Dundee. The pursuer was the trustee on the sequestrated estate of the late George Galbraith, residing at Muirdrum; and the defender was John Ogilvie, farmer, Pitlivie; and the question was as to the sum which the defender was bound to pay to the pursuer for the grazing of 259 wethers in a grass park rented by the said George Galbraith, and by him let to the defender. The conclusions of the action were as follows:—

"Therefore the defender ought to be decerned to pay to the pursuer, as trustee aforesaid, the sum of £35, 12s. 6d., or such other sum as may be ascertained in the course of the process to follow hereon to be the value of a grazing in a park or parks at Panmure, occupied by the said George Galbraith, and let by him to the defender for 300 wethers for the period of one month, beginning on or about the 18th day of May last, which grazing was let to the defender, and used and possessed by him without the rent being specified, or, if specified, without any proper record of it having been preserved, with interest on the said sum from the 18th day of June last, when the same was due, at the rate of five per centum per annum, till payment, with expenses.

The pursuer maintained that there had been no bargain as to the rate, and that 6d. per head per week was a reasonable charge. The defender, on the other hand, alleged a bargain, to the effect that the rate was not to exceed 3d. per head per week.

The Sheriff-substitute (GUTHRIE SMITH), after a proof, found for the defender, holding the bargain alleged proved. He added the following note:—

"*Note.*—The bankrupt George Galbraith having absconded, the pursuer, who is the trustee on his sequestrated estate, has been obliged to come into Court without being able to say whether there was any or what bargain made with the defender as to the pasturing of these sheep. The summons concludes for the value of the grazing possessed by the defender, 'without the rent being specified, or, if specified, without any record of it having been preserved.' But the record of it has been preserved in the defender's memory, and the only question is, Whether he is to be believed? It appears to the Sheriff-substitute that he has not been contradicted in any material particular. The statement by Mr John Galbraith, the bankrupt's father, that Mr Ogilvie, the defender, once told him that he was to give his son nearly as much for the park as his whole six months' rent, is not confirmed, and at best can only be taken to have been some loose observation by the defender as to the excellent bargain which the bankrupt had made with the landlord. It may be unfortunate for the

pursuer that he has been unable to adduce the bankrupt, but it is not to be presumed that he would have contradicted the defender even if his evidence had been available.

"The pursuer also argued, that as the defender admits he stipulated for the pasture of 300 sheep, he must pay rent for 300. But this is plainly untenable. In speaking of flocks and herds, a definite is often put for an indefinite, and besides, the complaint is now too late. He should have challenged the defender for the deficiency when the sheep were put into the field, or might have got other sheep to eat up the grass.

"The expenses to which the defender has been found entitled, must suffer some modification. He claimed the value of one sheep, which he says was abstracted from his flock, and a diseased one left in its place. But he has been unable to prove that this was done with the privity of the bankrupt, or was in any way attributable to his fault."

The Sheriff (MAITLAND HERIOT) altered and pronounced the following interlocutor and note:—

"The Sheriff having considered the appeal for the pursuer, against the interlocutor of 16th January last, along with the relative reclaiming petition and answers, and having also considered the record, proof, and whole process: Sustains the said appeal; recalls the interlocutor appealed against: Finds, that, from the 18th day of May till the 16th day of June 1865, 259 sheep were pastured in a field at Panmure possessed by the bankrupt George Galbraith: Finds that it is not proved that the same were so pastured at the rate of either 2d. or 3d. per head per week, as alleged by the defender: Finds that, in the circumstances, the defender must pay the fair value of the pasturage, according to the rule *quantum valeat:* Finds that, in the circumstances, 5d. per head per week is a fair and reasonable sum for the defender to pay for the same: Finds that the sum due to the pursuer, as trustee on the sequestrated estate of the said bankrupt, for the period of four weeks and one day, is £22, 7s. 1d. sterling: Finds that the defender, having consigned with the clerk of court the sum of £10, 19s. sterling on the 18th April 1866, there remains a balance due to the pursuer, as trustee aforesaid, of £11, 8s. 1d. sterling, for which decerns, with interest at the rate of five per cent. from the 16th day of June 1865: Ordains the clerk of court to pay over the consigned money to the pursuer, as trustee aforesaid: Finds the pursuer entitled to expenses; allows on account thereof to be given in, and remits the same to the auditors of court, or either of them, to tax and report, and decerns.

"FRED. L. MAITLAND HERIOT."

"*Note.*—It is proved and admitted that 259 sheep were pastured. The defender alleges that the agreement between him and the bankrupt was that payment was to be made at the rate of not more than 3d. a-head per week. This may be so, but unfortunately for the defender it is not legally proved, and the only way of fixing the value, in such circumstances, is *quantum valeat.* Looking to the evidence of this point, the Sheriff considers 5d. a-head per week a reasonable sum.

"The pursuer wished to be allowed to charge for 300 sheep, on the ground that the bankrupt had agreed to pasture 300 sheep, although only 259 were sent; but how does he propose to prove the bargain as to 300? By the evidence of the defender himself, whose evidence he discards as to the rate? If his evidence be insufficient as to the *rate,* it is equally insufficient as to the *number.* Accordingly, the Sheriff has allowed the pursuer to charge only for the sheep actually pastured.

"The defender claims deduction for one sheep not delivered. This, in the circumstances, cannot be allowed. He did not take over delivery in a regular way from the park keeper, but he broke open the gate, and took delivery at his own hands. He has himself to blame if a sheep was amissing or lost by him."

The defender advocated.

SOLICITOR-GENERAL (MILLAR) and THOMSON for him.

WATSON and BIRNIE in answer.

The Court, Lord NEAVES delivering judgment, adhered to the interlocutor of the Sheriff, and on the same grounds.

Agent for advocator—D. Milne, S.S.C.

Agent for respondent—G. & J. Binny, W.S.

Friday, February 7.

FIRST DIVISION.

JOHNSTONE BEATTIE *v.* JOHNSTONE'S TRUSTEES AND OTHERS.

(See 5 Macph., p. 340.)

Husband and Wife—Donatio propter nuptias—*Tocher—Divorce—Forfeiture—Assignation—Cautioner—Mutual Contract.* In an antenuptial marriage-contract the father of the bride assigned to the marriage-contract trustees all the estate and effects which should belong to him at his death, within six months after which date the trustees were to pay out of said estate and effects, when realised, a sum of £5000 to the husband or his assignees. Shortly after the marriage, the husband borrowed money, assigning this provision to the creditors in security, the fathers of the wife and of the husband being cautioners in one of the deeds of assignation. Thereafter the husband was divorced for adultery. *Held* (1) that the husband's right to the provision was forfeited by the decree of divorce, and (2) that that forfeiture destroyed the right of the assignees. *Observed,* that the provision was of the nature of *donatio propter nuptias,* and that it was assignable, whether vested in the husband or not, although assignees had not been mentioned.

These were conjoined actions of declarator, of extinction of trust, &c., raised at the instance of Mrs Margaret Elizabeth Grierson, or Hope Johnstone, residing in Dumfries, now known by the name of Mrs Johnstone Beattie, against the Honourable Arthur Dalzell and others, trustees under the marriage-contract between the pursuer and David Baird Hope Johnstone and others. The circumstances out of which the action arose, and the question at issue, appear from the following narrative, taken from the note of the Lord Ordinary.

"The pursuer was married in January 1860 to Mr David Baird Hope Johnstone, a younger son of Mr Hope Johnstone of Annandale, and then ensign in her Majesty's 92d regiment. An antenuptial contract, bearing date 23d and 24th January 1860, was executed, to which, besides the contracting spouses, Mr Hope Johnstone, father of the bridegroom, and Lieut.-Colonel William Grierson of Bardannoch, father of the bride, became parties.

"It is very apparent, and was not disputed at the discussion before the Lord Ordinary, that neither of the spouses had any means except what