I regret the decision your Lordships propose, for I agree with the Lord Ordinary, and all the more because I feel assured that the reversal of this judgment may lead in other cases to protracted litigations, and the funds of the poor may be spent in that way, while, besides that, the time of four Judges of the Supreme Court may be taken up in finding their way through evidence of this kind, which might be better bestowed on something else.

Before going into the evidence I shall refer to two cases reported in the books, which had, as I thought, settled two points which are now, I fear, to be disturbed by your Lordships' decision. These points are—(1) You cannot expect that complete and full proof in cases of this kind that is to be expected in cases of succession or the like; (2) in cases of this kind, where there has been a considerable lapse of time, the Court will give very full weight to any entries in registers that may be laid before them, and also to the deliberate statements made by the parties whose settlement is in question. The cases I refer to are, first, that of *Hay* v. *Murdoch*. The rubric there very fairly states the nature of the case that was established—"Held, in a question as to the birth settlement of a pauper, that an entry in a parochial register, made in the handwriting of a session-clerk not appointed till twenty-one years after the date the entry bore, was sufficient evidence in the special circumstances of the case to establish the parish of his birth." And the special circumstances really come to this, that in addition to that entry, which in itself was not without objection—for part of it was deleted—there were certain statements made by the deceased pauper as to the place of his birth. In the other case—that of the *Inspector of Lady* v. *The Inspector of St Cuthbert's*—the evidence was even less satisfactory, and yet the Second Division again sustained the birth settlement, as it was made out by certain statements of the pauper himself. From these cases then I deduce this rule, that you are to take such evidence as these statements and the records of the parish, and allow these to settle such questions.

I have considered the evidence in this case, and that is the conclusion I have come to. If I were to allow myself to analyse the evidence of witness after witness, I do not say that I could satisfy myself that the evidence establishes that the child was born in Old Luce. But that is not the method I should ever adopt. By travelling through all this evidence you could not expect ever to come to a satisfactory conclusion on the matter. You find the minister of the parish and his daughters taking such an interest in this child that they adopted it as one of the family. Then in the parish register of baptisms you find this entry—"John Mackenzie was born the fourth August 1800 and thirty-one years in Glenluce, and baptized the thirty-first day of January one thousand eight hundred and thirty-two years in Portpatrick." Now, when you are diving into a matter forty-seven years old, I think that an entry made by the session-clerk of the day of the baptism of the adopted son of the minister must be presumed to have been made with the full knowledge of the minister. I find that there is an entry in the minister's Bible made the same day by his daughter. It is true that I find nothing there as to the birthplace, but I do not suppose that it would have made any difference in your Lordships' views if I had. Then, when the young man goes to Glasgow College, you have these records written by himself, the second element in the cases I have referred to. I do not dwell on the entries in the Procurator-Fiscal's books; it certainly appears from them that the mother had some close connection with Glenluce. They are not of any importance in themselves, but if any corroboration were needed they supply it. Accordingly, I am of opinion that this case is ruled by authority, and that the evidence here is sufficient. I cannot take the view that if the entry here in the parish register had been found in the register of that parish against which the claim was made the case would have been different. I do not think that session-clerks in making up their registers can be said to be making their entries with a view to ultimate liability for the persons entered there as paupers. These registers are not to be treated like business books, where if I find an entry admitting liability, the party cannot afterwards be heard to dispute it.

On the whole matter, I think that the Lord Ordinary has given due weight to the decided cases, and has come to a sound conclusion, and his judgment should be sustained.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the Inspector of Old Luce against Lord Adam's interlocutor of 12th July 1877, Recal the interlocutor: Sustain the defences. Assoilzie the defender, and decern: Find the defender entitled to expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for Pursuer—Burnet—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defender—Balfour—J. P. B. Robertson. Agents—Mason & Smith, S.S.C.

Wednesday, March 20.

FIRST DIVISION

[Sheriff of Dumfries.

HISLOP *v.* THOMSON.

Process—Expenses—Stamp.

Where one party to an action produces an unstamped document and founds on it, paying the stamp duty and the penalty, he is not entitled to recover half of that expense from the opposite party, although the document be a mutual contract, the Court having held it to be of no effect, and the opposite party not having founded on it.

This was an action raised for payment of a sum of £127, 6s. 8d. by Hislop, a draper in Thornhill, against Thomson, who had formerly been a draper there. Hislop had been for some time a tenant of Thomson, and had while tenant made certain additions to the premises, the cost of which, by an agreement of parties drawn up and signed at the beginning of the lease, Thomson was to re-

pay to him at the termination of the lease. After the termination of the lease Thomson became bankrupt, and Hislop bought the premises. The question between them raised in this action was whether the claim for the cost of the addition made by Hislop while tenant had been discharged or not by the terms of the bargain made at the sale of the premises. To support his claim Hislop produced the agreement drawn up by the parties; the Court ordered it to be stamped at his expense. In their judgment on the merits the Court sustained the contention of the defender, that the stipulations of that agreement had been passed from by both parties at the time of the sale, and held that the agreement was no longer of any effect.

The pursuer asked that the defender should be found liable in one half of the stamp and penalty, in respect that if the deed had been stamped originally he would have paid half, and referred to the rule laid down in the cases of *Neil* v. *Leslie*, March 19, 1867, 5 Macph. 634, and *M'Donall* v. *Caird*, July 19, 1870, 8 Macph. 1012.

The defender answered that this agreement was no part of his case, and that it was only where both parties founded on a deed that they could both be liable for the expense of stamping it.

Their Lordships consulted the Judges of the Second Division.

At advising—

Lord President—In this case we found by our interlocutor that the pursuer expended a sum of £16, 15s. in putting up sundry moveable fittings in premises occupied by him as tenant, and the defender undertook by the document which has been stamped at the pursuer's expense to repay him that sum on his removal. Subsequently, the defender having become bankrupt, the premises came to be sold, and were purchased by the pursuer, and at the time of the sale nothing was said about this sum of money. The effect of that we held to be that this obligation had been departed from, and was no longer of any avail. That was the result of the case, but in the course of supporting his case the pursuer found himself met with this objection, that the document on which he founded was not stamped, and he was put to the expense of the penalty and the stamp. He says now that he is entitled to get one-half of that from the defenders, as this was a mutual agreement.

The point is quite settled that where the document is one on which both parties require to found, and the party leading it in evidence is made to pay the duty and the penalty, he will be entitled to recover half of that from the opposite party. But I am not satisfied that where an obligation of this kind is founded on by one only of the parties, and found to be worth nothing, then that party should be entitled to recover half the duty and half the penalty from the other party—the other party is quite entitled to say, "You should never have founded on this. I did not do so. You see the consequences of having done so, and you must bear them." Now, by our judgment this agreement is found to be a worthless piece of paper, and I do not see how that answer is to be met.

There is one case certainly whose principle I have had a little difficulty in reconciling with our present decision. In the cases of *Neil* v. *Leslie* and *M'Douall* v. *Caird* the common rule is applied; but there is another case where the principle is not so clear. I mean the case of *Logan* v. *Ellice*, Mar. 6, 1850, 12 D. 841. That was a case laid upon a mutual contract in which the pursuer concluded for £692; the defender tendered £205 as the sum due under the contract; the pursuer got a verdict, but only for £181, being £24 under the tender; the consequence was that the defender was found entitled to expenses after the date of the tender. The difficulty that arose was as to the cost of stamping the contract; that had not been done till the trial, long after the tender was made, and therefore the defender contended that he could not be held liable for any part of the expense of stamping it.

The Court, however, proceeded there on the footing that that was a writing on which both parties founded in the course of the case, and the Lord President says—"There is nothing to prevent our following the fair and reasonable rule, that where a mutual instrument is founded on by both parties, they should divide the expense of stamping it." That being the ground of the judgment in that case, it cannot be held to apply to this.

I should add that this judgment is given in accordance with the opinions of the Judges of the Second Division, whom we have consulted.

Lord Deas—The case of *Logan* v. *Ellice* was a case of mutual contract; the whole question was, how much was due under it; but both parties founded on it. The law is very correctly laid down by your Lordship in the case of *Neil* v. *Leslie*. What I added there was that when a document is produced by a party to us we should order it to be stamped at his expense, leaving it to be determined afterwards who is to be liable finally.

Lord Mure and Lord Shand concurred.

Counsel for Pursuer—Gloag. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender—Johnstone Agent—John Galletly, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, March 20.

M'ALLISTER *v.* DUNCAN DOUGLAS.

(Before Lord Justice-Clerk, Lord Young, and Lord Adam.)

Justiciary Cases—Statute 4 Geo. IV. c. 60—Illegal Lotteries — Insufficient Specification in a Complaint.

A conviction before the Justice of Peace Court, proceeding upon a complaint under 4 Geo. IV. c. 60, sec. 41, that "A B had on 15th December 1877, within the premises occupied by him at 135 Argyle Street, Glasgow, sold several or one or more tickets or chances in a lottery not authorised by Act of