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had been a contradictory decision from that against which this appeal has been lodged; but that case is open to this observation, (I mean the case of the Blair bond), that this question was not there raised before the Court. It was considered by the parties on both sides, (although the point was open), I suppose for their mutual interest, that it should be waived. But certainly the point was never argued; and therefore that decision, although in its terms at variance with the decision to which the Court of Session has since come, can hardly be considered as possessing much weight with respect to the present question.

My Lords, there were other subordinate points in the case, to which it does not appear to me to be necsssary to advert. The main question that was argued at your Lordships' Bar was the question to which I have called your attention. I think, on reference to the sections of the Act of Parliament of the 54. Geo. III., upon which the case must ultimately rest, your Lordships will be of opinion, that the judgment of the Court of Session is correct, and that it ought therefore to be affirmed.

Appellant's Authorities.—3. Ersk. 8. 101.; 1. Bell's Commentaries, p. 729.; M'Kenzie's Observations, p. 394.; 2. Stair, 12. 29. and 4. 35. 16.; 3. Bank. 5. 67.; Bellenden, March 1685, (3127.); Taylor, Dec. 9. 1747; Arniston, March 1686, (2. Sup. 92.)

Respondent's Authorities.—1. Bell's Commentaries, 729.; Grahame, Nov. 27. 1751, (12,160.); Bellenden, March 1685, (3127.)

MONCREIFF, WEBSTER, and THOMPSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 32. WILLIAM COLHOUN STIRLING, and his Commissioners, Appellants.—*Keay—Dunlop.*

WILLIAM DUN, Respondent.—*Lushington—A. M'Neill.*

Entail—Lease—Acquiescence.—1. Held, (reversing the judgment of the Court of Session), that the word 'dispone' in an entail strikes at leases of extraordinary endurance. 2. That the lease of a loch for 300 years is in no more favourable situation—in a question whether such lease falls under the prohibition to dispone—than any other part of the entailed estate. 3. That (affirming the judgment) a pro indiviso share of a loch, forming part of an entailed estate, is subject to the fetters of the entail. 4. Circumstances held not to constitute an acquiescence barring the heir of entail from challenging the lease in a question with an onerous assignee.

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2D DIVISION.
Lord Newton.

BY the entail, executed in 1691, of the estates of Law and Edinbarnet, with the pertinents thereof, it is declared, 'That it 'shall not be leisome or lawful to any of the heirs of tailzie above 'mentioned (except the heirs-male of my own body), to sell, dis- 'pone, wadset, or impignorate the said lands and others forc-

'said, or any part or portion thereof, or to grant infeftments of annualrent out of the samen, or any other right or security, either redeemable or irredeemable, of the said lands or others foresaid, or any part thereof; nor to contract debts, nor do other deeds of omission or commission, either civil or criminal, whereby the said lands and others foresaid, or any part of the samen, may be apprized, adjudged, evicted, or become caduciarie, escheat, or confiscat.' These prohibitions were fenced by the usual irritant and resolutive clauses.

The entailer had no issue male,—but James Stirling succeeded through a daughter.

The entailed land and the property of a neighbouring heritor surround the Loch of Cochney, of which about one-third pro indiviso belongs to Edinbarnet estate. Of this loch James Stirling, in 1787, let to the Duntocher Wool Company, 'all and whole his part, share, and interest, with the water-course therefrom, so far as is necessary for drawing the water from the said loch; with full power and liberty to the said company to construct and place a bank and sluice upon the said loch, at or near the place where the present sluice is, for the purpose of increasing the water in the said loch for the use of their mills on Duntocher Burn, and to raise the said bank or sluice to the height of 25 feet above the present height of the water in the loch, or higher if they think proper; and to take earth and turf from the adjoining lands for making their bank, without being liable in payment of any price or damages therefor; and also, whatever ground adjacent to, and round the part of the said loch above set, may, by raising the said bank and sluice, be laid under water, and thereby constitute part of the said loch; and that for all the days and years of 300 years from the term of Martinmas 1786, at which term the entry of the said company is hereby declared to have commenced.' The rent was to be L.3 annually; and the granter bound himself, his heirs and successors, in absolute warrandice against all mortals. At the same time the Duntocher Wool Company obtained a lease from the other proprietor of his share of the loch, for 38 years, at the rent of L.40.

This lease came by transference to Robert and Richard Dennistoun, and Colin M'Lachlan, merchants in Glasgow. James Stirling had also granted to John Gillies a lease for the like period of a lint-mill, and certain parts of the entailed estate, and which lease had come to M'Dowall and others by assignment.

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On the death of James Stirling, the next heir of entail, Agnes Hamilton, instituted a reduction of the lease of the loch, in respect, inter alia, that it had been obtained 'for a trifle of value, 'with diminution of rental, contrary to the limitations and conditions of the deed of entail under which the said James Stirling, 'the granter, possessed the estate, and for such unusual length of 'time as would in law amount to a perpetuity; and consequently 'is not legally a tack, but resolves into a permanent alienation or 'eviction of so much of the property, besides laying intolerable 'burdens and servitudes upon the whole estate, to the enorm lesion 'and prejudice of the granter himself, and his heirs of entail, if it 'should be sustained against them.' An action of reduction was also instituted as to the mill lease, &c. against M'Dowall and others.

The Court of Session, in both actions, repelled the reasons of reduction, 'in so far as founded on the prohibitory clause in the 'deed of entail;' and thereafter (3d March 1815) adhered, 'without prejudice to the lessees being heard upon the effect of 'grassums having been paid for the leases in question, in the 'event of their being able to shew that grassums were paid.'* Mrs Hamilton died in 1817, and William Colhoun Stirling succeeded as next heir of entail. The question as to the lease of the mill was settled in consequence of the tenant renouncing the lease in favour of Stirling, who, in 1825, appealed the other action as to Cochney Loch.† Besides Richard and Robert Dennistoun and M'Lachlan, he called as a party William Dun, whom he understood to have acquired the lease of the premises subsequently to the judgment in the Court below. In consequence of Dun objecting that he was no proper party to the appeal, since he had not been heard in the proceedings in the Court of Session, the parties agreed to petition the House of Lords for a remit; and, in consequence, obtained an order that 'the cause be remitted to the Court of Session, to the effect that 'William Dun, the said assignee, may be heard for his interest, 'and that the said Court do therein as shall seem to them just 'and proper.'

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* This judgment was pronounced in the action against M'Dowall and others, but applied to both cases,—M'Dowall's case being the leading action, and to the pleadings in which the others made reference. Hamilton *v.* M'Dowall and others, March 3. 1815; F. C.

† During the previous proceedings, William Colhoun Stirling had been in India. He returned in 1821, and again went to India in 1824, having appointed certain individuals his commissioners.

When the case returned to the Court below, Dun refused to appear, unless called by a supplementary action. This having been done, he stated in defence the same general plea which had been relied on by Dennistouns and M'Lachlan,— June 22. 1829.

That although, from the interpretation which had been given to the word 'alienate,' it would affect long leases, yet there was a distinction between 'alienate' and the term 'dispone;' that when (as in this case) the word 'dispone' was not coupled with other words, which showed an intention of using it in a generic sense, and more especially when it stood in connexion with other words which referred to particular modes of alienation, it was to be construed, like these words, as a technical phrase for a particular form of conveying property: and that besides, a prohibition against disponing (even when the term was used in its most ample sense) was only effectual against leases which had been granted on grassum, to the prejudice of succeeding heirs.

In addition to this plea he farther maintained,—

1. That the pursuer was barred from challenging the lease. The defender had paid a great price for it, and had been allowed, under the belief that his title was unchallengeable, to expend large sums in erecting manufactories on the stream leading from the loch. When at home, the pursuer had not interpelled him, but had tacitly acquiesced; he resided within a mile of the works, and was in constant communication with the defender; and from 1821, when he returned to India, to 1825, when the appeal was taken, not a whisper of disapprobation was uttered: on the contrary, he knew, without interfering, that works worth L. 100,000 were raising on the side of the stream,—that they would be worthless if the supply of water, which the defender could command by his lease, were cut off; and although it was true that the defender had not paid the rent, it was not unusual, when so small, to allow it to run into arrear; but at all events this was not relevant to infer non-acquiescence, unless the pursuer could shew, quo animo, it was neither received by him, nor paid by the defender.

2. That a lease of 300 years of a subject which yielded no fruit of itself, and could only be made productive by being let for a period of long endurance, was not an act of extraordinary administration. And,

3. That a pro indiviso right in a loch, is not susceptible of being brought under the fetters of an entail.

To this was answered,—

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That the prohibition to dispone, contained in this deed of entail, was equivalent to a prohibition to alienate; and was effectual to prevent an heir, possessing under such entail, from granting leases of any part of the entailed estate, whether water or land, for the extraordinary endurance of 300 years, even although no grassum were given: That whatever might have been the doubts formerly entertained on this point, the question had been settled; and, in particular, by a case relative to leases granted of land under the entail now in discussion:* And that if a grassum had been given, the lease would certainly have been struck at by the word 'dispone,' as granted under the true avail.

With reference to the new pleas it was answered,—

1. That the pursuer could not be barred merely because he was silent; but the fact was, that he did inform the defender that the right would not be recognized; and the assignation proved, that it was granted after the action of reduction had been raised, and only a few months before the first judgment in the cause; so that the defender could not have been led into the belief that the lease would not be challenged;—that accordingly the pursuer never would accept of rent, nor recognize the lease in any way;—that, besides, as the defender's lease of the rest of the loch from the other proprietor terminated in 1825, and he could not draw off water adequate to the demand of his manufactories without relying on the supply to be derived from a renewal of that lease, it was impossible he could allege that he had erected them on the faith of the lease in question.

2. That a lease for 300 years was one greatly beyond the usual period of endurance,—was in truth an alienation,—and therefore was an act of extraordinary and unwarrantable administration. And,

3. That a pro indiviso right in a loch is as susceptible of being fettered by an entail as any other heritable subject.

The pursuer also maintained, that, under the remit from the House of Lords, it was competent for the Court to decide on the merits of the principal point, as well as on the additional ground.

The Court found, 'that there had been no acquiescence 'on the part of the pursuer to bar him from insisting in 'this conjoined action against the defender: That the lease 'of a loch for the period of 300 years, stands in the same

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* Stirling v. Walker, Feb. 20. 1821; F. C. Two other leases of part of the same estate were also reduced, but the cases have not been reported.

'situation as if it were a lease of any other part of the en- June 22. 1829.
'tailed estate: That a loch, or a portion thereof, forming a
'part of an entailed estate, is subject to the fetters of the entail
'of such estate; and therefore repelled the defences now first
'pleaded by the defender: But in respect that the judgment
'of remit by the House of Lords does not empower this Court
'to review the interlocutors formerly pronounced in the ori-
'ginal action, and which are still under appeal, in terms of
'the said interlocutors, repel the reason of reduction, in so far
'as founded on the prohibitory clause in the deed of entail, and
'decern; but find no expenses due to either party.'*

Stirling appealed as to the validity of the lease, and Dun cross-appealed against the special findings, and the refusal of expenses.

As the House of Lords had no difficulty in regard to the special findings, and to the import of the word 'dispone,' which had, since the date of the former appeal, been fixed by judgments of the House, it is unnecessary to repeat the arguments of parties.

Their Lordships, therefore, in the original appeal by Stirling, ordered and adjudged, 'that the interlocutors appealed from be 'reversed; and it is further ordered, that the cause be remitted 'back to the Court of Session, to do farther therein as may be 'consistent with this judgment, and as may be just.' And in the present appeal, and cross-appeal, their Lordships 'ordered and 'adjudged, that the said interlocutor, in so far as complained of 'in the original appeal, be reversed. And it is farther ordered and 'adjudged, that the said cross-appeal be dismissed this House, 'and that the said interlocutor, so far as complained of in the 'cross-appeal, be affirmed. And it is further ordered, that the 'cause be remitted back to the Court of Session, to do farther 'therein as may be consistent with this judgment, and may be 'just.'

LORD CHANCELLOR.—My Lords, in a case in which William Colhoun Stirling and others are appellants, and Robert Dennistoun and Richard Dennistoun and others are the respondents, and also in a case in which William Colhoun Stirling and others are appellants, and William Dun is the respondent, I am to move for your Lordships' judgment; and I will state, very shortly, the grounds on which I shall

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* 6. Shaw and Dunlop, No. 104. p. 272.

June 22. 1829. recommend to your Lordships the judgment which, in my opinion, it will be proper for your Lordships to pronounce.

This case arises out of a deed of entail, which was executed in the year 1691 by William Stirling, of the estates of Law and Edinbarnet in Scotland. The property under that entail came afterwards to James Stirling; and in the year 1787 James Stirling, being at that time in possession of the property, granted a lease of that part of it which is the subject of the present inquiry. The property to which this question relates, was a part of the loch of Cochney, with the stream running from it, which was settled under that deed of entail. The rest of the loch belonged to the owner of the adjoining estate. James Stirling granted a lease of his portion of this loch, together with the stream which runs from it, to a person of the name of John Gillies, for the term of three hundred years. There was also a power given to raise an embankment to the height of twenty-five feet; and as the effect of raising that embankment, in the manner I have described, would be to raise the water, and give it a further extent upon the adjoining land, he included also so much of the adjoining land as should be covered with the water so raised. The question is, whether, under the terms of the entail, the party who was in possession of the entailed estate, by virtue of the deed of entail, had authority to make the lease in question?

My Lords, there is in the deed of entail this prohibitory clause:— 'That it shall not be leisome or lawful to any of the said heirs of 'tailzie, except the heirs-male of my own body,' (that is, of the party creating the estate tail), 'to sell, dispone, wadset, or impignorate the said lands or others foresaid, or any part or portion thereof, 'or to grant infeftments of annualrent out of the same, or any other 'right or security, either redeemable or irredeemable, of the said lands 'or others foresaid, or any part thereof, or to contract debts, nor to 'do any other deed of omission or commission, either civil or criminal, 'whereby the said lands and others foresaid, or any part of the same, 'may be apprized, evicted, or become caduciarie, escheat, or confiscate.' This prohibitory clause was fortified in the usual way, by irritant and resolutive clauses, the terms of which corresponded with the terms contained in the prohibitory clause; and the main question for your Lordships' consideration is, Whether, James Stirling having granted this lease in the year 1787, for the term of three hundred years, reserving the rent of L. 3 a-year, with at the same time a regulated supply of water, for a certain portion of the year, for a mill which formed part of the estate, this deed could, under these circumstances, be supported?

This question came before the Court of Session in the year 1814, in an action of reduction which was brought by Miss Agnes Hamilton, who was at that time in possession of the entailed estate, for the purpose of setting aside this lease. The Court of Session were of opinion that that action of reduction could not be sustained; and the

Court appear to have come to that conclusion, from an opinion which was at that period prevalent among the lawyers in Scotland, that where the word 'dispone' is made use of, that word has reference to a particular mode of conveyance, known in the law of Scotland by the name of a disposition; and that the word dispone had not the general sense of 'alienate,' to which it has been since considered entitled. This judgment of the Court of Session was pronounced in the year 1815. Mr Colhoun Stirling, who is the present appellant, becoming entitled to the estate tail in the year 1817, was at that time in India, and came to this country in the year 1821; and after returning to India in 1824, this appeal was, in 1825, lodged in this House. I have mentioned that the lease was originally granted to a person of the name of John Gillies. He assigned the lease, and his assignees again assigned it; and it was against those second assignees that the second action of reduction was brought. Those second assignees again assigned to William Dun, who is one of the parties of this record. William Dun was no party in the suit below, because it was not supposed, at the time when the suit was instituted, and the judgment pronounced, that any assignment of the property had been made to Mr Dun. However, Mr Dun was made a party to the appeal at your Lordships' Bar; and he contended, that as he was no party to the cause in the Court below, he could not be made a party to the cause in the first instance in the appeal at your Lordships' Bar. Your Lordships were of that opinion, and you were restrained therefore from pronouncing judgment at that period, in order that the case might go back by a remit to the Court of Session, that William Dun might be heard with reference to his interest.

When the case went back, the Court below was of opinion that a supplementary action was necessary against William Dun. Such supplementary action was brought, and the whole matter was again investigated by the Court; and the discussion, on this second occasion, was not confined to the simple question, whether or not there was authority to grant a lease for 300 years under the terms of the deed of entail, but other questions were agitated. It was contended, that Colhoun Stirling, the present appellant, had acquiesced in the lease; and it was further contended, that whatever might be the rule as to long leases of agricultural subjects, that rule could not be applied to property of the description in the present case. When that case came for judgment before the Court of Session, the Court pronounced the judgment I am now about to read to your Lordships. (His Lordship then read the judgment, p. 466.) Therefore it is perfectly clear, from the terms of that judgment, that the points which the Court intended to decide, were those new points that had been raised for the first time; and that, with reference to the main question for your Lordships' consideration, the Court merely, for the sake of form, confirmed their previous determination, on the ground that the case was at that time under the consideration, and subjected to the revision, of your Lordships.

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Having stated to your Lordships the position of this record, the first question will be, Whether this lease is warranted by the deed of entail? I have mentioned to your Lordships, that at the period when the original judgment was pronounced, many lawyers of eminence in Scotland were of opinion that the word 'dispone,' in an instrument of this kind, could have only the limited interpretation to which I have referred. That question was afterwards brought before this House in the Queensberry cases. It was much agitated at your Lordships' Bar, and much weighed in this House; and the learned Lord who at that time sat upon the woolsack, after much inquiry and much consultation, and referring to all the authorities upon the subject, came, with your Lordships' approbation, to this conclusion, —that although the word 'dispone' had the limited construction to which I have referred, it also had, in the law of Scotland, a more extended construction, and was equivalent to the word 'alienate.' My Lords, in another case, that of Elliott *v.* Potts, that opinion of your Lordships was confirmed; and we must consider it now as the law of Scotland, in reference to a lease of this description, where an heir is prohibited from selling, disponing, wadsetting, and impignorating, that, according to the terms and construction of the particular parts of the deed of entail, and the object of the entailer, according to the construction of that instrument, you are to decide what is the particular meaning of the word 'dispone,' as used in that instrument.

Now, my Lords, I must take the liberty of mentioning, that the question, subsequently to the decision now appealed from to your Lordships, was again brought before the Court of Session with reference to this very deed of entail, in three successive cases,—one of those cases is reported in the Faculty Collection;* and in all those three cases the Court of Session was of opinion, that, in this particular instrument, the word 'dispone' was, upon the authority of the Queensberry cases, to which I have referred, to be considered as equivalent to 'alienate;'—that the word 'dispone' was not to be regarded as having the limited construction to which I have referred, but that it should have the extended construction applied to the word 'alienate.' Those three cases, which have been decided by the Court of Session, are inconsistent in principle with the decision of the Court of Session which is now the subject of the present appeal; and from those decisions there has been no appeal to your Lordships' House. Independently of every other consideration, these cases are strong authorities for leading your Lordships to the conclusion, that it would be proper to reverse the judgment against which this appeal has been preferred.

My Lords, in addition to that, it does appear to me impossible, in adverting to the provisions of the deed of entail, to come to any other conclusion than this,—that it was the obvious intention of the parties

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* Stirling *v.* Walker, February 20. 1821.

to that deed of entail, to use the word 'dispone' in the sense which I have given to it; and that it was intended, that the parties entitled as heir of entail from time to time, should not have the power of alienating the property, so as to interfere with the object the settler had in view when the estate in tail was originally created. I think therefore, that, under all circumstances, I should recommend to your Lordships, if the case rested here, to reverse the judgment of 1815; and in reversing that judgment, we shall be acting in conformity to the decisions of the Court of Session itself, in those three cases to which I have adverted, upon the very instrument now under your Lordships' consideration.

My Lords, it was stated, and was argued at your Lordships' Bar, that this was not to be considered like the lease of an agricultural subject,—it being the lease of the loch I have mentioned—Cochney loch, with the stream running from it, for which a rent has been reserved; and that unless the power was given, or intended to be given, to grant a lease of this description, the property would have returned no benefit whatever to the proprietor: that granting a lease of this description, is the proper administration of property of this kind. My Lords, I shall not feel it necessary to enter into any minute detail or consideration, as to what duration of lease of property of this description must be regarded as proper administration of the property. It is not necessary for me to draw any precise line in a lease of this nature; because I presume that your Lordships will be of opinion, that, at all events, it is not necessary that a lease of three hundred years should be granted for the purpose of leading to a proper administration of property of this nature. I should think, therefore, that, under these circumstances, your Lordships would be disposed to concur in the judgment which the Court of Session pronounced in the case when remitted to them, with respect to this point of the subject, and to state that, in your opinion, according to the terms of the judgment of the Court below, a lease of a loch for the period of three hundred years stands in the same situation as if it were a lease of any other part of the entailed estate. I think that your Lordships will have no hesitation in coming to a conclusion of affirming that part of the judgment of the Court of Session.

My Lords, the remaining question is as to the acquiescence. I have read most attentively through the facts of the case, as far as they relate to the supposed acquiescence; and it appears to me, that there are no grounds whatever leading to the conclusion, that Mr Stirling has acquiesced in the judgment of the Court, or in the lease in question. Mr Stirling was in India in the year 1817, when his right first accrued. He came to this country in the year 1821. He declined receiving any rent for the property, and within the time limited by your rules he has instituted this appeal; and there are no circumstances of any description in this cause, as it appears to me, sufficiently strong to lead to the conclusion that he has waived his right, and that he is not

June 22. 1829. in the situation to support this appeal. The result, upon the whole, is this, that I should recommend to your Lordships to reverse the judgment of the Court of Session in the year 1815, and to declare your concurrence in the judgment pronounced by the Court below, in respect of those several special points, (to which I have adverted), when they considered the question upon the remit from your Lordships' House.

Appellants' Authorities.—Reg. Maj. lib. 2. c. 20.; Spottiswoode, p. 306.; Balf. Prac. p. 163. 200–207.; Maj. Prac. tit. 29. p. 814.; M'Kenzie's Works, vol. ii. p. 487.; 1585, c. 11.; 1597, c. 235.; 1581, c. 101.; Dirl. 146.; Queensberry, March 7. 1816, and Feb. 5. 1818, (F. C.); July 10. 1817, or July 12. 1819, (5. Dow, 293.); Elliott, March 10. 1814, (F. C.), and March 14. 1821, (1. Shaw's Ap. Cases, p. 16.); Baroness Mordaunt, March 2. 1819, (F. C.), and July 5. 1822, (1. Shaw's Ap. Cases, p. 169.); Duke of Gordon, Nov. 22. 1822, (2. Shaw and Dun. No. 31.); Malcolm, June 19. 1823, (2. Shaw and Dun. No. 387.); Stirling, Feb. 20. 1821, (F. C.); Turner, Nov. 17. 1807, (App. voce Tailzie, No. 16.); Sir John Malcolm, Nov. 17. 1807, (App. voce Tailzie, No. 17.); Earl of Wemyss, May 25. 1813, (F. C.)

Respondent's Authorities.—3. Bank. 2. 1.; 2. Ersk. 7. 2.; M'Kenzie's Works, vol. ii. p. 487.; Earl of Elgin, June 13. 1821, (1. Shaw's Ap. Cases, p. 44.); Lockhart, Nov. 25. 1755, (15,404.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 33. DOWNE, BELL, and MITCHELL, Appellants.—*Lushington—Murray.*

JOHN PITCAIRN, and Others, Respondents.—*Adam—Jervis.*

Title to Pursue—Partnership—Compensation—Process—Appeal.—1. Circumstances under which the title of the office-bearers of an unincorporated association to pursue, was sustained. 2. A plea of compensation, founded on an alleged disputed claim, repelled, (affirming the judgment of the Court of Session). And, 3. It would seem that an appeal against an interlocutory judgment, taken after the final decision of a cause, although the decree exhausting the cause is not appealed against, is competent.

June 24. 1829.

2D DIVISION. Lord Pitmilly.

THE Edinburgh and Leith Shipping Company had for some time employed Alexander Mitchell as their agent at London, in the course of which he received sums of money belonging to them; and, as he alleged, he made advances to and for them. In October 1809, and before any settlement of accounts, the Shipping Company entered into a contract with Downe, Bell, and Mitchell, wharfingers in London, (of which Mitchell was a partner); the general object of which was to secure, for the vessels of the Company, the exclusive use of the wharf on the Thames, belonging to Downe, Bell, and Mitchell, and to con-