to the respondents in the expense of discussing the question, and modifies the same to the sum of five pounds five shillings sterling, and decerns—two words delete.

"*Note.*—The petitioner's application, which is founded exclusively on the Lands' Clauses (Scotland) Act 1845, is for authority to uplift the sum of £13,062, 10s. (being part of the sum of £36,141, 8s. 9d. consigned in bank by the Gorbals Gravitation Water Company, in whose place the present respondents have come, as compensation for the land and other rights taken by the said Company from the entailed estates of Pollok),and to apply the sum in liquidation of the balance remaining due to Mrs Ferguson of the provision made to her by her father, the deceased Sir Hew Crawfurd Pollok, under the disposition and bond of provision by which it is heritably secured on the entailed estate. There can be no question that the application of the consigned money to the discharge of this provision is a legitimate and proper application, it being one of the purposes expressly sanctioned by the 67th section of the Act. But the Lord Ordinary is of opinion that, while the expenses of the petition and of obtaining the necessary orders and warrant of Court are expenses which must fall upon the respondents as representing the promoters of the undertaking, they are not bound to be at the expense of the discharge, that being a private transaction which would have required to be gone into whether the money had been consigned or not, and which ought to be paid by the party discharging. Accordingly, it is not an expense provided for in the 79th section of the Act, nor can it be brought within the terms of that section otherwise than by holding the application of the money in the discharge of the incumbrance on the estate to be truly of the nature of an *investment*, which was the view chiefly insisted in by the petitioner, but which appears to the Lord Ordinary to be an untenable view.

"So far as the Lord Ordinary is aware, the point is a new one in Scotland. At the debate the respondents cited the cases of *Graham* v. *Caledonian Railway Company*, 10 D. 495; *Torphichen*, 13 D. 1600; *Erskine*, 14 D. 119; and *Duke of Hamilton*, 21 D. 124, none of which, however, appear to touch the question. But they also referred to the following English decisions:—*Earl of Hardwicke* v. *Eastern Counties Railway Company*, in Law Journal, vol. 17, Ch. cases, p. 422; *Buckingham Railway Company*, 14 Eng. Jurist, 1065; and *Oxford Railway Company*, 27 Beav., 571. All these are decisions which, in the absence of other authority, are thought to be entitled to great weight. They are not directly in point, but have a material bearing on the present question, and the 69th and 80th sections of the English Lands' Clauses Act, (8 and 9 Vict. c. 18), under which they were pronounced, are in terms as nearly as possible identical with the corresponding sections 67 and 79 in the Scotch Act."

Agents for Petitioner—J. A. Campbell & Lamond, W.S.

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

Tuesday, March 9.

SECOND DIVISION.

VISCOUNT HAWARDEN, PETITIONER.

(*Ante*, vol. v, p. 698.)

Sequestration of Landed Estate—Competition for Fee—Judicial Factor—Petition for Recall. There being a competition for the fee of a landed estate, the Court, in 1861, upon concurring applications by the heiress of entail and an heritable creditor, granted sequestration. It has since been ascertained that there is no competition, the House of Lords having rejected the title of the trustee on the sequestrated estate of the heir last in possession, and found the right of another claimant to be that merely of an heritable creditor. In these circumstances judicial factory recalled.

A judicial factor was, in the year 1861, appointed on the estate of Duntiblae, belonging to the late Lord Elphinstone on concurring applications by the heiress, and of another party claiming possession, that estate being claimed by the trustee on Lord Elphinstone's sequestration and also by Lady Hawarden, as heiress of entail. Mr George Dunlop further claimed to be in possession in virtue of a disposition *ex facie* absolute. The House of Lords, on appeal, decided against the trustee, and the present petition was then presented for recall of the factory. The trustee opposed, mainly on the ground of the existence of a claim to possession on the part of Mr Dunlop, which Mr Dunlop had consigned to the trustees on the footing of obtaining his preference in the sequestration.

PATTISON for petitioner.

GORDON, Q.C., and FRASER, for trustee.

At advising—

LORD JUSTICE-CLERK—Your Lordships are familiar with the litigation between the parties, having had the matter repeatedly before you judicially. I am glad to find that the opinion which I have formed, in the absence of this advantage, concurs with yours.

I think that light is thrown upon the question by inquiring whether, if there had been no sequestration awarded, there would have been room, under the present circumstances, for granting a prayer to sequestrate these lands of Duntiblae. I am very clear that an application by the respondents for sequestration under present circumstances must have been refused. There seem to me three cases only in which the Court will sequestrate an estate—1*st*, Where property is without an owner or party having right to manage it; 2*d*, Where there is a competition for the property itself, and neither competitor has obtained peaceable possession, or is entitled to continue the possession of an ancestor; 3*d*, Where the property is unable to satisfy the debts which attach, or may be made to attach to it, and creditors are doing diligence so, as it has been expressed, as to tear it to pieces. Sequestration of landed estates by the Court is an exercise of extraordinary power, and the exercise of such a power requires to be justified by necessity or strong expediency. The passage in Bell, 2 Com. 263, referred to, and Mr Erskine's authority, B. 11, 12, § 56, are important on this general principle.

Here there is a property with a title of possession in the applicant. He is heir-apparent under the investitures of the estate; consequently, the subject is not without one entitled and ready to

administer it. There is now no competition for the fee of the estate, for it has been found by the recent judgment of the House of Lords that the trustee on the late Lord Elphinstone's estate cannot assert a right to have it conveyed over to him; and Mr Dunlop's right, as now ascertained, is that of an heritable creditor only. There is no race of diligence between creditors seeking to make good their debts against the estate, and it does not by any means appear that the estate is insolvent—that is, incapable of meeting the debt said to affect it.

Mr Dunlop has a security constituted by an *ex facie* absolute disposion in his favour. I am of opinion that we must deal with the case on the footing of this being a perfectly valid disposition. I reject as proper elements for deciding this question the views submitted by Mr Pattison as to the supposed trust of the heir of entail under the unregistered deed of entail as affecting the transmission; but, assuming it to be valid, it does not establish any special amount of debt. It is a security for advances made, and advances to be made, and there are no materials *in gremio* of the deed which can ascertain the amount of advances, or liquidate the debt, or fix its amount, in a question with the heir of entail. This remains to be ascertained. The heir denies the debt altogether. Mr Gordon refers us to the fact of Mr Dunlop having ranked upon the bankrupt's estate for upwards of £13,000, whereas Duntiblae is said not to exceed in value £9000. But as against the heir the statement of the trustee and creditors is not conclusive; and as all advances which Mr Dunlop may have made to the late Peer down to his death are claimable in the sequestration, while no debt contracted subsequent to 19th July 1860—the date of his succession to the peerage—can affect the heir of entail, it may very well be, for aught that we can know, that the bulk of the claim may have arisen on transactions subsequent to the occurrence of that which has been held to have made the late Lord a trustee for the heirs of entail. In any view the debt is disputed; and, although the form of security taken has many advantages, it is subject to the disadvantage that it does not *per se* instruct any specific amount to be due.

I do not see why Mr Dunlop and Mr Howden, as his assignee, should not proceed to realise their debt by the ordinary processes of law. I should have held it to form a sufficient objection to a petition to sequestrate at their instance that they were heritable creditors only, and had all the remedies of the law open to them to follow for making their heritable debt effectual. If I am right in holding that the intervention of the Court is an exceptional act, I am at a loss to see how the respondents could distinguish their case from that of any large creditor upon an estate, and if any creditor who says—the fact being disputed—that he has a security which will, when examined, turn out to be of a greater amount than the value of the estate is entitled to get the estate sequestrated, we shall have numerous estates under our administration.

If it be clear that a sequestration would have been properly refused had there been a petition to sequestrate, it seems to me to go far to support the view that the sequestration should be recalled. I think that the Court should not interfere with the exercise of the rights of property by an owner unless where there is a clear benefit to result from it, and, where there has been such interference, and where there is no benefit to result from its being continued, it should stop. It would, in my view, require a very slender case of alteration of circumstances to justify an act otherwise recommended by its giving to a proprietor the possession of his estate without injuring any tangible interest of any other party.

I think that there has been a material alteration of circumstances since the sequestration was granted. It was granted on concurring applications of the then heiress of entail and Mr Dunlop, at a time when the nature and extent of Mr Dunlop's claims under the deed of 1859, and another deed of 1854, were not ascertained. The extent of the debts claimable against the estate in the person of Mr Dunlop, and of other creditors of the late Lord, were then viewed as possibly extending to debts contracted subsequent to, as well as before his succession to the peerage, and the recent decision in the House of Lords proves that there is not now any competitor for the fee of the estate. I think that this alteration of circumstances is sufficient to justify us in reconsidering the propriety of continuing the sequestration, and, on these grounds explained, I concur with your Lordships that it should be recalled.

The other Judges concurred.

Agent for Petitioner—T. Ranken, S.S.C.

Agents for Trustee—Scott, Moncrieff, & Dalgety, W.S.

Thursday, March 11.

COURT OF LORDS ORDINARY.

WOTHERSPOON *v.* MACDONALD.

Interlocutor, Correction of — Clerical Error—Expenses—Competency. A final judgment was pronounced on 26th January, disposing of the question of expenses, and the judgment was forthwith written out and signed. On 11th March one of the parties moved to have the finding of expenses altered, as not being conform to the judgment pronounced. Motion *refused.*

In this case the Court, when it last sat, on 26th January 1869, heard parties, and on the same day pronounced judgment, disposing of the whole case, and also of the matter of expenses. The interlocutor of Court was on the same day written out and signed, finding the advocator (and defender) entitled to his expenses in this Court, but liable to the respondent (and pursuer) in one-half of the expenses in the Inferior Court. The advocator now moved the Court to alter this interlocutor to the effect of finding the advocator entitled to his expenses, both in this and in the Inferior Court, since the date of the Sheriff-substitute's judgment, and *quoad ultra* to find neither party entitled to expenses. The ground of the motion was that the judgment, as pronounced at advising, was in the shape proposed in the motion, and that the shape in the interlocutor had been used *per incuriam.* Reference was made to the cases of *Cathcart* v. *Cathcart*, 12th February 1850, 8 S. 497; *Wright* v. *Burns*, 6th December 1832, 11 S. 180, as supporting the competency of the motion.

The respondent denied that the judgment pronounced at advising was as stated by the advocator, and maintained that no alteration on the interlocutor could now be made. A clerical error or an *error calculi* might be corrected *de recenti*, but this was neither. Reference was made to *Bayne* v. *Macgregor*, 24 D. 1126.