Appellants' Authorities.—Ashton, Hodgson and Co. *v.* M'Crill, June 17. 1773, (4835.); 1. Ersk. 2. 19.; Mansfield, Ramsay and Co. June 17. 1795, (2594.); 54. Geo. III. c. 137. § 32.; 2. Bell, 347. May 20. 1825.

Respondents' Authorities.—4. Stair, 19.; 2. Ersk. 12. 47.; 1. Ersk. 2. 18.; 2. Bank. p. 393.; 3. Ersk. 9. 37.; 3. Stair, 8. 62.; 3. Ersk. 9. 37.; Haliburton, June 25. 1663, (16,090.)

J. CAMPBELL—GREIGSON and FONNERENE,—Solicitors.

JOHN DUGUID, Appellant. No. 26.

Mrs SUMMERS or MITCHELL, and Mrs JANET KYNOCK or MITCHELL, Respondents.

Oath of Calumny—Stamp.—A party having raised an action on a bond granted to his father in 1782, for the principal sum and interest from that date; and the defenders having alleged that the whole interest had been paid, but being unable to produce stamped receipts for it prior to 1818; and having required the party to emit an oath of calumny, and he having declined to depone that he believed the interest was due, but having sworn merely that money to the extent sued for was due; and the defenders having paid the principal sum;—Held, (affirming the judgment of the Court of Session), 1. That they were entitled to be assoilzied; and, 2. Question raised, but not decided, as to the effect to be given to unstamped receipts.

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1ST DIVISION.
Lord Meadowbank

IN 1782 George Laing, mason in Aberdeen, proprietor of a piece of ground in that town, borrowed from the late John Duguid, father of the appellant, L. 200, for which he granted an heritable bond over the ground. This property was acquired in 1785, subject to the heritable burden, by James Mitchell, father of the respondent Mrs Summers, and husband of the other respondent Mrs Kynock or Mitchell. He died about 1816, having conveyed his property to his wife in liferent, and to his daughter in fee. In June 1818 Duguid died, and was succeeded by his son, the appellant, a captain in the Aberdeenshire militia. The respondents alleged that the whole interest had been paid till the 20th of June of that year inclusive; tendered payment of the principal sum to the respondent in September thereafter; and required a discharge from him. The appellant, not being satisfied that all the prior interest had been paid, declined the offer; and the respondents thereupon brought an action, concluding that he should be ordained to receive payment of what was due to him, and grant a discharge and renunciation of the bond. He defended himself at first on the ground that he was entitled to the benefit of the annus deliberandi, but

May 25. 1825. having thereafter admitted that he was ready to receive payment of the sums due to him, and grant a discharge, a decree to that effect was pronounced. The question still, however, remained unsettled as to what was the amount of the sum due. The respondents alleged that the whole interest had been paid, in evidence of which they founded upon two unstamped acknowledgments, one dated 20th June 1816, and the other 20th June 1817, which had been inserted in a book kept by the respondent Mrs Mitchell, subscribed by the appellant's father, and alleged to be holograph of him; and another receipt, written upon a stamp corresponding to the sum of L.10, and which was thus expressed:—'Aberdeen, 20th June 1818.—Received from Robert 'Shand, Esq. for Mrs Mitchell, the sum of L.10 sterling, being 'interest of the late Mr James Mitchell's heritable bond to me, 'due at this date. (Signed) JOHN DUGUID.' On the other hand, the appellant, while he stated that he was willing to give credit for the sum contained in this latter receipt, denied that there was any legal evidence of any other payment, and therefore insisted on payment of the whole previous interest. To enforce this demand he brought an adjudication against the respondents for payment 'of the aforesaid principal sum of L. 200 sterling, annualrents 'thereof from the said 20th day of June 1782 to the date of the 'decree to follow hereon, but under deduction always of any part 'of said annualrents they can instruct to have legally paid.' In defence the respondents repeated their averment, that the whole interest had been paid up to 20th June 1818 inclusive, in support of which they founded upon the three consecutive receipts as forming legal evidence of a discharge of all previous interests; and contended that at least the unstamped documents might be referred to as collateral evidence, in connexion with the one which was stamped, to establish that fact; or that the latter, from the mode in which it was expressed, was to be held as a receipt in full. To this it was answered by the appellant, that a court of law could not regard any documents which were not duly stamped; that he was not satisfied that the acknowledgments of 1816 and 1817 were holograph of his father; that it was impossible to consider the receipt of 1818 as a legal discharge in full, because it was written upon a stamp corresponding to L.10, whereas the statutes required that a receipt in full should be written upon a stamp of 10s. value. Lord Gillies, before whom the case originally came, granted a diligence against havers, which was executed, and in virtue of which the appellant was examined, who inter alia deponed, in reference to a question, whether he knew,

or suspected where any of the writs called for were, 'That he does 'not know or suspect where any such will be, unless that he 'suspects these may be in the hands of Mrs Mitchell, the defen- 'der in the present action; and his reason for this suspicion is, 'that he understood and is certain that she was in the practice 'of keeping an account of the transactions betwixt her and the 'deponent's father, as to the accumulated interest of the bond in 'question; and that he is certain that she told the deponent 'that she was due his father L.200 over and above the bond, 'which L.200 she said she had paid him; that he has not put 'any papers away since he was cited as a haver, nor at any 'time, with a view to disappoint the defenders.' Thereafter, on the diligence being reported, and the case having come before Lord Meadowbank, he appointed the respondents to lodge a condescendence of their averments in support of their defence, and the appellant to give in answers. The respondents accordingly put in a condescendence in the following terms:—'On 'the 20th of June 1816, the pursuer's father, the late Mr Du- 'guid, did, with his own hand, make an entry in the account- 'book kept by the defender, Mrs Mitchell, of the payment of 'one year's interest of the bond libelled upon, in these terms:— "Aberdeen, June 20th 1816.—Then received from Mrs Mit- 'chell ten pounds sterling, being one year's annualrent of two 'hundred pounds sterling, from Whitsunday fifteen to Whit- 'sunday sixteen. JOHN DUGUID."

'2*d*, In the year 1817 the late Mr Duguid made a similar 'entry in Mrs Mitchell's account-book, as follows:—"Aberdeen, 'June 20th 1817.—Then received from Mrs Mitchell ten pounds 'sterling, being one year's interest of two hundred pounds ster- 'ling, from Whitsunday 1816 to 1817. JOHN DUGUID."

'3*d*, There is produced in process a receipt written on stamped 'paper, dated 20th June 1818, not for one year's interest, but 'for the interest due at the date of the receipt. It is in the 'handwriting of the clerk of the late Mr Duguid's man of busi- 'ness, and it is subscribed by the late Mr Duguid himself. Its 'terms are these:—"Received from Robert Shand, Esq. for 'Mrs Mitchell, the sum of ten pounds sterling, being interest 'of the late Mr James Mitchell's heritable bond, due at this 'date. JOHN DUGUID."

'4*th*, Before writing out this receipt, Mr Duguid's man of 'business asked his client, whether there were any former year's 'interest due, or whether the sum which he was about to receive 'comprised the whole interest then due upon his bond? and it

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'was upon Mr Duguid's informing him in answer, that there 'was only one year's interest due, that the receipt was expressed 'in the terms which have been quoted, instead of stating that it 'was the interest from Whitsunday 1817 to Whitsunday 1818.

'*5th*, On the 20th June 1816, Mrs Mitchell paid the late 'Mr Duguid a sum of L.10 sterling, or at least of L.100 Scots, 'in name of interest on the heritable bond in question.

'6*th*, On the 20th June 1817, the defender, Mrs Mitchell; 'paid the pursuer's father a farther sum of L.10 sterling, or at 'least of L.100 Scots on the same account.'

Note.—'Before proceeding any farther, the defenders would 'humbly submit, that this is a case in which it would be proper 'to ordain the pursuer to be examined de calumnia.'

To this condescendence the following answers were made for the appellant:—

'Article 1. The receipt, or alleged receipt here referred to, 'has been all along in process. The respondent does not know 'that his father wrote it as alleged, but whether he did so or not, 'it is a receipt without a stamp; and farther, it does not bear to 'be for interest on the bond referred to. The respondent was 'given to understand by one of the defenders, (Mrs Janet 'Kynock or Mitchell), in the course of the discussions previous 'to the commencement of this process, that no less than L.200 'sterling of interest had been allowed to accumulate upon the 'bond before the date of this alleged receipt; and the respondent 'has little doubt but that the receipt applies to interest upon 'that accumulation of L.200 sterling. It does not specify that 'it is for interest upon any heritable bond whatever.

'2. Is met by the same answer.

'3. This has been always admitted to be a regular receipt, 'and it is the only receipt produced.

'4. The respondent cannot know, as his father is now dead, 'whether the statement here made be true or not; and he does 'not admit the fact to be true, nor can he do so until it is proved 'by legal evidence; and he farther denies its relevancy.

'5, and 6. The allegations made in these articles are already 'answered under the first heads of the condescendence. There 'is no legal evidence of these alleged payments, and it is denied 'that they were made as here stated.

'*Note.*—The note subjoined to the condescendence should be 'expunged, as not warranted by the Act of Sederunt, and parties 'appointed to be heard. Before the pursuer, however, can be 'called upon to be examined de calumnia, the Act of Sederunt

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'13th January 1692 requires, that the statements referred to the 'oath of calumny shall have been found relevant for the party 'requiring the oath. But there has been no finding of rele- 'vancy here, and the relevancy is denied.'

Afterwards, these pleadings were appointed to be seen and revised.

On this occasion the respondents made the following addition to their condescendence:—'The defenders adhere in all respects 'to their original condescendence; and with reference to the 'first article of the answers, they deny that any debt of L. 200 'of interest had been allowed to accumulate upon the heritable 'bond before the date of the first receipt quoted in the condes- 'cendence, or that they owe the pursuer any sum whatever, 'excepting the sum contained in the said heritable bond itself, 'with the interest thereof from the term of Whitsunday 1818.'

The appellant made the following addition to his answers:— 'Having now seen the revised condescendence, the Counsel for 'the pursuer has only to add, that he adheres to the statement of 'facts which he has given in the above answers. And as to the 'relevancy of the condescendence, he prays to be heard upon it, 'if your Lordship has any doubt.'

Parties having been heard, Lord Meadowbank found, 'That the 'two writings produced by the defenders, and founded upon by 'them, as receipts for interest due upon the bond libelled for the 'years 1816 and 1817, cannot be sustained in support of the plea of 'presumed payment, the Stamp Act declaring, that such writings 'not being stamped cannot be pleaded or given in evidence in 'any Court, or admitted in any Court to be good, useful, or 'available, in law or equity; and farther finds, that the condes- 'cendence is hoc statu irrelevant;' but before further answer, remitted to a commissioner to take the appellant's oath de calumnia. The respondents lodged a representation against the finding in the above interlocutor, which was superseded till the oath should be reported. The appellant was then examined, and emitted the following deposition:—'Interrogated for the 'defenders, Whether or not he believes that the interests of the 'bond libelled on are actually due and unpaid?

'*Objected.*—The question now put is irregular, and is not 'authorized, either by the interlocutor of the Lord Ordinary, or 'by the Act of Sederunt 13th of January 1692, which regulates 'the proceeding regarding the taking of oaths of calumny. By 'that Act it is declared, "that if the party against whom any

May 25. 1825. ‘ point of allegeance is to be proven, require the oath of calumny ‘ of the party proponing the same, the terms shall be, that he ‘ may inquire, Whether he knows the thing that he proposes is ‘ not true?” The only questions, therefore, which the defenders ‘ can put under this Act are, first, Does the deponent believe ‘ the debts sued for to be due? and, secondly, Does he believe ‘ the statements contained in the answers for him to the condes- ‘ cendence for the defenders to be correct? They are not entitled, ‘ on any pretence, to go into an examination regarding the par- ‘ ticulars of which that debt is made up; such an examination is, ‘ in fact, prohibited by the Act; and it is requested that the com- ‘ missioner will confine the defenders to the mode of examination ‘ therein pointed out.

‘ *Answered* for the defenders.—That the law quoted by the ‘ pursuer is not in point. It appears by the act and commission ‘ produced, that the pursuer's libel subsumes, “ that true it is that ‘ the foresaid sums of money, principal, interest, and liquidate ‘ penalty, contained in the said bond above narrated, are justly ‘ resting unpaid;” and the question proposed goes to inquire, ‘ Whether the pursuer knows or believes that it is not true that ‘ the interest libelled for is unpaid? An oath of calumny would ‘ be of no use, if the party to whom it was put could get off by a ‘ general answer, under which there might be either mental reser- ‘ vation or reference to a point of law. The intention of an oath ‘ of calumny is to make an appeal to the party's conscience as to ‘ his own belief of the justice of his cause, or the truth of some ‘ particular fact on which he founds his action. Here there is no ‘ question as to the principal sum; the dispute is entirely about ‘ the justice of the pursuer's claiming interest on the bond libelled ‘ since the time it fell due; and the pursuer is certainly bound to ‘ say, upon his oath, whether or not he himself believes that this ‘ interest which he claims is actually due, and has not been paid; ‘ and therefore the question proposed is again repeated, and the ‘ pursuer is required to answer it, or to say that he refuses to ‘ answer it.

‘ *Replied.*—The pursuer is quite ready to give a regular oath ‘ of calumny, in terms of the Lord Ordinary's interlocutor. He ‘ has stated what he considers to be the proper mode of proceed- ‘ ing in taking his oath. No relevant answer has been made to ‘ that statement. To save farther trouble, however, the pursuer ‘ shall proceed to state all that he thinks he can be regularly called ‘ upon to say; and as it is believed that his statement will, in fact, ‘ contain an answer to the special question which has been objected

'to, it is hoped the defenders will not, by entering into farther particulars of the same nature, put the pursuer under the necessity of entering into farther discussion.

'And, of himself, the pursuer depones, That he believes money, to the extent sued for, is due, and that he also believes all the statements contained in the answers for him to the condescendence for Mrs Mitchell or Summers, &c. to be true, with this explanation of article 1st, that the sum of L.200, therein mentioned, was acknowledged by Mrs Janet Mitchell to have been due by her or her husband to the deponent's father, over and above the heritable bond sued for in this action; but whether it was for accumulated interest, or on any other account, the deponent cannot positively say; but of this he is confident, that such a sum was due by her or her husband to his the deponent's father, previous to the 20th of June 1816, and he has good reason to believe that said sum is still due. Whereupon the commissioner put the following question to the deponent, viz. Whether or not, to the best of his knowledge and belief, he has good cause to insist in the present process of adjudication against Mrs Mitchell and others, and that the grounds and conclusions of said action are just and true? depones, That he considers the answer already made to the first interrogatory to be sufficient in answer to the second. Again interrogated for the defenders, Whether he believes the interests of the heritable bond libelled on to be due and unpaid? declines answering the question now put, or any other that can be put, as he considers the answers already given as sufficient to exhaust what is properly comprehended under an oath of calumny. And the deponent being required to look at an unstamped receipt, dated the 20th June 1817, and another unstamped receipt, dated the 20th June 1816, appearing to be written and subscribed by the pursuer's father, each of them for L.10, as a year's interest of L.200, and to say whether he believes that these receipts are of his father's handwriting?

'Objected.—This question being put, clearly shews the propriety of the objection stated to the first question, and indeed the absolute necessity the pursuer was under of stating that objection. This question is, if possible, still more irregular than the first. It is required by the Act of Sederunt, that any allegeance on which a party is asked to give his oath of calumny, should have been found relevant for the party who requires the oath. In the present case, the Lord Ordinary, by interlocutor of 4th December last, expressly found, that the writings now attempted to be exhibited were not probative, and could not bear faith in judg-

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'ment; and he also found, that the allegeances founded upon them 'by the defenders were irrelevant. The defenders, therefore, are 'not entitled to ask one word at the pursuer regarding them; and 'this being his opinion, he declines answering the question.

'On this it was observed for the defender, That the validity of 'the receipts is not the question here. The defender makes an 'appeal to the pursuer's conscience, and asks him, upon looking 'at these receipts, to say, upon his oath, whether he thinks or be-'lieves that his father would have signed and delivered these re-'ceipts without receiving the money therein mentioned?

'Objected.—The same objection applies to this question as to 'the last; and, for the reasons there stated, the deponent declines 'to answer it. And another receipt being exhibited before the 'commissioner, dated 20th June 1818, written on a stamp, and 'subscribed by the pursuer's father, for L. 10 sterling, "being the 'interest of the late Mr James Mitchell's heritable bond to him, 'due at that date;" and the said receipt being presented to the 'pursuer, he was required to say, whether or not he believed that 'this receipt was meant to be a receipt in full?—Objected.—This 'question is irregular; but it has been already answered in the 'answer given to the first question; and the deponent refuses to 'give any further answer, or to look at the receipt. All which, 'in so far as the deponent has answered the interrogatories put, is 'true, as he shall answer to God.'

On advising the oath, Lord Meadowbank 'sustained the oath 'de calumnia,' and refused the representation. Thereafter the respondents lodged a bank receipt for the principal sum, with interest at 5 per cent to the 12th July 1820, (at which time they had consigned it), and at 3 per cent thereafter, which they indorsed to the appellant, and it was delivered to him. They then presented a petition to the Court, both on the question relative to the stamp laws, and to the effect to be given to the oath de calumnia; and, at the same time, they produced five unstamped receipts, from the 1st June 1802 to June 1806, by the appellant's father, for interest. On advising this petition, with answers,

The *Lord President* observed, That his chief difficulty was as to the want of stamps, which rendered it impossible to hold the three consecutive receipts as affording a legal presumption of the payment of the previous interest.

Lord Hermand was of the same opinion, and observed, that the case of Brown against Murdoch, as decided in the House of

Lords, was extremely strong on the question as to the stamp-laws.* May 25. 1825.

Lord Balgray observed, That this was a case attended with some difficulty, and of which he did not like the complexion.

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* The case referred to by his Lordship, which is dated 20th March 1815, it is believed is not reported; but the following notes, taken by Mr Gurney, of the opinions of Lords Chancellor Eldon and Redesdale were appended to the appeal case of the appellant, and contain a statement of its nature:— Brown *v.* Murdoch, 20th March 1815.

Lord Chancellor.—My Lords, I confess fairly to your Lordships, as an individual, I have been so distressed in disposing of this case in the only way in which it can be disposed of, that nothing but the most absolute conviction, that we can do no otherwise, induces me to state to your Lordships the proposition with which I mean to conclude. It will be in your Lordships' recollection, that this was a cause in which the appellants were persons denominated, 'The Weavers' Society of Old Monkland;' the respondents, Alexander Murdoch, and other persons, feuars at Baillieston; and it seems that the managers of this society had, in consequence of an old well failing to supply water to their property, opened a new well, and they applied to the respondents, the neighbouring feuars, to join them in the expense; and accordingly there is a minute of the officers of the Monkland Society, dated the 13th of April 1804, in which they state, 'That the society's well having gone nearly dry, on account of the water being 'carried off by an opening in the roof of a new driving mine from a coal-pit at Ba-'rachine, it was canvassed pretty fully before the meeting, whether or not it would be 'proper and prudent for the interest of the society, to cause the said well to be cleansed 'or dug deeper, when they thought to do either of these properly would run the society 'to a great deal of expense, and perhaps be entirely fruitless; therefore they thought 'it would be most prudent to try if a surface spring could be found in any of the lands 'on the north side of the adjacent turnpike road, (where liberty for such is granted in 'the society's feu-rights), by digging the same about six or seven feet deep; same time 'to acquaint the neighbouring feuars of the said proposition, to see if they would bear 'an equitable proportion of the expense that may be incurred wherever it may be found, 'and the persons on whose property it may be found to be indemnified for surface da-'mages, by their receiving the benefit of the water;' and it is represented in the respondents' case, from which I take the present statement, that this minute bore to be done 'by the whole office-bearers of the society, and it was duly entered in their 'books.'

My Lords,—There is another minute, which bears date on the 10th of September 1804, but it has a reference,—and I mention that circumstance in order that it may be seen it has not been overlooked,—it has a reference to what passed by parole on the 28th of August 1804. This minute is thus expressed:—'The committee for super-'intending the cleaning, &c. of the society's well having been unsuccessful in their 'search for water, the meeting therefore have resolved to warn the several feuars in the 'neighbourhood of the said well, to attend a meeting of theirs, which the preses shall 'appoint with all convenient speed, to be held at Baillieston Toll, in order to co-operate 'with them in making a farther search for water; which meeting was held accordingly 'in the house of Alexander Sym, spirit-dealer in Baillieston Toll, August 21st 1804, 'and the following resolutions concluded upon:—That whereas the well situate between 'the old turnpike road leading between Glasgow and Airdrie, and the houses belong-'ing to the Old Monkland Society of Weavers, was at first sunk thirty feet deep, and 'finished off with a wooden pump at the expense of said society, and for the behoof of

May 25. 1825. There were three questions involved in it. 1st, As to the effect of the oath; 2d, Of the unstamped receipts; and, 3d, Of the stamped one per se. With regard to the oath, he did not think that the pursuer had answered as he was bound to have done.

'their houses, exclusive of all others, for which there was an exuberant supply of water; 'but in last spring, when a mine was driving from a coal-pit in Barachine grounds, it 'had accidentally been driven under the same strata of metal where the water ran 'which supplied said well, by which means, a crater or vein of the water having burst 'out in the roof of the mine, the water was carried off from said well, so that it sub-'sided nearly to the bottom, and on that account was insufficient to supply said society's 'tenants. In order to remedy which, the managers of said society thought proper to 'make a trial, by taking the level of it with a neighbouring well belonging to John 'Kent, Langlees, to find what probability there would be of getting water before they 'put themselves to the expense of sinking deeper, by which means it was found out 'almost to a certain probability, that there would yet be a plentiful supply of water by 'sinking said well from ten to twenty feet deeper; but considering it would bear hard 'on the society alone, they agreed to warn the several tenants in the neighbourhood, 'who were equally in need of water, to attend a meeting of their appointment, in order 'to co-operate with them in making further trial for water. Accordingly, the follow-'ing managers of the society, and feuars, met in the house of Alexander Sym, spirit-'dealer, Baillieston Toll, on Tuesday the 28th day of August 1804 years, viz. John 'Brash, preses; David Donald, James Aitken, John Fergus, James Brash, John Baird, 'Robert Selkirk, James Turner, William Gilchrist, and John Calder, masters; James 'Thomson, clerk; James Walker, James Meikle, and Alexander Sym, representative 'for Alexander Murdoch, proprietor of his house, feuars; when the managers of said 'society formed the following resolutions:' So that what they did at that time is not, your Lordships perceive, a parole agreement on the part of the managers and feuars, but these are represented to be the resolutions which the managers of the society formed.

They then state their several resolutions, and they state in what circumstances the feuars in the neighbourhood, if they thought proper to make a payment of a proportion of the expenses, should have the benefit of this well which the society were to make; and none of the present feuars were to have the benefit of that well, unless they paid their proportion of the expenses. And there is this resolution:—'That in case of the 'society selling their houses at any time, such feuars as have right to said well shall 'take care to provide, that their right thereto be inserted in the papers granted by the 'society, to such as may purchase them, in order that they may preserve their property 'of the same, and prevent all dispute relative thereto; also any one or more feuars may 'have, whenever required, a double of these presents, extended on stamped paper, on 'his or their own expense,—which offer, as contained in these resolutions, the following 'feuars do hereby accept of and agree to.' So that the proceeding on the 28th of August, your Lordships observe, was nothing more than the formation of resolutions by the managers of the society; and this instrument of the 10th of September, is an instrument by which certain feuars do hereby accept and agree to those resolutions. I mention this particularly, to point out that it was strongly pressed at the Bar,—that this should be taken as a parole agreement,—that you are to look at what passed on the 28th of August as a parole agreement,—that this paper, therefore, might be laid out of the question,—and that if so, there could be no occasion to stamp it. The first answer to that is, that there was no such agreement on the 28th of August; and the next answer is, that if there had been such sort of parole agreement, (and there is a subse-

He had attempted to shelter himself under an ideal claim, different from that for which he was suing; and there was throughout his deposition an evident attempt to escape from making a

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quent written agreement), the subsequent written agreement must be the ground of the action. But supposing there had been nothing but a parole agreement, if the parole agreement is proved by nothing but a writing, not itself the agreement, the objection of the want of a stamp is just as strong against it as evidence of the agreement, as it is to there being no stamp upon the agreement itself. The real question therefore is, whether this is an agreement, regard being had to the subject of it, which, under various Acts of Parliament, is required to be stamped? And though it is stated, that the feuars shall have a double of this instrument, yet, inasmuch as they could not shew their right to that without this, if there was no stamp upon the agreement, nor upon that which is evidence of the agreement, I am afraid that was a decisive answer to the suit.

Now, my Lords, it has not been, and cannot be denied, that that was sufficiently brought before the Court,—I mean the fact, that this agreement, which was the foundation of the suit, or, if it is not to be represented as an agreement, this which was evidence of an agreement, was not upon a stamp; and indeed if there had been less of objection on the part of those who were defending than was made, (but there was a sufficient made),—if there had been less objection made, I am afraid it is the duty of a Court to say, that the evidence should be such evidence as the Court has given an admissible character to; for it is said, that no argument shall be available,—that no writing shall be available, whether it is an agreement or evidence of it,—it is not in the power of the Court, in consequence of the party's not taking an objection, to receive as legitimate evidence that which the Legislature does not permit to be available.

Now, my Lords, one cannot help seeing that the whole of the subject-matter is the sinking a well about twenty feet. One cannot imagine that could be an extremely heavy expense; but the misfortune is, that the expense was in a great measure incurred; and I conceive that your Lordships will feel extremely sorry that the parties, instead of going the right way to work, that was, by procuring this agreement to be stamped, (paying a small penalty), should go on through resolution after resolution: But the single question for your Lordships, as it appears to me, to decide is, Whether this suit can be maintained, which has its foundation on a writing—which writing the Court is prohibited by an Act of Parliament from looking at for that purpose.

My Lords,—There was another question in this case certainly, and that was, Whether those who, on the part of the society, did something, could bind the whole of the society? And with reference to that, one of the interlocutors contains a declaration, that this was a very beneficial thing in the administration of the property among the weavers, and therefore sustains the act of those who did sign the agreement. It is not necessary for us to give any opinion upon that, but I do not think our judgment would be right, if we left it as a point to be understood, that we meant to affirm that.

Under these circumstances, it is with some degree of painful hesitation I am obliged to move your Lordships to reverse the several interlocutors complained of, and to declare, that there being no stamp upon the entry in the books of the society, whether the same is to be considered as the agreement between the parties, or as evidence of that agreement,—no legal proof having been made of any agreement between the respondent and the persons described in the interlocutor of the 20th of June 1809 as the managers of the society, even if such managers had authority to bind the society by an agreement with the feuars, and to remit the cause to the Court of Session to do what is just and consistent therewith. They will by that means have an opportunity of giving such directions in the Court below as they shall think convenient, being consistent with the opinion expressed by your Lordships.

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fair and proper answer. Accordingly, when the question was put directly to him by the commissioner, he evaded it by referring to his former answer, which was quite unsatisfactory. His Lordship therefore thought that he ought to be examined again, so that in case he had been misled by wrong advice, he might have an opportunity of saying, candidly and honourably, whether he believed that the interest which he now sued for was due. This would not in the least affect the Stamp Acts; because it was quite competent, where there is no legal voucher, to refer to oath. With regard to the unstamped receipts, his Lordship stated, that he was afraid that, under the law as it presently existed, the Court were compelled to shut their eyes against them; but he was not satisfied that the argument of the pursuer, as to the necessity of the receipt of 1818 being on a stamp of 10s., to prove that L. 10 was all that was then due, was well founded. No doubt, where a receipt bears to be in full of all demands whatsoever, it must be on a stamp of 10s.; but this was not a question as to all demands, being one merely relative to prior interest. He thought, however, that some inquiry should be made at the stamp-office on this subject.

Lord Gillies stated, That he firmly believed that the whole interest had been paid; and what was more, he was convinced that the pursuer himself entertained the same belief. If he did not, he would most readily have sworn that he believed that it was due. But he had not ventured to make oath to that effect. If he had not sworn consistently with what was required by law,

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Lord Redesdale.—My Lords, The only doubt which has occurred to me upon this case is, whether, as the original proceeding was before the Sheriff, and the Sheriff entertained the subject, conceiving this agreement to be proved by that which is not legal evidence, it may not be necessary, in the order your Lordships pronounce, to have some reference to that proceeding.

Lord Chancellor.—It will be very easy, by altering the concluding terms, to extend it to that. The manner in which it struck me was,—the matter being brought before the Court of Session, this appeal states to us all the interlocutors complained of in the Court of Session, and it is from their interlocutors only that the appeal is brought; if we, therefore, reverse their interlocutors, directing them to do what is right, it strikes me they must then give such judgment upon what the Sheriff had done, as is consistent with what we have done; the noble Lord, however, and myself, will agree upon such words as shall remove all doubt. I would therefore move your Lordships, that this be farther proceeded in on Wednesday.

After some time, the Lord Chancellor said,—My Lords, in the case of Brown versus Murdoch, I have, in consequence of what was said by my noble friend, added these words, ' and with respect to the proceedings before the Court of the Sheriff;' and with that alteration I suppose your Lordships will agree to this cause being remitted.—Ordered accordingly.

his action could not be sustained; and his Lordship saw no reason whatever for giving him another opportunity of emitting a deposition. He had referred in his oath to his answers to the condescendence, and therefore they must be regarded as part of it; but his statements there and in his oath were at variance. He had endeavoured to shelter himself under some pretended information from Mrs Mitchell, as to an accumulated sum of interest; but his Lordship did not believe that any such information had ever been given; and at all events, it had no relevancy here. The question which was first proposed, and that put by the commissioners, were the proper ones; but they had not been answered, and therefore the action could not be sustained. In regard to the Stamp Acts he concurred with Lord Balgray, but suggested, that as it appeared that the receipts were entered by the pursuer's father in a book kept by Mrs Mitchell, whether, quoad hoc, that book might not be regarded as the book of the pursuer's father, and so payment proved scripto of him without the necessity of a stamp; just as if the entries had been made in his own books. May 25. 1825.

Lord Succoth concurred; and the *Lord President* stated, that in regard to the oath he was of the same opinion with Lord Gillies, and that he saw no reason for allowing the pursuer to emit a second one. The Court, therefore, on the 24th February 1824, pronounced this interlocutor:—'In respect of the terms of the pursuer's 'oath de calumnia, alter the interlocutor reclaimed against: Find, 'that by indorsing to the pursuer the receipt for the sums of prin-'cipal and interest consigned in the Commercial Bank, the defen-'ders have discharged themselves of all claims due in virtue of 'the bond pursued upon, therefore assoilzie them from the con-'clusions of the summons, and decern: Find the petitioners liable 'in expenses of process, and remit to the auditor to tax the ac-'count thereof when lodged, and to report.' By a clerical mistake the 'petitioners,' instead of the pursuer, were by the above interlocutors found liable in expenses; and he having immediately entered an appeal, they presented a petition to the Court on the subject, who 'authorized the clerk to correct the error in the in-'terlocutor;' and thereafter, on the 3d of June, found the appellant liable in the expenses of this petition.*

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* See 3. Shaw and Dunlop, No. 69. After the interlocutor correcting the clerical mistake had been pronounced, the appellant applied to the Committee of Appeals for leave to add it to his petition of appeal; but this being objected to by the respondents, and their Lordships, considering that such a correction or variation of a judgment brought under appeal involved a question of competency of great importance, declined

May 25. 1825.

Appellant.—The Court below were not entitled to give any effect to the unstamped documents, and therefore all allusion to them was irrelevant and incompetent. The appellant stands in the situation of a creditor suing for a debt on a liquid document, and consequently it is incumbent on the respondents to prove payment. This they have not done; but they allege that, as they made a reference to his oath of calumny, and he has not sworn in the mode in which they say he ought to have done, they must be assoilzied. There is a manifest distinction between an oath of calumny and an oath of verity upon reference. With regard to the former, the party cannot be examined on all articles that may be set forth in a condescendence, or obliged to depone as to the special grounds of believing or disbelieving all or any of those articles. The sole point to be ascertained is, whether he does or does not believe the statements to be true, which have been found relevant. But the statements of the respondents were found to be irrelevant; and therefore a reference to the oath of calumny was incompetent. Besides, it was plain that the respondents wished to convert it into an oath of verity, which the appellant was entitled to resist; and the answers which he made were those only which could be required from him, and were sufficient to support the action.

Respondents.—Although the question upon the stamp laws was properly introduced as a subject of discussion before the Court of Session, yet, as the judgment appealed against rests entirely upon the oath of calumny, no other question can be argued before this House. Now it is settled law, that a defender is entitled to appeal to the conscience of a pursuer, by insisting that he shall say whether he believes that the facts upon which his claim is rested are true; and it is quite competent to make such a reference, so as to ascertain the belief of the pursuer in his own statement, although that of the defender may have been found irrelevant. But the appellant anxiously evaded the questions which were put to him, and would merely swear, 'that he believes money to 'the extent sued for is due;' thus evading to return an answer

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to sanction the act of the Court below, by authorizing the interlocutor to be added to the petition, and left the matter to be disposed of by the House. Accordingly, when it was mentioned at the hearing of the cause, their Lordships stopped the Counsel for the appellant, and called on the respondents for an explanation and justification of the proceeding; and the House not being satisfied, a suggestion was ultimately made from the woolsack, that the farther hearing of the cause should be adjourned, and a recommendation was at the same time given to the respondents to settle the matter, and so have it withdrawn from the notice of the House. In consequence of this, a private arrangement was made under which the respondents paid L.70 of expenses to the appellant, and the hearing of the cause on the merits then proceeded.

to the question, whether he believed that the precise individual debt sued for was due. Having therefore declined to depone that he believes the debt claimed for to be due, the respondents were entitled, according to the law of Scotland, to be assoilzied, and consequently the judgment complained of ought to be affirmed. May 25. 1825.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutor complained of affirmed, with 'L. 100 costs.'

Appellant's Authorities.—4. Stair, 44. 17.; 4. Ersk. 2. 20.

Respondents' Authorities.—4. Stair, 44. 15. 21.; 4. Ersk. 2. 16.; Act of Sed., Jan. 13. 1692.

MEGGINSONS and POOLE—SPOTTISWOODE and ROBERTSON,—Solicitors.

Lieutenant-General GEORGE MONCREIFF, Appellant. No. 27.

WILLIAM TOD and PATRICK GEORGE SKENE, Esq. Respondents.

Entail—Heir and Executor.—An heiress of entail in possession having bound herself and the proprietor, at the end of a lease, to pay certain sums to the tenant for meliorations, but not having constituted them against the estate in terms of the 10. Geo. III. c. 51.;—Held, (affirming the judgment of the Court of Session, with certain variations as to illiquid claims), That the executor of the heiress, and not the succeeding heir of entail, was liable.

ON the 10th of August 1787 Major-General Philip Skene executed an entail of his estates of Hallyards and Pitlour, containing inter alia a prohibition against contracting debt or burdening them with sums of money, under irritant and resolutive clauses. At the same time he made a disposition, by which he conveyed to a certain series of heirs all his other estates, real and moveable, which included that of Falkland. In virtue of these deeds his sister, Mrs Helen Skene, widow of Colonel Moncreiff of Reddie, succeeded, in 1803, to the estates, on which occasion she took the name of Skene. The respondent, Patrick George Skene, Esq. was her grandson by her eldest son, and the appellant, Lieutenant-General Moncreiff, was her second son. Part of the entailed estate, called West-Gosperty, was let to the other respondent William Tod, and when his lease was about to expire a new one was granted to him in 1811 by Mrs Skene, who at this time was about 87 years of age. By that lease she 'set, and in tack

May 27. 1825.

1ST DIVISION. Lord Gillies.