Court to grant the powers specified therein in favour of the petitioners, and an interlocutor may be pronounced in the following terms:—

"Having considered the petition and proceedings, with the reports by Mr Robert Stewart, S.S.C., and Mr Murray, Finds that the procedure has been regular and proper: Grants warrant to and authorises and empowers the petitioners, or the survivor of them, as executors or executor *qua* trustees or trustee in the sense of the Trusts Acts of the deceased Mrs Frances Mary Pettigrew, or their successors in office, to grant feus of the subjects described in the petition, or of any part thereof, and that at such times and in such portions and at such rate or rates of feu-duty (not being less than £30 sterling per imperial acre) as the petitioners or their foresaids may think proper: Remits to the reporter to adjust the terms of the feu-charters to be granted in terms hereof: Finds the petitioners entitled to payment out of the funds of the estate of the expenses incurred by them in these proceedings: Remits to the Auditor to tax the same and to report, and decerns."

Mr Murray reported, *inter alia*—"The lands, which are in close proximity to the Shettleston station of the North British Railway, are not of great agricultural value, but from their position, being within one mile of the Glasgow city boundaries, and forming part of the suburbs of Glasgow, are very valuable as feuing subjects. Portions of the lands fronting the Edinburgh and Glasgow public road have already been feued at rates varying from £40 to £60 per acre, and the ground remaining to be feued is valuable for tenements or works, such as ironworks, &c."—and fixed the minimum rate of feu-duty.

The Lord Ordinary on 24th May 1890 pronounced an interlocutor in the terms suggested in Mr Stewart's report.

Counsel for the Petitioners—Rankine. Agent—Francis J. Robertson, W.S.

Thursday, June 13.

OUTER HOUSE.

[Lord Kincairney.

HENDERSON *v.* CALDWELL.

Contract — Fraud — Contract Importing Fraud on a Third Party.

In an action for £200, the unpaid balance of the price of a business, it was averred by the seller, that while the price set forth in the offer and acceptance was £1200, the real price agreed on was £1400, and that the sum of £1200 had been put into the offer and acceptance in order that the purchaser might obtain the assistance of a third party, who had agreed to assist him on condition that he obtained the business for the price of £1200. *Held* that the contract averred involved the intention and attempt to defraud, and could not be admitted to probation.

This was an action by Alexander Henderson, innkeeper, King's Arms Hotel, Melrose, against Robert Caldwell, wine and spirit merchant, County Restaurant, Loanhead, to have the defender ordained to "accept and thereafter deliver to the pursuer two bills of exchange each for the sum of £102, 10s. sterling, bearing date the 6th day of November 1888, and payable six months after date; or otherwise, to make payment to the pursuer of the sum of £200 sterling, with interest thereon at the rate of 5 per centum per annum from the 6th day of November 1888 till payment."

The pursuer averred — "(Cond. 1) In October 1888 the pursuer was lessee of and carried on business as a wine and spirit merchant in the County Restaurant, Loanhead. The defender, who was then a sheriff officer in Edinburgh, was desirous of purchasing the goodwill of the said business from the pursuer. The price for which the pursuer was willing to sell the goodwill, furnishings, and fittings of the business was £1400. This price the defender was willing to give, and in point of fact he agreed, by letters dated 24th and 25th September 1888, to give the pursuer a sum of £1450 for the goodwill, &c., of the business. His inability at once to deposit £500 to account of the purchase price, which he agreed to do, was the sole cause of the agreement not being carried out. Ultimately, however, Messrs Aitchison, brewers, Edinburgh, agreed, the pursuer believes, to assist the defender to pay the price of the goodwill, provided it could be bought for the price of £1200. (Cond. 2) The pursuer refused to sell the goodwill of the said business at a less price than £1400, and accordingly the defender, who was willing to pay that price and anxious to secure the business, agreed to pay the sum demanded—£1400. But in order to obtain Messrs Aitchison's aid the defender arranged that the letter from his agent to the pursuer's agents making offer for the goodwill should state as the price only £1200. The defender at the same time agreed that he would grant in favour of the pursuer two bills each for £100, with interest at 5 per cent. from the date of entry to the business till the date of maturity of the bills. It was agreed that the said bills should be taken at a currency of six months. (Cond. 3) The agreement above narrated was concluded on the 29th October 1888. Early on that day the pursuer's agents prepared a letter of obligation to be signed by the defender, binding him to grant the bills above mentioned in favour of the pursuer. The defender refused to sign the said letter until the whole transaction was concluded, and he had obtained entry to the premises, but he agreed that whenever he had obtained entry he would at once sign the bills. In reliance on this assurance the pursuer, later on the same day, authorised his agents to accept the defender's offer of £1200 for the goodwill of the said business, together

with the bar, bar-fittings, furniture, pictures, working utensils, and all other plant and articles then in use and connected with the said business. The offer and acceptance are dated 29th October 1888. Immediately after the acceptance was signed the defender specially requested the pursuer's agent not to let Messrs Aitchison's representative know anything about the bills above referred to, which the defender had agreed to grant in favour of the pursuer. (Cond. 4) The licence was duly transferred to the defender, the lease was assigned, he entered into possession of the said restaurant on 6th November 1888, and he has since carried on business therein. Shortly after he had commenced business the pursuer caused two bills, each for the sum stipulated, to be presented to the defender for acceptance. The defender did not then deny his undertaking to sign the bills, but said that he would require first to see his man of business. The pursuer has since requested the defender to implement his undertaking and grant the bills, but he fraudulently refuses now to fulfil the bargain which he made with the pursuer for the purchase of the said business. The present action has thus been rendered necessary."

The defender pleaded—"(1) The averments of the pursuer are irrelevant. (2) The alleged agreement as to the granting of the said bills can be proved only by writ or oath of the defender. (3) The defender not having agreed to grant the said bills, he is entitled to absolvitor from the conclusions of the summons, with expenses."

On 13th June 1890 the Lord Ordinary (KINCAIRNEY) issued the following interlocutor:—"Finds that assuming the truth of the pursuer's averments he is not entitled to enforce the contract averred: Therefore sustains the defender's first plea-in-law, and assoilzies him from the conclusions of the summons, and decerns: Finds the pursuer liable to the defender in expenses," &c.

"*Opinion.*—In this action the pursuer concludes that the defender should be ordained to grant in his favour two bills for £102, 10s. each, or otherwise should pay £200, with interest from 6th November 1888.

"In support of this conclusion he avers that he was lessee of the County Restaurant, Loanhead, and carried on business as a wine and spirit merchant there, and that he had agreed to sell, and the defender had agreed to purchase, the goodwill, furnishings, and fittings at the price of £1400. He avers that on 29th October 1888 a written contract was executed consisting of an offer on behalf of the defender and an acceptance on behalf of the pursuer, in which the price was stated to be £1200, but that at the same time the defender agreed to grant in favour of the pursuer two bills of £100 each to make up the price of £1400 which had been agreed on. The pursuer states that in implement of the agreement the defender was on 6th November 1888 put in possession of the restaurant, but that he now 'fraudulently refuses' to grant the bills in implement of his bargain.

"The defender states that the price agreed on was £1200 as stated in the written contract. I suppose that this price has been paid, as only the £200 is sued for.

"The reason why the price was stated in the written contract to be £1200, when it was truly £1400, is stated by the pursuer to be this—That the defender could not himself advance the money, but that Messrs Aitchison, brewers, Edinburgh, had agreed to assist him, provided the business could be got for £1200, and that when the contract was signed the defender specially requested the pursuer's agent not to let the Messrs Aitchison know about the defender's undertaking to grant the bills.

"The pursuer's averments are so far frank enough, although they are somewhat meagre and defective, but I consider that they come to this—That the price was misstated in the written contract with the object of deceiving Messrs Aitchison, and of inducing them to advance money to the defender in order to enable him to complete the bargain in the belief that the price was £1200 when it was truly £1400.

"The amount advanced by Messrs Aitchison is not stated, and indeed it is not distinctly stated that they advanced anything at all, although I think it is plainly implied that they did, and that the defender could not have carried out the bargain without their aid.

"The defender has pleaded (1) that the averments are irrelevant; and (2) that the agreement as to the bills can be proved only by the defender's writ or oath.

"In support of the former plea it was maintained that inasmuch as the averments of the pursuer imported a fraud practised on Messrs Aitchison, the pursuer could not recover in accordance with the maxim *ex dolo male non oritur actio.* It is certainly not usual to veil such a special defence under a general plea of irrelevancy. Still I think it may be maintained under that plea, and I am of opinion that it is well founded.

"The defender founded on the case of *Jackson* v. *Duchair*, February 6, 1790, 7 T. R. 551. There the facts were that Duchair had agreed to buy from Jackson goods at a valuation. Duchair had not the money, but she induced a friend —Welsh—to advance £70 for her, which he did, and took a bill of sale in favour of himself, which bore that the goods had been sold for that sum. It appeared that Duchair had agreed to pay £30 in addition, but this private agreement between her and Jackson was withheld from Welsh. She granted promissory-notes for the amount, and Jackson sued her on the notes. A jury returned a verdict in favour of the plaintiff Jackson, but the verdict was set aside. It was suggested by the pursuer's counsel that the ground of judgment was or might have been that Duchair had given no consideration for the notes—a ground of judgment not recognised in our law—but

although one of the Judges does suggest that the judgment might have been rested on that ground, it is manifest that the Court proceeded on the ground that Jackson could not recover because the agreement between him and Duchair was a fraud on Welsh. That decision appears to be closely applicable to the present case. The import of it is thus summed up in Chitty on Contracts (12th ed.), p. 700—'When one person advances money to another to buy goods from a third, and the person to whom the money is advanced agrees with the third to pay a higher price than the money advanced, this agreement is void as a fraud upon the person advancing the money, and the third person cannot sue for the higher price.' The case is quoted in Pollock on Contracts (5th ed.), p. 266, as involving that doctrine, and it appears to me that the statement of the case is fully supported by the reported opinions.

"If the principle given effect to in that case be sound—and I think that it is sound and in accordance with recognised principles in our law—it appears to establish the defence in this case. I think it plainly implied that Messrs Aitchison were induced to make advances on account of the misstatement of the price, to which the pursuer was confessedly a party, and in any view I do not think it would make a difference whether the fraud intended was carried out successfully or not. It is enough that the contract now alleged and sought to be enforced involved the intention and attempt to defraud.

"No case in our own books was referred to which comes so close to the present as the case of *Jackson* v. *Duchair*, but the principle affirmed, I think, is undoubtedly recognised in our law, and is thus stated by Professor Bell—'The general rule of law is that no right of action can spring out of an illegal contract, and no Court will lend its aid . . . to a claim founded on an immoral or illegal act'—Bell's Comm. ii. 317.

"A similar principle is familiar in cases of illegal preferences, which are not enforceable against a bankrupt on the ground that they involve a fraud on his creditors—*Riddell* v. *Chisholm*, November 20, 1821, 15 D. (N.S.) 160; *Arrol & Cook* v. *Montgomery*, February 24, 1826, 48 D. 499. It appears to me that this defence sufficiently arises on the pursuer's statement, and may be sustained without inquiry.

"Had I not sustained the above defence as excluding the action I would have sustained the second plea to the effect that the pursuer's averments being contradictory of the written contract could be proved only by the defender's writ or oath. But it seems to me that I could not properly allow a reference to the defender's oath without by implication sustaining the relevancy of the averments. The pursuer referred to the case of *Smith* v. *Kerr's Trustees*, June 5, 1869, 3 Macph. 863, in support of his motion for a proof at large, but I do not think it applies. In particular, it does not appear in that case that any fraud or deception was practised or attempted."

Counsel for the Pursuer—Ure. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Asher, Q.C.—Crole. Agent—Edward Nish, Solicitor.

Tuesday, July 15.

OUTER HOUSE.

[Lord Wellwood.

ROBERTSON *v.* MEIKLE AND ANOTHER.

Process—Expenses—Caution for Expenses—Poor's Roll—Where Action brought after Unfavourable Report by Reporters on Probabilis Causa Litigandi.

A pursuer having raised an action of reduction in ordinary form afterwards applied for admission to the poor's roll. The reporters reported that there was not a *probabilis causa*. He then proposed to proceed in ordinary form. *Held* that he must find caution for expenses.

On 29th August 1889 William Robertson, cab-driver, Edinburgh, raised an action of reduction against Robert Meikle, dairyman, Corstorphine, and another.

Issues for trial by jury were approved of on 22nd November 1889, and the trial ordered to proceed on 25th February 1890.

A few days before the date fixed for trial the pursuer's agent, Mr Thomas M'Naught, S.S.C., intimated that he no longer acted for the pursuer in the action, and on 19th February 1890 the Lord Ordinary discharged the order for trial, the pursuer having intimated his intention of seeking the benefit of the poor's roll.

Nothing having been done by the pursuer, the defenders on 5th March 1890 gave notice for trial at the close of the Winter Session, and on 13th March 1890 their Lordships of the Second Division discharged the notice of trial in respect of a statement on behalf of the pursuer that he was in course of making application for the benefit of the poor's roll. In June 1890 their Lordships remitted the pursuer's application to the *probabilis causa* reporters, and on 4th July 1890 they reported that there was no probable cause. Their Lordships remitted the case to Lord Wellwood for further procedure.

On the case coming before Lord Wellwood, the agent for the pursuer intimated through counsel that he again appeared for his client, and asked for a day to be fixed for jury trial.

Counsel for the defenders asked his Lordship to ordain the pursuer to find caution for expenses with certification. Authorities—*Hunter* v. *Clark*, 1 R. 1154; *Thom* v. *Andrew*, 15 R. 782 (*per* Lord Young); *Ritchie* v. *Young*, 8 R. 748; *Clarke* v. *Muller*, 11 R. 418.

The pursuer relied on the judgment of Lord Lee in the reported case of *Thomson* v. *North British Railway Company*, July 14, 1882, 9 R. 1102.