on behalf of Lachlan's estate was disallowed, but the debt upon the bill, as far as appears, is still unpaid.

It is said in excuse of all the deficiencies of evidence and the inconsistencies in the respondent's case, that he has lost his memory, and is unable to give the necessary explanations. But the fact of the alleged gift has been in controversy for many years. It was alleged generally soon after the mother's death. It was again insisted on in 1852, when the dispute took place with Miss M'Neill. It was raised again in 1854, when the disputes with the Stamp Office began, and has continued ever since. Law agents have been employed by the respondent during, at all events, a great part of this period. He has himself made several affidavits, and all the circumstances of the case, and the documents to prove them, must no doubt be in the possession of the agents, who could give the proper explanations, if any satisfactory explanation could be given.

If the evidence of Miss M'Neill be referred to, so far from proving the case of the respondent, it is quite inconsistent with it. His case is, that the money was the property of Mrs. Macneill in November 1838, and was then given to him by her for his own use, with no condition, restriction, or trust as to any part of it. Her testimony is, that several years before this date her mother told her, that she had made over all her property to the respondent, subject to the payment of £1300 to her, the witness. That this statement was made by the mother is strongly confirmed by the holograph letter in May 1838, under which the payment of this sum of £1300 has been awarded to her. That some arrangement was made by the mother with her sons with respect to this money for the benefit of the family is extremely probable. It is very likely, that the object was to defeat any claims of the revenue upon it at her death. What that arrangement was it is impossible to say; that it was such as the respondent alleges not only he has failed to prove, but all the facts and all the probabilities of the case, in my opinion, tend to disprove. I have no doubt, that the interlocutor must be reversed.

Interlocutors reversed, and interlocutor of Lord Ordinary affirmed.

Appellant's Agent, J. Timm, Somerset House.—*Respondent's Agents*, W. Sime, S.S.C.; Maitland and Graham, Westminster.

APRIL 20, 1866.

THE MAGISTRATES OF GLASGOW, and Others, *Appellants*, *v.* JAMES PATON, and Others, *Respondents.*

Church—Parish—Process of Disjunction—Special intimation to Heritors—7 and 8 Vict. c. 44, § 3—*The Statute 7 and 8 Vict. c.* 44, § 3, *provided, that in a process of disjunction of a parish the Lords of Session may appoint special intimation in such form and manner as the Lords should direct, to such heritors as should not have already consented or dissented, and may sist proceedings for a definite time to allow such heritors to state judicially their consent or dissent, and such of them as should not, within a time to be fixed by the Lords, to be specified in such intimation, judicially state their dissent, should be reckoned as consenting. An interlocutor under this section appointed intimation of the summons from the precentor's desk after forenoon service on Sunday, and in two newspapers, "to be made at least ten days before the process should be again moved in Court."*

HELD (reversing judgment), *That the interlocutor was void, because either it did not clearly express, that the time for expressing dissent was the same as that to which the process was sisted, or, if it did, then the period, to which the process was sisted, was not distinctly stated:* (LORD CHELMSFORD diss.)[1]

The defenders, the Magistrates of Glasgow, and the University of Glasgow, appealed to the House of Lords against the interlocutors, and in their *printed case* prayed for a reversal on the following grounds :—1. Because, having regard to the facts disclosed as the grounds of action, and to the conclusions of the summons founded thereon, the case should not have been dealt with as falling under the 3rd section of the Act 7 and 8 Vict. c. 44, but as under the 4th section of that Act, whereby the appellant heritors are not precluded from stating their dissents at any time, and are entitled to be reckoned as dissenting from, unless they have expressly consented to

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[1] See previous report 2 Macph. 1307 : 36 Sc. Jur. 654. S. C. 4 Macph. H. L. 26 : 38 Sc. Jur. 369.

the process ; and the intimation made in terms of the Statute 7 and 8 Vict. c. 44, cannot be held to have been given under any section of that Act not applicable to the facts of the case. 2. Because, even if the process can be competently proceeded with under the 3rd section of the Act 7 and 8 Vict. c. 44, the interlocutor of the Teind Court of 17th February 1865 is not conceived in terms to satisfy the requirements of that section, and does not satisfy them. 3. Because the intimation actually given was not special intimation in terms of the 3rd section of the Act 7 and 8 Vict. c. 44, either in respect of the persons to whom it was addressed, or the form and manner in which it was made on the subject matter contained in it, and did not satisfy the requirements of that section. 4. Because the Court did not sist proceedings for a definite time in terms of the Act, and ten days from the date of the last intimation appointed by the said interlocutor of 17th February 1864, could not have expired when the case was moved in Court on 2nd March 1864. 5. Because no time had been fixed by the Lords of Council and Session, and specified in any intimation to the appellant heritors, within which they must judicially state their dissents, or be reckoned as consenting. 6. Because, whether the proceedings be regarded as falling under the 3rd or under the 4th section of the Act 7 and 8 Vict. c. 44, the requirements of neither the one nor the other of these sections of the Act have been complied with, and the appellant heritors are entitled to have their dissents received or given effect to in the process. 7. Because the action cannot proceed, in respect that the appellants, the University of Glasgow, sole titulars of the teinds of the parish of Govan, have not consented to, but, on the contrary, have dissented from, the action.

The respondents in their *printed case* submitted that the judgment should be affirmed for the following reasons :—1. Because the interlocutor of 17th February 1864, appointing intimation of the process, was a valid and sufficient order in terms of the Statute 7 and 8 Vict. c. 44, § 3. 2. Because the said order was fully and in all respects complied with by the respondents. 3. Because the intimation was a reasonable and sufficient intimation of the process to the parties to whom it was addressed. 4. Because, assuming that intimation was validly and in terms of the Statute ordered by the said interlocutor of 17th February 1864, and that the said interlocutor was complied with by the respondents, the interlocutor complained of in the present appeal followed as a matter of course, and was properly pronounced by the Court below.

The Lord Advocate (Moncreiff), and *Sir H. Cairns* Q.C., for the appellants.

The Attorney General (Palmer), *Mr. Jessell* Q.C., and *Mr. S. Will*, for the respondents.

The arguments turned entirely on the construction of the Statute, and whether the interlocutor sufficiently complied therewith.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, this was an action brought in the Court of Session, the object of which action was to obtain a division of the parish of Govan, and to have the church of Partick made the church of one portion of the new parish.

Until the year 1844, division of parishes could only be effected under the provisions of a Scotch Act of 1707, and by that Act the previous consent of three fourths of the heritors was necessary. But that law was altered in the year 1844, by the 7 and 8 Vict. c. 44. Section 11 of that Act repeals the necessity for the consent of three fourths of the heritors.

The present question turns on the 3rd section, which is in the following terms :—"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 said recited Act, as altered and amended by this Act, that the consent of the heritors of a major part of the valuation of the parish, to be disjoined or divided, had not been given previous to such process having been 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 said Lords of Council and Session, and to be specified in such intimation as aforesaid, judicially state their dissent, shall, in computing the statutory proportion of consents, be reckoned as consenting heritors."

This action was raised by several gentlemen, who describe themselves as managers and trustees of the church or chapel of ease known as Partick Church. Partick is in the parish of Govan ; and the summons, after setting out the two Statutes to which I have referred, and after stating various reasons why the parish of Govan ought to be divided into two parishes, concludes that the lands forming the district of Partick ought, by decree of the Lords of Session, as Commissioners of Teinds, to be separated from the parish of Govan and erected into a separate parish to be called the parish of Partick, and that consequential directions ought to be made.

The University of Glasgow is the sole titular of the teinds of the parish of Govan, and, in that character, was made a party and defender to the summons.

The cause was duly proceeded with, but it is for the present purpose only necessary to refer to the second plea in law put in by the University of Glasgow. "Even supposing the pursuers to have a good title to sue, they 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."

In this state of the record, the Court, on the 17th February 1864, pronounced the following interlocutor:—"The Lords, in terms of the Statute 7 and 8 Vict. c. 44, appoint intimation of the conclusions of the summons to be made once from the precentor's desk of the parish church of Govan, and of the church or chapel of Partick, within the said parish respectively, immediately upon the blessing being pronounced after the forenoon service, on the Sunday, of which intimation certificate by the respective precentors shall be sufficient evidence: Appoint intimation in similar terms to be made, once in the *Edinburgh Gazette* and *North British Advertiser* newspapers, all which intimation to be made at least ten days before the process shall be again moved in Court; and further, appoint the pursuers to lodge with each of the Session clerks of the parish and church or chapel aforesaid, twenty copies of the printed summons for the use of such of the heritors or other parties interested as may apply for them: Upon motion for the University of Glasgow, allow the University to give in defences to the summons within ten days from this date."

Intimation was given in the mode required by the interlocutor, that is, by advertisement inserted in the *Edinburgh Gazette* of the 19th February 1864, and in the *North British Advertiser* of the 20th of the same month, and further, the intimation was, on the 21st of the same month, made from the precentor's desks in both the churches.

The intimation consisted of a notice of the pendency of the summons, the substance of which was fully stated, and then it set out *verbatim* the interlocutor of the 17th of February 1864, and concluded thus: "In terms of which interlocutor this intimation is now made. And intimation is hereby further given that in terms of the appointment therein, the pursuers have lodged printed copies of the said summons with each of the session clerks of the parish and church or chapel aforesaid, for the use of such heritors or other parties interested who may apply for them."

No dissents having been lodged on or before the 2nd of March, the Court on that day pronounced an interlocutor calling on the pursuers to lodge their condescendence, and the cause proceeded regularly.

On the 22nd June following the Magistrates of Glasgow and several other heritors moved the Court for leave to lodge a minute of dissent; but this was refused by the Court on the ground that no such dissent could be received after the 2nd of March. The Court held, that the interlocutor of the 17th of February 1864, which was embodied in the intimation, sufficiently indicated to the heritors, that they must lodge their dissents within ten days from the day when the last intimation was made, which was on the 21st of February. If the Court was right in its construction of the interlocutor, it was also right in rejecting the minute of dissent. But the Magistrates of Glasgow contend, that they presented their minute of dissent in proper time, and that it ought to have been received. They have therefore appealed to your Lordships' House against the interlocutor rejecting the minute of dissent, and the sole question now to be decided is, whether it was rightly rejected?

This turns entirely on the third section of the Act of 1844. I have already called your Lordships' attention to the terms of that section, and I need not repeat them. It is sufficient to say, that the Court is thereby authorized to proceed without the previous consent of the heritors required by the old Statute. It is sufficient if the consent of a majority of them is obtained after due intimation to them of the action.

The sole question is, whether in this case the heritors had such an intimation as the Statute requires. I think they had not. The Statute enacts, that such of the heritors as shall not, within a time to be fixed by the Court, and to be specified in the intimation, judicially state their dissent, shall, for certain purposes, be taken to consent. I will assume, that intimation of the pendency of the process was made to all the heritors, but I cannot discover, that the intimation specified the time within which they were bound to express their dissent. It is certain, that no such time was expressly fixed in terms. But it is said, that the time is discoverable by necessary implication from what is stated on the face of the intimation. The intimation sets out *verbatim* the interlocutor of the Court. That interlocutor directs the intimation to be made by being once inserted in two specified newspapers, and by being once made from the precentors' desks in two churches, and it further directs, that these intimations shall all be made at least ten days before the process shall again be moved in Court. This, I must remark, is a strange way of sisting process; but I suppose it may be taken to mean, that process shall be sisted for at least ten days after the last of the three intimations shall have been made.

I confess I do not think this is a compliance with the Statute, which requires the Court to sist process for a definite time. By definite time is evidently meant a time fixed by the Court; and I can discover no such defining in this interlocutor. Nothing as to the time during which the sisting is to endure can be discovered on the face of the interlocutor; it can only be ascertained

by reference to extraneous circumstances, namely, the dates of the intimations, and then nothing can be ascertained except the minimum of time during which the sist is to last. The maximum is left altogether uncertain. It is not inconsistent with the interlocutor, that the sist should endure for six months, or for any other length of time.

I am aware, however, that it is not on that interlocutor that your Lordships are in form called on to decide, but in substance the whole case depends upon it. The interlocutor complained of and now under appeal refused to admit the minute of dissent of the appellants tendered in June, on the ground, that the intimation of the process had been duly made to them from which the appellants must or ought to have discovered, that the Court had fixed the 2d of March as the time within which dissent must be judicially stated. To this I cannot agree. I doubt whether the requirements of the Statute were fulfilled by an interlocutor not itself stating the time during which the sist was to endure, but leaving it to be discovered by extraneous circumstances not necessarily known to the heritors. I further doubt, whether the heritors were bound to understand, that the time of the sist and the time allowed them for signifying their assent were necessarily the same. But, even if both these doubts are unfounded, I am of opinion, that the intimation did not directly or by implication state the maximum, even if it ought to be considered as having stated the minimum of time during which the sist was to last. And so that, even if the duration of the sist and the time for signifying dissent were to be considered as the same, there was nothing to indicate to the heritors, that they were out of the time when they moved, on the 22d of June 1864, for leave to lodge a minute of dissent.

I am therefore of opinion, that the interlocutor of the 6th of July, whereby the Lords of Session refused to allow the minute of dissent, was wrong, and I therefore shall move your Lordships, that it be reversed.

LORD CHELMSFORD.—My Lords, I have the misfortune to differ on this case from my noble and learned friend on the woolsack, and also, I believe, from my noble and learned friend who will follow me. I think, that the interlocutor appealed from ought to be affirmed.

Upon the interlocutor the only question which arises is, whether the Lords of the Council and Session had complied with the provisions of the 7 and 8 Vict. c. 44, in appointing intimation to the heritors of the parish of Govan of a process of disjunction and erection of the parish, and in sisting proceedings on such process for a definite time. The 3d section of the Act enacts, that it shall be lawful for the Lords of Council and Session before whom any process of disjoining or dividing a parish 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.

Upon the process in question, the Lords, on the 17th February 1861, made the interlocutor already quoted. In pursuance of this interlocutor intimation was made from the precentors' desks on the 18th February, and was inserted in the Edinburgh Gazette and the North British Advertiser of the 19th and 20th February respectively. The intimation, after reciting fully the conclusions of the summons of designation and erection, set out the interlocutor of the 17th February *verbatim*, and intimated that, in terms of the appointment therein, the pursuers had lodged printed copies of the summons with each of the session clerks of the parish of Govan and Church or Chapel of Partick, for the use of such of the heritors, or other parties interested, as might apply for them.

It is objected, that this interlocutor does not comply with the requisitions of the Act of Parliament, that it is not a special intimation to such of the heritors of the valuation of the parish as should not have given their consent or stated their dissent; that the proceedings were not sisted for a definite time, and that a definite time was not fixed within which the assent or dissent of the heritors was to be signified.

It appears to me, that none of these objections to the interlocutor ought to prevail.

It must be observed, in the first place, that the form and manner in which the intimation is to be made is left by the Act of Parliament to the direction of the Lords of Council and Session. The manner of promulgation prescribed by them is quite unobjectionable. Intimation from the precentor's desk is one of the ordinary modes of giving notice to the heritors of a parish of any matters in which they are interested, and even if it were not, it was competent to the Teind Court to direct that sort of notification to be given, and their interlocutor in this respect, and also as to the newspapers in which publication was ordered to be made, cannot be questioned. With respect to the form of the intimation, it certainly might have been more precise, and more clearly explanatory of its object; but it is in the form which has been in use since the passing of the Act of 7 and 8 Vict. c. 44, and it appears to me (although open to criticism) to be a sufficient compliance with its provisions.

By the words "special intimation" in the Act, I do not understand an intimation to be given specially, and not generally to the heritors. The words are, "it shall be lawful for the Lords of Council and Session before whom any such process is brought, to appoint special intimation

thereof"—that is, of the process. And the intimation of the conclusions of the summons appointed by the interlocutor and made accordingly, was in my opinion sufficiently special intimation of the process to satisfy the requisitions of the Act.

It appears to me also, that the time during which the proceedings were to be sisted is intimated with sufficient certainty, by stating, that "all the intimations are to be made at least ten days before the process is to be again moved in Court." There was no difficulty in ascertaining the time from which the ten days were to be computed, nor any uncertainty occasioned by one of the newspapers having what was called two days' circulation; nor from the different periods at which the intimation would be known to heritors living at a distance. The intimation must be taken to have been made in each instance from the time of the first publication in the newspapers, and it is immaterial when it reached the heritors, or whether it ever reached them at all.

It was contended, however, that even if distinct notice were given of the time during which the proceedings would be sisted, there was no definite time fixed, within which the heritors were required to state their consent or dissent. And it is upon this ground, that the opinion of my two noble and learned friends in favour of the appellants proceeds. It certainly would have been better if this had been intimated more distinctly and precisely. But the only object of the Legislature in the provisions of the third section of the Act was, that the heritors should have an opportunity afforded them of expressing their opinion upon the process for disjoining or dividing a parish by sisting the proceedings for a definite time, and giving intimation to them in such manner and form as the Lords of Council and Session should direct. When the intimation, therefore, of the pending process was made to them, and they were further informed, that proceedings had been sisted for a specified time, they must have known perfectly well, that this was done, in the words of the Act, "for the purpose of allowing them to state judicially their consent or dissent." And it was scarcely possible for them to be ignorant, that the "definite time" during which the process was not again to be moved in Court, and the "time fixed" within which they were "judicially to state their dissent," was one and the same.

Upon these grounds I am of opinion, that the interlocutor appealed from was right, and that it ought to be affirmed.

LORD KINGSDOWN.—My Lords, it is not without regret, that I find myself compelled to yield to the objections which have been taken to the sufficiency of this intimation.

The Act of Parliament gives to a majority of the heritors the power of interposing summarily, and of staying, by the simple expression of their dissent, any process for disjoining a parish in which their property lies. In order to afford them an opportunity of expressing their assent or dissent, the Statute provides, that a special intimation shall be made to those who have not already declared their opinion. The Lords of Session are to direct the form and manner in which this intimation is to be made, and they are 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 Session, and to be specified in such intimation as aforesaid, judicially state their dissent, shall, in computing the statutory proportion of consent, be reckoned as consenting heritors. Much no doubt is left to the discretion of the Court with respect to the intimation, and the manner and form in which it is to be made, but the Statute seems to me to have required positively two things—First, that the process shall be sisted for a definite time; and secondly, that the Court shall, and that the intimation shall, specify a time, within which dissenting heritors shall judicially express their dissent.

The periods, to which the process is to be sisted, and within which the dissents are to be expressed, may be the same or may be different, as the Lords may think most convenient; but I think, that the heritor has a right to know from the intimation itself what the period is within which he must come or be excluded. It is said, that, at all events, he must know, that he cannot come in after the period to which the process is sisted. Supposing that to be so, he cannot tell whether he had the whole of that period allowed him. It might well be, that the process should be sisted for four weeks, and that only four weeks should be allowed for the expression of assent or dissent. But here there is the further difficulty, that the process is not sisted for a definite period—that is to say, as I understand the words, for a period so defined, that the heritor can tell by the intimation when it will end. In this case the process is sisted for a period of ten days, beginning from a time which is quite uncertain, viz. from the time at which the last of four several notices—two in churches, and two in newspapers—shall have been given. How are the heritors residing possibly at a distance to ascertain when notices have been given in a church?

It appears to me, therefore, that, in the first place, the intimation does not clearly express, that the time to which the expression of dissent is limited is the same with the period to which the process is sisted; and that if it did, the period to which the process is sisted is not distinctly stated in the intimation, and that, therefore, the positive requisitions of the Statute are not complied with. In spite, therefore, of my reluctance to overrule the decision of the great majority of the Judges below, on the ground of an irregularity in a matter of form, by which it is difficult to

believe, that any of the heritors have been really prejudiced, I do not feel it possible to support the judgment below.

Lord Advocate.—My Lords, with regard to the form of judgment, I presume, that your Lordships will reverse the interlocutor, and remit the cause to the Court of Session, with instructions to receive the minute tendered on behalf of the appellants.

LORD CHANCELLOR.—If the interlocutor be reversed, all the rest will follow.

Lord Advocate.—Not necessarily.

LORD CHANCELLOR.—The case will be remitted to the Court of Session for consequential proceedings.

Lord Advocate.—That is enough. There is a decerniture for costs. I believe the ordinary form now is, that the costs, if paid, should be repaid to the appellants.

LORD CHANCELLOR.—Just so.

Interlocutors reversed, and cause remitted, with directions.

Appellants' Agents, R. B. Maconochie, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, Jollie, Strong, and Henry, W.S.; W. and H. P. Sharp, London.

APRIL 26, 1866.

THOMAS ALEXANDER LORD LOVAT and Others, *Appellants*, *v.* ARCHIBALD THOMAS FREDERICK FRASER, Esq. of Abertarf, *Respondent; et è contra.*

Entail—Estate subject to just debts—Costs of defending estate—Heir and Executor—*A, by deed of entail, disponed lands to F and certain heirs of entail "under burden of all my just and lawful debts, due and addebted at my death, which said debts shall noways diminish my executry or other funds, property, or effects." Various parties after A's death made demands and raised actions against F, as executor, which were decided by the Court to be unfounded, and F, in resisting such demands, incurred expenses amounting to £2791.*

HELD (by LORDS CRANWORTH L.C. and CHELMSFORD—*dissentiente* LORD KINGSDOWN, partly reversing judgment), *That F was not entitled to recover such expenses against the estate which had been burdened with A's debts, because such expenses were costs incurred in the administration of the personal estate, and were not debts due by A at his death.*

HELD FURTHER, *That it made no difference whether those expenses were properly incurred or not, nor whether for the benefit of the estate or not.*

Appeal—Competency—Interlocutor of Lord Ordinary not reclaimed—*Where an interlocutor of the Lord Ordinary is acquiesced in or not reclaimed against, to the Inner House, no appeal lies to the House of Lords against it.*[1]

The pursuer succeeded to the estate of Abertarff in Inverness-shire, under deeds of entail executed by his grandfather the Hon. Archibald Fraser of Lovat, who was fee simple proprietor of these estates. The pursuer was also his grandfather's residuary legatee and general disponee.

After the Hon. Archibald Fraser's death, certain claims were made by his creditors against the present pursuer as representing him. Some of these claims were admitted, and others were resisted, by the pursuer, who, after litigation, succeeded in considerably reducing them. The sums for which he was found liable, and those which he did not resist, amounted in all to £6186 0*s.* 7½*d.*, which he paid, taking assignations from the creditors.

The present action was raised by Mr. Fraser of Abertarff, as executor of his grandfather Archibald Fraser, and directed against himself as heir of entail in possession of the entailed estate of Abertarff, and against Lord Lovat and others as the heirs substitute of entail, for the purpose of having it declared, that the sums thus paid by the pursuer were the proper debts of the Hon. Archibald Fraser; and that, under the provisions of his settlement, they, and the expenses incurred in the litigations in reference to them, formed burdens on the entailed estate of Abertarff. An interlocutor was pronounced by Lord Handyside on 20th November 1855, finding, that the debts in question formed burdens on the entailed estate, but that the entailed estate was not liable in payment of the expenses of the litigations in which these debts had been constituted. This interlocutor, in so far as it dealt with the debts, was adhered to in the Inner

[1] See previous report 16 D. 645; 21 D. 1154; 31 Sc. Jur. 656. S. C. L. R. 1 Sc. Ap. 24; 4 Macph. H. L. 32: 38 Sc. Jur. 372.