

[16th July 1832.]

Sir GEORGE CLERK of Pennycuik, Baronet, and others, No. 10.  
Appellants.—*Lord Advocate (Jeffrey) — Spankie.*

Dr. WALTER ADAM, Respondent. — *Lushington —  
C. H. Maclean.*

*Property.*—Whether a portrait of a late rector of the High School of Edinburgh, taken at the request and expense of an association of his pupils, and placed in the school-room, be, after his death, and on the removal of the school to a new building, the property of the association, or of his son and representative? The Court of Session having found it to be the property of the association, but decerned that it should remain in the High School, the House of Lords reversed the latter finding.

IN the year 1808, Dr. Adam, then and who had been since 1768 rector of the High School of Edinburgh, was requested by Sir George Clerk and other persons who had been educated at that school, and were members of an association called the High School Club, to sit for his portrait, to be taken by Sir Henry Raeburn. The letter addressed to Dr. Adam, on this occasion, was as follows: “ 21st March 1808. Dear Sir, at a meeting of the High School Club some days ago, for the purpose of consulting how the members could best show you some mark of their regard, we are appointed a committee for carrying their resolutions into effect. In pursuance of these resolutions, we now beg leave to request that you will do us the

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“ favour to sit to Mr. Raeburn for your picture. We  
 “ are anxious to place in the school a memorial of our  
 “ gratitude, and of the high sense we entertain of the  
 “ advantages the public has derived for so many years  
 “ from your useful and important labours. We flatter  
 “ ourselves you will not be disposed to refuse this  
 “ favour, when you reflect, that we can ask it from no  
 “ other motive but those of the most sincere regard and  
 “ esteem, and that it may serve as an inducement to  
 “ those who shall come after you to emulate the able  
 “ and conscientious discharge of your official duties, by  
 “ which you have contributed so much to extend the  
 “ fame of our flourishing seminary.” Dr. Adam ac-  
 ceded to this request, and the portrait was accordingly  
 taken; and afterwards, on the 9th of August 1809,  
 Dr. Adam wrote to a member of the club as follows:  
 “ Dear Sir, I have been so much taken up with one  
 “ thing or another since I received your kind favour,  
 “ that I could not sooner find leisure to acknowledge  
 “ it. I feel my desire to prosecute this work (Dic-  
 “ tionary) increased by the conspicuous manner in  
 “ which you and your friends have been pleased to  
 “ exhibit me to public view. I went yesterday to  
 “ Mr. Raeburn’s with a gentleman who was desirous  
 “ to see the picture, and found it decorated with a very  
 “ splendid frame, very different indeed from what it  
 “ was in at the public exhibition. You have ordered  
 “ every thing concerning it with so much propriety,  
 “ and so far beyond my expectation, that whatever you  
 “ determine with respect to the placing of it, and the  
 “ inscription, will be quite agreeable to me. I have  
 “ only to request, that the names of those gentlemen  
 “ who have done me so great honour may be recorded,

“ and that their reasons for doing so, which you so  
 “ handsomely expressed in your first letter to me on  
 “ the subject, may be shortly mentioned. The shorter  
 “ and more simple the inscription is made the better.”

Dr. Adam having died in December 1809, and before the picture was placed, a petition was presented by the members of the High School Club to the magistrates of Edinburgh, as the patrons of that seminary, for permission to place the portrait in the High School library; and a special request was made that the magistrates would acknowledge, in their deliverance on the said petition, that the property of the portrait remained with the petitioners, and that they, or the majority of the survivors of them, might at any time thereafter dispose of the same as they should think fit; and that the portrait should not be at the disposal of the magistrates of the city during the survivance of any of the petitioners; and that failing them, and all provision by them to the contrary, the magistrates should then preserve the picture in perpetuam rei memoriam.

The magistrates granted the prayer of the petition, and authorized the picture to be placed in the High School library upon the terms therein mentioned. The picture was accordingly placed in the High School library, with this inscription, “ This portrait of Alexander Adam, LL.D., rector of the High School from  
 “ June 8, 1768, to December 18, 1809, author of  
 “ Roman Antiquities, &c., was placed here as a mark  
 “ of gratitude and respect by fourteen of his former  
 “ pupils, A. D. 1810.” There the picture remained till the removal of the school, in 1829, from the old premises in the High School yard to those erected on the Calton Hill, to which new premises the picture

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was carried. Upon occasion of this removal an application was made, on the 12th of June 1819, to the magistrates, on behalf of the club, referring to the petition and deliverance before mentioned, and stating that the old High School having been pulled down or disused, the club were desirous to resume possession of the picture, and craved warrant to have the same delivered up to them.

The magistrates, upon this petition being presented, made intimation thereof to Dr. Walter Adam, the son and heir of Dr. Adam, who thereupon entered a claim to the effect of having the picture disposed of in terms of the condition on which his father consented to sit for it, and which condition he stated to be, that the picture should remain in the library of the High School as a part of its property, and be independent of the controul of the High School Club, or any other person or persons whatever. To obtain a decision on these opposite claims, the magistrates raised an action of multiplepoinding, and called as parties Dr. Walter Adam and the surviving members of the High School Club; and

March 2, 1831. the Lord Ordinary found, “ that the picture in question  
 “ is the property of the claimants, Sir George Clerk  
 “ baronet, and others, members of the High School  
 “ Club: Finds that the intention expressed by them, of  
 “ placing it in the library of the High School, was not  
 “ a condition stipulated in favour of Doctor Adam or  
 “ his representatives, on which they are entitled to  
 “ found in this action: Finds there is evidence that it  
 “ was not so understood by Dr. Adam himself: Prefers  
 “ Sir George Clerk baronet, and others, members of  
 “ the High School Club, to the picture in question,  
 “ and grants warrant to, authorizes and ordains the

“ raisers of the multiplepointing to deliver up the same  
 “ to the said claimants, and decerns accordingly,” with  
 expences.

Against this interlocutor Dr. Walter Adam reclaimed to the Court of Session, praying inter alia that the Court should find that the intention expressed by the members of the High School Club, of placing the portrait in question in the library of the High School, was a condition stipulated in favour of the late Dr. Adam, and was so understood by him, upon which the claimant Dr. Walter Adam is entitled to found in this action.

The First Division adhered “ to the interlocutor re-  
 “ claimed against, in so far as it finds that the picture  
 “ in question is the property of the claimants, the mem-  
 “ bers of the High School Club: but, quoad ultra, they  
 “ alter the said interlocutor, and find that it was an  
 “ implied condition in the treaty betwixt the Club and  
 “ the late Dr. Alexander Adam, when he sat for his  
 “ picture to the late Mr. Henry Raeburn, that the por-  
 “ trait was to be placed in the High School of Edin-  
 “ burgh, as a memorial of the high sense the claimants  
 “ entertained of the advantages the public derived from  
 “ his useful and important labours, and as an induce-  
 “ ment to those who might come after him to emulate  
 “ the able and conscientious discharge of his official  
 “ duties, by which he had contributed so much to ex-  
 “ tend the fame of the High School: And they accord-  
 “ ingly decern and declare, that the said picture shall  
 “ remain in the High School of Edinburgh in perpetuam  
 “ rei memoriam; and that the Magistrates and Council  
 “ of the city of Edinburgh, as the patrons of that semi-  
 “ nary, shall be answerable that it is properly placed  
 “ therein, agreeably to the object in view, and care-

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“ fully protected from all injury: Find no expences  
 “ due by either of the parties.” \*

Of this judgment, excepting in so far as it found  
 “ that the picture in question is the property of the  
 “ claimants, the members of the High School Club,” Sir  
 George Clerk and others complained, and appealed.

*Appellants.*—The appellants are, without dispute, the proprietors of the picture, and are therefore entitled to the custody and to the disposal of it.

There was no contract, express or implied, between the appellants and the late Dr. Adam, by which the appellants bound themselves to deposit the picture in question for ever in the High School. Even although there were reason, from the terms of the letter of March 1808, to hold that there was an implied contract between Dr. Adam and the appellants that his portrait should be hung up in one particular place, still the Doctor, by his subsequent communication with the appellants, viz. by his letter to them of 9th August 1809, plainly intimated that he did not understand that there was any such implied contract.

On the contrary, when the appellants placed the portrait in the school, they stipulated with the proprietors of the building, who are patrons of the school, that they, the appellants, should be entitled at any time during their lives to withdraw the portrait; but, in face of this agreement, the portrait has been removed from the local situation in which the appellants and the late Dr. Adam contemplated that it should remain. It was no part of the understanding between the appellants and Dr. Adam

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\* 9 Shaw and Dun. 379.

that his portrait should be removed from the High School if the buildings of the old school should be erected on another situation.

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*Respondent.*—The respondent has a legal title and interest to enforce every agreement entered into with his deceased father; and, in particular, to insist that his portrait shall be applied to the purpose or placed in the situation to which it was destined by the transaction, agreement, or understanding in virtue of which his father consented that it should be formed or painted.

If the appellants have any right of property in the portrait in question, which seems more than doubtful, yet as, by the original proposal which they made to Dr. Adam, in virtue of which he was induced to sit for his portrait, it was destined to a specific public purpose, the appellants are bound by the terms of their own proposal, which it is not competent for them (nor have the town council the power) to alter after the death of Dr. Adam, more especially in the face of opposition by the respondent, his son and legal representative, and without the decided approbation of the patrons of the High School of Edinburgh.

It was in that school that Dr. Adam understood that his portrait was to be placed, and remain, and in that school it is intended to deposit it, for the institution is not altered, but improved, by the accommodation afforded by a new and finer building. Cadell, 1st June 1804. (Mor. 3 App., voce Literary property.)

LORD CHANCELLOR:—My Lords, in this case it appears that a society was formed in Edinburgh, consisting of gentlemen who had been educated in the High

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School of Edinburgh, under the superintendence of a very learned rector of that school (the father of the respondent), who is known to have been distinguished in the literary world by his useful and important labours, and to have been highly esteemed by those who had the benefit of his instructions. The gentlemen, thus associated in what was called the High School Club, appear to have requested that he would sit for his picture, stating it to be their intention to hang up that picture in a conspicuous part of the premises which belonged to this school. The letter by which they applied to him is in these words:—“ March 1808. Dear Sir,—At a meeting  
 “ of the High School Club some days ago, for the purpose  
 “ of consulting how the members could best show you  
 “ some mark of their regard, we are appointed a com-  
 “ mittee for carrying their resolutions into effect. In  
 “ pursuance of these resolutions, we now beg leave to  
 “ request that you will do us the favour to sit to  
 “ Mr. Raeburn for your picture. We are anxious to  
 “ place in the school a memorial of our gratitude, and  
 “ of the high sense we entertain of the advantages the  
 “ public has derived for so many years from your useful  
 “ and important labours. We flatter ourselves you will  
 “ not be disposed to refuse this favour, when you  
 “ reflect, that we can ask it from no other motive but  
 “ those of the most sincere regard and esteem, and that  
 “ it may serve as an inducement to those who shall  
 “ come after you to emulate the able and conscientious  
 “ discharge of your official duties, by which you have  
 “ contributed so much to extend the fame of our  
 “ flourishing seminary.”

The answer to this letter does not appear, but the result was, that Dr. Adam sat for his picture to Mr. Rae-



burn, and it proved one of the most successful efforts of that able artist. After having been publicly exhibited, it was hung up in the High School, where it remained for nearly twenty years. In the year 1829, the building occupied as the High School having been pulled down, and the school removed, the appellants, Sir George Clerk, and the other gentlemen who had paid for the painting of this portrait, applied to the Lord Provost to have it delivered up to them, claiming a right to deal with it as their own property. Dr. Walter Adam, the respondent, objected to the removal of it; and that raised the question, the magistrates feeling some doubt whether they could surrender it contrary to the wishes of him the son and representative of the Rector. The magistrates raised an action of multiplepoinding in the Court of Session, making the surviving members of the High School Club on the one side, and Dr. Walter Adam on the other, parties to it, in order that they might present their respective claims.

The case having been argued, Lord Corehouse, the Lord Ordinary, before whom it was heard, pronounced an interlocutor, in which I entirely concur. (Quotes Lord Corehouse's interlocutor.)

My Lords, an appeal to the Inner House against this interlocutor was brought by Dr. Adam, of whose motives and conduct I wish to speak, not only with no harshness, but with the greatest possible tenderness and respect. His conduct has been dictated solely by filial piety, and a deep consideration for the character of his much-respected father. He has involved himself in a litigation, in which he has exposed him-

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self to expence, solely for the purpose, as he conceives, of protecting his father's memory. The case coming on before the First Division of the Court of Session, the Lords adhered to the interlocutor claimed against, "in so far as it finds that the picture in question is the property of the claimants, the members of the High School Club." Therefore, at all events, their Lordships adhere to that important and fundamental part of the interlocutor; and they pronounce the picture in question to be the property of the gentlemen who requested the doctor to sit for it, who employed the artist, and who paid the artist; but they alter the second branch of the interlocutor, and "find that it was an implied condition in the treaty betwixt the club and the late Dr. Alexander Adam, when he sat for his picture to the late Mr. Henry Raeburn, that the portrait was to be placed in the High School of Edinburgh, as a memorial of the high sense the claimants entertained of the advantages the public derived from his useful and important labours, and as an inducement to those who might come after him to emulate the able and conscientious discharge of his official duties, by which he had contributed so much to extend the fame of the High School; and they accordingly discern and declare," according to the prayer, "that the said picture shall remain in the High School of Edinburgh in perpetuam rei memoriam, and that the Magistrates and Council of the city of Edinburgh, as the patrons of that seminary, shall be answerable that it is properly placed therein, agreeably to the object in view, and carefully protected from all injury: Find no expences due by either of

“the parties.” From this judgment, in so far as it altered the interlocutor of the Lord Ordinary, an appeal has been brought to your Lordships.

Now, my Lords, I certainly cannot go along with the finding which constitutes that alteration. The property in the picture is distinctly found to be in these claimants. But what kind of property in a personal chattel can a man be said to have, if, at the same time that you affirm the property in that chattel to be in him, you also affirm that there is in another a right wholly inconsistent with almost every one incident of property in the owner? For the magistrates and council are to have the custody of the picture; to have the possession and deposit; to put it in a place in which the others can have no access to it. To find that property belongs to A., but on condition that A. shall not have any controul over it — that it belongs to A., but A. shall have no use of it — that it belongs to A., but that B. shall enjoy it — appears most inconsistent. If such a restriction of property, so declared to be in the individual, could be established, it certainly would have required the most stringent evidence in order to sustain it.

Now, let us see what are the grounds on which the interlocutor proceeds which places this restriction upon the property. It is supposed to rest on an implied condition. The respondent says that there was an implied condition between the club and Dr. Adam, when he sat for his picture, that if he would sit for that picture they should use it in one way, and none other. This is the only ground which is stated for the putting a restriction on the use of the property. The only consistent way of stating it is, that there was a condition expressed or implied between Dr. Adam and the gentle-

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men, who must be admitted to be the owners of this picture, that they should use it in a certain way; but can it be said that there is proof of any such condition? Again, it is argued that these gentlemen, having subscribed their money, and Dr. Adam having contributed his time, which was as valuable to him as their money to them, and having undertaken the irksome labour of sitting for his picture, he may be said to have acquired a property in it, together with them. My Lords, if that be so, of course it is a joint property; but the interlocutor of the Lord Ordinary, and which is to this extent affirmed by the Court of Session, negatives that, and declares the property in the picture to be in the claimants, that is, in those who asked the doctor to sit. It affirms the separate property to be in the claimants, and consequently excludes that argument altogether.

Then we fall back on the condition. If that can be established at all, it must be extracted from one or other or all of these three matters which have been put forward in argument,—the letter of the 21st of March 1808; the act of sitting; and the letter of the 9th of August 1809. Now, I have read to your Lordships the first letter, that of 21st March 1808, and I cannot see how any part of it, followed by the only act of the party, the sitting, can amount to any thing like a condition imposed by him upon them, of using the picture in a particular way. Much stress is laid upon the expression of their wish to show some mark of their regard. What then is the mark of regard? It is having the picture painted for themselves; asking him to sit for his picture at their cost. I show my regard for a person by asking him to sit for his picture at my cost, and that I may use it as my property; that

is the most important part. I may be said to go further, if I tie myself down to use it in a particular way. “ In pursuance of these resolutions, we now beg leave to request, in the name of the club, that you will do us the favour to sit to Mr. Raeburn for your picture. We are anxious to place it in the school as a memorial of our gratitude.” That is the whole which is said to amount to an expression of their intention. Can it be said to be any thing more than an indication that, if he complied with their request, it was their intention at that time so to use the picture? It is a mere notification of an intention on their part, if they did become possessed of this portrait, to use it in that manner. Suppose I were to say, as I well might, to the learned counsel Dr. Lushington, Will you sit for your picture, that I may place it in my library, as an incitement to every man who sees it to pursue an honourable and useful course of professional and of public life? Suppose that he sits for his picture, and that I become possessed of it, and hang it up, and then after some years take it down, can it be said that I have broken any condition into which I had entered? that I having asked him in these kind and respectful terms, and he having so complied with my request, he, and after him his personal representatives, his next of kin, and after them again every other representative for an hundred generations, — for there is no length to which this claim may not run, according to the argument on which the judgment proceeds, — may call upon me to hang the picture up again, on the ground that when I asked the learned civilian to sit for his picture I represented that it was my intention, if he complied with my request, to use the picture in that kind of way, as being the most

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respectful to him, and the most useful to the world? If Dr. Adam, who has been influenced no doubt entirely by the respect he has for his father's memory, is authorized by the law of Scotland to bring forward the interest he has in this picture, the same principle must of course extend the same right to all generations through future ages, and they may come forward and claim in the same way. I think these observations are sufficient to show that the two first heads of evidence, to which I have adverted, furnish no support to this judgment, so far as it reverses the interlocutor of the Lord Ordinary.

Let us look, then, to the third of these pieces of evidence, which is the letter of Dr. Adam, dated the 9th of August 1809. I take it to be perfectly clear, that the representatives of Dr. Adam can stand in no better situation, in respect of this claim, than Dr. Adam stood himself; that they can have no higher right to interfere in this matter than he would have had if he had interposed during his life. After the perusal of the letter to which I am about to call your Lordships' attention, I hold it to be perfectly clear, that whatever might have been considered, whatever doubt might have existed with respect to the rights of the parties under the first part of the negotiation in 1808, the letter of these gentlemen to Dr. Adam, and the act of sitting, this letter of the 9th of August 1809 must remove all doubt. It is in these terms, addressed to one of the gentlemen:—

“ Dear Sir,—I have been so much taken up with one  
 “ thing or another since I received your kind favour,  
 “ that I could not sooner find leisure to acknowledge it.  
 “ I feel my desire to prosecute this work (Dictionary)  
 “ increased by the conspicuous manner in which you  
 “ and your friends have been pleased to exhibit me to

“ public view. I went yesterday to Mr. Raeburn’s with  
 “ a gentleman who was desirous to see the picture, and  
 “ found it decorated with a very splendid frame, very  
 “ different indeed from what it was in at the public  
 “ exhibition. You have ordered every thing concerning  
 “ it with so much propriety, and so far beyond my  
 “ expectation, that whatever you determine with respect  
 “ to the placing of it, and the inscription, will be quite  
 “ agreeable to me.” Even supposing there had been  
 any condition previously, even supposing they had tied  
 themselves down to hang it in a particular place, sup-  
 posing he had at the time acquired any right, this is an  
 entire relinquishment of right of interference, if any  
 such had previously existed: “ whatever you determine  
 “ with respect to the placing of it, and the inscription,  
 “ will be quite agreeable to me.”

There is another observation I would make, and  
 which goes very strongly to show that there was no  
 condition, previously to the portrait being taken, as to  
 where it should be placed. The negotiation and the  
 actual sitting were long before these gentlemen had  
 obtained leave to hang up the picture in the school-  
 room. That room was not theirs any more than it was  
 Dr. Adam’s; it belonged to the magistrates. This  
 negotiation took place before any permission to hang it  
 there had been asked; and that fact, at any rate, goes  
 strongly to negative the notion of any condition made  
 between the parties, that it should be hung up in this  
 particular room. I will not trouble your Lordships  
 with any reference to what took place before the magis-  
 trates in the year 1810; but perhaps it is not imma-  
 terial to observe, that it precludes the magistrates from

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saying they had a right to claim as against these gentlemen; for a petition was presented by the gentlemen to the magistrates, to have it declared by them that the property of the portrait remained with them, and that they, or the majority of the survivors of them, may, at any time hereafter, dispose of the same as they shall think fit; and that the said portrait shall not be at the disposal of the said magistrates of Edinburgh during the survivance of any of the petitioners; and that failing them, and all provision of theirs to the contrary, the magistrates shall then preserve the same perpetuam rei memoriam. It appears that the magistrates on the 25th of April 1810 read that petition, and made an order, by which “ they granted liberty to the petitioners “ to place the portrait of Dr. Adam in the High “ School library, on the terms and conditions before “ mentioned;” that is to say, that it shall be the entire property of those petitioners, to dispose of it as they shall think fit; thus recognizing their right; and that it should not be at their, the magistrates’, disposal till all the petitioners had died. This was the condition on which the proprietors of the portrait permitted it to be hung up in the High School. It is said that Dr. Adam was no party to this; it does not appear that he was; but this is consistent with that which had previously passed between the parties; and unless the magistrates could prove that this order was by fraudulent concealment of the facts obtained from them, they would be bound to deliver up the picture to the claimants; and if they had no proof of the fact of fraud having been practised upon them (for which there is no ground whatever), having delivered up the portrait, they must have left



Dr. Adam to have proceeded against the claimants as he might see fit, upon the ground of the implied condition, that condition being so far surviving for his benefit as to give him a right to interpose. My Lords, there is a case upon which a good deal of observation was made, and which I was a good deal struck with when the present question was heard at your Lordships' bar; I mean the case of *Cadell v. Stewart*, respecting the letters of Burns the celebrated poet. It is clear that the Court of Session appear to have allowed the representatives of Burns to interfere as parties in the suit, upon the ground, as stated in that report, that they had sufficient interest, for the vindication of his character, to restrain the publication of those letters. But there is a great distinction between that case and the present. There was no declaration there that the property in those letters was in the party publishing them; but the Court proceeded on the ground that letters are written on an implied confidence that they shall not be published without the consent of the writer: and they allowed the representative of Burns to interfere, for the reputation of his ancestor, to prevent the publication. Undoubtedly that is going very far; and it requires very strong arguments to support the decision, that the representative may interfere, and obtain a solatium in damages for the injury done by the publication of writings of that nature. That, however, is the ground of the decision—the sum and substance of the reported judgment. It is sufficient for me to remind your Lordships, that, whether it be a sound decision or not, it does not at all dispose of the question in this case, and for one reason, which is quite sufficient, that the judg-

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ment there rested upon no finding of property. Persons who had possessed themselves of those letters had published them contrary to the wishes, and also in violation of the rights of the parties to whom all Burns's manuscripts had been committed. It is one thing to restrain the improper use of that in which a party has no property, and another thing to restrain a party from the use of that in which you declare that he has a property. Upon the whole, I feel myself called upon to advise your Lordships to support the judgment of the 10th of June 1831 in so far as it adheres to, and to reverse it so far as it alters, the interlocutor of the Lord Ordinary of the 2d of March 1831, leaving that interlocutor of the Lord Ordinary to stand as it was originally pronounced, and which will be in substance done by reversing the judgment of the Court of Session, so far as complained of; and I feel satisfied that the use which will be made of this portrait by the gentlemen, whose property it is decided to be, will be that which, in their opinion, shall do most honour to the memory of this learned and virtuous man, furthering, as much as possible, the pious intention of keeping his useful life and eminent services in lasting remembrance.

My Lords, I have made some inquiry with respect to the costs. There is no doubt that Dr. Walter Adam has interfered from a feeling highly honourable to him; and under those circumstances I am quite sure, from what I know of the appellants, that they will never suffer those costs to fall upon him. If in substance they are not to be paid by the magistrates, but by Dr. Walter Adam, I am certain that those gentlemen will not permit him to pay one farthing of the costs. I will now move

your Lordships, that the interlocutor of the Court of Session be reversed, so far as complained of.

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The House of Lords ordered and adjudged, “ That the  
“ said interlocutor, so far as complained of in the said  
“ appeal, be, and the same is hereby reversed.”

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RICHARDSON and CONNELL—SPOTTISWOODE and  
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