[14*th August* 1834.]

THOMAS M'MILLAN and others, Appellants.—*Lord Advocate (Jeffrey)—Tinney.* No. 22.

CHARLES CAMPBELL and others, Respondents.—*Dr. Lushington—Macdougal.*

Entail—Trust.—Held (affirming the judgment of the Court of Session) that a trust deed conveying lands for behoof of creditors, and on which the trustee is infeft, does not so divest the granter as to prevent him from granting a procuratory of resignation and deed of entail.

1ST DIVISION. Ld. Moncreiff.

IN 1797 the late Mr. Campbell of Combie, being proprietor in fee simple of, and feudally infeft in, the lands of Auchnonard and other lands, executed a disposition of them and of his whole effects, in trust for behoof of his creditors, to Mr. Ferrier, W. S.; whom failing, to "such other person as may hereafter be "named and appointed by my said creditors," &c., with power, "without any further advice or consent of "me or my creditors, to sell and dispose of the lands," &c. privately or publicly, on such terms as he thought fit, after advertisements; to receive payment of the price, and "to grant dispositions, discharges, and other "writings necessary, with all clauses needful, to the "purchasers of the said lands, &c.; and that simply, so "as that the said purchasers shall be nowise concerned "with the application of the prices thereof, nor be

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" burdened or affected with any of the provisions or " conditions herein contained, but shall only be subject " to pay their respective prices to the said trustee, or " to any factor or cashier nominated by him, or to my " said creditors, as the acting trustee shall direct." The deed then declared, that, " after deduction and " payment of my debts, the trustee shall make pay- " ment to me, my heirs or assignees, or to any person " or persons to whom I shall direct the same to be " paid by a writing under my hand, at any time in my " life (secluding executors), of the residue of my said " funds, if any shall remain, and shall convey and re- " dispone to me and my foresaids the remainder of my " said lands and estate, in case any part thereof shall " remain unsold," &c. It contained procuratory and precept, and Mr. Ferrier took infeftment under the precept, sold a considerable part of the lands, and granted dispositions to the purchasers. When the debts were thus very much reduced, he executed, on the 24th of March 1808, a disposition reconveying the unsold lands to Mr. Campbell, under burden of the remaining debts. This deed contained only a procuratory of resignation ad remanentiam.

On the 21st of May 1808 Mr. Campbell expede an instrument of resignation, which set forth that it proceeded in virtue of a procuratory contained in a disposition of the lands, " dated the 25th of March last, " executed " by Mr. Ferrier in his favour, and the instrument was erased in the date. Thereafter Mr. Campbell executed an entail, in the form of a procuratory of resignation, of the above lands, in favour of himself in life-rent, and his eldest son Charles Campbell in fee. The procuratory was recorded in the register

of tailzies in 1814; and after Mr. Campbell's death, his son Charles obtained, in virtue of the procuratory, charters of resignation from the several superiors of the lands, on which he was infeft.

Charles Campbell having subsequently contracted several debts to the appellants Thomas M'Millan and others, they raised an action of reduction of the instrument of resignation ad remanentiam expede on the procuratory of Mr. Ferrier, and also of the procuratory of resignation in favorem containing the entail, with the charters and infeftments following thereon, on two grounds: 1, That the instrument was improbative, being erased in substantialibus, and did not proceed in virtue of the disposition 24th March 1828; and 2, That David Campbell, the father, was, by the infeftment of Ferrier under his disposition, divested, except as to a bare mid superiority, and therefore could not validly grant the procuratory containing the entail; and consequently the appellants, as creditors of his son, were entitled to charge him to enter heir in fee simple, and thereupon to adjudge the lands.

The Lord Ordinary having reported the question on Cases to the Court, and issued the subjoined note[1],

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[1] *Note by the Lord Ordinary.*—" As this case involves important ques-
" tions, and is prepared on Cases, it appears to the Lord Ordinary that
" it may be most convenient for the parties and the Court that it
" should be reported without a judgment; but he shall state the views
" which occur to him on the points of law raised.

" 1. He is inclined to think that the objection stated against the
" validity of the instrument of resignation ad remanentiam is a good
" objection. There can be no doubt that the date of the disposition con-
" taining the procuratory in virtue of which the resignation had been
" made is an important and essential part of the instrument. The
" instrument clearly bears two erasures in the date; and whatever
" ingenious reasonings may be used as to the words which could or did
" stand in the deed before the erasures were made, the Lord Ordinary

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their Lordships found " that David Campbell, not " having been divested by the trust deed, had power

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" apprehends that the legal rule is, that the words must be taken pro " non scriptis, in which case the instrument is blank as to the year in " which the disposition was executed. The case of Maxwell v. Houston, " quoted by the defender, was different in this respect, the import of the " clause being the same in law, with or without the word written on " erasure. There is further, in the present case, a discrepancy in the " day of the month, the instrument bearing that the disposition was dated " on the 25th of March, whereas the disposition founded on is dated the " 24th of March. The Lord Ordinary thinks this alone fatal, because, " on the face of these title deeds, non constat that there may not have " been another disposition and procuratory bearing the date of 25th " March.

" 2. If the instrument of resignation ad remanentiam is held to be " invalid, the consequence is, that David Campbell, the maker of the " entail, had no feudal title under the disposition in his favour by " Mr. Ferrier. His titles then stood thus:—He originally stood fully " invested under his original titles to the estate, before he conveyed it to " Mr. Ferrier;—he had disponed it to Mr. Ferrier in trust for the pay- " ment of his debts, and with a power of sale, under an obligation to " reconvey the residue to himself, or his heirs or assignees; and on this " conveyance Mr. Ferrier stood infeft. And by Mr. Ferrier's disposition " to David Campbell there was a personal right vested in him, with an " unexecuted procuratory of resignation. The question between the " parties is, whether, under any of these titles, David Campbell had " power to execute a deed of strict entail in the form of a procuratory of " resignation to the effect that, when the title was completed by charter " and sasine, the entail should be effectual against the creditors of his " immediate heir.

" 3. It is maintained that David Campbell had power to execute the " entail,—1, in virtue of his original radical title preceding the trust convey- " ance to Mr. Ferrier; and, 2, in virtue of the personal right which stood " in him under Mr. Ferrier's disposition. The first of these points appears " to the Lord Ordinary to be the most important; and he thinks that it is " ruled by the principle first settled in the case of the creditors of " Campbell of Ederline, 14th January 1801. It seems to be impossible " to explain away the doctrine of that case in the manner attempted by " the pursuers. The facts are simple:—Dugald Campbell stood infeft " in the estate; he conveyed his estate, heritably and irredeemably, to " trustees, expressly for payment of his debts, with power to sell, and " under an obligation to reconvey any residue under a strict entail. The " trustees were infeft. Mr. Campbell died, and a competition arose " between adjudgers from the trustees, and prior adjudgers who had " proceeded directly against the estate, as in hæreditate jacente of him, by " charging his heir to enter. There could not be a more perfect state of " the case for trying the question whether the feudal title subsisted in the

" to execute the procuratory of resignation containing
" the entail, and that the titles made up under it were
" truster. The creditors who adjudged the hæreditas jacens did not
" adjudge any mere jus crediti;—they adjudged the estate itself by
" charging the heir to enter, which charge necessarily implied that it
" was competent for the heir to be served in special as heir of the
" investiture; and accordingly the interlocutor of Lord Eskgrove,
" adhered to by the Court, expressly found that Dugald Campbell 'was
" 'not completely divested of the real right and property of his estate by
" 'the trust right and infeftment thereon founded on by the objectors,
" 'the same having been a trust for the granter's behoof, though it
" 'contained a power to the trustees of selling the lands,' &c. The Lord
" Ordinary is of opinion, that whenever an estate can be adjudged as in
" hæreditate jacente, to the effect of carrying a feudal title by charter of
" adjudication, it must be equally competent to the heir to be served and
" infeft; and he thinks it a self-evident proposition, that whenever a
" man's title so stands by his investiture, that upon his death his heir
" might be served, and get a feudal title, directly as heir, he himself
" must be in titulo, while alive, to convey the estate, subject to all existing
" burdens; because, if his investiture subsist to the effect of the estate
" being carried by the service of his heir, he must have, by his sasine, the
" powers of an undivested fiar to convey, however he may be restrained
" by conditions or affected by burdens. The case of Ederline settles
" the point that a trust conveyance almost identical with the trust in the
" present case does not divest the granter of his feudal title, and is only
" to be considered as a burden on that title. The form of the question
" in that case appears to have been very favourable for bringing out the
" point. But it occurred much more lately in a case not adverted to in
" the papers,—the case of W. Bellenden Ker against the Trustees of
" Lady Essex Ker. John Duke of Roxburghe conveyed his whole
" unentailed estates to trustees for payment of his debts, and then for
" purposes to be appointed by him. On his death the trustees were
" infeft in his estate. The heirs at law, Lady Essex and Lady Mary
" Ker, challenged the deed by which the residue was settled; and
" having succeeded, they obtained a conveyance from the trustees, and
" completed their title. But afterwards a defect occurred in regard to
" the transmission of a part of the estate from Lady Mary to Lady
" Essex, in consequence of which Mr. Bellenden Ker and others, as
" heirs at law, claimed those lands, as not having been so vested in Lady
" Essex as to warrant her conveyance of them. In order to obviate this
" plea, it was maintained that Lady Essex and Lady Mary Ker, before
" getting the title from the trustees, had made up a title by adjudication
" upon a trust-bond directed against the estate as in hæreditate jacente of
" Duke John himself; and as Lady Essex had a general service to Lady
" Mary, it was maintained that this title by adjudication, which had
" remained personal, was sufficient to vest a personal right in her, which
" she could convey. The Court had no doubt that that adjudication by

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" validly and feudally made up; and therefore as-
" soilzied the defenders from the conclusions of this
" action."[1]

" trust bond was a valid title, clearly assuming that a feudal title remained
" in Duke John and his hæreditas, notwithstanding the trust deed and
" the infeftment on it. It was found, indeed, to have been superseded
" by the complete feudal title established under the conveyance of the
" trustee; but there was no doubt entertained that it was a valid form
" of obtaining a feudal title in the estate, subject to the burden of the
" trust. In the case of Sir James Fergusson, the conveyance to Lord
' Hermand was ex facie absolute and unconditional.

" The Lord Ordinary therefore thinks the point quite settled; and as
" he cannot enter into the idea that these cases suppose merely the
" competency of adjudging a jus crediti or personal claim to be made
" effectual through the trust, but, on the contrary, thinks that they
" necessarily import that a direct feudal title might be taken as remaining
" in the truster, he is of opinion that the plea of the pursuers is thereby
" met by a conclusive answer.

"4. The separate ground taken by the defender, that the entail was
" effectual under the personal right vested by Mr. Ferrier's disposition,
" appears to the Lord Ordinary to be very doubtful. The title by infeft-
" ment completed in the defender's person depended on the resignation
" ad remanentiam by David, and must therefore be laid aside; for
" though it might have been made effectual in another manner, this was
" not done. Then, although it was held in the case of Livingston
" against Lord Napier that a personal right might be entailed even
" against creditors, it is to be observed that James Livingston, the insti-
" tute or first substitute in that case, was not the heir even of the
" personal right, and far less heir of any investiture. He had, therefore,
" no other title. But, in the present case, the defender was the heir
" apparent under Mr. Ferrier's disposition, and in the reversionary right,
" under every view of his father's title. It would be at least a very
" difficult matter to establish that his creditors are affected by such a
" personal entail, consistently with the decisions in the case of Denholm
" of Westshiell, and other similar cases, yet the Lord Ordinary is sensible
" that there is considerable difficulty in this question. The procuratory
" of resignation creating the entail simply designs the granter as heritable
" proprietor, without reference to any particular title.

" If the Lord Ordinary were to pronounce a judgment he would adopt
" nearly the words of the first part of Lord Eskgrove's judgment in the
" case of Ederline, and then find that David Campbell, not having been
" divested by the trust deed, had power to execute the procuratory of
" resignation containing the entail, and that the titles made up under it
" were validly and effectually made up, and on this ground assoilzie the
" defender."

[1] 9 S. & D., 55.

Appellants.—The infeftment in the person of the trustee extinguished for the time the whole feudal right which had belonged to David Campbell, and that feudal right could not be revived except by a reconveyance from the trustee, completed according to the feudal forms. The question, how far a proprietor is divested of his feudal right by the granting of a trust-deed, has been agitated in the Court of Session at different times, and under different circumstances.

The appellants admit that as the infeftment of Mr. Ferrier, the trustee, was never confirmed by the superior, David Campbell, in virtue of his original infeftment, still retained the dominium directum of his estate, and that to the extent of the dominium directum or superiority the entail which he executed may be effectual. But in relation to the dominium utile, in which the trustee was expressly infeft, the feudal title of David Campbell still subsisted, to the effect of entitling him to grant other effectual feudal conveyances of the same property. The powers of the trustee were not limited to ordinary acts of administration. He had the power of selling the lands in whole or in part, at such prices as he might think fit, without the advice or consent of the truster; he had also the power of granting dispositions in favour of the purchasers, and, being himself infeft, he had the power of granting procuratories of resignation and precepts of sasine for rendering those dispositions feudally complete. The appellants are not aware upon what grounds in law it can be maintained, that adjudications of the same property can be led at the same time against different parties with equal effect; or, in other words, how it can be held that the entire right of property subsists in two distinct persons at one and

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the same time. In the Court of Session the Judges did not attempt to supply the defects, or to explain the apparent difficulties of the case of Campbell of Ederline.

The ground assigned in that case for sustaining the adjudication which was led against the heir of the truster, was, that the trust was created "for the granter's "behoof," and it is easily understood, that a trust of that description may be so constituted as to impair in no degree the substantial right of the granter. A trust for the management of the granter's property defeasible at the will of the granter, and under which the trustee is responsible to the granter alone, may fairly be held not to impair the radical right of the truster. In like manner, a trust contained in a mortis causâ settlement, and the object of which is the distribution of the granter's estate amongst his gratuitous legatees after his decease, stands almost precisely in the same situation. Of this description was the trust-deed of the Duke of Roxburghe, alluded to in the Lord Ordinary's note. Down to the period of the Duke's death, the infeftment by which he held his estates could not be affected by a deed, the effect of which was necessarily suspended until after his death. In fact he died infeft in the subject in which Lady Mary and Lady Essex Ker might competently have made up a title to him by special service. A trust may be created either by a qualification expressed in the infeftment of the trustee, or it may be created by a separate writing, or even by the simple acknowledgment of the trustee himself. The difference between those several species of trust may often be very important in questions with third parties deriving right from the trustee. But in questions between the truster and trus-

tee individually, it seems plain that, a trust being admitted or proved, the rights of the truster and trustee must be the same, whatever be the nature of the proof by which it is established.

The sustaining of adjudications, as competent against a truster, after conveying his property to trustees, falls short of deciding the question in this case, and it remains still to be decided what the effect of such adjudications is, and what right is thereby carried.[1]

Respondents.—The conveyance by David Campbell to Mr. Ferrier did not divest David Campbell of the radical right to the property, or put an end to the feudal investiture in his person. It was merely a conveyance in trust for a limited purpose—the payment of debts, and although it contained powers of sale, these powers were merely granted in explication of the trust, and are common in a mere conveyance in security. There was no intention on the part of either party that the lands should be given or taken in absolute satisfaction of the whole debts, or of any definite part of them, or should belong to Mr. Ferrier himself. The lands were merely placed under a certain controul for the immediate security and ultimate payment of the creditors, and even that controul ceased when the object was accomplished. Even if David Campbell had died without obtaining any reconveyance, his heir could have made up a valid feudal title to the lands by a service in special as heir of the investiture, or the creditors of

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[1] *Appellants Authorities.*—2 Stair, 11. 6; 2 Bell, 291–3; Munro, Jan. 27, 1756 (Supp. V. 310); 2 Bell, 496, and note; Fairley, July 11, 1827, 5 S. & D. 937; Douglas, Feb. 22, 1765 (15616); Russell, &c. Jan. 31, 1792 (10300).

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David might have adjudged the estate in hæreditate jacente. This was decided, in the case of Campbell of Ederline in 1801, and has been uniformly recognized as settled law ever since.[1]

LORD WYNFORD.—My Lords, this is an action of reduction and declarator, brought by the creditors of a person of the name of Campbell, to set aside a settlement of an estate which had been made by Campbell the father. The question for your Lordships is, whether Campbell the father, at the time of making that settlement, had a sufficient legal estate to enable him to make that settlement. The facts are these:—Campbell the father conveyed this property by a deed to a person of the name of Ferrier; and it appears that the object of the conveyance was to make Ferrier a trustee, for the purpose of paying creditors. If any part of the proceeds of the estate remained, he was to pay these proceeds back to Campbell the father, or if any part of the estate remained unsold, he was to reconvey that estate to Campbell the father. A part only of the estate was sold; the remainder the trustee intended to reconvey. He made a reconveyance, which the Judges in Scotland decided was imperfectly made, and consequently that no estate passed back by that conveyance. The question then is, whether Campbell the father—the estate having been conveyed, and there being no effectual reconveyance—was disabled from making a settlement of his property. If this case had occurred in England,

[1] *Respondents Authorities.*—Campbell, Jan. 14, 1801 (Mor. v. Adjud. App. 11); Fairley, July 11, 1827, 5 S. & D. 937; Napier, March 3, 1762 (15418), and July 20, 1762 (Supp. V. 888); Carmichael, Nov. 15, 1810 (F. C.); Paul, May 28, 1828, 6 S. & D. 826.

undoubtedly Campbell the father would not have had such an estate as would enable him to levy a fine or suffer a recovery, because the legal estate was clearly out of him; but this is a case depending on Scotch law, and your Lordships, I should numbly hope, would be very careful how you reverse a decision of Scotch Courts, when proceeding either on the practice of pleading, or the practice of conveyancing; because it is quite impossible that persons in this country can be so conversant with that practice, or those forms of conveyancing, as the Judges of the Court of Session. This is a pure question of Scotch conveyancing; the only question being, whether, notwithstanding this conveyance, there was not, according to the understood law of Scotland, a sufficient legal interest remaining in Campbell to enable him to make this settlement. If he had been living in England, a Court of Equity, though he had made such a conveyance, would have compelled the person in whom the legal estate was, to complete his conveyance; it would have been imperfect at common law: but there is a great difference in the Courts of Scotland in that respect, for there is in that country but one Court exercising a jurisdiction of law and equity, and that may have led to the difference upon this subject. The Scotch Judges have decided that, notwithstanding this conveyance, as it appeared upon the face of the deed itself, it was a conveyance for the purpose of paying debts. We are not to hesitate to reverse, if we see that the law clearly requires it; but we must see that to be perfectly clear before we overturn the judgment of the Court of Session. This judgment appears to me to be consistent with equity, for this reason, that if the interest was not all disposed

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of, it belonged to Campbell, the original settler; and those who claim under him have a right to the disposal of it. A trustee holding under such a deed in this country would have been compelled to reconvey. What right, in equity, then, have the creditors of Campbell's son to come and claim? They can have no right but through the father; and if the father had made a strict settlement they ought not to be allowed to defeat that settlement. The settlement was made by the father, not for the benefit of immediate successors, but the benefit of the line of successors. The Scotch Judges have held, that in consequence of the deed to Ferrier the legal estate was out of the father, but that as it was conveyed to Ferrier for a particular purpose, enough of it remained in the father who conveyed, to enable him to make such a settlement as that before your Lordships. I consider this as a perfectly well decided case. In that which is laid down by my Lord Moncreiff, who was the Lord Ordinary in this case in the Court below, I would express my entire concurrence. His Lordship referred to two cases, which I cannot distinguish from the present, in which the same doctrine is asserted; the one of a settlement by a person of the name of Campbell, (a gentleman of the same name with the settler in the present case,) who conveyed his estate in nearly the same words, giving a power of sale, for the purpose of the estate being sold for the payment of debts. There was no reconveyance of that estate; but the Court, about thirty years ago, held that the person originally conveying had still the legal estate in him. This appears to me precisely the same with the present case. The words in which Lord Eskgrove delivered his judgment are certainly very

strong. In giving judgment his Lordship said, "A "conveyance such as this does not divest the granter "of his feudal title, and is only to be viewed as a "burthen upon the land;" those words are express,— "the feudal title remains undisturbed in the settler of "the property." This cause was decided about thirty years ago, and was never appealed against to this House. If there was to be no law in Scotland except that settled by appeals to this House, there would be very little law indeed; but decisions acquiesced in are of great authority, as there is unquestionably a strong disposition on the part of the good lieges of Scotland, where they can find a good reason for appeal, to bring the case under the consideration of this House. It appears to me, therefore, that we must consider the judgment of the Court of Session in this case, so acquiesced in, as founded in law. In a subsequent case the same question came under the consideration of the Court, in the case of the Duke of Roxburgh, where a conveyance similar to the present was made and where it was held that the Duke of Roxburgh still remained the legal owner of the estate, and was entitled to make a legal conveyance of that estate as the legal owner. Here are, therefore, two decisions. Is there, then, any decision to oppose these; if not, then unquestionably the balance of authority which constitutes the rule of the Court in cases of this description being all on one side, your Lordships would be bound to affirm this judgment. The Lord Advocate, who has brought forward all the learning upon it which the books of law afford, has referred to one case,—the case of Sir Adam Fergusson of Kilkerran, who made a new feu of the lands of Drumellan to his brother, Lord

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Hermand, his heirs and assignees whatsoever, upon which Lord Hermand was infeft. After this, Sir Adam Fergusson conveyed away his property. The question was, whether he was in a condition to make that conveyance, having previously made a conveyance to Lord Hermand. The Court of Session were of opinion that he was in no condition to do that, the legal estate having passed to Lord Hermand. But your Lordships will see the distinction between that case and this. In that case there was no object expressed, such as the payment of debts. In the present case there is the expression of that object, and the object ceases for which it was made; so that every one would see that it was not conveyed to him absolutely, but for certain purposes. A person claiming an interest, therefore, would be called upon, in the present case, to look and see whether those purposes were answered or not. In the conveyance to Lord Hermand by the brother there was nothing of the kind. It was a conveyance, probably, for love and affection, and was an absolute conveyance; and after the object for which it was conveyed was accomplished the estate was reconveyed, but the conveying it back appears to be an acknowledgment that that was a valid conveyance. The deed objected to being a deed executed between the first and the second conveyance, it appears to me it was impossible that that could stand. Lord Hermand had reconveyed it before the death of his brother, and from that moment Sir Adam Fergusson would have been in the legal possession of the estate; but a reconveyance after a certain deed had been made could not give validity to that deed; and there is a manifest difference between these two cases. A person looking at that

deed could not possibly have said that a scintilla of interest, either in law or in equity, remained in the legal owner of the estate. This is the only case which has been attempted to be brought to bear upon this case. It appears to me there is a manifest distinction between the two cases; therefore, upon the weight of authority, as has been already stated by the learned Judges of the Court of Session, it appears to me we are called upon to affirm this interlocutor. I shall therefore humbly advise your Lordships to affirm it, and I should humbly advise your Lordships to affirm it with costs. I never recommend to your Lordships to give what are called vindictive costs; they should never be given by way of punishment, for that is preventing the party doing that which, by the law of this country, he has a right to do; but if a person thinks proper to appeal, he ought to do it at his own expense, and not at the expense of the other party; that is strict justice between man and man. I know it has been usual to mention a particular sum, but I understand from one of your Lordships officers, from whom we are in the habit of receiving great assistance, that that practice has been lately departed from in some cases. I very much approve of that departure. I feel that it is desirable, before your Lordships decide what you should give in the shape of costs, that you should be informed what the costs actually amount to. I shall therefore humbly recommend to your Lordships to postpone the consideration of the question of costs, desiring, at the same time, that the agents for the respondent will submit to the officer of the House their bill, that the officer of the House may inform your Lordships on another day as to the amount. I shall therefore now

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only humbly move your Lordships, that the judgment of the Court below be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor, so far as therein complained of, be, and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of one hundred and seventy-one pounds for their costs in respect of the said appeal.

DAVID CALDWELL, Solicitor.