MARCH 14, 1854.

BANNERMAN, *Appellant*, *v.* MELVILLE, *Respondent.*

Oath in Reference—Construction—Interpretation—Proof of Facility—*B. having set up a will of his old master made when he was* 90, *the trustees raised an action to reduce it, and after two jury trials and verdicts to the effect that it was obtained when the maker was under incapacity, and was void, B. referred the matter to the oath of the pursuers. All that their oaths amounted to was, that the old man's memory and reason were gone at the date fixed, though they admitted he signed some family documents and accounts after the date of the will.*

HELD (affirming judgment), *that the oaths were not inconsistent with the verdicts, and were negative.*[1]

The appellant was a servant, and in attendance upon the late General Scott of Malleny, who died, in his 96th year, in April 1842. General Scott had executed in 1826 a trust disposition, by which he appointed trustees and executors, and in which he gave a year's wages and board-wages to the servants who might be in his service at the time of his death. On the 3d June 1842, the appellant received payment from the trustees and executors of the sum of £83, as the amount of wages and board wages payable to him under this provision of the settlement. Thereafter he brought forward a claim upon an alleged settlement or testamentary writing, bearing to be dated in 1838, *and to have been written by the appellant himself*, conceived in the following terms :—" I, General Thomas Scott of Malleny, in this missive, does bequeath to my servant James Bannerman, one year's wages and board wages, and a suit of mournings, and my bed room furniture, and also my dining room and drawing room furniture, and lobby furniture. I also do leave him my two gold watches, and all the contents of my chest of drawers, money inclusive. I also leave him £500 sterling, to be paid him by Mr. James Haig out of the money which he has the charge of in the bank. This I do grant him as a legacy over and above what I have left him in my will, as he is very attentive at all times to me, and to his duty. Witness my hand and seal. This writ written by James Bannerman, at Malleny, on the sixth October eighteen hundred and thirty-eight, before these witnesses, Abram Wallace, smith, and Daniel Noble, wright, both in Balerno. THOMAS SCOTT.

" Malleny, the sixt October, eighteen hundred and thirty-eight.

" Abram Wallace, *witness*.

" Daniel Noble, *witness*."

The executors of General Scott having refused to give effect to the document, the appellant raised an action against them for payment of one year's wages and board wages, amounting to £83, and a suit of mournings, or the sum of £5 10*s.* as its value, and for delivery of the whole articles of furniture, watches and others enumerated in the alleged settlement; or, in the event of their failing to do so, for payment of the sum of £200 sterling, as the alleged value, together with the £500 said to have been bequeathed to him, with the interest on the said several sums. Appearance was made in defence by the late Colonel George Scott, the late Sir Francis Walker Drummond, and the respondent, Mr. Melville, as trustees and executors, and others; and they alleged, that at and prior to the date of the alleged settlement, General Scott was incapable, from the condition of his mind, to have executed any such deed, or that if he did possess such a degree of mental capacity as to be capable of executing it, he was imposed upon by the appellant, and induced, by circumvention operating upon his facile condition of mind, to subscribe it.

The trustees also brought a reduction of the summons, which was conjoined with the other case. The case went to trial before a jury, in July 1845, on issues as to capacity and impetration, and it resulted in a verdict for the respondents, but a new trial having been granted, another trial took place in March 1847, which also terminated in a similar verdict.

The appellant then lodged a minute of reference to the oaths of the respondents; and the oaths were reported.

The Court pronounced the following interlocutor :—" The Lords having resumed consideration of the minute of reference to the oaths of the pursuers in the reduction with the oaths thereupon, and heard counsel for the parties,—Find the oaths negative, and declare accordingly; and in respect of the verdict found by the jury on the issues in this cause, reduce, decern and declare in terms of the conclusions of the libel in the process of reduction: Sustain the defences pleaded for the pursuers, the trustees of the late General Scott, and others, to the action against them at the instance of James Bannerman, and assoilzie them from the conclusions thereof: Find the defender in the reduction, James Bannerman, liable to the pursuers of the reduction in the

[1] S. C. 26 Sc. Jur. 411.

expenses incurred by them in the conjoined processes; and remit to the auditor to tax the accounts when lodged, and to report, and decern."

Bannerman having appealed, he maintained that the interlocutor of the Court ought to be reversed,—"1. Because, on a sound construction of the oaths, with the documents referred to therein, the oaths are *affirmative* of the reference. 2. Because the general answers of the respondents, Carteret Scott, and Mrs. Jane Cunningham or Scott, in their own favour, at the conclusion of their depositions, in opposition to the inferences deducible from their admissions and more specific statements, taken in connection with documents referred to in the body of their depositions, cannot, either in law or equity, be sustained. 3. Because, if the depositions of the respondents, or either of them, are either vague and inexplicit, or in too general or doubtful terms, it is still competent for your Lordships, if considered necessary for the ends of justice, to direct such a re-examination on oath of the respondents. 4. Because, instead of finding the humble appellant liable in costs to the respondents, the Court below ought to have found him entitled to payment from them of the expenses occasioned by the repeated commissions and diligences which the Court granted against them for recovery of the numerous important documents founded on, which were in their possession, and which, though called on previously, both in the record and otherwise, they failed to produce. 5. Because, in any view, the cost of parties in a question of a disputed will or settlement, ought to be ordered to be paid out of the trust funds."

Hodgson, for the appellant, contended, that the Court of Session had come to a wrong conclusion in finding the oaths negative of the appellant's claim. (The arguments turned entirely on the true construction and purport of the oaths, and are sufficiently noticed in the judgment.)

Sol.-Gen. Bethell, and *Anderson* Q.C., for respondents, were not called on.

LORD CHANCELLOR CRANWORTH.—My Lords, I think it would be quite improper that your Lordships should occupy any more time in the consideration of this case. It appears to me to be a matter upon which there is not the smallest doubt in the world. The appeal is an appeal from an interlocutor of the Court of Session, of 28th November 1848, which is in these words :—"The Lords having resumed consideration of the minute of reference to the oaths of the pursuers in the reduction, with the oaths thereupon, and heard counsel for the parties—find the oaths negative, and declare accordingly," and so on. "Sustain the defences pleaded for the pursuers, the trustees of the late General Scott, and others, to the action against them at the instance of James Bannerman, and assoilzie them from the conclusions thereof: Find the defender in the reduction, James Bannerman, liable to the pursuers of the reduction in the expenses incurred by them in the conjoined processes."

My Lords, the question which arose, I may state very shortly, was this :—Bannerman, the appellant, had been the domestic servant of General Scott, and I take it that he had been so from the year 1824. There is, I think, no legitimate evidence that General Scott said he had been his servant since 1824. There is evidence that he wrote a paper which has that effect. That is at least as efficient as if he had so. I take it to be, that he had been his servant since 1824. The question is—Whether, in the year 1838, when, unquestionably, General Scott signed the paper giving to the servant a legacy of £500, and several other specific legacies, he was in a sound state of mind, so as to be able then to make his will, or what we should call a will—a testamentary deed,—and if he was, whether this was obtained from him by fraud or imposition, practised upon him on the part of the servant?

The trustees refused to pay the legacy, alleging that it had been obtained by fraud, and that General Scott was in an imbecile state of mind when the instrument was made; and, in order to recover the legacy, the present appellant, Bannerman, instituted first an action for the payment of that legacy and the other benefits of that will. In order to defend themselves against that demand, it was necessary on the behalf of the trustees of the deed to institute a counter proceeding—a summons of reduction, as it is called—to get rid of that instrument, and they instituted that proceeding accordingly.

The matter came to be heard before the Lords of Session, and the Lord Ordinary saw clearly what the points were, and the issues were framed to raise the question. The *first* issue was—"Whether the writing purporting to be a codicil, being No. 5 of process, is not the deed of the late General Scott of Malleny?" *secondly*, "Whether, on or about the 6th day of October 1838, the date of the said writing, the said General Thomas Scott was a person of weak and facile mind, and easily imposed upon; and whether the defender, taking advantage of his said facility, did, by fraud and circumvention, procure or obtain the said deed, to the lesion of the said Thomas Scott?" "or," then they put, *thirdly*, a sort of converse, "Whether it was a valid deed?"

Then the matter went down to be tried before a jury upon those issues, and upon the first trial the jury, it seems, found upon the first issue only, that it was not the deed of Thomas Scott. What is the exact meaning of that finding I do not know. Whether they meant that it was not his signature, or that it was not in point of law his deed, in consequence of his want of mind, I do

not know that that very clearly appears. It is immaterial, because the counsel for Bannerman satisfied the Court of Session that the trial had not been conducted in all respects as it ought to have been, and that he was entitled to have a new trial. A new trial was accordingly granted, and upon the new trial it was competent for Bannerman to examine Hay and all the other persons who would know anything upon this subject, and when I must presume they really were examined, or if not examined, were only not examined, because it was known that they could give no satisfactory evidence—they either were examined, or for that reason only, they were not examined. The result was, that the jury found against the servant upon all the issues. They found that it was not a deed or instrument executed by General Scott—that he was at the time of the date, the 6th Oct. 1838, a person of weak mind, and that he had been imposed upon, and induced by Bannerman, by fraud and circumvention, to execute that instrument.

Bannerman, being dissatisfied with the finding of the jury, applied again, as I collect, to the Lords of Session for a third trial, but it did not appear to the Lords of Session that there was any ground for having it investigated again ; from which I infer they had no manner of doubt that the jury had come to a perfectly correct conclusion, and that the case ought there to end. But an advantage was then given to Bannerman, which he possessed by the law of Scotland, which he would not possess here, viz., to have this finally determined by what is called a reference to oath—which is a proceeding which may sometimes be ancillary to justice, and sometimes may be clearly a very oppressive proceeding. It is this : that the party not having been able to establish his case by evidence, says, I have no other means of establishing my case : I refer it to you—I refer to my adversaries.

LORD BROUGHAM.—Whether he has or has not failed before, he may refer at any time.

LORD CHANCELLOR.—If he has failed before, I presume it is in the discretion of the Court to prevent any further proceedings. I do not know how that is. Is it a matter of right at any time?

Mr. Anderson.—It is a matter of right at any time, my Lord, even after the trial.

LORD CHANCELLOR.—It is a matter of right, but of course common sense suggests, that if the party has recourse to reference to oath after a verdict not found in his favour, he must go with that finding hanging upon his neck, as it were, to get rid of it. However he does get this reference, to have it referred to the oaths of the parties. He says—"I am sure that when they are examined they will be obliged to admit that mine is a just case."

Now the consequence was, that the parties were examined—the parties who represented General Scott ; he having died, I think, in the year 1842. They were the nephews of General Scott—Colonel Carteret Scott, Mrs. Scott, the widow of a younger brother, and Mr. Melville, W.S., who was his law adviser, and a trustee and executor. Bannerman examines all these persons, and what he is bound to do is, by their examination to shew, that this was a valid instrument executed by General Scott ;—that on 6th October 1838, when he executed it, he was not a person, as it is called by the law of Scotland, of facile mind, easily imposed upon, and that the deed was not obtained from him by fraud. Bannerman has to prove that not to be the case. The jury had found it was so, and he undertakes to say—"I shall shew by the examination of my opponents that the finding of the jury is wrong."

Now he examines these persons. The first he examines is the nephew of General Scott. It is here suggested that he is an interested person. No doubt he is an interested person. The disinterested persons, viz., the witnesses before the jury, had all found against Bannerman, and he is now obliged to have recourse to interested persons, viz., his opponents in the action. Of course they are interested persons—they are the very persons with whom he is litigating. Bannerman says—Let me examine them, and I will undertake to shew that the verdict of the jury is wrong. How does he shew that? Why, Colonel Scott, so far from contradicting anything in the verdict of the jury, says, that in the year 1828 General Scott would be about 80 years of age—he was stated to have been 96 when he died in 1842. I think Colonel Scott states that he was 82. This gentleman had recently returned from India.—"I saw General Scott in 1828. At that time he knew me ; but decidedly did not know me well. He would remark to me, having seen me the day previous—'How much you have grown since I saw you last.'" This was his nephew, who had been serving his country for years, in India. The remark was quite childish—"How much you have grown since I saw you last." If that were all, I should think, that very likely all that he might have meant would have been this : not since I last saw you—that is, since I saw you yesterday—but since I last saw you before you went to India. It may be that might explain it. It does not rest upon that. Colonel Scott goes on to say, referring to the year 1835, "I cannot recollect if I visited him in lodgings in Edinburgh in 1835. I did occasionally go out to Malleny in 1836, but very seldom. I saw General Scott once or twice, but I cannot say how often. I had no conversation with General Scott on these occasions. I may have spoken to him, but he could not understand what I said to him sufficiently to carry on a conversation."—That was in 1836, when General Scott was 90 years old.—"I cannot remember whether he ever spoke to me. He may have spoken to me, but as I considered his mind quite gone, anything

he said would make little impression on me. He never addressed me by my name. He did not know who I was, his mind was so far gone—at least that was my impression.'' Then Colonel Scott was interrogated, "Do you think that the General was at that time capable of writing a letter of several lines? I should think not; but he may have done so. I did not see the General often, but so far as I had an opportunity of seeing him, my impression as to his mind was as above stated. I formed my impression from this, that when I addressed him he sometimes did not answer me, and when he did give me an answer, it was not a rational one." The conclusion that a person would make, having intercourse with an old gentleman of 90, that being the state of things, was very reasonable, that he had lost his mind—outlived his understanding. Then there is a great deal more to the same effect; and that is the general result, that he saw him in the years 1835 and 1836, and I suppose after that time occasionally, and that he considered him from his appearance to be a man, whose mind, understanding and intellect were gone. Does that negative the effect of the finding of the jury? Clearly it quite supports it.

Then the next oral evidence is that of Mrs. Scott. She also says, in giving the result of her observation,—"I cannot tell whether the General, in December 1836, could understand a difficult document on business"—I suppose that was the very question that was put to her—"but my impression is that he could not. He might have understood a simple matter at the time it was explained to him, but would have forgotten it next moment.'' Now the counsel in arguing the case said, "I do not care what he had forgotten, if it was after he executed the deed.'' With great deference to him, I do not think that is a very reasonable way of viewing questions of this sort. If a man, ten minutes after he has executed a deed, giving a legacy of £500, has forgotten it altogether, the circumstance of his then forgetting it casts light backwards upon what was the state of his mind ten minutes before. To be sure, if a man is of perfectly sound mind, and being of perfectly sound mind, gives a legacy, and then forgets it, if that were a possible thing, ten minutes afterwards, that would not invalidate it; but the fact that he has forgotten it, affords, if not irresistible evidence, yet almost irresistible evidence, that he was not of sound mind when he gave it. Then Mrs. Scott goes on to say—"At this time I used to mention to the General any little trifling event that might occur, to amuse him, but did not carry on what could be properly called a conversation with him. He used to allude to his military exploits in early life, but my impression was, from the allusions he made to events at which he could not have been present, speaking as if he had been there, that his statements were not accurate. I think the General could understand a few simple words at this time. Thus, if Dr. Craig said to him, 'General, I am going to draw money for you,' he would say, 'Very well,' but he would not understand the amount, whether it was £100 or £1000.'' All Mrs. Scott's impressions, therefore, were in exact conformity to the evidence which was given by the nephew.

Then the only other witness examined is Mr. Melville, who was one of the executors, and was to some extent the law adviser of the General in his lifetime, being a partner in the firm of Writers to the Signet who seem to have been employed by him. Mr. Melville says he knew extremely little about him: but we collect at one place, that he says, "I never met General Scott, either in professional business or in society, until at Malleny, on one or two occasions, when I breakfasted with him, and that was within a year of his death." I think there must be some mistake, because I see in another place Mr. Melville says, "I do not recollect having seen General Scott in Edinburgh after August 1838, nor can I say at what time previous to that I have seen him in Edinburgh, although I have seen him in Edinburgh. When he called at our office in George Street, it was not to see me, as he transacted his business with another partner." It is obvious from that, that Mr. Melville knew very little of General Scott, and that they had hardly any intercourse at all, therefore that leaves the matter pretty much to the other witnesses. Then the question arises as to the account given by those persons, whether of itself sufficient to establish insanity or not might have been a doubt? I confess that I should be very reluctant to come to any other conclusion, if that was the only evidence that was offered; but the question is — Whether it establishes sanity against what is elsewhere found? That is hardly a proposition that can be gravely stated; indeed, counsel does not rely upon that. What he really relies upon is this, that during those years, or some of those years, the General certainly is shewn to have executed several instruments of importance. In the month of March 1835 he executed a lease of a house called Lymphoy, in his park, to his brother. The house had been previously occupied by a brother who died; and in 1835, General Scott, who I suppose was rich, and his brother poorer, executed a lease—his brother Alexander having died—in favour of another brother, whose name I forget, the husband of Mrs. Scott, one of the now respondents. He executed in his favour a new lease, I suppose, at the same rent, and he also executed a deed, whereby he secured his property in succession to his brothers and their children. I am afraid that is a sort of transaction, I do not say very wrongly, but very commonly done, where there is a family living together upon perfectly good and intimate terms, all aware that they are not imposing on one another at all — whether the elder brother was of perfectly sound mind or not, he was going to dispose of his property in a way which they all thought extremely reasonable.

My noble and learned friend suggests just exactly the same kind of thing, viz., the settling of his accounts. He had an account with his agents, who were receiving his rents, which were very large—much larger than his expenditure. There were certainly three yearly accounts, and I believe four. I look at the highest, in which the yearly expenditure was £1200; that includes the payments to his family, leaving about £1000 or a little more, and the receipts seem to be much larger every year. There was a balance of £7000 or £8000 in the hands of the agents, and the agents—properly or not I do not know—let him settle the accounts up to a certain period; the last I think is in the year 1839—a date subsequent no doubt to the instrument which Bannerman is now relying upon. The question is—Whether that outweighs all the other testimony in the case? Then there are one or two letters, but to all of them the same objection applies. They are, every one, either family transactions, or else settlements between General Scott and his agents, of pecuniary matters, which no doubt were under the immediate cognizance of those who were taking care of this gentleman in the state of second childhood into which he had fallen.

I have not the least doubt myself, that, if there were blame, it was only technical blame. I have no doubt that the circumstances of the case furnish abundant evidence that what they were doing, though apparently with General Scott, they were doing with General Scott's family, who were about him, and taking care of him. That appears to me to be the reasonable conclusion. Whether it is so or not, does not touch the facts of this case. The circumstances are perfectly sufficient to satisfy me, that the appellant has wholly failed in making out that there was anything wrong in this verdict; therefore the decree of the Court of Session was correct, and I shall move your Lordships that it be affirmed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I take a very short view of this case. Here we have a mere question of disputed fact. There is no matter of law whatever—there is no matter of procedure or practice whatever—there is merely the question of fact—Was or was not the party capable of making what is called a settlement? I do not exactly comprehend why it is not called a will—it is much more like a will than a settlement—there is nothing respecting heritage in it. It is in the nature of a disposition of personal property and moveables attaching only to the person. This question of fact has been considered and disposed of without any apparent difference of opinion by the learned Judges in the Court below, as I understand. This mere question of fact has been so decided by the learned Judges in the Court below. It is a question of fact to be decided by an examination of the evidence; for in this case there was a reference to the oaths of the respondents, the persons against whom this poor man Bannerman proceeded in the Court below, and upon their depositions the Court came to their conclusion in point of fact, after sifting and examining the depositions of those persons.

Now, my Lords, it must be, in a Court of Appeal like this, a very strong case, indeed, to entitle your Lordships to differ from the opinion of the Court below upon this mere question of fact; and that is the view taken by all Courts of Review in matters of this description. The question, as has been most correctly stated, is not, whether the party hereby referring to the case of his adversaries, has obtained a case against himself, in which he may pick holes, and to which he can raise objections, but he has the affirmative cast upon him. He has referred to those adversaries, and he is to be bound by their answer to that reference; and unless he can shew, that that answer proves his case, he is out of Court upon the reference, because he is bound by that answer, and unless that answer is for him, and decides the case in his favour, his case is gone. The Court below have examined that upon the mere question of fact, which I have already stated; and the question for your Lordships to consider is—Has sufficient been shewn by the very able and elaborate argument of the learned counsel at the bar for the appellant, to shake in your minds the judgment of the Court below upon that question of fact? I am clearly of opinion that enough has not been shewn, and that I therefore must abide by the judgment of the Court below, and agree to the proposition of my noble and learned friend for affirming that judgment.

My Lords, it is an unfortunate thing that this poor man should have taken the course he has done, which, unhappily, must have led to great disagreement between him and those respectable persons, the respondents at your Lordships' bar, against whom he has proceeded. It is perhaps a little going out of what is our province upon the present occasion, but considering the unfortunate situation of the appellant, I think I do not act wrongly when I do go for a moment out of that path. The appellant stands in the situation of having been, apparently, from what we see, the faithful and useful servant of the late General Scott, and for 16 years after he appears to have made a will giving him something. I think it is asserted that in the year 1826 he made a will, by which he then gave him something—the settlement, as it is called, the instrument in question, refers to the will, for it says—"I give him £500 over and above what is left in my will." Well, then, this poor man continued, after the General had made whatever provision he had made in his will, 16 years longer to be his faithful and useful attendant. I cannot help thinking, that it would be highly becoming and kind of these parties, who take a very considerable

succession under the late General's will, to consider those 16 years' services; though I do not in the least degree, not for an instant, blame them for having resisted this claim, because this settlement, as it is called, is of a very peculiar nature. It is not only leaving him £500, the two gold watches, and the mourning, but leaves him all the furniture of the house—the furniture of the dining room, drawing room and bed rooms, and even of the vestibule, is all left to this servant; therefore, I do not at all wonder that they disputed this instrument. I do not in the least degree throw any blame upon them for having so disputed it; but, though these parties have been brought here, and have been put undeniably to expense, and cannot in the least degree (the poor man suing here *in formâ pauperis*, as I suppose he did in the Court below) recover any part of their costs, nevertheless, I should hope and trust that they would take all these circumstances into consideration.

Interlocutor affirmed.

A. Simson, *Appellant's Solicitor.*—Maitland and Graham, *Respondents' Solicitors.*

APRIL 28, 1854.

W. DUNCAN and OTHERS (Brechin Gas Co.), *Appellants, v.* THOMAS HUNTER WHITSON, *Respondent.*

Copartnery—Construction—Transfer of Shares—Presumption—Obligation—*It was provided by the articles of copartnery of a gas company, that no partner should hold more than twenty shares. A. W., who held twenty shares, purchased twenty more in name of his brother T. H. W., who was then abroad, but who had left a commission and factory in favour of A. W., in terms sufficient to cover the transaction. T. H. W. was duly entered in the register of shareholders, and the dividends were paid to his brother for him. On his return to this country he repudiated the purchase, and declared that the shares were not his, but his brother's. The company thereupon required A. W. to find some other person willing to undertake the responsibilities of a shareholder. Before any new holder of these shares was found, T. H. W. wrote a letter recalling his repudiation, and expressing his willingness to undertake the responsibilities attaching to a copartner.*

HELD (affirming judgment), 1. *That the company's requisition did not amount to such an acceptance of T. H. W.'s repudiation as to bar his subsequent retractation; that, as he was now willing to undertake the responsibilities of a partner, the company were bound to receive him as such, and to pay the dividends to him.* 2. *That it was not relevant to aver that this was a mere device on the part of A. W. to evade the conditions of the contract of copartnery, by holding twenty additional shares in his brother's name.*[1]

The defenders appealed against the judgment on the following grounds :—"1. In the circumstances, it was to be taken as an established fact, that the respondent was not originally the owner of the stock in question; and he was barred from maintaining that he was originally the owner; and nothing had occurred sufficient to confer on him any subsequent right to it. 2. The respondent, as he was not, and never had been, a partner of the company, was not entitled to sue for dividends on its stock."

The respondent supported the judgment for the following reasons :—"1. The appellants have no legal interest in maintaining the pleas upon which their defence is rested; the only interest they could maintain, which is that of having a separate partner as holder of twenty shares of stock, is attained by the very fact of the receipt of dividends by the respondent as proprietor. 2. The respondent, having been admitted and registered as a partner in the books of the company, is entitled, as in a question with the company, to the privileges and advantages of a partner. 3. It is not competent to impugn the claims of the respondent without a reduction of the register. 4. The respondent having all along been liable as a partner, in consequence of the acts of his mandatory, and all that was required by the appellants having been accomplished by his adoption of the shares, and ratification of the acts of his commisssioner before any pretext of forfeiture, the appellants were barred from rearing up any pretended forfeiture. 5. The respondent having been recognized as a partner subsequent to the challenge, and nothing having subsequently happened to deprive him of his status, the refusal of payment of his dividends was illegal. 6. The resolution of the general meeting of the 31st July 1843 was illegal, and the attempted execution of such a resolution a contravention of the contract of copartnery."

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[1] See previous report 23 Sc. Jur. 546. S. C. 26 Sc. Jur. 417.