fraud imputed to him. They maintained that the pursuer had ample opportunity of challenging the balance-sheet, and that it was his duty to have examined and tested it before he affixed to it his signature.

Lord MURE, in charging the jury, said that the first question involved was this—Was the balance-sheet referred to in the issue an incorrect and false balance-sheet? The second question was whether, assuming on the evidence that the balance-sheet was false and incorrect, it was made use of by the late Mr M'Dowall in the knowledge of its falsehood and incorrectness? and thirdly, whether having been so used by the late Mr M'Dowall in the knowledge of its inaccuracy the pursuer was induced by that falsehood and fraud to sign the balance-sheet? There had been produced gentlemen skilled in figures who told them that they were agreed in taking the books of the company as the sole materials on which they were to test the accuracy of the balance-sheet. The results they arrived at were certainly very different, and the question the jury had to decide was which of these results was the correct one. Mr Jamieson estimated the assets of the company in 1861 at £83,000, and the proportion of the balance due to the pursuer at £24,000, instead of £14,000, as stated in the balance-sheet; and according to his view the balance-sheet in August 1861 should have shown a much larger sum as the value of the works at that time held between the partners. That was concurred in by Mr Brown, and the question was, whether this view of Mr Jamieson was the correct one, or whether the statement of Mr Guild, concurred in by Mr Mackenzie, was the more accurate view of the matter, which, compared with the other, showed a difference of £30,000. His Lordship went over the evidence which had been led on both sides at considerable length, and the jury retired to consider their verdict.

The jury, after an absence of three-quarters of an hour, returned a unanimous verdict for the defenders.

AYR SPRING CIRCUIT.

Thursday, April 12.

(Before Lord Deas.)

BROWN *v.* BROWN'S TRUSTEES AND OTHERS.

Counsel for Pursuer—Mr Fraser and Mr J. G. Smith. Agents—Messrs Macgregor & Barclay, S.S.C.

Counsel for Defenders—Mr Watson and Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

This case was set down for trial at the Ayr Circuit. Hugh Brown, lately farmer in Milton, now residing at Gatehead, near Kilmarnock, is pursuer; and James Barr, farmer in Monkland, and Thomas Fulton, writer in Kilmarnock, trustees of the deceased Allan Brown, residing at Beanscroft, in the parish of Fenwick, and Allan Barr, son of the said James Barr, and Mary Brown, both residing at Beanscroft foresaid, are defenders; And the following were the issues:—

"It being admitted that the pursuer is heir-at-law of the late Allan Brown, who died at Beanscroft on the 28th July 1856:

"I. Whether the disposition and settlement, being No. 8 of process, dated 18th May 1855, is not the deed of the deceased Allan Brown?

"II. Whether the codicil, dated 8th December 1855, appended to the said deed, is not the deed of the deceased Allan Brown?

"III. Whether the trust-disposition and settlement, dated the 18th December 1855, being No. 17 of process, is not the deed of the said Allan Brown?"

Before the jury was sworn, the case was compromised. The defenders agreed to pay the pursuer £350 on the death of the defender, Mary Brown, who liferented the estate, and each party is to pay his own expenses.

HOUSE OF LORDS.

March 5, 6, 8, *and April* 20.

MAGISTRATES OF GLASGOW *v.* PATON AND OTHERS.

Process—Church—Disjunction and Erection—Intimation to Heritors—Stat. 7 and 8 Vict., c. 44. Terms of an intimation to heritors of the dependence of a summons of disjunction and erection of a district into a parish, under the Act 7 and 8 Vict., c. 44, which held *(rev. Court of Teinds, diss. Lord Chelmsford)* not to be sufficient compliance with section 4 of the statute.

Counsel for Appellants — The Lord Advocate (Moncreiff) and Sir Hugh Cairns, Q.C. Agents—Mr B. Maconochie, W.S., and Messrs Loch and Maclaurin, London.

Counsel for Respondents—The Attorney-General (Palmer), Mr Jessel, Q.C., and Mr Will. Agents—Messrs Jollie, Strong, & Henry, W.S., and Messrs W. & R. P. Sharp, London.

This is an appeal from an interlocutory judgment pronounced by the teind Court as to the sufficiency of "a special intimation" to heritors under the 7th and 8th Victoria, cap. 44, entitled "An Act to facilitate the disjoining or dividing of extensive or populous parishes, and the erecting of new churches in that part of the kingdom called Scotland." By an Act passed in the Parliament of Scotland in the year 1707, entitled "Act anent Plantation of Kirks and Valuation of Teinds," the Court of Session are authorised, empowered, and appointed to judge, cognosce, and determine in all affairs and causes which by the ancient laws and practice of Scotland were referred to, and pertained and belonged to, the jurisdiction and cognisance of the commissioners appointed for the plantation of kirks and valuation of teinds, as fully and freely as the said Court did or might do in other civil causes; and particularly, *inter alia*, to disjoin too large parishes, to erect and build new churches, to annex and dismember churches as they should think fit, conform to the rules laid down and powers granted by the 19th Act of the Parliament 1633, the 23d and 30th Acts of the Parliament 1690, and the 24th Act of the Parliament 1693, in so far as the same stood unrepealed; the transporting of kirks, disjoining of too large parishes, or erecting and building of new kirks, to be always with consent of the heritors of three parts of four at least of the valuation of the parish whereof the kirk was craved to be transported, or the parish to be disjoined and new kirks to be erected and built. By the construction put upon this clause of the Act, it came to be the rule that no process for the purpose mentioned could be competently brought into Court without the consent of three-fourths of the heritors having been previously obtained. Subsequently, however, in the year 1844, another Act was passed upon the subject (7 and 8 Vict. cap. 44). The preamble of that Act narrates the previous statutes, and in particular that of 1707, and then proceeds to declare that whereas it was expedient to afford facilities and to make further provision for the disjoining or dividing of extensive or populous parishes, from and after the date of the Act so much of the Act of 1707 as required the consent of the heritors of three parts of four at least of the valuation of the parish whereof the kirk was craved to be transported or the parish to be disjoined and new kirks to be erected and built, should be repealed, and that the consent of the heritors of a major part of the valuation of any parish should be necessary and sufficient in all cases in which the consent of the heritors of three parts of four of the valuation of such parish was required by the said Act except as thereinafter provided. The second section provides that a parish may be

deemed and held to be too large, and may as such be disjoined or divided under the provisions of the Act of 1707 as altered and amended by reason of the largeness of the population of such parish, although the superficial measurement thereof may not be to large for one parish. The third section enacts that it shall not be a valid objection to the competency of any process which should be brought for disjoining and dividing a parish or parishes and erecting a new kirk or kirks under the before-mentioned provisions, that the consent of the heritors of a major part of the valuation of the parish to be disjoined or divided has not been given previous to such process having been brought into Court; and that it should be lawful for the Lords of Council and Session before whom any such process should be brought to appoint *special intimation thereof to be made in such form and manner as they should direct* to such of the heritors of the valuation of the parish as should not have already either given their consent, or judicially stated their dissent; and to sist proceedings in such process for a definite time, for the purpose of allowing such heritors to state judicially their consent or dissent, and declared that such of them as should not within the time fixed by the said Lords, and specified in such intimation, judicially state their dissent should, in computing the statutory proportion of consents, be reckoned as consenting heritors. The fourth section provides that if in any such process it shall be shown to the Lords of Council and Session, that there is already built and in good repair a church or place of worship suitable for the church of the new parish proposed to be erected, and capable of being lawfully appropriated to that purpose, whereby the expense of erecting a new or additional church would not be incurred by the heritors; and that the titulars or others having right to the teinds, out of which is to be paid not less than three-fourths of the additional stipend or stipends to be modified by reason of such disjunction or division, have consented or have stated no objection thereto after due intimation as aforesaid, it shall be lawful and competent for the Lords of Council and Session to allow such process to proceed, and to give judgment and decree therein, if, upon consideration of the whole case, it should appear to them that there were good and sufficient reasons for doing, although the heritors of a major part of the valuation of the parish to be disjoined should not have consented.

The parish of Govan is situated chiefly in the county of Lanark, but also partly in the county of Renfrew. It comprehends a considerable district within the Parliamentary boundary of the city and suburbs of Glasgow, the village of Govan and surrounding district lying on the south of the river Clyde, which intersects it, and also the burgh of Partick, with the surrounding district on the north side of the river. The total population of the parish is about 100,500 persons, of whom about 72,000 are included within the Parliamentary boundary of Glasgow, 13,700 in the village of Govan, on the south side of the Clyde, and 14,800 in the burgh of Partick, on the north side of the river. The parish church is situated on the south side of the river, and being capable of affording accommodation for about 1100 persons only, and inconvenient of access to parishioners living on the north side of the Clyde, another church was in 1834 erected in Partick, which has since been considerably enlarged, and a schoolhouse and manse built in connection with it. In 1836 a constitution for this church, as a church in connection with the Church of Scotland, was approved of by the General Assembly. It vested the property of the church in trustees, and provided for the election by the seat-holders of persons to be managers of the chapel.

The managers for the time being of this chapel on the 11th of January 1864 raised an action of disjunction and erection into a parish *quoad omnia* of the district of Partick in the Teind Court against the University of Glasgow—who are the sole titulars of the teinds of the parish—and other parties, who, however, did not appear. The summons concluded that for the better propagation of the gospel and edification of the people, the whole district of Partick should be separated and disjoined from the parish of Govan, and erected into a separate and distinct parish, to be called in all time coming the parish of Partick—the church before referred to to be the church of the said parish, and that the minister thereof should have modified, settled, and appointed to him a stipend, to be payable out of the teinds of the said new parish.

On the 17th of February 1864, the Court, in compliance with the 7th and 8th Victoria, cap. 44, appointed intimation of the process to be made, once from the precentors' desks of the parish church of Govan and of the church of Partick, immediately upon the blessing being pronounced after the forenoon service on the Sunday; appointed intimation in similar terms to be made once in the *Edinburgh Gazette* and *North British Advertiser* newspapers; all which intimations were to be made at least ten days before the process was again moved in Court; and the pursuers were further appointed to lodge with the session-clerks of each church twenty copies of the printed summons for the use of such of the heritors or other parties interested as might apply for them. Intimation was accordingly made in the *Gazette* on the 19th February 1864, copies of the summons were left with the session-clerks on the following day, and intimation also given in the *North British Advertiser*, and on the 21st intimation was made from the precentors' desks in either church. On the 2d of March, the University of Glasgow, as sole titulars of the teinds of the parish, having lodged defences objecting to the process, and dissenting from it, the Court pronounced an order for condescendence and answers. Thereafter, on the 22d June, the magistrates of Glasgow, as heritors of Govan, moved the Court for leave to lodge a minute of dissent from the proposed disjunction and erection. After a debate on the appellants' right to appear at the date of their minute and state their dissent, the Court of Teinds (Lord Neaves dissenting) on 6th July 1864 pronounced the interlocutor now brought under review, wherein they refused to receive the said minute, and found the Magistrates liable in expenses (2 Macp. 1307).

Sir HUGH CAIRNS, on the part of the appellants, said that the first point he should submit was this, that the third section of the Act under which this process was brought required a precise time to be mentioned in the intimation, within which the heritors should appear.

Lord CHELMSFORD—Might they not have proceeded under the fourth section?

The ATTORNEY-GENERAL said he would be happy if his learned friends would grant that they did.

Lord CHELMSFORD—I merely asked for my own satisfaction.

Sir HUGH CAIRNS said they could not have proceeded under the fourth section because the titulars did not consent. What the limit of time was to be was in the discretion of the Court; but a time they must fix, and name it in the intimation, with the purpose for which it was given. The intimation in question did not in the least convey that unless the time given was made use of the heritors would be held as consenting. He might imagine two purposes for which this would have been a proper intimation—first, it would have been a perfectly proper intimation under the fourth section; second, under the third section, as a mere preliminary general intimation, in order to see whether a majority of heritors could be brought forward for the purpose of approving or disapproving the process.

Lord KINGSDOWN—The intimation may be in accordance with the order, but the order not in accordance with the statute.

Sir HUGH CAIRNS said he did not proceed upon the order. If this intimation was to the heritors, did it mean that the heritors were to come forward within the ten days, or before the case was again moved in Court? Then, again, from what point are the ten days to be dated? from the time the notice is given

in the parish church, or when it appeared in the *North British Advertiser*, or when it appeared in the *Gazette*. The *North British Advertiser* was circulated gratuitously.

Lord CHELMSFORD—We all have it sent to us.

Sir HUGH CAIRNS—Oh, yes; we are all recipients of the paper. From what time were the ten days to be reckoned?—from the date of the paper, the day when it was delivered, or from the Monday when the news it contains commenced.

Lord CHELMSFORD—When does the *North British Advertiser* issue?

The ATTORNEY-GENERAL said on Saturday.

Sir HUGH CAIRNS said his learned friend answered the question in his own way. The paper must be considered as issued as much on Monday as on Saturday. Next, there was no sist of proceedings for a certain time, because within those ten days the University of Glasgow gave in their defences. Again, what was special intimation? Not a mere publication addressed to no one at all. There was no difficulty in discovering who the heritors were, and it was open to argument that each heritor was entitled to individual notice, though he would not press the right so far.

The LORD CHANCELLOR—Perhaps the Lord Advocate can inform us whether, like "special service" here, "special intimation" has any particular meaning by the law of Scotland.

The LORD ADVOCATE said it had not, but meant something which was not general.

Sir HUGH CAIRNS then proceeded to read and criticise the judgments of the Courts below. All the learned Judges had supported the form of intimation, though each in turn had cast a stone at it—it was approved by them, though buried under their anathemas.

The LORD ADVOCATE then followed on the same side.

The ATTORNEY-GENERAL said his learned friends had rested their case upon the third section, and properly so. They could not have done so on the fourth. There was a fallacy in confounding the words "erect" and "build," erect meaning simply to introduce into a parish an already existing church, in illustration of which the learned counsel referred to the Act of 1707; and the 7th and 8th Victoria, cap. 44, made the same distinction, so that the fourth section would not apply.

Lord KINGSDOWN—I did not understand Sir Hugh Cairns to say that it did.

The ATTORNEY-GENERAL said the appellants had not insisted that it did, and he would therefore pass on. First, the want of the requisite number of consents was no preliminary objection to the Courts entertaining the process at all. They were necessary to substantiate jurisdiction only. Secondly, as to the form and manner of the intimation, everything of that kind was put by statute within the discretion of the Court; and therefore criticism upon these subjects was entirely out of place. This form had been in use for many years, and there had no doubt been many cases such as the present; and all previous proceedings would be invalidated if the consent of the heritors was not ascertained in the manner required, as the foundation of the jurisdiction would be gone and invalidated. Very strong grounds, therefore, should be shown before their Lordships disapproved the previous practice. Now what is a special intimation? The Lord Justice-Clerk thought special had reference to the subjects of the intimation. Individual notice was impossible, because the valuation roll was made up only once a year, while the heritors were continually changing. This was the usual form in which notice is given to heritors. Dr Cook's Styles and Forms in Church Court Procedure showed it was also the form used in cases of augmentation of stipend, in conformity with the Act 48 Geo. III., c. 116, and the Act of Sederunt founded on it. Then it was said this notice might be supposed to be one to titulars under the fourth section; but it was necessary to call the titulars as parties, so that no notice to them was required. And, again, that it might be supposed to be a general preliminary notice. The Court had no power to order such notice. Besides, it bore to be given in terms of the statute, mentioned to the heritors, and showed it was to them it was addressed. So much for criticism upon form and manner. Next, as to the sist, it was said this was not so entire a sist as required by the statute; but it was never meant that minutes of dissent might not be lodged during that time, though no action would of course be taken upon them—so also might defences be lodged for the University of Glasgow. Then, as to when the time commenced to run, every person knew the date of a paper when it reached him. There were objections taken to the multiplication of ways taken by the Court in order to give substantial information. The date of publication was, of course, the time from which the ten days was to be computed. The sist was for a definite purpose, and it was to be mentioned in the intimation. The terms of the Act were repeated in the intimation, and the heritors must be presumed to know something of a statute which concerned their rights.

Lord KINGSDOWN—Do you mean they are precluded from interposing at any subsequent stage?

The ATTORNEY-GENERAL said he did not. If they had subsequently any substantial reason of objection, the consent inferred by the statute would not exclude them; they might object to the situation, to the sort of church, and to other matters of that nature. He concluded by submitting that the intimation given perfectly satisfied the requirements of the statute.

Mr Jessel having followed the Attorney-General on the part of the respondents, Sir HUGH CAIRNS replied for the appellants. He said that the Attorney-General had complained that the appellants came there to overthrow substance in order to establish form. The reverse was the case, because they were only endeavouring to preserve their own property; they had had no actual notice, and the respondents were endeavouring to saddle them with a constructive consent. It was next said that if the form of this intimation were overthrown, all previous proceedings of a similar kind would be invalidated. There could not be many, if any, cases of a presumed consent since 1844, and besides it was a mere chimera to suppose that after the first order had been made, a parish disjoined, and the teinds appropriated, that the proceedings could be declared invalid in consequence of a defect in the notice. The attorney-General had also said that the heritors were not precluded from appearing at a subsequent stage of the proceedings. How could they appear? they were not called as, and could not be, parties to the action in any way.

Lord KINGSDOWN—The Act does not state who are necessary parties.

Sir HUGH CAIRNS said the heritors could not be; their right was to prevent any process of disjunction being brought into Court unless with their consent. It was then said that this was the usual form in which notice was given to heritors, but the notices referred to differed very much in effect from the present—by them no one was precluded from appearing subsequently. Then, as regarded the valuation roll, it was made up every year; and though there might be changes in the intervals, these could not be so extensive as to prevent persons knowing by personal canvass whether a majority of the heritors were in favour of a disjunction or not. Now, as regarded the notice itself, the third section of the Act distinctly pointed out two processes — one the fixing a definite time for the sist, and the other a definite time during which the heritors might appear and state their dissent. These terms might be made identical, but they need not be; the sist might be, for example, for two months, and the time for the heritors to appear six weeks. In this intimation no time whatever was mentioned within which the heritors were to appear. The Attorney-General had

said the heritors must be presumed to know the law. There was no such maxim except in criminal law; and uninformed writers had imported it into their works as applying to civil law. The Legislature made no such presumption, because it had required this notice to be given. It was not enough that the intimation should mention only the time for which the proceedings were sisted. Thus a "special intimation" was requisite, and his learned friend had said the Act meant "special" with regard to the subject. Why, the notice would necessarily bear on its face the subject to which it had reference, otherwise it would be quite unintelligible. "Special" had reference to the heritors, to whom the notice ought to have been particularly addressed, and not, as was the case, to the general body of the public. Again, there was no sist of proceedings. A minute of dissent might very well be lodged by one who was not a party to the action, but no step could be taken by either of the two litigants such as lodging defences. Then there was no day fixed from which the intimation should date—no day fixed either for its publication in church or in the newspapers. It was therefore impossible to know when the ten days would expire. Even had there been personal service, the heritors would have been in just as great ignorance, because no one would have known when the last heritor was served, and the ten days were to run from the last intimation. He concluded by submitting that the right of the heritors could not be taken away but by a strict compliance with the statute; that there had been no such compliance, and that the interlocutor of the Court below ought therefore to be reversed.

The LORD CHANCELLOR—This is a question merely of form, but still of some nicety, and the House will therefore take time to consider. Judgment will be given in a few days.

Friday, April 20.

Judgment was delivered to-day.

The LORD CHANCELLOR said — My Lords, this appeal arises in consequence of an action having been brought in the Court of Session, having for its object the separation of the district of Partick from the parish of Govan. Until the year 1844 such a proceeding was governed by a statute passed in 1707, entitled "An Act anent the plantation of kirks and valuation of teinds," which contained a provision that no process for the purpose of dividing parishes or erecting new kirks could be brought into Court until the consent of three-fourths of the heritors had been obtained. In 1844, however, another Act was passed upon the subject—the 7th and 8th Victoria, cap. 44—the first section of which provides that the consent of three-fourths of the heritors shall not henceforth be required, but that it shall be sufficient and necessary that the consent of the heritors of a major part of the valuation of any parish sought to be divided has been obtained. The question in the present case arises upon the third section, which enacts that it shall not be a valid objection to the competency of any process which shall be brought for disjoining or dividing a parish or parishes, and erecting a new kirk or kirks, under the provisions of the Act of 1707 as altered and amended, that the consent of the heritors of a major part of the valuation of the parish to be disjoined or divided has not been given previous to such process being brought into Court; and it shall be lawful for the Lords of Council and Session before whom any such process shall have been brought to appoint *special intimation* thereof to be made, in such form and manner as the said Lords of Council and Session shall direct, to such of the heritors of the valuation of the parish as shall not have already either given their consent or judicially stated their dissent, and to sist proceedings in such process for a definite time, for the purpose of allowing such heritors to state judicially their consent or their dissent; and such of them as shall not, within a time to be fixed by the Lords of Council and Session, *to be specified in such intimation* as aforesaid, judicially state their dissent, shall, in computing the statutory preparation of consents, be reckoned as consenting heritors. The present process was brought by several gentlemen who describe themselves as managers of the church of Partick, and, after setting out the grounds for their application, concludes, that the lands and others forming the district of Partick should be separated and disjoined from the parish of Govan and erected into a separate and distinct parish, to be called in all time coming the parish of Partick. The University of Glasgow is the sole titular of the parish, and in that character was made a party to the action. The only proceeding which it is necessary for the purposes of the present question to refer to is the second plea in law for the defenders. That plea is to the effect that the pursuers are bound, in terms of the statute 7 and 8 Vict. c. 44, to obtain the consent of the heritors holding a major part of the valuation of the parish. On the state of the record the learned Judges in the Court below pronounced an interlocutor, dated 17th February 1864, appointing, in terms of the statute, intimation of the conclusions of the summons to be made once from the precentors' desks of the parish church of Govan and of the church and chapel of Partick, within the said parish respectively, immediately upon the blessing being pronounced after the forenoon service on the Sunday, of which intimation certificates by the respective precentors shall be sufficient evidence; and, further, appointing intimation to be made also in the *Edinburgh Gazette* and in the *North British Advertiser* newspaper—all which intimations were directed by the interlocutor to be made at least ten days before the process shall be again moved in Court. Intimation was accordingly given in the *Edinburgh Gazette* on the 19th, in the *North British Advertiser* on the 20th, and from the precentors' desks on the 21st February. It consisted of a notice that a summons of disjunction and erection had been brought at the instance of the respondent and others, managers of the church of Partick, against the University of Glasgow and others, for the purpose of obtaining the separation of the district of Partick from the parish of Govan. It then set out the interlocutor I have already mentioned, and concluded—"In terms of which interlocutor, this intimation is now made." No dissenting parties having appeared up to the 2d of March, the Court upon that day appointed the pursuers to lodge a condescendence by the first box-day in the vacation. On the 22d June the magistrates of Glasgow tendered a minute of dissent, which, however, the Court refused to receive, upon the ground that the interlocutor of the 17th of February set out in the intimation sufficiently indicated to the heritors that they must express their dissent, if they desired to do so, within ten days. The magistrates contended that they were still in time to express their dissent, and that their minute ought to be received; and hence this appeal to your Lordships' House. It is unnecessary for me to repeat the third section of the Act—suffice it to say that it requires special intimation to be given to the heritors; and the sole question in the present case is whether such intimation as the statute requires has been given. I am of opinion that that question must be answered in the negative. The third section provides that such of the heritors as shall not, within a time to be fixed by the Lords of Council and Session, to be specified in such intimation, judicially state their dissent, shall, in computing the statutory proportion of consents, be reckoned as consenting heritors. Now, this intimation does not specify the time within which the heritors are bound to express their dissent. It is said that what that time is to be is a necessary implication from what is stated in the interlocutor of the 17th of February. That interlocutor directs that all the intimations shall be made at least ten days before the process shall be again moved in Court—certainly a strange

said the heritors must be presumed to know the law. There was no such maxim except in criminal law; and uninformed writers had imported it into their works as applying to civil law. The Legislature made no such presumption, because it had required this notice to be given. It was not enough that the intimation should mention only the time for which the proceedings were sisted. Thus a "special intimation" was requisite, and his learned friend had said the Act meant "special" with regard to the subject. Why, the notice would necessarily bear on its face the subject to which it had reference, otherwise it would be quite unintelligible. "Special" had reference to the heritors, to whom the notice ought to have been particularly addressed, and not, as was the case, to the general body of the public. Again, there was no sist of proceedings. A minute of dissent might very well be lodged by one who was not a party to the action, but no step could be taken by either of the two litigants such as lodging defences. Then there was no day fixed from which the intimation should date—no day fixed either for its publication in church or in the newspapers. It was therefore impossible to know when the ten days would expire. Even had there been personal service, the heritors would have been in just as great ignorance, because no one would have known when the last heritor was served, and the ten days were to run from the last intimation. He concluded by submitting that the right of the heritors could not be taken away but by a strict compliance with the statute; that there had been no such compliance, and that the interlocutor of the Court below ought therefore to be reversed.

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The question in the present case arises upon the third section, which enacts that it shall not be a valid objection to the competency of any process which shall be brought for disjoining or dividing a parish or parishes, and erecting a new kirk or kirks, under the provisions of the Act of 1707 as altered and amended, that the consent of the heritors of a major part of the valuation of the parish to be disjoined or divided has not been given previous to such process being brought into Court; and it shall be lawful for the Lords of Council and Session before whom any such process shall have been brought to appoint *special intimation* thereof to be made, in such form and manner as the said Lords of Council and Session shall direct, to such of the heritors of the valuation of the parish as shall not have already either given their consent or judicially stated their dissent, and to sist proceedings in such process for a definite time, for the purpose of allowing such heritors to state judicially their consent or their dissent; and such of them as shall not, within a time to be fixed by the Lords of Council and Session, *to be specified in such intimation* as aforesaid, judicially state their dissent, shall, in computing the statutory preparation of consents, be reckoned as consenting heritors. The present process was brought by several gentlemen who describe themselves as managers of the church of Partick, and, after setting out the grounds for their application, concludes, that the lands and others forming the district of Partick should be separated and disjoined from the parish of Govan and erected into a separate and distinct parish, to be called in all time coming the parish of Partick. The University of Glasgow is the sole titular of the parish, and in that character was made a party to the action. The only proceeding which it is necessary for the purposes of the present question to refer to is the second plea in law for the defenders. That plea is to the effect that the pursuers are bound, in terms of the statute 7 and 8 Vict. c. 44, to obtain the consent of the heritors holding a major part of the valuation of the parish. On the state of the record the learned Judges in the Court below pronounced an interlocutor, dated 17th February 1864, appointing, in terms of the statute, intimation of the conclusions of the summons to be made once from the precentors' desks of the parish church of Govan and of the church and chapel of Partick, within the said parish respectively, immediately upon the blessing being pronounced after the forenoon service on the Sunday, of which intimation certificates by the respective precentors shall be sufficient evidence; and, further, appointing intimation to be made also in the *Edinburgh Gazette* and in the *North British Advertiser* newspaper—all which intimations were directed by the interlocutor to be made at least ten days before the process shall be again moved in Court. Intimation was accordingly given in the *Edinburgh Gazette* on the 19th, in the *North British Advertiser* on the 20th, and from the precentors' desks on the 21st February. It consisted of a notice that a summons of disjunction and erection had been brought at the instance of the respondent and others, managers of the church of Partick, against the University of Glasgow and others, for the purpose of obtaining the separation of the district of Partick from the parish of Govan. It then set out the interlocutor I have already mentioned, and concluded—"In terms of which interlocutor, this intimation is now made." No dissenting parties having appeared up to the 2d of March, the Court upon that day appointed the pursuers to lodge a condescendence by the first box-day in the vacation. On the 22d June the magistrates of Glasgow tendered a minute of dissent, which, however, the Court refused to receive, upon the ground that the interlocutor of the 17th of February set out in the intimation sufficiently indicated to the heritors that they must express their dissent, if they desired to do so, within ten days. The magistrates contended that they were still in time to express their dissent, and that their minute ought to be received; and hence this appeal to your Lordships' House. It is unnecessary for me to repeat the third section of the Act—suffice it to say that it requires special intimation to be given to the heritors; and the sole question in the present case is whether such intimation as the statute requires has been given. I am of opinion that that question must be answered in the negative. The third section provides that such of the heritors as shall not, within a time to be fixed by the Lords of Council and Session, to be specified in such intimation, judicially state their dissent, shall, in computing the statutory proportion of consents, be reckoned as consenting heritors. Now, this intimation does not specify the time within which the heritors are bound to express their dissent. It is said that what that time is to be is a necessary implication from what is stated in the interlocutor of the 17th of February. That interlocutor directs that all the intimations shall be made at least ten days before the process shall be again moved in Court—certainly a strange

mode of sisting process—but does not state from what time the ten days are to be computed. That time is now defined to be the day on which the latest intimation is given, but it is only by reference to extraneous circumstances that that information is gained. It is not from that interlocutor, however, that the present appeal is brought, but from that of the 6th of July 1864, in which the Court refuses to receive the minute of dissent tendered by the magistrates. That refusal proceeded on the ground that having stated the period during which proceedings were to be sisted, it was unnecessary to specify a time within which dissents should be lodged. In that view I cannot concur, and beg therefore to advise your Lordships to reverse the interlocutor appealed against.

Lord CHELMSFORD—I have the misfortune to differ from both my noble and learned friends, and to think that this interlocutor ought to be affirmed. The sole question is whether the Lords of Council and Session have complied with the provisions of the statute in the intimation they have given to the heritors. (His Lordship then repeated the facts of the case.) It has been objected, first, that the intimation was not of a sufficiently special character; but that is an objection to its form and manner, both of which the statute directs shall be left to the discretion of the Court. Intimation from the precentors' desks, too, is the most usual mode of giving notice to the heritors of a parish. It is next objected that the proceedings were not sisted for a definite time. I think the interlocutor, in directing that the intimations shall be made at least ten days before the process is again moved in Court sufficiently defines the time of the sist; and the time from which it was to be computed would, of course, be the date of the publication of the intimation in the newspapers. It is lastly objected that the intimation specifies no time within which dissents are to be lodged; and it is upon this ground that my two noble and learned friends think it defective. It would have been better had the interlocutor distinctly stated the time; but I think that the heritors, having been informed of the sist, they could not fail to know that it was directed in order to give them an opportunity of stating their dissent. The time for which procedure was sisted appears to me sufficiently identified as the time within which dissents must be lodged; and I therefore think that the interlocutor appealed from ought to be affirmed.

Lord KINGSDOWN—It is not without regret that I feel compelled to yield to the objections which have been raised to this intimation. Much is no doubt left to the discretion of the Court, but the statute positively requires two things to be done—one, that the proceedings should be sisted for a definite time; and the other, that a time should be specified in the intimation within which dissents must be lodged. The times may be the same, or they may be different; but the heritors were entitled to have them clearly defined. The positive requirements of the statute have not been complied with in the present instance, and I therefore concur with my noble and learned friend on the woolsack that this interlocutor must be reversed.

Interlocutor reversed.

March 3, 5, *and April* 26.

LOVAT AND OTHERS *v.* FRASER, *et e contra.*

Entail—Executor—Entailer's Debts—Expenses. A deed of entail having been executed under burden of all the entailer's debts—*Held* (rev., in part, Court of Session, diss. Lord Kingsdown) that an heir of entail, who was also the entailer's executor, was not entitled to charge the entailed estate with expenses incurred by him, after the entailer's death, in resisting payment of unjust demands.

Counsel for Lord Lovat and Others—The Lord Advocate (Moncrieff) and Mr Rolt, Q.C. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S., and Messrs Grahames and Wardlaw, London.

Counsel for Mr Fraser—The Attorney-General (Palmer), Sir Hugh Cairns, Q.C., and Mr J. F. M'Lennan. Agents—Mr Æneas Macbean, W.S., and Messrs Loch & Maclaurin, London.

This is an appeal from an interlocutor of the First Division of the Court of Session.

The late Hon. Archibald Fraser was heir of entail of the estate of Lovat, and proprietor in fee-simple of the lands of Abertarff and others, in the parish of Inverness, in the purchase of which a grant to him under the Privy Seal, vested in trustees, had been applied. He was also possessed of a considerable amount of personal property. In the year 1805 he executed a deed conveying those fee-simple lands to himself and his heirs-male, and to any subsequent series of heirs which he might name by writing under his hand. His eldest son, Colonel Simon Fraser, being then dead, the respondent, his grandson, was the sole descendant of the family. On the 25th June 1808, Archd. Fraser executed in favour of the respondent a general disposition of various subjects lying in the burgh of Inverness and the village of Campbeltown, and of all his property, heritable and moveable, which he might leave undisposed of at the time of his death; the deed also contained a declaration that *its revocation should not be inferred from implication or construction, but only from an express writing.* Thereafter, on the 15th of August in the same year, he executed a strict entail of the lands of Abertarff and the lands of Auld Castlehill, of which he was owner in fee-simple in favour of Thomas Alexander Fraser of Strichen, now Lord Lovat, and a certain series of substitutes, amongst whom the respondent was not included, under burden, however, of all his just and lawful debts due and addebted, or which might be due and addebted by him at his death; which said debts he declared *should in noway affect or diminish his executry*, or other funds, property, or effects, *unless* such executry should be *given* and conveyed by him *to the said Thomas Alexander Fraser of Strichen* and the other substitutes mentioned in the deed. This deed contained a reservation of power to revoke or alter. On the 2d July 1812, Archibald Fraser executed another deed, which proceeded upon the narrative that he had some years ago executed an entail of the lands of Abertarff and others, and that he intended in the exercise of the power therein reserved to alter and revoke that deed to a certain extent. He accordingly disponed the lands to the heirs of his body, whom failing to the respondent and the heirs-male of his body, whom failing to the other heirs and substitutes mentioned in the deed of entail, but always with and under the several provisions, conditions, burdens, &c., contained in that deed, and under certain other additional provisions—viz., that the respondent and his heirs-male succeeding to him should take the name of Archibald, and that he should disencumber the lands in the parish of Inverness of the debts affecting them out of the executry, or by burdening the other lands, In April 1813, Archibald Fraser executed an entail of the lands of Castlehill in favour of the respondent; and on the 2d of August in the same year he executed a general conveyance by which he disponed to certain persons as trustees, tutors and curators, of the respondent, all the lands, houses, heritages, and heritable subjects (that is to say, all the lands not included in the deed of entail), and all the goods, gear, effects, and moveable subjects of every description, which he had destined, given, disponed, and conveyed to his grandson, the respondent. Archibald Fraser died in December 1815, and the respondent succeeded to the estate of Abertarff, and also as general disponee and residuary legatee to the whole fee-simple estates and executry which belonged to the deceased.

Various litigations arose between the appellant,