period of division. That right was made subject to the *destination* or *substitution* already mentioned, in favour of the other children *who then survived.* That destination was effectual notwithstanding the subject of it being a sum of money—it being established law that by means of trusts even *nomina delitorum* may be subjected to such substitutions, provided these are not inconsistent with the enactments in the Entail Amendment Act. But these two ladies were empowered to evacuate these substitutions by executing *mortis causa* settlements. Margaret and Amelia did exercise that power. Both of them left such settlements regulating the succession to their respective shares, and consequently the right to these shares now belongs to the parties upon whom they were so settled. To that extent I concur in the Lord Ordinary's interlocutor.

But what is to become of the remaining sixth share which was provided to the other daughter, Isabella? She, on the one hand, *survived* her brother Henry, but, on the other hand, *predeceased* her mother, and the period of division of the trust funds; and she was *survived* by her two brothers, Humphrey and Frederick, and her two sisters, Margaret and Amelia. And although she had been married, and had had a child, she had been predeceased both by her husband and by her child. To whom then does the sixth share, which had been conditionally destined to her, belong? That destination operated not as a substitution—no right having ever vested in herself—but only as a conditional institution. And who were the conditional institutes? This question must be regulated by the directions which were given to the *second* set of trustees, in whom the three shares destined to the daughters were directed to be invested for the purposes of that trust; and the directions by which the succession to these shares is regulated are those which were given to that set of trustees. And as she had died without issue, and without her having left any *mortis causa* settlement, the sixth share which had been provided to her was, according to these directions, payable to such of her brothers and sisters as *were surviving at the time of her death.* Their survivance of her was made an express condition of the substitution of her brothers and sisters, and their heirs. Such survivance was made a condition of the substitution, not only by the special directions to the subsidiary set of trustees, but also by the additional provision which was added as to the succession of all the children, whether sons or daughters. The result, therefore, in my opinion, as to the succession to the sixth share which was the subject of the conditional provision in favour of Isabella, is that *one-fourth part thereof* belongs to Humphrey Graham, her surviving brother; and that the Lord Ordinary's interlocutor is erroneous in so far as it does not sustain *his claim* to that extent. Whether or not another fourth of that sixth share does not belong to the parties who are now in right of the provisions to Frederick, Margaret, and Amelia, all of whom also survived Isabella, and also the term of division, is a matter upon which we are not called upon or warranted to pronounce any decision at present, because no such question is raised by any of the Reclaiming Notes now before us. I therefore abstain from expressing my opinion upon that matter.

William Henry Graham, the son of Henry, by his Reclaiming Note does claim a share of this sixth. But I think his claim cannot be sustained. Even had the succession to this sixth share of the trust-fund not been limited by express terms of the destination to those children of the testators who survived Isabella herself, I would have held, in conformity with the decision of the House of Lords in the case of *Young*, 4 Macq., p. 337, and several prior decisions to the same effect, that William Henry Graham, as in place of his father, who had predeceased Isabella, would not have been entitled to participate in this sixth share. But the succession to the share which had been conditionally destined to Isabella, having been limited in express terms to such of the other children *as should survive her*, and to the heirs and disponees and assignees of such survivors; and Henry Graham not having survived her, and not having been alive even at the time when the right to the trust-estate vested by the death of survivors of Mr Graham, the truster, no right has accrued to his son to participate in this share of the fund. And on this part of the case, also, I differ from the Lord Ordinary.

The LORD PRESIDENT and LORD ARDMILLAN concurred.

LORD DEAS agreed with the Lord Ordinary.

Agents for Trustee—A. & A. Campbell, W.S.

Agents for W. H. Graham—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Executors of Amelia and Margaret—Thomson, Dickson, & Shaw, W.S.

Agents for Frederick's Trustees—Maconochie & Hare W.S.

Friday, March 20.

SECOND DIVISION.

ALEXANDER M'ALLISTER *v.* STEVENSON, M'KEELAR & CO.

Sale—Pre-emption—Delivery of Ice—Construction of Written Agreement—Alleged subsequent Parole Agreement—Period of commencement of Winter. Where a party purchased by written agreement for ten years 300 tons of ice *per annum*, and exercised his right of pre-emption as to all the surplus ice of that year, viz., 200 tons, *held*, on a sound construction of the agreement, that he was bound to take delivery of the whole surplus of one year within that year, and proof of an alleged verbal agreement subsequent to the written contract refused.

This was an advocation from the Sheriff Court of Lanarkshire. The parties had in September 1865 entered into a written agreement by which the respondents became bound to deliver, and the advocator to take, 300 tons of ice annually (if that quantity could be obtained from Hogganfield Loch, near Glasgow), "for a period of ten years, from and after and inclusive of the winter of 1865." The ice was to be delivered at the advocator's premises whenever he required it, and in quantities of not less than a ton at a time. The agreement also contained a right of pre-emption to the advocator to take the whole ice should it exceed 300 tons. The advocator exercised that right, and purchased the whole ice gathered in 1866. But at the end of October 1867 there remained in the respondent's icehouse about 200 tons of surplus ice undelivered, of the whole of which the advocator was asked to take delivery, but refused to do so, otherwise than when he asked it, and in such quantities as he chose, being not less at any time than a ton. Ac-

cordingly, the respondents presented a summary petition to the Sheriff craving that the advocator be ordained to take delivery, and, in the event of his failing or refusing, craving a warrant of sale of the ice. The advocator opposed, and pleaded (1) that by the agreement he was not bound to take the ice otherwise than as he chose, and in such quantities of not less than a ton at a time, and at such times as he chose, whether a year had elapsed or not from the winter of 1865; (2) that he was entitled to parole proof of a subsequent verbal agreement, which modified and explained the written contract. The Sheriff-Substitute (GALBRAITH) and the Sheriff (BELL) held that the winter began on 1ts November 1865; that the advocator was bound is have the ice-house cleared of all ice placed there between 1st November 1865 and 1st November 1866; and, failing his taking delivery of the whole ice stored at the date of the petition, that the respondents were entitled to a warrant of sale. The Sheriff also held that there was no room for parole proof of a subsequent verbal arrangement, but this, for what the Court deemed an unsound reason, viz., that because the terms and dates intended were clearly fixed by the written agreement, such proof would have been incompetent.

GIFFORD for the advocator.

SHAND and D. BRAND for the respondents.

The Court substantially adhered, holding that the respondents were entitled to have the ice-house cleared in one year to make way for the next season's ice. It never could have been intended that the whole ice of one year might, if the advocator chose, be left there for ten years; that the 1st November was a reasonable time from which to date the commencement of the year, but without holding that winter must be taken to begin at 1st November, more especially as the time was now come and byegone—the 1st January—when, by the advocator's own showing, the ice-house should have been cleared. The Court also held that parole proof was inadmissible, as no subsequent verbal arrangement had been properly averred. The reasons of advocation were therefore repelled, and the cause remitted *simpliciter* to the Sheriff, with expenses in this Court.

Agents for the Advocator—Wotherspoon & Mack, S.S.C.

Agents for the Respondents—Campbell & Smith, S.S.C.

Monday, March 23.

JURY TRIAL.

CUNNINGHAM *v.* DUDGEON.

Wrongous Sequestration—Landlord and Tenant—Jury Trial. Action of damages for wrongous sequestration of tenant's effects. Verdict for pursuer.

In this case, which was tried before Lord Ormidale and a jury, the pursuer was Alexander Fairlie Cunningham, Esq., residing at Cargen House, in the parish of Torqueer, and Stewartry of Kirkcudbright; and the defender was Patrick Dudgeon, Esq., of Cargen, presently residing in Edinburgh.

The issue submitted to the jury was in the following terms:—

"It being admitted that, by lease dated 15th and 18th May 1865, the defender let on lease to the pursuer, for three years from and after Whitsunday 1865, the mansion-house of Cargen, together with the household furniture and furnishings therein, garden, offices, pleasure-ground, three lodges, cow park of 14 acres or thereby, orchard field, and the exclusive right to the game and shootings and fishings on the estate of Cargen:

"Whether, on or about the 29th of October 1867, the defender wrongfully and oppressively sequestrated the books, pictures, plated articles, horses, carriages, cattle, and other effect belonging to the pursuer, in or upon the said mansion-house of Cargen and others, or any part thereof, in security of the half-year's rent of the said mansion-house and other subjects let by the defender to the pursuer, to fall due at Martinmas, 1867, and the half-year's rent to fall due at Whitsunday, 1868, or either of them—to the loss, injury, and damage of the pursuer."

Damages were laid at £500.

SOLICITOR-GENERAL and BLAIR for pursuer.

CLARK and J. MARSHALL for defender.

After a lengthened proof had been adduced, and counsel for the pursuer and the defender and Lord Ormidale had addressed the jury, the jury retired, and after an absence of about forty minutes returned with the following verdict:—"The jury find unanimously for the pursuer, and assess damages at £250."

Agents for Pursuer—Hunter, Blair, & Cowan, W.S.

Agents for Defender—Scott, Bruce, & Glover, W.S.

Tuesday, March 24.

FIRST DIVISION.

ROBERTSON AND OTHERS *v.* SALMON AND OTHERS.

Churchyard—Heritors—Expenses—Interdict. Held, that the property of a parish churchyard is in the heritors, subject to certain uses of burial by the parishioners, but the heritors having power to alter the level, and perform such other operations on the subject as may be necessary for proper administration of it. Petitioners, although found entitled to expenses of bringing a suspension and interdict against the heritors on the ground of improper interference with lair, yet found liable in expenses after date of lodging of defences, the respondents having offered therein certain terms of arrangement, which the petitioners ought to have accepted.

In April 1860, a meeting of the heritors of the Abbey Parish of Paisley was held for the purpose, *inter alia*, of taking such measures as might be approved of for securing the church from damp and cold. A committee was appointed to inquire into the circumstances. The committee instructed Mr Salmon, architect, to inspect the church, and to report. Mr Salmon reported that it would be necessary, *inter alia*, to remove the soil from the outer face of the church walls, particularly from the west and north walls. At a subsequent meeting of heritors in 1861, Mr Salmon's report was considered, along with a minute of meeting of the general subscribers to the fund for improving and restoring the abbey, and the heritors agreed to contribute £600 in full of all demands that might be made upon