tried in earth about one month since, it grew 90 per cent. 150 bushels of the same seed was sold about two months ago and had no fault; it has been cleaned since, and will likely grow the same. In short, you may have all confidence in the seed." On 28th June the defenders wrote expressing their dissatisfaction; and eventually in the course of the month rejected the seed.

The Sheriff-Substitute (GALBRAITH) assoilzied the defenders; and the Sheriff (GLASSFORD BELL) adhered in the following interlocutor:—

"*Glasgow, December 10th* 1869.—Having heard parties' procurators on the pursuer's appeal, and thereafter made avizandum with the proof, productions, and whole process: Finds that, in reply to the pursuer's letter of 21st May 1867, offering to sell 50 bushels of East Lothian Purple Top Swede Turnip Seed, the defenders sent the pursuer, on 22d May, the letter No. 53, in which, before accepting the offer, they wrote, 'Please say whether you know this seed to be of really first-class stock and good growth; perhaps you may be able to state the per centage of germination': Finds that, in answer, the pursuer sent the defenders, on 23d May, the letter No. 54, in which he writes, "In answer to yours, the seed is first-class stock, the same stock having been grown regularly by father and son for the last thirty years; it is good growth, having been tried in earth about one month since, it grew 90 per cent. 150 bushels of the same seed were sold two months ago, and had no faults; it has been well cleaned since, and will likely grow the same; in short, you may have all confidence in the seed:" Finds that, although this may not be a warranty that the seed would grow 90 per cent., but only a representation that such growth was probable, it *is* substantially a warranty that the seed was of good growth, and it was under said warranty that the purchase was made: Finds it proved, that when the seed was tested it was found not to be of good growth, seeing that no such seed is, according to the established understanding of the trade, of good growth if it does not possess a germinating power of at least 85 per cent., whilst the seed in question shewed an average germinating power of only 63 per cent.: Finds that the defenders ascertained the quality of the seed by the proper and usual method of testing, within a month of its delivery, and as soon as they found that it was not a merchantable article, or, at all events, not the article intended to be bought, and not according to warranty, they intimated to the pursuer their rejection of it: Finds that there was no undue delay on the defenders' part in making this intimation, and the pursuer was bound to have taken back the seed: Therefore sustains the defences, adheres to the interlocutor appealed against, dismisses the appeal, and decerns.

"*Note.*—There are four points in this case which support the defence: First, that it was expressly stated by the pursuer, and that in such a manner as to amount to a warranty, that the seed was of "good growth," which means of full germinating power; second, that the deficiency in the seed was latent, and could not be discovered by merely looking at it; third, that on being tried, it was found not to be of good growth, or reasonably fit for the use for which it was sold; and fourth, that the trial was made, and the rescinding of the purchase was intimated without any unreasonable delay. When all these elements combine, goods to which they are applicable cannot be forced upon the buyer.—See Parson on Contracts, vol. i, p. 592; Story on the Law of Personal Property, p. 456; and Benjamin on Sale, p. 488. See also *Dickson* v. *Kincaid*, Dec. 15, 1808, F.C. It may be right to add that, although the interlocutor sheets instruct that a judicial warrant was granted, *pendente lite*, to sell the seed, it appears from the statement of parties that no sale has taken place, and the pursuer is consequently entitled to have the seed returned to him."

The pursuer appealed.

BLACK and CAMPBELL for him.

SHAND and BALFOUR in answer.

The Court unanimously reversed the Sheriff's interlocutor upon the same grounds as in the preceeding case.

The statement by the pursuer of the germinating power of the seed was in answer to a question, and it was only a statement of what it had yielded to his experiments. No others of those who had received the seed had complained, though there had been a great many purchasers. There had been in this case less delay in complaining of the seed. The same judgment, however, ought to be pronounced. The Court commented upon the peculiar fact that the Mercantile Law Amendment Act did not seem to have been pleaded in the Sheriff-Court, and that decision had been given irrespective of it.

LORD KINLOCH—I am of opinion that the same judgment should be pronounced in this case as in that we have just considered. At first sight it appears as if something more was warranted than in the other case, the seed not only being stated of "first class stock," but of "good growth." But on looking into the correspondence, it appears that the statement was given in answer to a question in these words—"Please say whether you know the seed to be of really first class stock, and good growth. Perhaps you may be able to state the percentage of germination." The answer is—"The seed is first class stock, the same stock having been grown regularly by father and son for the last thirty years. It is good growth, having been tried in earth about one month since; it grew 90 per cent." He afterwards adds, "it has been cleaned since, and will likely grow the same." This statement is not proved to be untrue, on the contrary its truth is established by the evidence. I am of opinion, that there is not here any special warranty that the growth would be 90 per cent., or of any particular sort. I think the seller fairly stated all he knew of the matter in reply to the inquiry of the purchasers, and the purchasers had brought before them the seller's whole ground of knowledge. I cannot assume that here, any more than in the other case, there was any special warranty of quality or sufficiency, and the same conclusion must, I think, be come to in both cases.

Agent for Pursuer—A. Kelly Morrison, S.S.C.

Agent for Defenders—J. W. & J. Mackenzie, W.S.

Wednesday, May 25.

ABBOTT *v.* MITCHELL.

(*Ante*, vol. vii, p. 160.)

Lease—Bankrupt—Delegation—Power to grant Leases.

A granted an *ex facie* absolute disposition of certain subjects to B & Co.; but by back-bond it

was declared that they held it only in security of the sums due to them by A. The disposition was recorded, but not the back-bond; and A continued in occupation of the subjects. The day before B & Co. stopped payment, and shortly before his own bankruptcy, A granted a lease of part of the subjects to his son. The trustee upon B & Co.'s bankrupt estate challenged the lease. *Held*, on a proof, that A had authority under the back-bond to grant leases, and that the lease in question was valid.

This was an action of declarator of the validity of a lease. The circumstances under which it was granted were narrated formerly (*ante*, p. 160), and are given at length in the opinion of the Lord President upon 20th December 1869. The Court allowed a proof to both parties of their averments, which was taken before Lord Kinloch.

The proof having been reported, parties were further heard.

FRASER and MAIR for pursuer.

SCOTT and M'LAREN for defender.

At advising—

LORD PRESIDENT—The motive of the institution of this action of declarator was the attempt of the defender Mr M. Mitchell, as trustee for the creditors of Weir Brothers & Co., to interfere with the pursuer's possession under the lease by means of certain proceedings in the Sheriff-Court. It is not necessary to detail these proceedings, as they do not affect the question for decision now.

The first plea of the defender was, that the pursuer had no title or interest to sue, but the possession of a lease gave him both title and interest to maintain its validity against all comers. There were two other defences, viz., that the lease having been fraudulently granted by an insolvent on the eve of bankruptcy to his son, was invalid, both under the Act 1671 and at common law.

These pleas made a proof necessary, but it is not necessary to consider the import of that proof, as both these pleas are now withdrawn.

We must now assume the lease to have been granted in *bona fide* for an adequate rent in the fair administration of the property. The only remaining defence is the third plea—"Weir Brothers & Company, and the defender as their trustee, being proprietors of the subjects in the lease, and the lease not being granted by them, the defender should be assoilzied." That plea is illogical, because a lease is good though granted by a previous proprietor, and also if granted by a person having authority from the landlord to grant leases. But it means that the party granting it had no right or title to do so, and we must consider that question, and for that purpose some detail is necessary.

Abbott senior was proprietor of considerable property in London Street prior to the year 1861. He had then occasion to create a security for money borrowed over it, in the form of an absolute bond and disposition and a back-bond, The first creditor being Robertson, the security was transferred in 1862 to Weir Brothers & Co., and by them, in 1865, to William Weir, John Weir, and Patrick Weir, as trustees for the firm of William Weir Brothers & Co., by disposition dated March 1865. These dispositions were all *ex facie* absolute, and were recorded.

There were, however, back-letters, to the terms of which it is necessary to attend, which were not recorded. The back-letter is referred to in Cond. 6 as follows:—"By back-letter, dated 8th and 14th March 1865, addressed to the said William Abbott, the said William Weir, John Weir, and Patrick Weir, as trustees for behoof of the said company of William Weir Brothers & Company, with consent and concurrence of the said William Weir Brothers & Company as a company, acknowledged and declared that although the last-mentioned disposition appeared *ex facie* absolute, yet the same was made and granted, and the said subjects and others were hereby conveyed to them, as trustees foresaid in security, and in order that they might hold and be vested in the said subjects and others, and that they accordingly hold the same in trust and security of the payment of all debts already incurred and due, and which might thereafter be incurred and become due by the said William Abbott to the firm of William Weir Brothers & Company, or to the individual partners thereof; and of all sums already advanced and which might be advanced by the said firm or partners to or on his behalf, and all obligations already undertaken by the said firm or partners for or on his behalf, and all interest thereon and expenses that might be incurred by them in relation thereto, including therein the price of all goods furnished and to be furnished by said firm or partners to him. It was declared by said back-letter that if the said William Abbott failed to pay and free and relieve the said William Weir Brothers & Company of all such debts, advances, and obligations, and interest thereon, and expenses, within three months after a written demand, the said William Weir, John Weir, and Patrick Weir, as trustees foresaid, should, on the expiration of said three months, have full and absolute right of property in the said heritable subjects, and that it should be lawful for them to enter into possession of the said subjects, and to sell or dispose of them either by public roup or private bargain. The said William Weir, John Weir, and Patrick Weir became bound by the said back-letter to hold just count and reckoning with the said William Abbott for the proceeds of the said subjects." It is important to observe that down to 1865 Abbott never ceased to act as proprietor of the subject—occupying part, letting the rest, and advertising part for sale; and this back letter is obviously intended to continue that state of possession.

The granting of the lease in question now is not a solitary instance of his acting as proprietor, for he granted several, and it is now admitted that it was done in good faith. That being so, on the 11th, 14th, and 15th February 1867, he caused advertisements to be inserted in the newspapers, giving notice that the goodwill of the business carried on at Nos. 116, 118, and 120 London Street, Glasgow, was for sale, and that the purchaser might also obtain a lease of the subjects. On 15th March Abbott's son, the pursuer, made an offer of £400 for the stock and goodwill, and desired a lease of the premises for ten years at £75 per annum.

That offer was accepted, and Mr Abbott junior entered into possession of the premises, and on the same day he paid £200, half the price of the goodwill and stock-in-trade, and granted bills for the remainder of the price, which seem to have been duly retired.

The lease was finally arranged on the 25th March, and bore to be for ten years, with a break at seven years. The next circumstance which occurs is the bankruptcy of Weir Brothers & Co. on 3d April, and on 17th April the defender Mr Mitchell was confirmed trustee, thereby getting a good

title to the premises previous to the recording of the back-bond. Abbott senior becomes bankrupt upon 20th May in the same year.

The question of law in these circumstances is whether the lease thus granted by Mr Abbott senior on 25th March is invalid, in respect that he had no title or authority to grant leases? It would have been a different question if Abbott senior had granted a conveyance of the subjects or created a heritable security over them; and I give no opinion on the effect of such transactions entered into by him in such circumstances.

Now, in the first place, it is clear that, in a question between Abbott senior and junior on the one hand, and Weir Brothers & Co. on the other hand, if in a state of solvency, there could have been no doubt of the validity of the lease, because Weir Brothers & Co. had, by agreement with Abbott senior, left him in full possession of the subject, with power to administer the property. Feudal proprietors may delegate to any one the power to grant leases, and the terms of the back-letter had given that power to Mr Abbott senior.

But the question remains, Whether the bankruptcy of Weir Brothers & Co. gave their trustee a title to challenge their lease. Suppose it had been granted years before, it would be a strong thing to say that the trustee of the bankrupts, as an adjudger or singular successor, could reduce the lease. Suppose we take it that Mr Mitchell as trustee is to be entitled to all the privileges of an adjudger or singular successor, is he entitled to challenge this lease?

Leases granted by a proprietor are good against a singular successor if they are clothed by possession, even if the singular successor is a trustee for creditors.

Therefore, if Abbott senior had authority from the feudal proprietor to grant it, the lease is good against the trustee just as it would have been against a singular successor. In the circumstances I think that Abbott had authority from proprietors to grant leases, and that they are binding upon the trustee for the proprietor's creditors just as much as they would have been against an adjudger or singular successor; and therefore I think that the pursuer is entitled to degree in terms of the declaratory conclusions of the action.

Lord Deas concurred.

Lord Ardmillan—This case is now before us on the documents produced, and on the proof taken before Lord Kinloch.

The pursuer seeks to enforce a lease of subjects in Glasgow, granted to him by his father, William Abbott senior, on 19th March 1867.

The defence is,—that the lease was fraudulently granted, and fraudulently accepted; and also that it was granted in contravention of the Act 1621, cap. 18.

I understand that these grounds of defence are not now maintained; but that the case is limited to the question of power, viz.,—Was William Abbott senior in a position to grant a valid lease of these premises, and is the lease to the pursuer effectual?

Abbott senior was proprietor of these subjects, and he retained possession of them up to the date of the lease. Weir Brothers & Co. held from Abbott senior an *ex facie* absolute disposition of the subjects, dated in March 1865, but so qualified by a back-letter, as to render the apparent proprietorship of the disponees truly and only a right in security, as in a question between them and Abbott senior. Still further, and operating as an additional qualification of the *ex facie* rights of the parties, the continued possession and administration of the subjects was left with Abbott senior, the original owner and granter of the security. Accordingly, Abbott senior did so possess and so administer, and in the course of that administration he drew the rents; he granted other leases; made other agreements; undertook obligations; was returned to the Valuation Roll and the Inland Revenue as proprietor; and generally maintained the open and avowed possession and administration as owner of the subjects. It is stated by the defender that "the other pretended leases were granted to take off the appearance of fraud from the lease in favour of his son." But that charge of fraud has been given up; we must hold that there was no fraud, and, in the absence of fraud, the other leases remain as real acts of administration by Abbott senior as proprietor. The back-letter was not recorded. Accordingly it cannot be held to qualify the feudal right of property in the subjects in a question with a third party not representing Weir Brothers & Co., and not bound by the equity affecting them, but standing on their own right with no qualifications but such as appear on the record. But Weir Brothers & Co., or any one taking their right as it stood in them, must be bound by the manifest equity which would have precluded them from challenging a *bona fide* lease. As against them the lease was valid; and not only so, it was granted fairly, for a reasonable rent, and as an act of ordinary administration. We are not dealing with a question of feudal title to the property of the subjects, but merely with a question of the validity of a lease—that question being raised by a trustee for a body of creditors. I do not, therefore, think it necessary to express an opinion on an important question which has been adverted to in argument, but which does not here arise—whether in regard to the property of heritable subjects a trustee for general creditors, who is neither purchaser nor special assignee, must take the subject *tantum et tale* as it stood in the person of the bankrupt, or could have challenged and set aside a conveyance or a security? *Gordon* v. *Cheyne*, Feb. 5, 1824, 2 S. and D. 567, and 1 Bell's Com., 286.

This lease was a valid and onerous contract, in so far as concerned the lessor and lessee. It was also a contract to which Weir Brothers & Co., who had granted the back-letter, and permitted Abbott senior to possess and administer the subjects, could not object, and it was granted in the course of that administration, and was an ordinary, and not an unfair, or an unreasonable, act.

It is true that a lease granted by a factor or commissioner for another must be supported by proof in writing of the commission or authority, if that is challenged.

But specific authority is not required. If the authority is fairly deducible from the terms of the writing, that is sufficient. Here the possession, and the administration of the subjects was, by the stipulations of the back-letter, in Abbott senior. All ordinary powers of administration, including the power to grant a lease at a fair rent for an ordinary term, were implied, and were exercised. No doubt could be raised on this point in a question with Weir Brothers & Co., nor can the objection (the averments of fraud being withdrawn) be now sustained

when stated by their trustee. It is not necessary that the power to grant an ordinary lease shall be in a writing appearing on record, especially if the lease be granted by a person openly in possession. It is enough if the power to grant the lease be exercised fairly and reasonably, and be deducible from the writing under which the lessor possessed.

Weir Brothers & Co. could not have challenged this lease; and in this question, raised by the trustee for their creditors, not in regard to the property but in regard to a lease only, I am of opinion that *assignatus utitur jure auctoris.*

In the absence of fraud, and having regard to the long and open possession and administration of the subjects by Abbott senior, I am of opinion that no sufficient ground has been shewn for refusing to sustain this lease.

Lord Kinloch—The only question before the Court regards the validity of the lease granted by William Abbott senior in favour of the pursuer William Abbott junior in March 1867. There are some points of delicacy and importance on which the question touches; but I think it may be solved on its own special considerations.

The lease purports to be granted for ten years from the 19th March 1867; and, according to the evidence, possession was immediately taken on it by the lessee, and has been maintained by him ever since.

It is proved that in the year 1862 Mr Abbott senior, the granter of the lease, constituted a security over property, of which the subject of the lease formed part, in favour of Messrs Weir Brothers & Company, for their relief of certain advances made or to be made by them on his behalf. This security was constituted by a disposition *ex facie* absolute, on which infeftment, or what was equivalent, followed. A back-bond was granted by Messrs Weir Brothers expressive of the true nature of the transaction. But this back-bond was not recorded; and so Messrs Weir Brothers appeared on the face of the records as the absolute owners of the property.

On 3d April 1867 the estates of Weir Brothers were sequestrated under the Bankrupt Statute. The defender Mr Mitchell, the trustee in this sequestration, now appears to contend (1) that the effect of the sequestration was to carry into his person, on behalf of the creditors, the property of Abbott, feudally vested in Weir Brothers, as absolute owners; (2) that the property was so carried unburdened with the lease by Abbott senior in favour of his son.

It is the latter of these two points which forms the important subject of inquiry; because, if the lease is valid in any question with the creditors of Weir Brothers, it would be unimportant that the feudal right of the property had passed to them. The lease still remained a legal burden on their right.

I am of opinion that the lease is valid, and that none of the objections stated against it by the trustee of Weir Brothers is well founded.

The lease was at first impeached on the ground of fraud, being, as alleged, a fraudulent transaction between Abbott senior and his son, in order to deprive the creditors of Weir Brothers of a right which otherwise would have belonged to them. But this ground of objection was ultimately abandoned; and the case must now be determined on the assumption that the transaction is valid, unless capable of being challenged on the ground of want of legal efficacy. This accordingly was the ground on which the argument of the defender was at last exclusively rested. It was maintained that by force of the *ex facie* absolute disposition Weir Brothers were the owners of the property, and that no valid lease of any part of it could be granted without their consent. The lease to Abbott junior not having this consent interponed to it, was therefore, it was contended, void.

But I think that this argument fails in its very first step. The disposition in favour of Weir Brothers was undoubtedly in form absolute. But it was only intended as a security; and possession was not meant to be taken on it, except in the event of payment of the debt secured not being made, and after due intimation to the debtor. The back-bond which was granted by Weir Brothers makes this sufficiently plain. It contains, indeed, what in my view is equivalent to an express contract, that, until the time came for entering into possession, the debtor was to be allowed to act in the full administration of his own property. It is proved by conclusive evidence that this is what in point of fact happened. Abbott senior was not only left in the entire possession of the property, he was also left to transact in all respects concerning it as owner, in the same way as before the deed in favour of Weir Brothers was granted. He might consult with Weir Brothers as to more or fewer of his proceedings. But these consultations were apart from public view. To the world at large he remained ostensibly the owner exactly as he had been before. In particular, he granted leases on the property, and transacted with the tenants in these leases; settled with them as to repairs; sued, and was sued by them as proprietor. Weir Brothers, the creditors in the security, acquiesced in all these proceedings on the part of Abbott senior. With their full knowledge and assent he conducted himself in all respects as continuing owner of the property. The lease to his son Abbott junior was granted in the ordinary course of these proceedings. We must now hold it to have been granted in good faith, and in the due course of administration of the property.

I am of opinion that, in these circumstances, the lease in question was entirely valid in any question with Weir Brothers, the ostensible feudal owners of the property. It is undoubted that if the lease had been granted by a factor appointed by Weir Brothers, it would have equal validity with a lease subscribed by themselves. The very least view of the right of Abbott senior would place him in the position of factor for Weir Brothers, holding an implied factory. In reality, his position was much more favourable. He was the original owner of the subjects, permitted to retain that character in the face of the world, and to continue all the administrative powers of an owner by those who, though ostensibly absolute disponees, were in reality only creditors in security. I cannot for a moment doubt that any lease *bona fide* granted by him was good in a question with Weir Brothers, who had given him, both directly and by implication, such unlimited administrative powers. And if the question was now between Abbott junior, the lessee, and Weir Brothers themselves, I do not see room for questioning that the lease fell to be declared valid.

But, if this view be well-founded, it is to my apprehension conclusive of the whole case. For

whatever questions might be raised as to the effect of the *ex facie* absolute ownership on the face of the records, in carrying Abbott's property to the creditors in the sequestration of Weir Brothers (and into these questions I entirely forbear from entering), any right which would pertain to them could not be otherwise than burdened with a lease competently granted, and carried into effect by possession, anterior to the acquisition of their right. Even the most undoubted singular successor only acquires his right burdened with such leases. A purchaser or adjudger from Weir Brothers on the faith of the records could only take the subjects under the burden of the leases which they had granted, either themselves or by any one fully authorised by them, and on which possession had followed prior to the sale or the adjudication. The creditors in the sequestration cannot, even in statement, place themselves in a higher position than a single adjudger would have held. In many respects, it is well known, the general creditors in a sequestration hold a situation much less favourable than an individual purchaser or creditor. Without therefore entering on any other or more debateable ground for sustaining the lease in a question with the creditors in the sequestration, it is enough I think to hold that, being in the same position as if granted by Weir Brothers themselves, and being granted and completed by possession anterior to the sequestration, it must be held valid against these creditors equally as against Weir Brothers.

I am of opinion that judgment should be pronounced in terms of the conclusions of the summons.

Agent for Pursuer—John Galletly, S.S.C.
Agent for Defender—A. K. Morison, S.S.C.

Thursday, May 26.

ELLIS *v.* ELLIS' TRUSTEE.

Procedure—Bankrupt—Expenses—Sisting—Trustee.

In an action of reduction and count and reckoning the Lord Ordinary reduced, and in regard to the other conclusion appointed the case to be enrolled for further procedure. The defender reclaimed, but meanwhile became bankrupt. His trustee asked to be sisted, on the footing that he would not persist in the reclaiming note, and should not be found liable in the previous expenses. The Court *held* that at that stage of a cause it was not competent to sist the trustee *sub conditione*, and remitted the case to the Outer House.

In an action of reduction and count, reckoning, and payment, at the instance of James Walter Ellis, against his brother, Clement Ellis, the Lord Ordinary (Ormidale) pronounced an interlocutor, of date 2d February 1870, finding that the contract of copartnery and deeds of agreement concerning the business of James Ellis & Son had been impetrated from the pursuer by false and fraudulent misrepresentations on the part of the defender, and by taking advantage of his ignorance of business and facile disposition. The Lord Ordinary therefore reduced the said deeds, and appointed the case to be enrolled for further procedure with regard to the conclusions of count, reckoning, and payment—reserving all questions of expenses.

The defender lodged a reclaiming note, with leave of the Lord Ordinary, against this interlocutor; but, before the reclaiming note came on to be heard, the defender was sequestrated. The trustee on his sequestrated estate appeared, and moved that he should be sisted in the case, on the understanding that he was not to insist in the reclaiming note against the interlocutor reducing the deeds, and on the condition that he was not to be liable for the expenses of the previous litigation,—his object being merely to appear for the creditors' behoof in the count and reckoning, which he maintained was essentially a separate action.

Horn and Shand for the trustee.

Solicitor-General and Balfour for the pursuer.

The Court, *hoc statu*, refused the motion of the trustee. In the general case, when a trustee sists himself, he adopts the contract of *litis contestatio* in its entirety, and renders himself liable for all expenses past and future. Although the circumstances of the present case were so peculiar that it was pleaded they took it out of the general rule, yet it was impossible, *hoc statu*, to grant the trustee's motion. Even were it decided that the two parts of the case were so essentially distinct as that in the present question they might be considered two distinct causes, still, even in the first the reduction was not yet exhausted, the reclaiming note was not yet disposed of, and the expenses were reserved. The general rule must therefore apply, and the trustee sisted now must be sisted in the whole action, and become liable for the previous expenses. The motion for sisting the trustee *sub conditione* must therefore be refused *hoc statu*, reserving to him to come forward with it again when the reductive part of the action was exhausted.

The Court thereafter, on the motion of the pursuer, and in respect that no appearance was made for the reclaimer, and that his trustee had not sisted himself, refused the reclaiming note, and gave the pursuer his expenses from the beginning of the action. The Court also found the defender liable in the expenses of to-day's discussion, and modified them at £5, 5s.

Agents for Trustee—J. & R. D. Ross, W.S.
Agent for Pursuer—James Webster, S.S.C.

Friday, May 27.

JENKINS, PETITIONER.

Procedure—Appeal to the House of Lords—Caution.

The Court having unanimously pronounced two interlocutory judgments, allowing a proof, and ordering the pursuers (who had been unsuccessful) to find caution before further procedure, one of the pursuers intimated to the agents of the defenders his intention not to find caution, and some time afterwards presented a petition for leave to appeal to the House of Lords. The Court *refused* to grant leave, as, the action being a declarator of right of way, the petitioner had no more interest than the rest of the public, and though a poor man he had rich backers, and as it was for these reasons the interlocutor had been pronounced ordaining the pursuers to find caution.

Some years ago the petitioner and one or two other parties raised an action of declarator of right of way for foot passengers along the bank of the