FOREWORD

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AND
SHERIFF COURT RECORD

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AND

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AND

SHERIFF COURT RECORD.

GLASGOW, NOVEMBER, 1858.

ENGLISH AMENDMENTS OF SCOTCH LAW.

The Mercantile Law Amendment Act (Scotland), 1856, proceeds upon this preamble:—"Whereas inconvenience is felt by persons engaged in trade by reason of the Laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience, it is expedient to amend the law of Scotland as hereinafter is mentioned."

This is too frequently the language of some law reformers. They do not say that the law of Scotland is defective, or that its principles are unequitable and unsound. It may be the "collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns;" but assuming that it is, "Persons engaged in trade," who have become familiar with the principles of another system of jurisprudence, feel some "inconvenience" when their claims are tried and determined by the rules of Scotch law, and therefore it is expedient that these rules be altered, or more correctly, abolished. No doubt the existence of different legal principles in various parts of the same kingdom—more especially where they form a portion of the Law merchant—cannot fail to produce loss and inconvenience to some members of the community. This has been long acknowledged; and for years past Chambers of Commerce, Societies for the Amendment of Law, and other associations, have called for the assimilation of English and Scotch law. And if assimilation means the combining of what is good and the rejection of what is useless or worse in both, so that there may be produced a system more harmonious and complete than that which either country now possesses, then let the assimilation of the laws proceed. If, however, instead of this, a remedy for the evil is sought in the importation into the one of isolated principles taken from the other at the bidding of those who live under the latter, the cure will only aggravate the disease. The traders of England are numerically greater than the traders of Scotland, and if it is expedient that our law should be amended so as to remove the "inconvenience" which its peculiar principles cause to those who are supposed to understand the rules of another system, the course to be followed is clear and open,—that "inconvenience" must be the measure of law reform—must determine what it shall be, where it is to begin, and where to end.

Judging by what has been already done in this way, the law of Scotland—which, however imperfect, is still a system—will soon be so disjointed and deformed, that instead of harmonising in its various parts, it will be a mere piece of patchwork—a disgrace to the science of jurisprudence—a thing to be swept out of sight for ever. Better at once to adopt the laws of England and of Ireland in their entirety. In that case the student will have a science to master, and the community will by degrees adjust their contracts, and peril their interests under a coherent body of law. As it is now, certain "persons engaged in "trade" in England or Ireland complain that some principle of Scotch law "inconveniences" them, and as a necessary consequence, English lawyers, who know little, and sometimes boast that they know nothing of Scotch law, propose to remove the inconvenience by substituting the principles of their own law, for principles which are so interwoven with our system, that they cannot be destroyed without more or less injuring what remains. Scotch lawyers, whose duty it peculiarly is to watch the effect of such proposals when embodied in a bill, too often carelessly assume, that a diversity of definition constitutes a substantial difference, which may be removed by the simple process of blotting out the one, to make room for the other. Strange as it may sound, the result of this is not always to assimilate, but in some instances to make the laws of the two countries more unlike than they were. The Act, the preamble of which has been quoted, affords a striking illustration of this. Before it became law, a seller in Scotland was not by the contract divested of the property of the goods sold—that could not be trans-

ferred to the buyer without delivery. Delivery is not now essential; the property of the goods sold, if these be specific, and nothing remains to be done by the seller as such, is passed to the purchaser by the contract. The right to possess may remain with the seller, and he may be entitled to maintain it under various circumstances, and until certain conditions are fulfilled. With that right it is not necessary to deal. The destruction of the distinction already stated, which obtained between the laws of England and Scotland, is enough for our present purpose. That distinction has been described by writers on English law as one merely of "definition," and as of "no great practical importance, because in England "the buyer acquired no right to possession till he had "paid the price."* In this there is no consideration of the rights and interests of those who might come to be interested in the estates of the parties to the contract of sale; because, as will be seen, these were cared for, although, perhaps, not with equal effect, in both systems. In Scotland, while possession was retained by the seller, the contract gave the buyer no right as to the goods, but to demand delivery; and the creditors of the former might, before that had been obtained, attach these as the property of their debtor. Possession presumed property; and ostensible ownership was a sufficient assurance to those who gave credit in the belief that the party with whom they were dealing was the owner of what he possessed and used. By this Mercantile Law Amendment Act, it is enacted,—sect. 1, "That where goods "have been sold, but the same have not been de- "livered to the purchaser, and have been allowed to "remain in the custody of the seller, it shall not be "competent for any creditor of such seller, after the "date of such sale, to attach such goods as belonging "to the seller, by any diligence or process of law, "including sequestration, to the effect of preventing "the purchaser, or others in his right, from enforcing "delivery of the same; and the right of the pur- "chaser to demand delivery of such goods shall, from "and after the date of such sale, be attachable by, "or transferable to, the creditors of the purchaser." Possession, therefore, is now of little value as indicating or presuming the ownership of goods. Under this enactment, a man may sell his household furniture and his whole stock-in-trade, and yet retain the possession, and thereby obtain credit on the faith of an appearance, which is only kept up to deceive and defraud. So soon as some creditor adopts proceedings, and endeavours to attach these goods, the buyer may come forward and claim as his what he had purchased, but not removed. No doubt, if it should be shown that the sale was a mere pretence—that no price was paid, or that if paid, it had been returned, his attempt to interfere would be unsuccessful. But the difficulty of instructing such facts is, or may in most cases be made, almost insuperable, so that for one instance of detection, there will be ten where such a scheme has been so adroitly devised and cunningly carried out, that it will be crowned with success. As the law of Scotland now stands, there is no security against such devices; but it is not so in the law of England. By the Statute of Frauds, it is provided that "No contract for the sale of any goods, "wares, and merchandises, for the price of £10 or "upwards, shall be allowed to be good, except the "buyer shall accept part of the goods so sold, and "actually receive the same, or give something in "earnest to bind the bargain, or in part of payment, "or that some note or memorandum in writing of "the said bargain be made and signed by the parties "to be charged by such contract, or their agents "thereunto lawfully authorised." Although it is under this provision quite permissible to complete a contract of sale by parole; yet in cases where the thing sold is of some importance, as, "where the "vendor wishes to convey his entire property to the "vendee," a bill of sale is usually executed;* and any other mode of carrying out such a transaction, where it is not intended that the vendee should take possession, could not easily be followed under the provisions above quoted. Fortunately it happens that it is just in cases where a party disposes of his whole property that it is most frequently found to be the main object of the transaction to defeat the claims of creditors. But a very palpable remedy presents itself when such a transaction is embodied in a deed; and we find accordingly that, by the Statute 17 & 18 Vict. cap. 36, it is provided that all such bills of sale made in England must be filed or registered within twenty-one days after execution, otherwise the holder cannot compete with the seller's creditors. The preamble of the Act is somewhat instructive: "Whereas frauds are frequently "committed upon creditors by secret bills of sale of "personal chattels, whereby persons are enabled to "keep up the appearance of being in good circum- "stances and possessed of property." The same fact had been known and provided for in England long before the passing of this Act. In the reigns of Elizabeth, James I. and Geo. IV., enactments had been passed to prevent the effect of the principle of the law of sale on the rights of creditors who had trusted to the reputed ownership of goods which they saw in the possession of their debtors.

In the Bankrupt Law Consolidation Act of 1849,

* Tayler's Differences of the Law of Contract in England and Scotland, p. 86.

* Smith's Mercantile Law, p. 434.

there is a like provision. By sect. 125 it is enacted, "That if any bankrupt, at the time he becomes "bankrupt, shall, by the consent and permission of "the true owner thereof, have in his possession, "order, or disposition, any goods or chattels whereof "he was reputed owner, or whereof he had taken "upon him the sale, alteration, or disposition as "owner, the Court shall have power to order the "same to be sold and disposed of for the benefit of "the creditors under the bankruptcy."

With such safeguards against fraudulent and concealed contracts of sale, the law of England was little less favourable to the interests of the seller's creditors than the pure and simple rule of Scotch law. The difference between the two was, as has been already said, one principally of definition, and "of no great practical importance." It is, however, very different now. This bill to assimilate the laws of England and Scotland has done the very opposite. The difference is no longer one of definition—in that particular both are the same; but in "practical importance," that definition has a very different signification in the two countries. With us it is not subject to the exceptions and provisions which modify its effect in England; and the interests of creditors are exposed to the full influence of a principle which has again and again been modified by the express legislative enactments of the country from which it has been imported. So much for the principle and the method of some of the recent changes speciously called measures of assimilation.

MASTER AND SERVANT.

REIDS *v.* BARTONSHILL COAL COMPANY.
M'GUIRE *v.* BARTONSHILL COAL COY.*

WE are induced to devote a portion of our space to some consideration of the judgments in these cases, for two reasons—*First*, on account of the influence they are obviously calculated to exercise, directly and indirectly, upon an important department of our law; and, *second*, because of the special necessity that arises, for their practical bearings being fully and correctly understood amongst our brethren practising in the Sheriff Courts, more especially in the Courts of Lanarkshire, where so many causes arise out of coal-pit, and similar, accidents. We believe we are not far beyond the mark when we say that one-half of all the actions of damages tried in the Scottish Courts, on account of injuries to workmen, occur in the Courts of the Middle and Lower Wards of this county.

* English Jurist of 28th August, 1858. Journal of Jurisprudence, July, 1858.

Before noticing the particular circumstances of the two cases referred to, we may endeavour to state, in a general way, what was previously understood to be the law of Scotland, as regards the liability of masters, for reparation of injuries sustained by persons in their employment. If injury arose from any cause imputable to the employer, directly, there could be no doubt at all about his responsibility for the consequences. If, personally, he either did something which he should not, or omitted to do something which he should, have done, there was *culpa*, and hence liability. If, again, the injury arose from defective machinery, the liability depended upon whether the defect was patent or latent. If it was patent—such a defect as a person of ordinary skill and carefulness should have detected—the master was held to be liable. If it was latent—a hidden defect, which ordinary skill and care could not be supposed to detect—the master was not liable. He was not held to warrant the sufficiency of the machinery, under all circumstances; but was considered to satisfy the obligation incumbent upon him, by the exercise of ordinary skill and care. In this case, also, *culpa* was evidently the foundation of the master's responsibility.

As to injuries arising from want of skill, carelessness, or recklessness, on the part of other servants, these were divided into two classes,—injuries caused by fellow-workmen, *collaborateurs*, strictly speaking; and those caused by persons standing in some sort of representative position between the master and the person injured. A great deal has been said and written on this subject of fellow-workmen, as if there had been room for supposing that the law of Scotland countenanced the doctrine, that a master might be subjected in damages for injury caused by one servant to another, even if the two were upon precisely the same footing—for example, two colliers working in the same pit. For this, however, we believe there never was any ground whatever. The supposition that a coalmaster was to be liable for the want of skill, carelessness, or recklessness, of every individual of the thousand coal-hewers working in his pits, was too extravagant ever to have been entertained.

But the case was considered to be essentially different where the person in fault was entrusted with some special duty, upon which the safety of the other workmen depended, and upon the due performance of which they were entitled to rely. Keeping to the particular instance of a coal-pit, the individuals supposed to occupy such intermediate positions might be enumerated as follows:—Where the employer did not superintend personally, there were the general manager, having the control of the entire operations, and the underground manager, having

charge of all matters below. There were the firemen, whose duty it was to examine the roads and working places, so as to ascertain that these were free from fire-damp. There were the roadsmen (or reddsmen), having charge of the roads through which the colliers and drawers required to pass, in order to secure that the roofs, etc. were in proper condition. There was also the bottomer, or person in attendance at the pit-bottom, to give necessary signals, and otherwise regulate the ascent and descent of the workmen. And there was the engineman, or skilled person in charge of the engine at the pit-head, used for pumping, and for lowering and bringing up materials and coals, and the workmen themselves. All these were viewed in the light of officials, selected by the employer, with reference to their supposed experience, intelligence, and fitness otherwise, for the performance of certain duties, upon the performance of which the lives of the general workmen depended. Whatever might be said in favour of another view of the matter, there were obvious reasons for the distinction so made, and it was held that the master was responsible for evil arising out of the incapacity, misconduct, or neglect, of such officials.

So matters stood at the time when the two cases of Reids and M'Guire came before the Supreme Court of Scotland. Indeed, it may be said that so matters continued, notwithstanding the appeals taken in these cases, until the judgments lately pronounced. In the interval, numerous accidents occurred, where damages were paid and awarded, under the rule that a master was liable for the conduct of persons holding positions such as have just been described. The most notable instances were those of Lennaghan, and Callaghan, against the Monkland Iron Company. Our readers will no doubt recollect the general features of these cases. Two men were employed driving a mine. An explosion of fire-damp took place during the evening. The men were considerably injured, but might, notwithstanding, have survived had they been promptly removed from the pit. They were not removed for several hours, and after being taken up they died. Two points were raised: *first*, that blame attached to the masters, in regard to the ventilation of the mine; and, *second*, that at all events, the men's deaths had become unavoidable from their being left so long in the pit, which was imputable to the fault of the engineman, in having failed or neglected to answer the signals, and raise the cage. The cases were tried twice, when verdicts were given against the masters, principally on the ground of the engineman's supposed misconduct, though it appeared in evidence that he was a man of good character and great experience. Heavy damages and expenses were awarded in these cases, but so satisfied were the eminent counsel for the defenders, as to the state of the law of Scotland, that no legal exception was attempted. We refer to these instances, as showing clearly what was the general impression, previous to the late judgments in the House of Lords.

Let us now turn to the state of the facts in the cases of Reids and M'Guire. The men killed were colliers, in the employment of the Bartonshill Coal Company, at a pit wrought in the usual way by a steam engine. That engine was in charge of a person named Shearer, and was used, among other purposes, for lowering the men to, and bringing them up from, their work. On the 17th of September, 1853, on the occasion of these two workmen being brought up the pit, in a cage, Shearer, after putting the engine in motion, neglected to stop it when the cage reached the pit-head, in consequence of which the cage was carried up to the pulleys, and there overturned, the men precipitated to the ground, and killed. It was specially averred that the accident "was occasioned "by the neglect or carelessness of the defenders' en-"gineman." About this there was no dispute between the parties.

The pursuers further alleged that, upon the night previous to the occurrence, Shearer had been at some entertainment, where he had been drinking, and that, at the time of the accident, he was unfit for duty. Something was also said regarding the nature of the engine and machinery; but there having been apparently no foundation, in fact, for these statements, they were not pressed at the debate on the relevancy, they were not embodied in the issues, and no proof was attempted to be led in support of them at the trial. Upon the closed record, it was objected that there was no relevant case stated to subject the defenders in damages, in respect they "could not in "law be made responsible for injuries sustained by "one of their workmen, through the fault of his "fellow-workman, engaged in the same common "employment, it not being alleged that the latter "was an unfit or improper person for such employ-"ment." In the case of Reid (M'Guire's case meantime lying over by arrangement), the Lord Ordinary repelled the defenders' plea, and the cause went to trial, under the following issues:—

"It being admitted that the pursuers are the law-"ful wife and children of the deceased William Reid, "Whether the defenders were, in the month of Sep-"tember, 1853, in the occupation, as proprietors or "lessees, of the coal-pit in question? and Whether, "on or about the 17th of September, the said de-"ceased William Reid, while in the employment of "the defenders in the said pit, received severe and "mortal injuries, through the fault of the defenders, "*in the management of the machinery for lowering and* "*raising the colliers at said pit*, in consequence of

"which he died, to the loss, injury, and damage of "the pursuers?"

The evidence at the trial was in conformity with the statements on the record, which had been sustained as relevant. But, on the other hand, it appeared that the engineman Shearer was a sober, steady, and experienced man, so that his neglect on the occasion in question was an exception to his general conduct, not in any way accounted for.

In these circumstances, the Lord President (M'Neill) "directed the Jury that, if they were satisfied on the "evidence that the injury was caused by culpable "negligence and fault on the part of Shearer in the "management of the machinery, the defenders were "in law answerable." To this direction the defenders excepted, and asked a direction in the following terms:—"That, if the Jury are satisfied on the evi-"dence that the defenders used due and reasonable "diligence and care in the selection of Shearer as "engineman, and that he was fully qualified to per-"form the duties of engineman, and furnished with "proper machinery, then the defenders are not in "law answerable for the personal fault or negligence "of Shearer." The Lord President declined to give this direction, and an exception was taken. A verdict was then given for the pursuers.

The bill of exceptions was argued before the Judges of the First Division,* the Lord President, Lords Ivory, Curriehill, and Deas, who all concurred in holding that, by the "settled law of Scotland," a master was liable for the culpable neglect of a person in the position of Shearer the engineman, and disallowed the exception accordingly. The point being one of very great general importance, not merely to the defenders in the particular cause, but to all employers similarly situated, an appeal was taken, which has resulted in a reversal of the judgment of the Court of Session. The same course was followed in the case of M'Guire.

It is now, therefore, to be held as fixed law, not merely that a master is not liable for injury occasioned by the fault of a fellow-servant, but that this term, "fellow-servant," or *collaborateur*, covers all such persons as we have already referred to, as performing special duties in a coal-pit, with the exception, it may be, of a manager. This exception was not made in express terms; and we shall return to the point by and by. In the meantime, not only do the judgments in question establish a new general rule, but they indicate certain important things to be kept in view, in every-day practice. Obviously, it will no longer do, in a summons or record, to set forth simply that a defender is liable in damages, for injuries sustained by a workman, occasioned by "the "fault or negligence of the defender, *or* some one re-"presenting him, or for whom he is responsible." To make a relevant libel, it will be necessary to disclose, whether the *culpa* relied upon be that of the master personally, or of an alleged representative; and, in the latter case, to name and describe that representative, in order that it may be seen whether he really stands in such a position, or is to be considered merely as a fellow-workman. Without these particulars, the defender is plainly not in a position to state a defence, much less go to trial. It seems also a necessary inference, that a pursuer, in many cases, must go farther, and set forth that the engineer, fireman, roadsman, or other official, was a person not qualified for the duties of his situation, and blameably selected by the master. In the cases of Reids and M'Guire, the character and qualifications of the engineman were the subject of evidence at the trial. This arose under the counter averments made by the defenders. But it seems necessarily to follow, if in the general case there is no liability, and if such liability arises only when there exist the elements of unfitness in the servant, and neglect or carelessness in the selection by the master, that these elements must be introduced as an essential part of the case for the pursuers, which he undertakes to prove.

As this is a practical point of material consequence, a short reference may be made to those portions of the Judges' opinions that bear upon it. And, in order fully to understand the remarks about to be quoted, it is necessary to explain the particular position of the appeal in the case of M'Guire. As already indicated, parties had agreed that this case should be regulated by what took place in the case of Reid. When, therefore, the Lord Ordinary repelled the defenders' plea of want of relevancy, in the one case, the same interlocutor was repeated in the other, *pro forma*. So, also, when a verdict was given in the one case, a similar verdict was taken in the other; and, when the Bill of Exceptions in the case of Reids was disposed of, both verdicts were applied. When parties came before the Appeal Court, an objection was made by the counsel for M'Guire, that the appeal was incompetent, because it had not been taken within a certain limited period, after the judgment on the Bill of Exceptions, as provided for by statute. To this it was answered that, in point of fact, the agreement between the parties regulated the whole subsequent procedure, including an appeal; but, however this might be, with reference to the interlocutor on the Bill of Exceptions, the appellants were entitled to bring up the interlocutor of the Lord Ordinary on the relevancy. It was then argued, that there having been, *ab initio*, no relevant case to go to the Jury, the whole subsequent procedure fell to the ground. It was after hearing this argument that the Judges gave their opinions in both cases.

* Dunlop, Rep. 3d July, 1858. Vol. 17, p. 1017.

Such being the position of matters, Lord Cranworth, in moving a reversal in the case of Reids, remarked—"The question for decision is, Whether if, in "the working of a mine, one of the servants employed "is killed or injured by the negligence of another "servant employed in the same common work, *that* "*other servant having been a competent workman, and* "*properly employed* to discharge the duties entrusted "to him, the common employer of both is respon-"sible to the servant who is injured, or to his repre-"sentatives, for the loss occasioned by the negligence "of the other? Where an injury is occasioned to "any one by the negligence of another, if the person "injured seeks to charge with its consequences any "person other than him who actually caused the "damage, it *lies on the person injured to show that* "*the circumstances were such as to make some other* "*person responsible.* In general, it is sufficient for "this purpose to show that the person whose neglect "cause the injury, was at the time acting, not on his "own account, but in the course of his employment, "as a servant in the business of a master, and that "the damage resulted from the servant so employed "not having conducted his master's business with "due care. In such a case the maxim '*respondeat* "*superior*' prevails, and the master is responsible." After giving certain illustrations, his Lordship adds, "But do the same principles apply to the case of a "workman injured by the want of care of a fellow-"workman, engaged together in the same work? I "think not."

The Lord Chancellor, in moving the reversal in the second case of M'Guire, put the matter in this way: "The questions to be decided are, first, Whether "James M'Guire, the deceased, and James Shearer "were fellow-labourers, engaged in one common "employment? and, secondly, if they were, Whether, "the death of M'Guire having been occasioned by "the carelessness of Shearer, in the course of this "employment, *without any proof of general incompe-*"*tency for his duties*, their mutual employers are "liable in damages for the event?"

The way in which the matter was thus put by these two noble Lords, makes it pretty evident that a pursuer must now set forth, and undertake to prove, at least, the "general incompetency" of the person in fault. The point under consideration, however, is more clearly brought out by the concluding portion of Lord Cranworth's address, where he says—"I am of opinion that the exception to the ruling of "the Lord President at the trial ought to have been "allowed, and consequently that the 3d and 4th "interlocutors appealed against ought to have been "reversed. I think, further, that the 1st and 2d "interlocutors appealed against ought to be reversed, "*on the ground that no relevant case is stated by the* "*pursuers.* The case, as made in the 6th article of "the Condescendence, attributes the accident entirely "to the neglect and carelessness of Shearer the "engineman, and as there is no statement in that "article that the appellants had *failed to exercise due* "*care in the selection of an engineman, or that they* "*had any reason for distrusting the competency or* "*carefulness of Shearer*, no case is there stated infer-"ring liability on their part to the pursuers."

It would thus appear that, in every case of the kind, a pursuer will require not merely to libel and prove general incompetency in the workman at fault, but also want of due care in his selection, or reason for distrusting his competency, on the part of the master.

With the explanations that have been thus given, no one can fail to see in how many important aspects the judgments referred to must go directly to modify our law and practice, in the department of Master and Servant. There may be differences of opinion as to the effect of the change, according to the preconceived views and feelings of parties. There are those who, sympathising with the workmen, may be inclined to agree with Lord Deas, when he remarked, with reference to the old rule, "It is pro-"bably wholesome that such should be the rule, for "it would be very difficult otherwise to insure, not "only that care in the selection by the master of his "representative, but likewise that constant watchful-"ness over, or attention to, the conduct of such re-"presentative, which is essential where the safety of "life is concerned." On the other hand, we believe that the judgments of the Court of Appeal have met with general approval, not only among employers, but among intelligent persons, free from prejudice, one way or the other. For ourselves, we are satisfied, from mature consideration of the whole question, that the rule now established does rest upon sound principle. But, while saying so, we are by no means satisfied that, either in England or Scotland, the principle has been fairly applied, and carried out to its legitimate conclusions. Neither are we satisfied with the process of reasoning occasionally exhibited in the opinions of the learned Lords, in the Court of Appeal. We are convinced, among other things, that if if the principle is fairly applied, liability can, in no case of the kind, rest upon any basis saving that of actual *culpa*. To this, and some other points, we would now request attention.

(To be concluded in No. II.)

THE TITLES TO LAND ACT.

After a careful perusal of this important statute, it is with much pleasure we find that there is in it so much to be praised and so little to call for unfavour-

able criticism. The whole career of the Lord Justice Clerk has been fortunate exceedingly; and amongst other subjects of gratulation, he may reflect with pleasure that, during his brief tenure of office as Lord Advocate, he had the opportunity, and did not neglect it, of associating his name with those of Rutherfurd and M'Neill in the reform of our system of conveyancing. Why amongst the numerous bills introduced by his predecessor, many of them of so little comparative importance, one was not dedicated to the service of the public in connection with this subject, of course we cannot say. But it seems to be very generally admitted that had it not been for the brief period of power of Lord Advocate Inglis, this excellent step in progressive legislation might have been postponed for an indefinite period. In so saying, however, we are not to be understood as meaning that the statute is perfect, or that it does not bear evident marks of the hurried, not to say slovenly, manner in which so many of our recent Scottish bills have been framed. On the contrary, it is undeniable that some imperfections do exist, owing, perhaps, in a great measure, to the rapidity with which the close of the session and the Lord Advocate's own peculiar position at the time, rendered it necessary that the measure should be passed. But still, after all deductions, enough remains and enough has been done so well, as to justify us in cordially congratulating its author and the public upon the passing of this wholesome statute.

Nor would it be doing justice to the members generally of the legal profession if we did not admit that the inauguration of the new system of conveyancing, with all its attendant advantages, is almost entirely owing to themselves. So great was the apathy or so complete was the bewilderment of the public when circumstances brought before them the mazy intricacies of conveyancing, that it would have been the easiest thing in the world to convince them that these intricacies were indispensable, and that without them the safety of landed rights was impossible. Such, indeed, we dare say, is the opinion even at this hour of many lawyers who, from early training and lengthened practice, are wedded to the ancient feudal forms, and this without their necessarily being biased by pecuniary considerations. But gradually, as years have advanced and the progress of commerce has rendered the transference of all other kinds of property frequent and rapid, the minds of the profession have become alive to the inexpediency—if not absurdity—of maintaining the cumbrous forms of a barbarous and obsolete order of things. And no sooner had this conviction time to ripen than it was given to the public on every occasion which offered itself, but especially in the evidence before the Royal Commissioners in 1838, and the men whose sources of income depended in a great measure upon the existing system of conveyancing, and who could not foretell what fatal influence upon that income any innovation might entail, were the first to state that the times required a change, and that, "*coute que coute*," the change should be effected. If the profession had taken a different course—had its members regarded only what appeared to be their own advantage—had they, in short, said to the public, "True, there are inconveniences attending the present system, but touch it, nevertheless, at your peril, for the results may be disastrous," that system would have remained intact, and the statutes of the last thirteen years relating to conveyancing would never have been passed. But to their credit be it spoken—and it is only fitting that the tribute should be paid—the course they adopted was directly the reverse; and ignoring entirely the consideration of the effect that course might have upon their own pecuniary interests, the lawyers were the most forward in advancing the desired reform.

It is not our intention, and it seems to be quite unnecessary, to devote a series of articles to the consideration of the statute. Its clauses are upon the whole sufficiently distinct in themselves; and those of our readers who wish to be informed as to the principles of the Act, and the relation of its provisions to previously existing law, will find them as clearly and correctly expressed, as is at present possible, in the excellent analysis recently published by Mr Ross. Undoubtedly, in the course of practice, many points and questions will arise which only the practical working of the statute can properly develope. It would, however, be premature to speculate upon these; and regarding as we do the Act, not in the light of a measure of finality, but as a very satisfactory step in a direction which must be still further pursued, we can look forward for the correction of any defects, and the supply of any omissions, which experience may point out to future legislation on this important subject. The dictum recently promulgated by one of our worthy representatives in Parliament, that where a great principle is at stake no instalment can be accepted, is, to say the least of it, open to very considerable question. And in effecting measures of large and liberal reform on a system which has endured for ages, and whose details and ramifications are so numerous and difficult as those of our ancient system of conveyancing, it is evident that the steps must be gradual and progressive, and that a new regime is not to be established at a blow.

The safety and the convenience of the public in their daily transactions in regard to heritage ought to have been, and we believe has been, the object of the promoters of the statute. Hitherto, however, these objects have been attained by means so much more elaborate and technical that it is not surprising

if professional men, and even it may be the members of the public themselves, may still look forward with some uneasiness to the working of the Act in relation to these paramount considerations. The provision of the thirty-seventh section, that Deeds may be partly written and partly printed, taken in connection with the other provisions as to shortening descriptions, etc., may indeed give rise to apprehension that a slovenly species of conveyancing shall spring into practice from which the worst evils must result. Indeed, we believe we are justified in stating, that had not the measure for reasons already indicated been hurried through its progress with undesirable speed the clauses alluded to would have been at least modified by the framers of the bill, with the view of remedying this rather formidable objection. It must never be forgotten by the sensible portion of the public that although forms are shortened, the principles of conveyancing and the laws regulating the due execution of deeds remain the same, and that in no hands but those of a skilled conveyancer is a party safe when transacting in regard to heritable property. We have no hesitation in enforcing this doctrine, because its soundness is undeniable, and the profession has already shown that it is not influenced by selfish views in reference to this reform. Indeed, supposing that unskilful parties, availing themselves of the apparent facilities of the Act, should attempt the management of heritable transactions and the preparation of the necessary deeds, the evil would, especially in large communities, be cured almost as speedily as begun. It is still necessary, and always will be necessary, to test the accuracy of the progress of prior titles for a long period of years. It is still necessary, and always will be necessary, to see that a seller is in a position to convey, or a borrower to borrow, with safety to the party purchasing or lending, and all these duties can only be competently performed by one who is a skilled conveyancer and conversant with the extensive and difficult range of legal principles involved in such transactions. If these duties be not discharged, or if they be discharged in a perfunctory and unskilful manner, the effects, as already stated, will speedily be made manifest. The purchaser may wish to sell or to borrow upon the security of his acquisition, but in either case he will, in all probability, in his turn have to show that his title is clear, and his progress of writs complete and free from challenge. The errors or defects which ought to have been remedied, or which ought not to have been committed at the time when he acquired the property, will then be discovered; the whole work will require to be done over again, and a great amount of trouble, expense, and positive risk will in all likelihood be in-[illegible]d. But although, therefore, a practice so loose [illegible]erous, if attempted at all, cannot long endure, we still conceive it to be a duty, so far as in our power, to place before our general readers the probable, indeed we may say the certain consequences of even its partial adoption. And while upon the subject, it may not be improper to advert particularly to the terms of the thirty-third section of the Act. That section refers to the beneficial statute of William the Fourth, whereby clerical errors by erasure in instruments of sasine, and of resignation *ad remanentiam*, are in a great measure divested of the ruinous effects with which they were at one time liable to be attended. In the present statute, however, while the provisions of that Act are extended to notarial instruments and the other writs therein mentioned, they are not extended to conveyances themselves, which are now to be recorded instead of instruments of sasine. It is evident, therefore, that in the case of a conveyance improperly and carelessly executed and recorded, very grave questions may arise, in the settlement of which the provisions of the Act of William the Fourth will not be found available. In these remarks, however, we do not mean to say that the framers of the present Act have been guilty of an omission in not so extending the effect of the provisions referred to. On the contrary, as the conveyance now is not only the recorded evidence of the completion of the acquirer's title, but is also the original and principal writing constituting that title, it is clear that it must be as carefully and formally executed as has always been necessary in the case of a charter or disposition. It would therefore have been a serious error, calculated to induce much looseness in practice and consequent risk, had the same latitude been extended to the Conveyance itself, as to the subsidiary and merely formal instrument of sasine.

We find, however, that our space does not permit us at present to enter further upon the consideration of this valuable statute. We shall, in all probability, speedily recur again to the subject; and it is also our intention to endeavour to point out, not only the advantages arising from the reform which has been already effected, but also what other measures appear to us to be requisite before the labours of law reformers in regard to the conveyancing of Scotland can be deemed complete.

INFANTICIDE.

In a trial for child-murder at the Circuit Court held at Perth last month, the law, as laid down by the Lord Justice Clerk (Inglis), placed a difficulty in the way of the prosecution which in such cases seems at present to be insurmountable. Jean M'Callum was charged with the murder of her own child. No one was pre-

sent when she was delivered; and the child was never seen alive. In her declaration she stated that she "was delivered of a female child in the poultry-house "at Braco, and that she tied her garter round its "neck after it was born." From a post-mortem examination, the medical witnesses concluded that the child had lived, and that its death had been caused by strangulation. So far, the case seemed conclusive; but there was this important element awanting in the evidence for the prosecution—it was not proved that the child had been born alive. True, it had respired, and the blood had circulated, and the medical witnesses were of opinion that it had lived, and so also must have thought the unfortunate woman when she tied the garter round its neck. But the law stepped in with a definition of birth which raises a nice and difficult question. It was proved that birth is often progressive. That frequently the head is born first, after which the rest of the child may remain some time in the womb. During this transition state the child may breathe, and the medical witnesses admitted that they could not, on a post-mortem examination, distinguish between the cases of a child who had died during labour after the birth of the head, and a child who had died immediately after being entirely separated from the mother. The Lord Justice Clerk, giving effect to the argument of the prisoner's counsel (Mr W. E. Gloag), ruled that birth by the law of Scotland did not take place till the child was fairly separated from the mother—that "till then it had "no separate existence, and was not a human being." It therefore followed that, supposing the mother had killed the child before complete delivery, she was not guilty of murder, and that still less was she guilty if the child had died from natural causes prior to complete separation, although she had thereafter, believing it to be still alive, done that which, if it had been alive, would have caused its death. It was therefore incumbent on the Crown to prove that the child had been born alive. It is obvious that this could not be done, because the medical witnesses had concurred in stating that they were unable, from a post-mortem examination, to say whether the child had died during parturition, or immediately after it; and there were no witnesses present at the birth. The same difficulty must be met with in all such cases. In short, a conviction for infanticide, where the crime is committed immediately after birth, and in private, is impossible. This is a most serious consequence, for infanticide is commonly committed at such a time and in such circumstances; and if the law laid down by the Lord Justice Clerk be correct, the intervention of the Legislature is imperatively called for. The moral guilt, in such cases, is of course equally great whether the child was actually alive at the time or not. The intention in either is the same; and in both, some punishment ought to follow the commission of the crime. The change in the law which would effect this, would simply be the adoption of a more reasonable test of birth—if the child has begun to derive its sustenance from the air—if it breathes, and the blood circulates—it is *de facto* an independent being—a being born into the world alive. Let the Legislature declare this to be birth, so far as the criminal law is concerned, and the immunity to infanticide, which the law now secures, will be removed. No doubt the woman may now be tried alternatively for concealment of pregnancy and infanticide, or the Jury may, on an indictment for infanticide, return a verdict of culpable homicide. But a little consideration will show that, if a woman be delivered in secret, and tie her garter immediately round her child's neck, her immunity is certain, for there may be no concealment of her *pregnancy*, however private she may keep her *delivery;* and as to culpable homicide, since it is impossible to prove that the child was alive, when the ligature was applied, there might be no homicide at all.

But when we are proposing a change in the law, we would also suggest a mitigation of the punishment now annexed to the crime. There is much to distinguish infanticide from other classes of murder. While, on the one hand, the relationship of the mother and child, and the helpless dependence of the one on the care and protection of the other, seem to aggravate the enormity of the crime, there are, on the other hand, many considerations which diminish the criminality, and ought to mitigate the punishment. In the ordinary case, the mental and bodily sufferings of the mother render her unable to estimate to the full extent the atrocity of her conduct, or the magnitude of its consequences; and there can seldom be that calm, deliberate intention which precedes the perpetration of a crime, and forms its very essence.

Again, the pains of labour very frequently induce temporary insanity in some degree, even in cases where all the necessary appliances and assistance have been provided. But where the delivery is secret and unassisted, as in M'Callum's case, the probability of insanity being induced must necessarily be greater, while the possibility of ascertaining the mental condition of the mother is altogether excluded. It may be said that if the woman, at the time of delivery, laboured under such insanity as would relieve her from the consequences of her actions, the insanity would either manifest itself in such a way as to attract attention, or would be traceable after the birth was discovered. This may be true; but when we consider the position of a woman who secretly and without assistance delivers herself—her body

racked by the severest torture, and her mind inflamed and excited by a sense of wrong, dishonour, and shame, it is impossible to resist the belief that there is in many—if not in all cases of infanticide—a degree of mental derangement on the part of the mother, which, although insufficient, if proved, to screen her from responsibility, ought certainly to weigh in determining the punishment she should suffer.

But there are other grounds on which it is expedient that the punishment of infanticide should be mitigated. The punishment at present is capital, and yet cases of infanticide are becoming more numerous in Scotland. The reason is obvious. The very severity of the sentence which must follow a conviction, renders it almost impossible to obtain one. The evidence which would satisfy any Jury of the panel's guilt, were the punishment arbitrary or limited, will not secure a conviction where death is to follow. The feelings of the Jurymen are enlisted in the panel's favour. They are anxious to escape from a painful duty, and they gladly give effect to doubts and scruples which ought not to sway their judgment, and which they would at once disregard were the issue less momentous.

We observe that the subject of infanticide was discussed at the recent meeting of the National Association for the Promotion of Social Science; and we concur very heartily in the views propounded by Lord John Russell and other speakers who advocated a mitigation of punishment. If effect be given to these views in future legislation, we are satisfied that the ends of justice will be less frequently frustrated, and that this species of crime will speedily diminish.

The case of Jean M'Callum suggests a farther change in the law. Concealment of pregnancy is a crime. Concealment of delivery is not. Now, it must be obvious to every one, that the latter implies a greater risk to the child's life than the former. If the woman conceal her pregnancy, the law presumes an evil intention; but surely the same presumption arises when the woman is found in the hour of delivery, and when most in need of assistance, carefully segregating herself from her kind; and it is scarcely necessary to remark, that it is at this time that the danger arises, which the law had in view when it constituted concealment of pregnancy a crime.

Review.

COMMENTARIES ON THE LAWS OF SCOTLAND IN RELATION TO MERCANTILE AND MARITIME LAWS, MOVEABLE AND HERITABLE RIGHTS AND BANKRUPTCY, BY GEORGE JOSEPH BELL, PROFESSOR OF THE LAW OF SCOTLAND IN THE UNIVERSITY OF EDINBURGH. *Sixth Edition.* By PATRICK SHAW, Advocate.

SINCE the first edition of Bell's Commentaries was published, more than fifty years ago, it has been, in the departments of which it treats, the universal book of reference—alike for the judge, the practitioner, and the student. It is impossible now to estimate to the full extent the difficulties which, when it first appeared, attended its composition. Not the least of these difficulties was, that the principles of the commercial law of England had to be sought in the many hundred volumes of the reports, without the guidance of the numerous treatises in which, more or less ably, these principles have been elucidated and explained by English writers on commercial law in general, as well as on the various branches of which it consists. These difficulties, however, were overcome by the author's patient and unwearied research, and a vast repertory of legal principle and reasoning was formed, which, however defective in arrangement, has proved of incalculable value to the profession and to the public.

To indicate its value, and the estimate formed of it at home, we have only to remember that, almost since the date of its first publication, it has been quoted in our Courts from the bar and on the bench oftener than any or all other text writers. Many English and foreign legal writers speak of Mr Bell and his works with great respect, and none in higher terms than the great American jurists, Story and Kent.

In the preface to his Treatise on the Law of Partnership, Justice Story says that "Mr Bell's excellent Com-
"mentaries on the commercial law of Scotland, are at
"once learned, comprehensive, and exhausting, and have
"afforded me very great assistance."

In speaking of another of the author's works, Mr Kent (*Commentaries on American Law*, vol. iii. p. 376), remarks, "There is an admirable summary of the Law of
"Scotland, by Professor Bell of the University of Edin-
"burgh. The essential principles of the law of the con-
"tracts of sale, hiring, bailment, surety, negotiable paper,
"partnership, maritime contracts, contracts of affreight-
"ment, average, salvage, bottomry, and respondentia,
"marine insurance, and insurance against fire, and of
"lives, are stated with all possible brevity, consistent
"with perspicuity, precision, and accuracy. The cases
"and authorities are annexed to each paragraph, and
"the adjudged cases are given at large in some succeed-
"ing volumes as *illustrations* of the principles declared.
"I do not know of a more convenient and useful manual
"of the kind to the student and practising lawyer."

George Joseph Bell was born at Edinburgh on the 20th of March, 1770. He was one of three brothers, the sons of a Scottish Episcopal minister, all of whom attained eminence in their several professions. His elder brother was Mr John Bell, an Edinburgh surgeon of some cele-

brity, who died at a comparatively early age. His younger brother was the amiable and admirable Sir Charles Bell. Like most of the distinguished men of Edinburgh of that time, he was educated at the High School; and he afterwards attended the lectures in the University of that city, of Professor Tytler on General History; of Professor Dugald Stewart on Moral Philosophy; and of Professor Hume on the Law of Scotland. He entered the Faculty at the early age of twenty-one, and associated himself with the brotherhood of young Whig lawyers, of whom Jeffrey was the head. In the year 1804, he published the first edition of his Commentaries, in two volumes octavo, under the title of a Treatise on the Law of Bankruptcy.

In the year 1821 he was appointed Professor of the Law of Scotland in the University of Edinburgh, and in the year 1831, he was appointed one of the principal Clerks of Session. To the disgrace of successive Governments, this was the highest promotion ever obtained by the first of modern Scottish jurists. His position was certainly a singular one: to sit in the relatively humble position of a clerk, and hear his superiors, the judges, respectfully quote his dicta as of the highest authority to rule the decisions of a Court of which he was the subordinate officer.

Successive and gradually enlarged and elaborated editions of Mr Bell's great work were published in his lifetime—the fifth and last in 1826. He died in 1843.

The last edition of the Commentaries having been published so far back as 1826, a new edition has long been felt to be a desideratum by the profession. But the task of adequately and satisfactorily editing such a work was felt to be an undertaking for the execution of which few possessed the necessary patience, diligence, and erudition. To render the new edition as useful and as valuable to the lawyer of the present time, as was the last to the lawyer of thirty years ago, it was necessary, first, to trace the course of the progress of the law through the reports of the Courts in England as well as in Scotland, noting particularly those cases in which former decisions and opinions have been overruled, and secondly, not only to indicate but to explain and elucidate the nature and effect of the many changes effected by statute on commercial and bankrupt law since the publication of the former edition. If the editor was not qualified for this task, and prepared to undertake it, a new edition would be worse than useless.

When an edition of the Commentaries, edited by Mr Patrick Shaw was announced, it was confidently expected that this long felt desideratum would at length be supplied. We regret to say that the learned editor, whose ability is undoubted, has shrunk from the necessary labour, and in place of conferring a benefit on the community and the profession to which he belongs, has done us a positive disservice by excluding other labourers from the field.

To do Mr Shaw justice, he does not attempt to conceal his own demerits, but proclaims the deficiencies of his work in the preface. Had his publishers, by way of prospectus, printed this preface, (which is a curiosity in its way, and worthy of perusal as such,) we suspect that the effect on the circulation would have been somewhat alarming.

As indicated by Story, the great merit of the Commentaries is their "exhaustive" character. All the authorities on the subject under discussion are, in former editions, not only noted, but carefully explained, and on consulting them, we are not referred to other text-writers or to the volumes of the reports for the authority on which the author's dicta are rested. In short, the book itself formed a library of Commercial Law. It was, beyond any other, self-contained.

Now, let us see how Mr Shaw has dealt with his authority in these respects. As no one can accuse him of want of candour, we shall take the description of his idea of the way in which the works of a great legal writer are to be dealt with by an "able editor," in his own words. "Since the date of the last edition, the "author published a collection of cases under the title "of 'Illustrations of the Principles of the Law of Scot-"land.' In the former edition of the Commentaries, he "placed in foot-notes reports of the decisions referred to "as authorities. As the greater number of these cases "are included in the Illustrations, a work in the hands "of all engaged in the practice of the law, I considered "that it would render this edition less cumbersome either "to refer simply to the Illustrations, or to abridge the "statement, and I have accordingly done so; but I have "always preserved any observation made by the author. "To have attempted to bring within this edition the "decisions of the English Courts since the last was "published, applicable to the subjects of this work, "would have been a task of an overwhelming nature, "even if I had possessed a knowledge of English law "sufficiently large to qualify me for doing so. Those "which have been referred to by the author in the "former edition I found to have been well selected, and "with a few exceptions, to be cited in modern English "treatises. Instead, therefore, of overloading the book "with the mass of their decisions, I have given a refer-"ence to those treatises where the cases quoted in this "work are to be found. Thus, in regard to Mercantile "Contracts, I have referred to Mr Addison's Treatise "on the Law of Contracts, and Mr Smith's Compendium "of Mercantile Law; to that of Mr Collier on Part-"nership; and under Maritime Law, to Abbot on "Shipping, edited by Mr Shee. On turning to these "references, all the more recent cases will be found, and "also an expression of the present state of the law "in the text of these treatises." In other words, Mr Shaw's editorial services have consisted in mutilating and abridging the text of his author, and adding a few references to English writers which the indices of their books would supply.

We have equally to complain of the manner in which the editor has executed the second part of his task. No systematic attempt is made to explain, or even to detail the changes made in Commercial Law by statute since 1826. Some Acts are given, partially in the words of the Legislature, and partially in a paraphrase of Mr Shaw's own, without any attempt to point out, much less to solve difficulties in their construction and operation. References are given in other cases to the particular sections of statutes modifying the doctrine in the text of the Commentaries, but this is frequently omitted, and sometimes when the nature of the alteration is stated, it is not correctly stated.

As an instance of omission, we may refer to page 332, where Professor Bell states correctly the rule as to notice of dishonour of inland bills, under the then existing law, viz.: "That it shall be sufficient to preserve the said re- "course if notice is given of the dishonour within four- "teen days after the protest is taken." But this rule is altered by the 14th section of the Mercantile Law Amendment Act, which provides, That "where any "inland bill of exchange shall be presented for acceptance "or payment, and such acceptance or payment shall be "refused, or where any promissory note shall be pre- "sented for payment, and payment shall be refused, "notice of the dishonour of such bill or promissory note, "by such refusal to accept or pay, shall, in order to "entitle the holder to have recourse to any other party, "be given in the same manner, and within the same "time, as is required in the case of foreign bills by the "law of Scotland." In short, that in place of having fourteen days to give notice of dishonour, the holder shall only have one. Mr Shaw does not in his notes to the passage in question think it necessary to mention this very material alteration of the law at this place, nor even to refer to a former page where the section is quoted out of place.

The eleventh section of the same statute is noticed in a note on p. 310, but its import is incorrectly stated. In the text it is laid down that "in Scotland even a written "acceptance, separate from the bill, would not be suffi- "cient to authorise summary diligence, there being, in "the ordinary course of pronouncing a decree of regis- "tration, no judicial authority to take notice of such "extraneous evidence; and a parole acceptance, *what- "ever effect it may have in constituting a debt, or in com- "pleting an assignment*, can have none at all in constitut- "ing an accepted bill on which execution can pass "summarily." In his note, Mr Shaw observes that, "by section 11 of 19 & 20 Vict., c. 60, the rule stated "in the text is made applicable to all bills, whether "inland or foreign, in Scotland after December, 1856." But the enactment of the statute goes much further than the rule laid down by Professor Bell. It provides that after the date stated, no acceptance of any bill of ex- change "shall *be sufficient to bind or charge any person* "unless the same be *in writing on such bill*, or if there be "more than one part of such bill on one of the said parts, "and signed by the acceptor, or by some person duly "authorised by him."

The first and second sections of the same statute have effected a complete change in the law of sale in Scotland. Mr Shaw seems to think he has done his duty as editor by merely quoting them in a foot-note (pages 99 and 123), the first almost, the second literally without one word of explanation or comment; and so with the remaining sections of this very important Act.

We shall probably proceed to consider the details of the execution of this work in our next number.

Correspondence.

(To the Editor of the Scottish Law Journal.)

SIR,—One benefit which your Journal confers on the members of the legal profession is, that it gives them a direct and convenient medium of inter-communication on any subject of general importance. Of the opportunity thus afforded I beg to avail myself, for the purpose of bringing under the notice of my brethren throughout the country the subject of their procuring for themselves the status of an incorporated body, either by Act of Parliament or Royal Charter.

I am aware that there are serious obstacles to contend with, such as the absence of organisation, and the difficulty of inducing local societies already incorporated to fuse themselves into a general society; but such obstacles do not appear to be insurmountable.

The Writers to the Signet, and Solicitors before the Supreme Court, have each a constitution, with rules regulating the admission of members, and otherwise upholding the status of their societies. The country practitioners outnumber both those respectable bodies, and why should not they have a constitution on a somewhat similar model?

The clergy have their "Ministers' Widows' Fund," the doctors have their "Medical Practitioners' Act," but the country agents, though as numerous as either of those classes, have no bond of union, and no means of combined action or mutual protection; and apparently for no other reason than this, that they do not bestir themselves in the matter.—I am, Sir, your obedient servant,

UNION.

(To the Editor of the Scottish Law Journal.)

SIR,—The value of the Sheriff Court Act of 1853 is admitted on all hands, but it has often occurred to me that the mode of taking proofs admits of improvement. Under the present system, the Sheriff-Substitute, the only Judge who sees the witness, takes short notes in the form of a narrative of what the witness says, and very frequently these notes show only the result of a series of questions, which have all been rendered necessary by the unwillingness of the witness, of which there of course remains no trace. It has been often remarked that the Judges on appeal are in no way assisted by these notes in distinguishing whether a witness had a leaning or not to either side, because it was impossible to say whether the statements recorded were made spontaneously or extracted by a tedious process of cross-examination. Besides such disadvantages, the time required in taking the proof is a serious encroachment on the valuable time of the Sheriffs, agents, and witnesses.

I have often thought that this state of matters might be remedied, by having the evidence recorded, in the form of question and answer, in short-hand, by sworn reporters. Such a system would not, I believe, add much, if anything, to the expense of litigation, and there can be no doubt that thereby a great saving of time would be effected; and what is as important, an exact record of each witness's deportment, when under examination, and of the answers he gave, would be secured.

LEX.

The "Scottish Law Journal" will be published in the first week of each month, Price One Shilling, post free.

The Editors are desirous that the Journal should contain the Reports of all Cases decided in the various Sheriff Courts in Scotland involving points useful or interesting to the Profession, and would therefore solicit a Report from either of the Agents in each such case, or from the Sheriff. It will be necessary to have the Report signed by one of the Agents or the Sheriff, to ensure its correctness, except in those cases where the party reporting is known personally to the Editors.

The Editors will take no notice of anonymous communications, and will not hold themselves bound to return articles or communications not found suitable.

Advertisements can be received till the evening of the 23d of each month. All communications to be addressed to the Editors, care of the Publishers.

Any error or delay occurring in the transmission of this Journal to Subscribers, should be immediately communicated to the Publishers.

The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, DECEMBER, 1858.

POLICY OF THE BANKRUPTCY LAWS.

WHILE our Bankruptcy Laws amply provide for the protection and discharge of the bankrupt and the distribution of his estates, there are still great difficulties, delay, and expense in the way of rendering a debtor notour bankrupt, and in procuring a sequestration of his estates. And although he may have been guilty of fraud, the statutes do not contemplate his punishment, but leave him to the common law. No doubt he is subjected to an examination, which the press makes public, but the exposure is to many, and these generally the worst of all, no punishment; he may be incarcerated as a *civil* prisoner, but this again too often assumes the complexion of private vengeance rather than the expiation of a public offence. No doubt also, the bankrupt is liable to be prosecuted for fraudulent bankruptcy just as he may be prosecuted for any other well-defined fraud. But for the lesser commercial frauds—for incurring debts which he never intends to pay; for accepting bills which he has no prospect of meeting; for ordering goods as if for trading, while he instantly sells them at a loss, or pledges them to raise money; for trading after he is hopelessly insolvent; for granting preferences, secret trusts, and gratuitous alienations, on the eve of bankruptcy; for personal extravagance or vexatious litigation with his *bona fide* creditors, for such offences as these our Bankruptcy Laws prescribe no punishment. The debtor, indeed, is not practically subject to compulsory bankruptcy, nor to punishment for fraud; he can resist the former, he evades the latter; and farthermore, even if his career does terminate in bankruptcy, he may get protection from diligence by the vote of a certain majority of his creditors, and, on the expiry of a couple of years, he may obtain his discharge independent of his creditors altogether.

This has not always been the state of our Bankruptcy Laws. They were at one time based on a policy that was stern perhaps, but just and salutary. The system was simple and rude, but, at all events, it had in view the rights of creditors and the interests of trade. It did not altogether look on the bankrupt as a criminal, but it provided certain disagreeable consequences for him which amounted to an adequate punishment, and at any rate it did not give him the chance of cheating his creditors more than once. Now, our bankruptcy laws, though no doubt as a system elaborate and refined, are lamentably deficient in much that is necessary to secure the interests of creditors, and protect the public against fraud.

Let us look for a moment at the different statutes and endeavour to trace this declension in these laws. The preamble of our earliest statute on the subject—that of 12 Geo. III., cap. 72—passed in the year 1772, is as follows: "Whereas, by the laws now subsisting in that part of Great Britain called Scotland, "the personal estates of such debtors as become insolvent are carried off by the diligences of arrestment and poinding, executed by a few creditors, "who, from the nearness of their residence to, and "connection with, such debtors, get the earliest "notice of the insolvency to the great prejudice of "creditors more remote and unconnected, and to the "disappointment of that equality which ought to "take place in the distribution of the estates of insolvent debtors among their creditors: Therefore, "to remedy such injustice and inequality in time "coming, and to render the payment of the creditors "of insolvent debtors more equal and expeditious, "May it please," etc. It bears to be a statute expressly for the benefit of creditors. Its objects are twofold — the expeditious realisation of the debtor's estates, and an equal distribution of his assets among the creditors. The machinery introduced by the Act is all intended to effect these purposes. It does not provide for the protection or discharge of the bankrupt. It merely provides a summary way of rendering him notour bankrupt, and of seizing and realising his goods, and dividing the proceeds among the creditors.

In 1783, the Act 23 Geo. III., cap. 18, was passed. It sets forth that it is "expedient that the plan of "the said Act should be varied, and that some other "rules and regulations should be made for putting "the diligence of creditors upon an equal and pro-

"per footing, and preventing unjust preferences and "accumulation of expense, and likewise for operating "a more speedy distribution of the estates of bank- "rupts, both real and personal, especially when such "estates belong to persons engaged in trade and "manufactures." This statute is the beginning of that system of defective legislation to which we have been adverting. In the preamble this is apparent. It does not profess to introduce any mode of compulsory bankruptcy by which the estates of a trader may be immediately secured and distributed among his creditors. It contains no improved machinery for this purpose. Indeed, it is not so much a statute to protect creditors against the fraud of their debtor as against the acts of each other. Its main object is to cut down preferences. And in looking into the body of the Act this will be seen more clearly. It contains elaborate provisions for the reduction of preferences acquired by individual creditors, and for the sequestration of the estates of traders upon their own application. It does not, however, give creditors any increased facilities for making their debtor bankrupt or seizing his estates. In place of using compulsion, the statute coaxes him to become bankrupt, by promising him protection and a discharge. Here, for the first time in our bankruptcy system, are the hands of the individual creditors tied up by a majority. The debtor, with consent of the trustee and four-fifths in number and value of the creditors, may apply to the Court for protection; and at the distance of two years, with a similar majority of the creditors, he may apply for a discharge without composition.

The two following statutes, 33 Geo. III., c. 74, passed 1793, and 54 Geo. III., c. 137, passed in 1814, merely carry out these provisions a little farther. The only new principle they introduce is the debtor's discharge upon a composition contract. They provide that upon a majority of nine-tenths in number and value of the creditors agreeing to accept of a composition, the bankrupt shall get his discharge. These provisions are extended by the subsequent statutes, 2 & 3 Vict. c. 41 (1839), 16 & 17 Vict. c. 53 (1853); and 19 & 20 Vict. c. 79 (1856). The first of these statutes allows a majority in number and value to give protection to the bankrupt against personal diligence, and a majority in number and four-fifths in value may immediately grant a discharge upon a composition; and a similar majority may in eight months grant him a discharge without a composition. The second and the last of these statutes continue these provisions, and, indeed, the last extends them so far as to allow the bankrupt to apply to the Court for his discharge in two years, without any composition, and without the consent of any one. The whole of these three last-mentioned statutes likewise allow four-fifths of a majority to award an allowance to the bankrupt for his subsistence out of the estate.

These facts are remarkable, both for what they do contain, and for what they do not. It is remarkable that they do not contain any provisions for dealing with the bankrupt himself. The creditors cannot have him punished for misconduct. No matter how extravagantly he may have lived, or how recklessly he may have managed his business; no matter what false pretences he may have made to get credit, or what preferences to favourite creditors, or donations to friends he may have given at the expense of his general creditors; no matter what fraud, what folly, what rashness there may have been in his whole career, our bankruptcy laws have no remedy, and no punishment for offences like these. In this respect they are lamentably defective. They are farther defective, in so far as they contain no system of summary procedure to bring a debtor into a state of bankruptcy; no system, we mean, so summary or so secure as the procedure which a landlord can follow out for the recovery of his rent or for the removal of a refractory tenant. They likewise appear based on an erroneous principle, in so far as, instead of giving creditors the power of procuring a sequestration summarily at their own instance, these laws rather put the whole matter into the debtor's own hands, and invite him voluntarily to apply for sequestration with the prospect of protection, allowance, and discharge.

MASTER AND SERVANT.

Reids and M'Guire, *v.* Bartonshill Coal Co.

(Concluded from No. I.)

One point to which we would direct attention, as not being specifically disposed of, or cleared up, by the judgments under review is, the liability, or non-liability of a master for the neglect or carelessness of persons in the position of managers, and the like.

Adhering to the case of a colliery, as affording the most obvious materials for our remarks, we may remind our readers, that besides enginemen, firemen, roadsmen (or reddsmen), bottomers, etc., there are, very generally, employed about collieries of any extent, a Manager, whose duty it is to engage workmen, procure materials, and oversee generally the operations above; and an underground Manager, whose duty it is to oversee the operations below ground. In case anything should be supposed to depend upon a name, these men may, just as correctly, be termed Overseers, Foremen, or Superintendents. Notwithstanding the judgments in the Bartonshill cases, a very general impression prevails, that, although a coalmaster is not liable for an en-

gineman, he remains responsible for the omissions, or carelessness, of persons of the description of these managers. Is it so, or not? The answer to this question is to be gathered partly from the principles, and reasoning relied on by the Judges in the Court of Appeal in the recent case, and partly from what has been laid down by the same Court in former cases.

The discussion, in the recent case, came to turn very much upon the question, Who are *collaborateurs*, or fellow-workmen? The Scottish Judges had given this term a strict interpretation; and the argument for the respondents was conducted on the same basis. The English Judges took a broader view, which was thus stated by Lord Cranworth, who, as Chancellor, had originally heard the case of Reids:—

"When several workmen," said his Lordship, "engage to serve a master, in a common work, they "know, or ought to know, the risks to which they "are exposing themselves, including the risks of "carelessness, against which their employer cannot "secure them, and they must be supposed to contract "with reference to such risks. I do not at all ques- "tion what was said by the Lord President, that the "real question is, what is common work. But, in the "present case, there appears to me to be no doubt "but that Shearer and the miners were engaged in a "common work. It is not necessary, for this purpose, "that the workman causing, and the workman sus- "taining the injury, should both be engaged in per- "forming the same or similar acts. The driver and "the guard of a stage coach—the steersman and "rowers of a boat—the workman who draws the "red-hot iron from the forge, and those who after- "wards hammer it into shape—the engineman who "conducts a train, and the man who regulates the "switches or the signals—are all engaged in common "work. And so, in this case, the man who lets the "miners down into the mine, *in order that they may* "*work the coal*, and afterwards brings them up, toge- "ther with the coal which they have dug, is certainly "engaged in a common work with the miners them- "selves. They are all contributing directly to the "common object of the common employer in bringing "the coal to the surface."

The new Chancellor put the case in another way:— "The Lords of Session," said he, "decided that Shearer "and the deceased were not *collaborateurs*, because "Shearer had the superintendence of the machinery for "raising and lowering the men and the materials from "the mine, a superintendence which took his duties "altogether from common employment with the men "below, and that the deceased's business was to ex- "cavate coal from the pit, a line of business entirely "different from that of engineman. But, my Lords, "it appears to me that the deceased and Shearer were "engaged in one common operation, *that of getting* "*coals from the pit*. The miners could not perform "their part, unless they were lowered to their work, "nor could the end of their common labour be at- "tained, unless the coal which they got was raised to "the pit's mouth; and, of course, at the close of "their day's labour, the workmen must be lifted out "of the mine. Every person who is engaged in such "an employment, must have been perfectly aware "that all this was incident to it, and that the service "was necessarily accompanied with the danger that "the person entrusted with the machinery might "occasionally be negligent and fail in his duty."

Now, if the principles here laid down are sound, we cannot see why there should be any hesitation in holding that they embrace such a person as a manager. It is impossible, we submit, to conceive the case of one person acting for another, in an intermediate capacity, in a more delicate and onerous position towards third parties, than the skilled superintendent of a steam-engine, by means of which, and of which alone, the workmen of a colliery can reach, and return from, their labour. If a master is not bound for the acts or omissions of such a person, without *culpa* on his own part, it is really difficult to conceive the case in which he should be bound. Is there any reason, in the nature of things, why a master should be liable for the acts or omissions of any official, whose duties are general, rather than of another, whose duties are equally important, but are confined to one class of operations? Lord Cranworth says, that workmen must know they run risks, "including the risks of *carelessness*, "against which their employer *cannot secure them*," unless to the extent of employing trustworthy offi- cials. Does this not apply to a manager, equally as to an engineman? His Lordship further lays down emphatically that "it is not necessary for this "purpose" (constituting a common employment) "that "the workman causing, and the one sustaining, the "injury, should both be engaged in performing the "same, or similar, acts." He gives among other in- stances, "the steersman and rowers of a boat," the engineman who conducts a train, and the man who regulates the signals. Upon the same principle, he might have instanced the pilot, or master of a ship, and the seamen. All this applies to the case of the manager—or to adopt another word, the "overs- man"—as much as to the persons specially pointed out. But, as if to remove any ground for doubt, his Lordship concludes,—"They are all contribut- "ing, directly, to the one common object of their "common employer, in bringing the coal to the sur- "face."

So much for Lord Cranworth. Then, it could scarcely be called a paraphrase of the Lord Chan- cellor's dictum to render it thus:—"But, my Lords, "it appears to me that the deceased collier, and "this manager or overseer, were engaged in one "common operation of *getting coals from the pit*. "The miners could not perform their part, unless "there had been some one to make necessary arrange- "ments, procure materials, such as propwood, etc.; "nor could the end of their common labour be at- "tained, unless the coal were removed from the pit- "mouth, and properly disposed of. Every person

" engaged in such employment must be perfectly " aware that the service was necessarily accompanied " with the danger that the person entrusted with the " *management*, above or below ground, might occasion- " ally be negligent and fail in his duty."

If the simple and intelligible principle is carried out, that *culpa* is the basis of reparation, in such cases, the course is quite clear. But, if mere arbitrary distinctions are to be introduced, there will be no end to confusion, and the constant recurrence of "special cases." The more carefully the matter is canvassed, it will become the more obvious that *culpa* is the only safe ground to rest upon. But the principle must be applied to a great many cases, different in their *prima facie* aspects from that of the Bartonshill Company. For example, questions frequently arise out of the condition of a pit, in respect of ventilation—dependent upon the proper state of the midwall, bratticing, and similar details. Others, again, arise out of the condition of the roof, as regards the pillars, propwood, etc. Lord Cranworth, in course of his opinion, takes up just such a case, and distinguishes between it and the case before the Court, assuming that a master may be responsible for a defect of this kind, although free from responsibility on account of his engineman. Now, let us see what ground there is for such a distinction.

Every body knows that coalmasters are not in the practice of making midwalls, or erecting bratticing, or propping roofs, with their own hands, any more than they are in use to work their own engines. They employ, or ought to employ, persons of skill and experience, in both departments. The House of Lords has solemnly determined that they are not liable for any accident in the engine department; unless it can be proved that they have been guilty of carelessness, or neglect, in the employment of an "incompetent" assistant. Now, suppose an accident from an explosion of fire-damp, or the falling of a roof, and that competent firemen, roadsmen, and competent overseers, have been employed, and entrusted with the duty of seeing all these matters kept in proper order. We should like to hear any reason for holding the master liable, in such a case, any more than in the case of an accident in the engine department. We shall see, by and by, at the expense of some unfortunate litigant, how our courts of law are to apply the recent judgments, when such questions are raised.

But, in considering those judgments in the light of expositions of legal principle, let us contrast them with what took place in the case of Paterson *v.* Wallace, so late as 1854.* That was an action by the widow and children of a man who had been killed in a coal pit, by the fall of a stone from the roof, and the question of fact was, whether this arose from the insufficient condition of the roof, "through " the fault, negligence, or unskilfulness of the de- " fenders, or of *any person or persons for whom they* " *were responsible.*" At the trial, the pursuers led evidence to show that the accident was caused by the negligence of the underground manager. The defenders attempted to show that it happened from the deceased's own recklessness. The presiding Judge, improperly, as it was ultimately found, took the case out of the hands of the Jury; and, under a bill of exceptions, and appeal, it went to the House of Lords. As Lord Cranworth remarked, by way of getting rid of this judgment, in dealing with the Bartonshill cases, the appeal turned upon the conduct of the Judge at the trial. But some significant statements fell from the Woolsack, and were concurred in by Lord Brougham. Thus:—

The LORD CHANCELLOR.—"The pursuer's counsel " at the trial said, by his exception, that the learned " Judge ought to have laid down the law as fol- " lows:—'That if Snedden, the defender's *manager*, " had failed in his duty in timeously directing the " stone in question to be removed, it would afford no " defence that Paterson continued to work after the " orders for removal of the stone were ultimately given.' " *That I apprehend is good law.* But the exception " goes on:—'If Paterson continued so to work, in " consequence of the directions of the *roadsman*, the " defenders are responsible for such orders.' That " may be right or wrong; for we have no evidence to " show what is the character of a 'roadsman.' If a " roadsman is a person whose province is to direct " the workmen whether they may safely work or not, " the law stated in the exception may be correct."

LORD BROUGHAM.—"No one can read the evi- " dence without being satisfied that there was delay " on the part of the defenders, or of Snedden, *for* " *whom they were responsible;* and though we may " know little of what a 'roadsman' is, *the defenders* " *were beyond all doubt answerable for the negligence* " *of Snedden, their manager.*"

If the law thus confidently laid down was good, then we confess ourselves totally at a loss to comprehend the principle upon which the Bartonshill judgments were rested. A manager, or overseer, is a person employed to see that the apparatus and condition of a pit, generally, are correct. A roadsman (or reddsman) is a subordinate, in a special department, indicated by his name, and he does the actual work. These men have a charge extending over all the pit. An engineman has charge of an equally important department. He gives the necessary signal, assuring the workmen that all is right; he invites them to enter the cage; and from carelessness, either in allowing the machinery to be out of order, or in his own acts, he kills the men so entrusted to his care.

* 3d and 6th July, 1854. M'Queen's Rep., I., 748.

In that case the House of Lords says, "The masters "are not responsible, unless it can be shown he was "improperly selected." The manager, overseer, or roadsman, says the roof is safe, and allows the collier to go on with his work. The collier is killed, and the House of Lords declares, "beyond all doubt the "masters are answerable," however skilful, experienced, and steady such an official may have been!

When such contradictions arise, it becomes quite manifest that recourse must be had to the general principle, and that the question must be, *Culpa* or no *culpa*?

We expressed our dissent from some of the processes of reasoning, exhibited in the opinions delivered by the Judges. Let us give one example. Lord Cranworth spoke as follows:—

"Where an injury is occasioned to any one, by the "negligence of another, if the person injured seeks "to charge with its consequences, any person other "than him who actually caused the damage, it lies "on the person injured to show that the circumstances were such as to make some other person "responsible. In general, it is sufficient, for this "purpose, to show that the person, whose neglect "caused the injury, was at the time when it was "occasioned, acting, not on his own account, but in "the course of his employment as a servant in the "business of a master, and that the damage resulted "from the servant, so employed, not having conducted "his master's business with due care. In such a "case, the maxim 'Respondeat superior' prevails, and "the master is responsible. Thus, if a servant "driving his master's carriage along the highway "carelessly runs over a by-stander; or if a gamekeeper employed to kill game carelessly fires at a "hare, so as to shoot a person passing on the ground; "or if a workman employed by a builder in building "a house negligently throws a stone or brick from "a scaffold, and so hurts a passer-by; in all these "cases (and instances might be multiplied indefinitely,) the person injured has a right to treat the "wrongful or careless act, as the act of the master: *Qui facit per alium, facit per se.* If the master himself had driven his carriage improperly, or "fired carelessly, or negligently thrown the stone or "brick, he would have been directly responsible, "and the law does not permit him to escape liability "because the act complained of was not done with "his own hand. He is considered, and reasonably "considered, as bound to guarantee third persons "against all hurt arising from the carelessness of "himself or of those acting under his orders. Third "persons cannot, or at all events may not, know "whether the particular injury complained of was "the act of the master or the act of his servant. A "person sustaining injury, in any of the modes I "have suggested, has a right to say, I was no party "to your carriage being driven along the road, to "your shooting near the public highway, or to your "being engaged in building a house. If you chose "to do, or cause to be done, any of these acts, it is "to you and not to your servants I must look for redress, if mischief happens to me as their consequence. A large portion of the ordinary acts of "life are attended with some risk to third parties, "and no one has a right to involve others in risks "without their own consent. This consideration "is alone sufficient to justify the wisdom of the rule "which makes the person by whom, or by whose "orders, these risks are incurred, responsible to "third parties for any ill consequences resulting from "want of due skill or caution."

Now, it occurs to us that apart from the fact of the conclusions here come to having been determined by "precedents," some of our readers might have difficulty in admitting the soundness of these conclusions. Why should I be liable in damages, because a person, employed by me to perform the lawful operation of building a house, "negligently throws "a stone from a scaffold and kills a passer-by?" I did not employ, or instruct, him to throw stones from the scaffold. He was not acting for me in doing so. The maxims, *Alterum non laedere*, and *Qui facit per alium, facit per se*, are excellent maxims, in their proper place. But it is a pure begging of the question to apply them to such circumstances. I am not to injure my neighbour—very true; but I did not myself injure him; I gave no permission to another to do so; on the contrary, I took every precaution that it should not be done. What I do by means of another I must be held as doing myself—very good; but how can I be said to do that by another which I never dreamt of doing, and never, either expressly or by implication, instructed or empowered any one to do for me? Indeed, if it could be shown there was *culpa* on my part, that would introduce an altogether different ground of liability. The fact of the matter seems to be, that the rule of law, used, as we have seen, by Lord Cranworth, in support of his argument, does not rest upon principle at all, but upon previous decisions.

The inconsistency of that rule, and of the reasoning just quoted, is illustrated by what the House of Lords did in the famous case of Orr *v.* Fleming.* That was a suit arising out of the destruction of a number of sheep belonging to Major Orr, by a young foxhound, the property of his neighbour, Captain Fleming. The Sheriff of Dumbartonshire found the defender liable in the damage. The case went to the Court of Session, where the judgment was adhered to. The defender pleaded, chiefly on the authority of English decisions, that "to render him liable it "was necessary to show that the dog was previously "known to be dangerous and vicious;" in other words, that there must be *culpa*, in the shape of negligence. The pursuer maintained that this was not the case of an ordinary dog—that "the foxhound

* Dunlop, XV., 486. M'Queen, II., 14.

" was a description of dog whose nature it was to " pursue animals, and therefore the defender was " not entitled to let it go loose." In delivering their opinions, the Judges concurred in holding that the sheep had been, in point of fact, worried by the dog. *Lord Justice Clerk* said, "Then, as to the " liability of the owner, there is, I apprehend, no " doubt in the law of Scotland. I lay aside entirely " the cases and authorities cited from the law of " England." *Lord Cockburn* said, "I have under- " stood all my life that if my dog worries another " man's sheep, I must pay for it. But it is said I " must revise this opinion. I speak with great re- " spect of the law of England; it is a system with " which I do not profess to be acquainted, and I " would recommend that Scotch law should be quoted " to us here in Scotland, not only in this case but " also in many others." Then he proceeds to deal, as if by anticipation, with the analogy of the very cases instanced by Lord Cranworth, thus: "I believe " my coachman to be a sober and respectable man, " and a good steady driver, *would it be any defence* " *for me, against his having ridden over an old woman,* " *that he had never done so before?*" *Lord Wood* said, "I lay aside the authorities from the English " law;" and all the Judges concurred in finding Captain Fleming liable for the misconduct of his dog.

When the proceedings, thus briefly sketched, are studied, it will be seen that the Judges of the Scottish Courts reasoned thus:—"If a master is liable for " an injury sustained by a third party through the " carelessness or misconduct of his servant, in spite " of the previous good character of the servant, " *a fortiori* must he be liable for injury done to " a third party by a foxhound, the tendency of " whose nature is to do such injuries." The rea- soning was triumphant. Let us see in what way the House of Lords dealt with the case. The rubric of the Report bears:—" *Liability for a dog.* If the " owner of a dog keeps him properly secured, but " another person improperly lets him loose, and " urges him to mischief, the owner is not liable. " *Proof*, therefore, that the dog of A has killed the " sheep of B will not entitle B to recover compensa- " tion from A; for, consistently with such proof, " the dog *may* have been kept properly secured by A, " and *may* have been improperly let loose and urged " to mischief, by a third person."

There was much argument as to how far the laws of the two countries corresponded, in regard to such a case. And the law as laid down by the Scottish Judges was overruled. It is not material for our present purpose to go into details; but we may give one or two quotations from the Chancellor's speech in moving judgment. Among other things, he said, " If, in order to make the owner liable, " it was necessary that he should have been aware " of the mischievous propensities of the dog, that " should have been found. If that is not essen- " tial by the law of Scotland, in order to fix the " owner with liability, but if some *culpa* or negligence " on his part is essential, then that *culpa* or negli- " gence should have been found." Again, " The " reason why, by the English law, it is necessary to " allege and prove the *scientia* is, that in the case of " an animal *mansuetæ naturæ, the presumption is that* " *no harm will arise.* Starting from that, there can- " not be blame in the owner merely from allowing " liberty to the animal. Blame can only attach to " the owner when, after having ascertained that the " animal has propensities not belonging to his race, " he omits proper precautions to protect the public. " But, after all, *culpa* or negligence of the owner is " the foundation on which the right of action against " him rests." And once more—" The interlocutor " here not necessarily showing either knowledge of the " vicious propensities of the dog, or want of due care " in keeping him, I think it quite clear that there is " nothing to fix the appellant with liability." One would naturally have supposed it lay with the owner to show due care on his part.

The result of all this just is, that, if a man ventures upon the lawful and proper acts—acts essential to the comfort, if not the existence of society—of employing another to build a house, or drive a carriage, and the like, and the person so employed injures the property or person of a third party, the employer shall be charged with the consequences of the injury, without the slightest attempt to impute any carelessness or other *culpa* to him; whereas, another man may keep a semi-wild animal for his mere amusement, and should that animal injure the person or property of another, it is necessary, in order to found a claim for redress, to allege and prove direct *culpa* on the part of the owner—in the shape of a previous knowledge of the animal's faults. What becomes here of the maxims *alterum non lædere* and *qui facit per alium?* Why should I be more liable for what my man does than for what my dog does? Is it not infinitely more reasonable to say, "the presumption is, that no harm will arise," in the case of the human being, endued with free will, and a moral sense, to which an injurious act is opposed, than in the case of the hound, whose natural instinct it is, to worry? Would it not be much more consistent with public policy to protect the lieges, in lawful and necessary business, than in the pleasure of keeping foxhounds?

Revert for a moment to the remarks of Lord Cranworth. His Lordship reasons thus, in support of the absolute liability for injuries to third parties— " third persons cannot, or at all events may not, " know whether the particular injury complained of " was that of the master or of the servant." Well, how were third parties to know—why should they be bound to know, whether the owner of a foxhound has kept him properly secured, or whether he was loosed by some person or persons unknown? Again, his Lordship says—" I was no party to your carriage

" being driven along the road, or to your building a " house; if you choose to do, or cause to be done, " any of these acts, it is to you and not to your ser- " vants I must look for redress, if mischief happens " to me in consequence of their acts. *No one has a " right to involve others in risks without their consent.*" So, Major Orr might have said—" I was no party to " Captain Fleming keeping a foxhound, and if he " chose to do so, it is to him and not his hound, or " some person unknown, I must look for redress—he " had no right to involve me in risk without my " consent."

We might carry such a course of criticism much farther. But we conclude with repeating, that there seems to be no sound principle on which one man can be made responsible for the unauthorised acts of another, than that of *culpa;* and we can see no reason why this should not be applied to the case of injury to a stranger, as well as injury to a fellow-workman.

SHERIFF COURTS.

THE advantages of a speedy and satisfactory disposal of law-suits—the facilities which Local Courts afford for the determination of disputes—and the preference which the community generally shows for tribunals which are at every man's door, are so apparent, and have been so often stated, that it would now be worse than useless to enlarge upon or enforce one or other. What we propose to do, from time to time, under this title, is, to offer suggestions for the improvement of the procedure and the constitution of the Sheriff Court. To contrast the system of forms, and the clueless labyrinth through which a process dragged its ever-accumulating bulk prior to the Sheriff Court Act of 1853, with the much more simple and sensible procedure which was introduced by that statute, would serve no good purpose. No one looks with regret upon the past, and a consideration of the grievances so lately removed would not add to the anxious desire which universally prevails for still further progress in the direction which was so effectually taken five years ago. In a word, let us say, in commendation of the measure referred to, that it has diminished expense, abridged the time occupied in disposing of a case, and—what is not less important—has excluded from the proof and other proceedings a great amount of irrelevant and useless matter which not unfrequently interfered seriously with the proper administration of justice. The average expense of an action in the Sheriff Court is now from £15 to £20 on each side; formerly it was little, if anything, under £40. Within four or five months, unless the autumn recess intervenes, a final judgment may be obtained. Under the old system, a process that terminated within one year was a novelty. The witnesses are now examined before the Sheriff-Substitute. Objections to questions daily diminish—when stated they are disposed of at once, and the case proceeds. When the proof was taken by a commissioner, every objection and its answer had to be committed to writing, which means that each objection gave birth to two pleadings. The answer was taken and sealed up to await the decision of the Court. At last what was the proof was separated from what was not, and the *dicta membra*, being so gathered up, were the judge's guide, by which it was expected he would be brought to a correct result. Changes so beneficial have necessarily increased—perhaps it would be more correct to say, have created, the confidence which is generally manifested in the administration of justice in these Courts. No doubt the advantages which local tribunals afforded led to that wide-spread desire, the expression of which brought about the measure of 1853; but now that an improved procedure has exhibited these advantages more strikingly, greater interest has been manifested in the proceedings, and there is in the public mind a more general conviction of the substantial worth of the County Court. Let us see whether we can suggest any improvement on the practice and procedure.

By the Act 16 and 17 Vict., cap. 80, sec. 3, it is enacted that "The Sheriff shall hear the parties in " explanation of the grounds of action and the nature " of the defence to be stated thereto; *and, if satisfied* " that no farther written pleadings are necessary, he " shall cause a minute in the form of schedule (D) " annexed to this Act to be written on the summons, " setting forth concisely the grounds of defence, " which minute shall be subscribed by the parties or " their procurators, and the Sheriff shall thereupon " close the record by writing under the said minute, " 'Record closed.'" The form given in the schedule is—

" No title to pursue, *or* prescription, *or* the goods specified " in account libelled were not ordered or not received by de- " fender, *or* compensation, conform to account due by the pur- " suer, amounting to £ , herewith produced, *or* the defender, " who was the drawer of the bill sued on, received no notice " of dishonour, *or otherwise, in like manner, as the case may " be.*"

Schedule A of the Act gives the form of a summons, which runs thus:—

" The defender ought to be decerned to pay to the pursuer " the sum of , contained in a bill drawn by the pursuer " upon, and accepted by, the defender, dated , and " payable after date, with the legal interest thereof " till payment; *or* to make delivery to the pursuer of " sold by the defender to him; *or* to pay to the pursuer the " sum of , for goods sold by the pursuer to the defender, " per account, commencing the day of , and " ending the day of , annexed hereto; *or* to pay " to the pursuer the sum of , being damages sustained " by the pursuer in consequence of the defender having slan- " dered the pursuer, by stating , *or otherwise, according " to the nature of the circumstances of the action.*"

This provision leaves a great deal to the discretion of the Judge, and we consequently find that the practice in the various Courts is by no means uni-

form. In some, the short record contemplated by the statute is little, if at all, known—while in others it is looked upon as a bed of Procrustes, into which, by a little judicial, if not judicious, lopping and pruning, any case may be fitted. There are errors in either course, and the statute lets them in. "No "title to pursue," *or* "prescription," is a vague defence; and besides, they are both pleas, and not answers to the averments made in the summons. The Court and the pursuer are not only entitled to know what the objection to the pursuer's title is, or which prescription is relied on, but the defender should, by the statements in the record, be prevented from shifting his ground in any Court in which the case may come to be heard. In an action which was ultimately decided in one of the Divisions of the Court of Session, the defenders stated in substance the defence suggested by the schedule: "The goods specified were not ordered and not received by the defenders." In point of form it was impossible to object to such a defence—it was provided for by statute—and the record was closed. The pursuers were allowed a proof of the libel; and the proof proceeded. As it went on, it became apparent that the defenders—a mercantile company—objected only to three or four items of the account,—and that on the ground that the articles to which they referred had been furnished not to, or for behoof of the company, but on the order, and to one of the partners who had become insolvent. This was no doubt within the defence; but what was the result? Evidence had been prepared and led upon what was not intended to be disputed. The case assumed a new shape—an adjournment became necessary—and only at a second diet was the real case opened. No wonder, then, we admit, that some Judges discountenance the adoption of the short form of record.

On the other hand, the statute provides for closing the record on a minute written on the summons where the defence, besides admitting or not admitting the statements in the summons, raises an inquiry beyond the matter of the libel altogether. The defender may admit and avoid—not denying the statements in the libel; he may, in the words of the schedule, and under the sanction of the statute, plead "compensation con- "form to account herewith produced." He may wish to know what answer the pursuer intends to make to his claim; but he has no means of compelling him to meet it. If the Sheriff-Substitute is "satisfied that no further pleadings are necessary,"—and the matter is left wholly to his discretion,—the record is closed. A case occurred lately where this plea was stated, and proofs having been allowed and led, it was ultimately found that the pursuer's answer to the plea of compensation—at least it was the answer to which he resorted after the proof—was that there was no *concursus debiti et crediti*. If the defender's case had been stated in a form which admitted of and compelled an answer, this plea, on which the pursuer succeeded, would have been stated and disposed of without the expense and delay attending a proof of statements which turned out to be immaterial. Such results are countenanced by the statute, and under its provisions it is within the discretion of the Judge before whom the case is in the first instance brought, to compel the parties to adopt a form of pleading which may, and often does result in needless expense, and sometimes in absolute injustice. It is to be admitted that there are cases in which the short record is sufficient; but it is much to be doubted whether it serves,—the purpose which the Sheriffs who most generally adopt it so laudably have in view,—to accelerate the issue which a defence is sometimes intended to postpone.

The making up of a record by condescendence and defences, if the time allowed for doing so were not unnecessarily extended, would cause less delay than the vague, oracular-like minute which admits often of more than one interpretation. We take it to be one of the first essentials to the satisfactory solution of any question or the settlement of any contention, that the disputants and the Judge should know exactly where the difficulty or disagreement lies. It is all very well to be informed at what results two who have disagreed respectively wish to arrive; but this is not enough. They, and he who is to decide between them, should understand, before either proof or argument, what the exact points are on which the contention is to turn. This is not to be attained by any other than a strictly logical process. In some cases the conditions of such a process may be substantially complied with in the short form of record. An action for money lent may be met by the answer that the defender did not borrow the sum sued for, or any part of it. A summons for damages and *solatium* on the allegation that the defender slandered the pursuer, may be answered by the defence that the defender never uttered the words stated in the summons. In either of these cases the issue would be very distinct. But by far the greater number of cases do not admit of answers so simple; and in these, a more elaborate and exhaustive process must be followed in order to ascertain what is averred and relied on, and what is admitted and denied by the several parties. "Cases," says Professor Bell, "may be "distinguished as either admitting of a denial in fact "or in law, or of an answer by the statement of some "opposing right, which admits of denial or avoidance. "The one class may be called simple cases; the other "complex." If a case is "complex," it follows necessarily that the record cannot be satisfactorily closed on a minute—that the pursuer is not only entitled, but bound to state in reply whether, and if so, on what grounds he intends to dispute the defender's

separate case. Assume that in such a case depending in the Court of Session, the defender, instead of stating his "opposing right"—his exception to the action—in a separate statement of facts, embodied it in his answers to the pursuer's statements, the Court would delete the averment and close the record, if the defender wished it, or direct that it should be put in a separate "statement of facts," which the pursuer would have an opportunity of answering. The same course would be pursued in any case in an inferior Court, if condescendence and defences were ordered; but when, in terms of the statute, a minute of defence is considered sufficient by the Sheriff, a complex case may be stated, without allowing the pursuer any opportunity of meeting it, or committing him to any statement in reply. The record, so far as he is concerned, is left open.

The abuses to which this leads are partially illustrated by one of the cases we have instanced; and they must be serious if there be any wisdom or reason in closing a record at all. The obvious remedy is to require from the defender in cases where the defence is a direct answer to the pursuer's claim, a precise and articulate statement of his objections, and where the defence raises a new inquiry upon a separate case, to order the record to be made up by condescendence and defences. If, for instance, the libel concludes for payment of the price of goods furnished, a general denial should be minuted only when the defender means to rely on the statement, that he never purchased and never got delivery of the goods. Instead of this we sometimes find the vague defence, "a denial of the whole statements in the summons" resolve into this, that the goods were furnished and rejected, because they were not conform to sample, or not equal to the warranty, or this, that the account is overcharged. On the other hand, it should be an absolute rule, that when an avoidance of the action by the setting up of a separate case is pleaded, the record should be made up by the exhaustive method of statement and answer. There are, besides, many cases in which necessarily the pursuer's statements are numerous, and although the defence may be raised by the defender answering these, yet it would often abridge the subsequent procedure if at the outset it were ascertained precisely how much of the pursuer's case is admitted, and how much of it denied. This is often attempted in the shape of a minute of defence; but instead of such a minute as is contemplated by the statute, there is produced a document of several pages, in which, without regard to the order of the statements in the summons, general and special denials, qualified admissions and explanations, are all jumbled together. The fruits are uncertainty, delay, and increased expense. And how can it be otherwise, when no effort is made, and no method adopted to fix and ascertain upon what matters of fact and questions of law the parties disagree? If this is not done at the outset, and it cannot be done without having recourse to a record logically shaped and carefully prepared, either party may shift his ground—both must prepare for such a step—and much needless expense may, and often must, be incurred. The first remedy to be applied is, in the great majority of cases, to have the record made up by condescendence and defences. The statute allows of this.

Besides this, we would suggest an addition to the procedure provided for by the statute. The prevailing practice in cases of disputed fact is to allow parties a proof at large of their respective averments; and consequently every link of the case is made the subject of probation. It would certainly be more correct to limit the proof to what is really essential, and to what is disputed or relied upon by the parties; and this could best be done by the adjustment of an issue or issues. Let each party be ordered to lodge an issue, on which he proposes that the case should be tried; and after a hearing, let the Sheriff-Substitute settle the issue, and the proof would necessarily be limited to the precise questions raised. In all cases this would be of immense advantage. Attention would be fixed on the very point of the contention—much of the time now occupied in preparing a case for judgment would be saved—expense proportionately diminished, and greater certainty of result secured.

RESIGNATION OF SHERIFF-SUBSTITUTES.

The Act 16 and 17 Vict., cap. 80, largely increased the salaries of Sheriffs, providing that thenceforth £500 should be the minimum, and £1000 the maximum; and it declared, section 38, that, in computing the amount of retiring allowance, "the "emoluments drawn by them on an average of the "five preceding years shall be held to constitute their "salary." It thus became the interest of the Sheriff-Substitutes then in office to retain their seats for five years more, and it is scarcely necessary to say that in this particular these gentlemen have prudently attended to their interest. Indeed, we fear that in more than one instance the Sheriff-Substitute has continued on the Bench to the loss of the public and the annoyance of the profession, solely for the purpose of securing the premium which the Legislature has thus unwisely offered for his retention of office. The five years, however, came to an end on the first of November last. There is now at least no pecuniary motive to deter those of our local judges, who are unable, by reason of age or infirmity, to discharge efficiently the arduous and onerous duties of office, from seeking the repose of private life. On the contrary, the legislature has made ample provision for their comfort. By the former Act of 1 and 2 Vict., chapter 119, it is enacted, "Such retiring annuity "shall not exceed one-third of the salary payable to "such person, in case the period of his service shall "have been not less than ten years; and shall not "exceed two-thirds of such salary, in case the period "of service shall have been not less than fifteen years; "and shall not exceed three-fourths of such salary,

" in case the period of service shall have been not less " than twenty years or upwards." And although this statute fixes only the maximum, leaving the minimum undetermined, there can be little doubt that in all cases those in authority will give a liberal construction, and, in general, award the retiring Sheriff the maximum allowance.

In these circumstances, it was generally expected that when the five years of increased salary had expired, several of our Sheriff-Substitutes, who had been in office for the longest of the three periods of service contemplated by the Act, would have availed themselves of the opportunity of retiring from public service to enjoy the leisure which their services so well merited; but unfortunately, a certain construction of the clauses in the Act raises a difficulty which we know has deterred many from availing themselves of its privileges. With all respect to these gentlemen, we think that in this matter, where they are judging in their own cause, they have put a construction on the statutory words which, at all events, is not the only one of which they are susceptible. The sixth section of the Act 1 and 2 Vict., cap. 119, provides that no retiring annuity shall be granted "unless " such Sheriff-Substitute shall have duly fulfilled the " duties of his office during one of the periods before- " mentioned, and is, from old age or permanent in- " firmity, disabled from the due exercise of his office, " which facts shall be certified by the Lord President, " the Lord Justice Clerk, and the Lord Advocate, for " the time being, as having been established to their " satisfaction by proper evidence."

Now, we are aware that the necessity for such an investigation as is here implied, and the nature of the circumstances to be inquired into, have operated in deterring several Sheriffs from availing themselves of the liberal provisions in their favour. They are, naturally enough, not inclined to admit that they are disabled from the due exercise of their office by old age or other permanent infirmity, and they feel a delicacy in calling on their official superiors to certify these points. They believe that as a *sine qua non* to their resignation being accepted, they must confess physical infirmity or mental incapacity, and what is harder still, must prove it. But surely this can never have been the intention of the Legislature. The obvious policy is to throw out inducements rather than to present obstacles to old Judges retiring from office; and there are ample means of checking abuse in the matter without having recourse to personal mortification. There is the sacrifice of a considerable portion of present income, a sacrifice which does not become easier by lengthened enjoyment of the full salary; and there is the power of awarding less than the maximum proportion of salary allowed by the Act.

While the words of this Statute are not the best which might have been selected, we are satisfied that they will bear a construction more consonant with public policy and common sense than that which the Sheriffs have put upon them. A man may be unable rightly to perform the duties of a Judge from no failure in his mental powers, but simply from the increase of the business which he is called on to perform. Having been educated and trained under the old system, he may be unable to adapt himself to the ceaseless changes in the forms of process, or he may not apprehend with the same readiness and facility as he would have done when a younger man, the nature of those new duties which are every year thrown on the Sheriff Courts. The Sheriff-Substitute may be mentally and physically as able as ever he was—he may, at sixty or seventy, be as active as he was at forty, but in the interval circumstances have changed. The business of his sheriffdom, large enough when he was first appointed, may have become overwhelming, simply through increase of population. The Court town, which at the date of his appointment contained a population of twenty thousand, may now number fifty thousand inhabitants, and from being a place of little or no trade, may have become one of the great centres of manufacturing industry. In such a case it is evident that although the old age of the Judge may neither have impaired his abilities, nor diminished his powers, it must render him less able to deal with the novel and intricate questions which are daily submitted to his determination.

But after all, it is more than doubtful whether the provisions of the Act 1 and 2 Victoria on this point are still in force; for the 38th section of the present Sheriff Court Act (16 & 17 Vict. cap. 80,) seems to revoke all conditions except length of service. At least no other condition is mentioned. "It " shall be lawful for the Commissioners of her Ma- " jesty's Treasury to grant to any person who has " held, now holds, or may hereafter hold the office of " Sheriff-Substitute, such annuity as is by the said " second recited Act to be granted in respect of long " service for one or other of the periods specified in " the said second recited Act, notwithstanding such " service may not have been continuous or may have " been in different counties."

On the whole, therefore, there seems no real foundation for the scruples of the Sheriff-Substitutes. The Act 1 and 2 Victoria may bear the construction they put upon it, but if it were doubtful which is the sounder reading, the doubt seems to be removed by the subsequent Act, which carefully avoids all mention of the ambiguous conditions of the former. Length of service is all that is necessary to entitle a Sheriff-Substitute to the statutory allowance on his retirement from office.

SHERIFF BARCLAY'S ADDRESS.

At the opening of the Winter Session of the Glasgow Legal and Speculative Society, Mr Sheriff Barclay of Perth delivered an address on "Some Points on " Proof by Parole." The lecture was characterised by the learned Sheriff's usual ability, and contained much that was valuable and interesting to the profession. We are induced, from the importance of the subject, to lay before our readers two extracts, which may be to them of practical utility.

Having selected the seventh chapter of the fifth book of Quintilian's Institutes of Oratory "*Concern-* " *ing Witnesses*" as the foundation of his remarks, Mr Barclay quoted certain passages with the view of applying the rules of Quintilian to modern practice. He next contrasted the present mode of making up

the Record, which had its origin in the Judicature Act of 1826, with the form of pleading prior to that date; and having shown that the fees allowed for precognition are totally inadequate for the proper discharge of that most important and delicate duty, proceeded to point out the beneficial effects of a more liberal allowance for the precognition of witnesses, in the following terms:—

We feel assured that, with a more adequate allowance for precognoscing witnesses, a great reduction in the number of cases in which proofs are now often very unnecessarily entered on, would be the sure result. Full fees, with outlays, ought to be allowed on production of the precognitions and vouchers to the auditor, according to the practice, we understand, with propriety adopted in the Jury Court.

The averments made without such preparation, are, from the one-sided and exaggerated statements of the clients, and when tested by precognition or proof, are found to be so highly pitched as to be far above the harmony of the witnesses. In precognoscing witnesses, let caution be had to do so with care. In fact, the witness ought to be precognosced with as much circumspection as if he was under examination in Court, and this ought to be impressed on his mind. He ought to be warned to say nothing but what he will be able to testify in Court. Great care ought to be taken not to overcharge the statements, or to get up a case. It can be easily seen whether the witness is speaking with a conscientious regard to truth, or under the impulse of passion or partizanship. In the latter case it is very clear that he will cool down in process of time, and will not sustain his intensity when in Court. Great anxiety ought to be taken to suggest all such cross-questions as will likely be put by the opposite side. It may often be necessary to renew the precognition, after the counter averments have been exhibited, and in every case where there have been any considerable lapse of time between the first precognition and the leading of the proof. The neglect of this has frequently occasioned the loss of a just cause. Let me suggest the propriety of getting the witness himself to take and retain a note of precise dates, and perhaps names of persons and places. There is nothing which has less of fixidity in the memory of witnesses, especially from rural districts, than the lapse and epochs of time. Mercantile men with Day-Books and Ledgers, and Bills receivable, but still more so, Bills payable, and the oft-recurring mercantile crisis, have more ample index of the lapse of time. With country witnesses such festivals as Handsel-Monday and Hallowe'en are the only grand epochs in the year, and such events as the dry year 1826, or the failure of the potato crop of 1845, alone make notches in the even tenor of their way. In fact, the temper of rural witnesses is aroused, and they appear as insulted, should they be pressed as to dates; and I have seen them insist that they cannot state, whether an event happened within five or fifty years bygone; and such an answer has been dwelt on as proof of a desire to conceal, whereas it was but the over-sensitive desire to speak on nothing but what can be reduced to exactness.

When the facts are thus fully and accurately ascertained, it becomes a comparatively easy matter to frame the Record on both sides. However much it may be recommended on the plea of economy, experience is against the short Records, which are rapidly framed by the Judge. Unless where the fact is one and simple, capable of being categorically admitted or denied, or the case resolves into an issue of law, or where of necessity the proof, as in the case of a prescribed claim, must be limited to writing or oath, such short Records are far from being satisfactory and are often dangerous. In like manner, it is doubtful whether there should be control of the Court over the preparation of the Record, unless in cases of very gross irregularity. Parties and their agents ought to be left to themselves, as to making and meeting averments under the usual penalty, on the one hand, of being precluded from proof of facts not averred, and on the other, of being held as admitting facts distinctly averred, within the knowledge of the party, and yet not denied. It is not for the Judge to suggest averments not made, or the suppression of others, or to recommend admissions or denials. A dangerous error is often committed by averring *evidence* instead of *facts*. The averment should be so comprehensive, as to include all its details, because where unnecessary minutiæ are given, the party is more open to challenge for omission or misstatement. One important rule should be kept in view, to give each substantial fact a separate article of averment, so as to compel a distinct answer. A very frequent error occurs in this way in actions of filiation and aliment. The complex averment is made "that the pursuer brought forth a child on a certain day, *of which the defender is the father*." This almost necessitates a denial, and thus the pursuer is forced to prove the birth, which, had it been put singly, in all probability would have been admitted.

Such answers as "So far admitted," "*quoad ultra* denied," or "admitted or denied with reference to the counter statements," in the mass or in detail, ought to be avoided, as leading to a very unsatisfactory result. The absurdity of the complex answer is well illustrated by a case, where one of the averments was, that the pursuer was an "*ultra* Tory," which received the witty answer, "Admitted that the pursuer is a Tory, *quoad ultra* denied." The usual appendage of "irrevelant" is out of place. Relevancy is a plea in law, and should therefore appear in its proper place. One not unusual practice ought to be discountenanced, namely the defending party first meeting the leading averments by answers, and then separately affirming their opposites, and thus compelling the other party to deny negatives. Another practice is to be reprobated, where, under the term "admitted," matter is put which was not averred on the other side, and so could not be thus confessed. It is an attempt to put words into the mouth of the other party, which has a bad aspect, and should be avoided.

To conclude this rather lengthy section, it may be confidently affirmed, that if a full and fair precognition be taken before the preparation of the Record, perhaps few Records will be completed and closed, as one or other of the parties may be advised to yield the matter of fact as indisputable; or where a Record is thus prepared, the range of proof will be greatly limited by admissions which cannot be avoided; or where there is a fair controversy of fact, the point of difference and the issue will be made so narrow and so clear, that there can never arise any doubt or difficulty as to the application of the proof to the issue.

The remarks on the mode of conducting a proof are worthy of attention, and the position and experience of Mr Barclay entitle them to the greatest possible weight. He states:—

In leading proof, one most important and responsible duty is the selection of the witnesses to be called. There are two extremes to be here avoided—the over-feeding and the starving of a case. It ought to be recollected that two witnesses are sufficient to establish a fact, and that testimony is to be *weighed* and not *numbered*. No doubt there is a natural anxiety on the part of a pursuer to guard against surprise by the number of witnesses who may be called on the other side. But in practice it will often be found that the complaint of repletion rests

more against the defender, and it is too often the desire of the Court, were it not out of order, to cry, "Hold, enough." Nothing contrasts more between English and Scotch Courts than the practice in the former to establish a case with the fewest possible witnesses, whilst in the latter, "Legion" is generally the name of the host of witnesses; and the question is, how *many* can be brought to support a point made as clearly by *two* as it can be by *twenty* witnesses? The economy of leading proof before the Judge instead of a Commissioner, is conducive to a plethora of evidence. Some check might be obtained to the excess of evidence by requiring parties to exchange lists of witnesses a given time before the diet of proof. This rule would be attended with other and important advantages.

In leading evidence, due attention should be had to the order of calling witnesses, and of their individual examination. The former is often politely sacrificed to the convenience of witnesses, and it follows that the notes of evidence present a piece of Mosiac, where the facts are recorded without any pretence of order or association. In the same way, in the course of examination, often facts are found quite out of place, and strata overleaps strata repugnant to any scientific arrangement. It is often remarkable how a skilled agent can bring out, by a few well-chosen questions, all that is essential to the issue. Others labour to make the matter plain by reiteration of question upon question, until the tired and jaded witness begins to lose, with his temper, confidence on his first position, and so to modify, qualify, and explain, much to the discomfort of his tormentor. An examinator ought never to forget that he is proving and not pleading his cause. The great secret at the bar and elsewhere, not excluding the pulpit, is "to finish so soon as done." All beyond is certain to weaken rather than strengthen. It is always painful, after a full examination of a witness on every thing essential, to observe a reluctance on the examinator to sit down, but a painful scratching of the cranium, as if to start some new mode of questioning on points already sufficiently answered, or to raise up new points nowise essential to the issue.

One of the most important points of practice is the cross-examination of witnesses, so well spoken to by Quintilian. There again the English practice is superior to ours. There the cross-examination, which with us is the rule, is the exception, and where entered on, the questions are few and well chosen, and the questioner soon determines whether it be safe longer to pursue his investigation. In Scotland it is matter of notoriety that generally it is considered *duty* to cross-examine every witness, and that with the unskilful the examination is to compel the witness to go over the same ground, often only to strengthen his first position by supplying details which it was not thought worth the while of the examitor-in-chief to disclose. Of course, where it is known that the witness has either intentionally or by mistake testified to error, it is right that every mode be used to detect and expose the error, and in this much talent and tact are necessary.

There are some sensible rules as to examining witnesses in that amusing volume "Adventures of an Attorney in Search of Practice," published in 1839. The author, who appears no unpractised lawyer, observes that "Witnesses are like the muscles of the body, voluntary and involuntary in their action, but with this difference, your voluntary witness cannot be restrained, your involuntary witness never acts spontaneously. A witness requires to be studied with close attention, and the opportunity of studying him is best obtained by quietly leaving him to speak for himself, unless it appears that he is deterred by bashfulness or timidity."

Much irregularity exists in renewed examinations of the same witness. Often there appears a desire, as in a scold, to have the last word—cross succeeds cross, without much of the proper element in either. It is always painful to exclude the light of truth on any mere technical ground, but it is the duty of the Judge to see that the farther examinations are founded on some matter brought forth in the last stage of examination, and that the witness be not made the subject of legal "ball and shuttlecock." Where the presiding Judge has read the Record, and clearly discovers the true issue, divested as he is of any personal interest in the cause, he may perceive points which have escaped the notice of both parties, and thus questions from the Bench may subserve the ends of truth and justice, and relieve a witness from seeming perplexities and apparent contradictions.

Here may be noticed a matter of practice, under the recent law of evidence, as to the time of calling parties as witnesses for themselves. In this several Courts widely differ, and the results must obviously be very important and serious. In some Courts, parties, after hearing all their own witnesses, give evidence, as if in supplement or in corroboration. In others, both are excluded during the leading of the evidence, if they are to be made witnesses for themselves. The correct mode is to treat them as witnesses. So that it rests with the agent to call his client first if he desires his presence and help in examining the others, or to enclose him until the time he desires his evidence to be taken up in order. There is a difficulty, however, in applying this rule to the defender, who in all cases has thus the advantage of hearing the whole of the pursuer's proof, and including the pursuer himself, before he is called on to give his own testimony, which can be thus skilfully prepared. The remedy would be, that both parties where they are to be offered as witnesses, should be first examined outwith the presence of each other. Such a rule would more than any other lead to the discovery of truth and the detection of error. Such a remedy is loudly called for in cases of filiation and aliment, where the new law of evidence have opened a flood-gate to perjury, and renders it now most difficult to fix paternity on the man, and is yearly throwing on the Poor Law authorities numbers of bastards, to become the pests of another generation.

The form of putting the questions is often a matter of nicety, and neglect in the proper frame leads to erroneous answers. One instance of frequent occurrence may be here given. It is desired to know whether a certain thing was done, or words spoken. The question ought to be put directly, was the thing done, or the words spoken. But generally it is put indirectly, did you see such a thing, or hear such words; or still more incautiously, it is as often put, "*Do you recollect* of seeing or hearing?" The witness, if he did not see or hear the matter, can give no answer but the affirmation of not seeing or hearing, or *no recollection;* and it is so recorded. But then this is evidence merely that the witness did not see or hear or has no recollection of the matter, which is quite consistent with the occurrence of the fact. Had the question been directly put, it might have been negative of the fact, on the supposition that the witness must have seen or heard the matter if it did happen. The answer of *non memini* ought never to be thus suggested, but left to the witnesses, many of whom are much too apt to cast the shield of a bad memory over a worse conscience.

It is absolutely necessary, as noticed by Quintilian, to use plain language to plain people. All technical terms to uneducated people should be avoided. It is in my recollection, that an honest country smith, who was called to give evidence as to a diseased horse, was petrified, whilst the audience were convulsed in laughter, by a coxcombical village attorney of the olden school solemnly asking, "Have you carefully read and fully digested that erudite article in the Edinburgh Encyclopedia Britannica *voce* Farriery?"

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, JANUARY, 1859.

CRIMINAL PROCEDURE IN SCOTLAND.

THE Criminal Law of Scotland, properly so-called—that branch of jurisprudence which treats of the definition of crimes and the punishments appropriate to each—approaches, perhaps, as near to perfection as the code of any of the surrounding nations. It is at once simple, mild, and equitable.

In many respects our law of criminal procedure is unquestionably superior to that of our southern neighbours, and within the last fifty years they have adopted, as usual without acknowledgment, rules of practice similar to our own. As an instance:—In England, a prisoner accused of felony, though he were a foreigner ignorant of our language, though of childish years, and even though dumb, was denied the assistance of counsel to address the Jury upon the evidence; and this continued to be the law of England down almost to our own times. While to crown the cruel absurdity, counsel were admitted in the minor offences, known as misdemeanors, and in the major offence of high treason. This has now been amended, and the prisoner is in all cases allowed the assistance of counsel.

Few things are so odd and unintelligible to a stranger as the system of prosecution in England. Sometimes the prosecutor is the Attorney-General on behalf of the Crown, sometimes the vestry of the parish, sometimes the party injured, sometimes his nearest of kin, sometimes a policeman, and sometimes a person who apparently has nothing to do with the matter, but who had been casually present and witnessed the crime. The English are not apt to quarrel with any system merely on account of its theoretical absurdity; but the practical inconvenience seems now to be severely felt, and energetic measures appear to be in progress to secure, in a form modified to suit the circumstances, the appointment of public prosecutors. The main difficulty in the way is obviously the absence of such officials as our Sheriffs and Sheriffs-Substitute, with their Procurators-Fiscal, and local Courts, civil and criminal.

The agitation of such questions in England suggests the present as a proper occasion for the inquiry, whether our own criminal procedure is capable of improvement? In pursuing this inquiry, the subject naturally divides itself into three parts—First, The preliminary investigation; second, the indictment; and, third, the trial.

I. THE PRELIMINARY INVESTIGATION is conducted, according to the present practice, by the Procurator-Fiscal under the surveillance and control of the Lord Advocate and his deputes. Upon receiving information of the commission, or supposed commission of a crime, it is the duty of the Procurator-Fiscal, if he see grounds of suspicion, to cause the suspected party to be arrested and brought before the Sheriff for examination. The Sheriff, before proceeding with the examination, informs the accused that he is not bound to make any statement, or to answer any questions, but that any statement he may make may be used in evidence against him. No counsel or agent is allowed to be present on behalf of the accused. Indeed, from the moment of his apprehension, until his committal, he is allowed to advise with no one—even his nearest relatives are not permitted to see him. Upon the examination, follows the committal for trial; and then the Procurator-Fiscal completes his precognitions. These precognitions are formally authenticated and signed by the witnesses; and an unwilling witness may even be put upon oath to compel him to disclose the truth. All this takes place, or more correctly, perhaps, is supposed to take place, in presence of the Sheriff. Not only is the public rigidly excluded, but no counsel or agent is allowed to attend on behalf of the accused, and even the presence of the accused himself at the precognition is prohibited. After the precognition is completed, it is transmitted along with the declaration of the accused to the Crown counsel, by whom instructions are given as to whether the accused is to be prosecuted, and, if so, in what Court.

The main differences betwixt the English procedure and our own, at this stage, appear to be that in England the whole preliminary investigation is carried on before the magistrate publicly, and in open Court, and that throughout, and from the first,

the accused is allowed to avail himself of the assistance of his professional advisers.

The system of public preliminary investigation has its advantages and its disadvantages; but it appears to us that the latter greatly preponderate. The evidence to be tendered, and that too while incomplete, is reported in the newspapers, accompanied in cases of general interest with comments criminatory or exculpatory of the accused, as to whose guilt or innocence the jury must have in many instances formed and expressed an opinion before entering the box. The facilities afforded for the concoction of evidence for or against the accused form likewise a serious objection.

But while we would deprecate the public examination of the accused and the prosecutor's witnesses as preliminary to the trial, we do think that it is in all cases important, and in many essential, that the accused should have the benefit of professional assistance during these preliminary proceedings. However honest a public prosecutor may be in the discharge of his duties, however anxious to act fairly, still, consciously or unconsciously, he must necessarily act under a strong bias. His occupation is to trace out guilt; and constituted as men's minds are, he is too apt to assume its existence, and to act upon that assumption. He probably puts his questions fairly and clearly enough; but these questions are all put with the view of establishing the guilt of the accused. Seldom, indeed, is a question put to demonstrate his innocence.

Of course, we do not contemplate that the accused should be allowed to advise with his agent as to the answers he is to return to the questions put to him by the public prosecutor. The agent's duty must be confined to seeing that the prosecutor's questions are properly put, and the answers correctly recorded, and to putting any questions which may appear to him to be necessary to elicit the whole truth and demonstrate his client's innocence. The same remarks seem applicable to the precognition of the prosecutor's witnesses, with this addition, that it is just that the accused should be allowed to tender for precognition such witnesses as he may think fit.

By these means we conceive that the preliminary investigation would be rendered more complete, as well as more fair than it is at present; and in some cases the innocent would be saved from the ordeal of a public trial, often only a few degrees less painful to a sensitive mind when terminating in an acquittal than when resulting in a conviction.

II. The indictment. The form of the indictment is perhaps somewhat antiquated, but it is clear and logical; and we do not see the necessity of any change in this respect.

III. The trial. Under the recent Sheriff Court Act, the prisoner who is to be tried before the Sheriff and a Jury, is cited to attend at two diets—the first before the Sheriff alone, to plead guilty or not guilty, and in the event of the former plea, to receive sentence; and the second—ten days later—before the Sheriff and a Jury, in the event of a plea of not guilty being recorded at the first diet. In this way the attendance of witnesses and jurymen is rendered unnecessary in those cases where the accused pleads guilty, and not only are they spared much inconvenience and annoyance, but the annual saving to the Exchequer is very considerable.

It is desirable that this system should be extended to the Justiciary Courts; but as the High Court sits in Edinburgh, and the Judges are resident there, and visit the assize towns only on circuit, there is a practical difficulty in the way. Various plans might be suggested for meeting this difficulty. The simplest and most practicable would be to cite the accused to appear at a first diet before the Sheriff of the county in which the offence was committed, and record his plea. If the plea should be "guilty," then the Sheriff would recommit him to prison to be brought up for sentence at the next circuit. If the plea be "not guilty," then the citation of jurymen and witnesses would proceed according to the present practice. The desired object would in this way be attained.

In England the trial commences with an address by the prosecuting counsel to the Jury, stating the facts which he proposes to bring before them, and the evidence by which these facts are to be established. In Scotland, on the other hand, after the indictment is read, the prosecutor, without any remark, proceeds at once to examine his witnesses. In complicated cases, and particularly in cases of circumstantial evidence, the superiority is in this respect decidedly on the side of the English practice. In such cases a Jury must often, in the absence of preliminary explanation, listen to a large portion of the evidence, particularly that first adduced, with very indistinct notions of its bearing upon the points at issue. In fact, an ordinary juryman may sit through half the trial before he is quite sure what it is all about; while the same man, if informed by the prosecutor, at the outset, of the facts which he undertook to prove, and the evidence by which he undertook to prove them, could and would watch narrowly how far the prosecutor's pledge was fulfilled—how far the evidence came up to the statement.

According to the present system it is optional to the prosecutor to produce or suppress the declaration of the accused taken before the committing magistrate. If it criminates or tends to criminate the accused, it is read by the Clerk of Court to the Jury, while, if it tends to exculpate him or to explain away the criminatory circumstances, the prosecutor has the power, which, if an ill-natured or un-

scrupulous man, he will very probably exercise, of withholding altogether from the Jury the statement of facts made by the prisoner immediately after his arrest. Such a rule seems more adapted to the latitude of Constantinople than to that of Edinburgh.

The law of England admits of but two verdicts, *guilty* and *not guilty*. In Scotland the choice of three is open to the Jury—*guilty*, *not guilty*, and *not proven*. According to the ancient practice of Scotland, however, as we understand, there were but two, *proven* and *not proven*—and this ancient form seems at once to be not only the most logical but practically the best.

The basis of all criminal law is the fundamental rule of natural equity that every man is to be presumed innocent till he has been proved guilty—that is, till his guilt has been established by complete legal proof. In despite of this rule, however, the law of Scotland permits a Jury to stigmatise a man with the suspicion of guilt whose guilt has not been proved. The verdict of not proven unquestionably operates, and is meant to operate in this way, and often most unjustly brands the innocent with the stigma of ineffaceable disgrace. Explain them as lawyers will, jurymen interpret and apply the verdicts in this way—where guilt is established they find the verdict of guilty—where absolute innocence is proved they find the verdict of not guilty—and where guilt is not proved and innocence, or the impossibility of guilt, is not proved they find the verdict of not proven. Society receives the verdict as the result of these rules of decision.

The objection to the choice of verdicts allowed by the law of England is, that to the mind of an ordinary juryman, they seem to call on him to declare absolutely the guilt or innocence of the accused, when he conceives himself not in a position to do either. He has no sufficient proof of guilt before him, yet he is not in a position to say that he believes the accused to be innocent. The Judge, indeed, explains to him, generally rather diffusely and with many periphrases about giving the prisoner the benefit of all reasonable doubts and so forth, that *guilty* and *not guilty* mean merely *proven* and *not proven*. But still the painful feeling of doubt and indecision remains. How much better to make the verdicts express what they mean! Jurymen will not, in the general case, follow the equitable rule of law to its exact logical result. Guilty or not guilty, they take to be the expression of their own opinion of the accused's guilt or innocence. "Guilty," if the prosecutor has proved his case; or "not guilty," not simply because the charge has not been established, but because the accused has proved that he is innocent. And from time to time we hear the lament in England that there is no middle course—no easy way by which a conscientious juryman can escape from the most difficult duty of saying "not guilty" in a case where, lacking evidence sufficient to convict, he shrewdly suspects that the accused is not altogether innocent of the crime laid to his charge. Just as if the principles of law and equity were to give place to the idiosyncrasies of a certain number of men whom the chances of the ballot have thrown together into the jury-box. The accused is not bound to establish his innocence. Innocence is presumed; and the presumption yields only to positive proof of guilt. The verdict then of not guilty means nothing more than that such proof has not been adduced—that upon the evidence the accused is not guilty. The verdict "not guilty," as it comes from the foreman's lips, sends a twinge to the conscience of every juryman who suspects, although he cannot convict the accused.

This is a less evil, we believe, than arises under the system which affords an easy escape from supposed responsibility by the return of a verdict, which at once says to the prosecutor—this was a case for investigation—you have discharged your duty in bringing the accused into Court: and to the accused—you have made a narrow escape—the rules of the law have saved you from its penalties. All such results would be avoided by the adoption of the two alternatives "proven" and "not proven." These express the whole force of the other verdicts, "guilty" and "not guilty;" and they have this recommendation, that they fairly meet and truly answer the only question submitted to the Jury—whether the crime charged in the indictment has been found proven or not proven by the verdict of an Assize.

This leads us to observe, that there is frequently submitted to the Jury, in addition to the question whether the accused is guilty of the particular crime libelled, the further question whether he has been previously convicted of one or more like offences. The fundamental rule already referred to requires that the panel should be presumed innocent of the charge brought against him; and it follows plainly that no evidence except that which goes to establish his guilt of that offence is relevant to determine that question. When the Jury have to answer not only whether the charge libelled is proved, but also whether the accused has been previously tried and convicted, it is of course relevant to adduce evidence of the panel's ascertained guilt. No doubt the Jury are told by the counsel for the prisoner, and directed by the Court, to deal with the evidence as if no previous convictions had been libelled or proved—to make up their minds upon the evidence as to the accused's guilt or innocence of the crime for which he is being tried, without bias or influence from what they may have heard of the prisoner's career. Concealed as it may be, this procedure is an encroachment on the presumption of the accused's innocence; because the minds of those who are to determine the question

of guilty or not guilty, will, and cannot but be, more or less affected by the evidence of the panel's antecedents. Of course, if any one who has been convicted of a crime is to lose the benefit of the presumption of innocence in all time coming, then there can be no objection to this part of our criminal procedure; but, in that case, the presumption of law must be modified. If evidence of previous convictions is adduced to assist the Jury in arriving at a verdict of guilty, in the special case before them, then leading such evidence is manifestly unfair. If it is adduced as a reason why, in the event of the panel being found guilty, the punishment should be severe, then, as the punishment is entirely in the hands of the Court, that evidence should be laid before the Judge alone.

JOINT-STOCK COMPANIES AND THE WESTERN BANK.

We purpose, in a series of short articles, to consider some of the more important questions which have arisen, and will probably still arise in the winding up of the Joint-stock Company lately carrying on business under the title of the Western Bank of Scotland, and the present paper is merely introductory to that series.

Before there can be any final adjustment of the various conflicting interests involved in that stupendous ruin—the Western Bank—it will be necessary to settle authoritatively many questions disputed and to be disputed, and arising between parties very variously situated. We shall consider a number of questions which must be involved in at least three classes of cases, and, as preliminary, certain general questions common to Joint-stock Companies. The general questions are—

First.—What in law is the relation between a director and shareholder; what between a director and the public; and what, if anything, does a director guarantee by signing and publishing balance-sheets and recommending dividends? In this and elsewhere we use the word "director" as meaning "managing director."

Second.—What constitutes a contributory?

The three classes of cases which we will consider are special, and arise from the present position of the affairs of the Western Bank. They are as follows:—

I. Questions arising between the liquidators and shareholders.

II. Questions between the shareholders and directors.

III. Questions of relief by the shareholders *inter se.*

Now, to answer satisfactorily, if not all, at least some of these questions, regard must be had not only to the general principles of the law of partnership, which are well and clearly ascertained, and founded in a great measure on considerations, whether right or wrong, of public policy, but also to the relations constituted by the contract of copartnery of the Western Bank, and the duties and obligations imposed upon, and accepted by, its officers. We must ascertain the position of the bank, from time to time, and above all, investigate the conduct of these officers, and consider the legal effect of their dereliction of duty by passive negligence or wilful misrepresentation.

The following statement contains all the facts relevant to our present inquiry, to which we have access.

The Western Bank was established on the 23d of May, 1832. The contract of copartnery provides, *inter alia*,

That the business of the company shall consist of banking in all its branches, but that they shall embark in no other trade or adventure whatsoever.

That the affairs of the company shall be regulated and carried on by a governor, deputy-governor, six extraordinary, and six ordinary directors.

That the directors shall meet once a-week at least throughout the year, and a certain number of the ordinary board, to be fixed by the committee of management, attend at the bank daily, or as often as necessary, to superintend the business of the company, three to be a quorum, and exercise all the power and authority vested in them as a committee of management.

The committee of management, or ordinary board of directors are authorised and empowered to superintend, direct, manage, and transact the whole business and concerns of the company, and to carry on the business of banking in all its branches for behoof of the company; they are also authorised to appoint the officers of the bank.

They are empowered to give credit on cash accounts to partners of the company to the extent of one-half of the stock held by such partners, without farther security than the right of retention of the stock, but they are prohibited from granting a cash credit or account to any other person without satisfactory security.

It is further provided that "the said ordinary board of directors shall not be liable for omissions, nor shall they, nor the manager, cashier, or other officer, be liable for the responsibility of persons dealing with the company, nor for the sufficiency of the securities or properties in which the funds of the Company may be invested as aforesaid; nor shall the said directors be liable for the acts and intromissions of the manager, or other officers of the company, appointed or to be appointed as aforesaid, or of any other persons intrusted with the business of the company, nor shall they be liable *in solidum*, nor for the intromissions of each other, but each of them for his own actings and intromissions allenarly: Declaring

that, after the commencement of the Company upon the said 23d day of May, 1832, the six ordinary directors shall severally be paid for their attendance, at the rate of not less than five shillings sterling for each meeting, but they shall have no claim for remuneration previous to that period."

"That there shall be regular and correct books kept for the general business of the company, and in the various departments thereof, and all the transactions, affairs and obligations, notes and other documents of the company, shall be duly and faithfully inserted and recorded in the said books, by the person or persons who shall respectively have made or entered into or granted the same; which books shall be brought to a just and true balance upon the last Wednesday of May, in the year 1833, and upon the last Wednesday of May in each succeeding year; at which periods, statements or abstracts of the company's affairs shall be made out and regularly examined, doqueted and subscribed by the said ordinary board of directors, or their quorum, previous to the foresaid general meeting to be held on the second Wednesday of June yearly; and at the said meeting the substance or import of the said statements or abstracts shall be reported by the manager, for the satisfaction of all concerned: Declaring always, that the partners, other than the said ordinary board of directors, shall, on no account or pretence, have right to examine the books of the company, but shall be bound to rest satisfied with the report above provided for."

The ordinary directors are empowered to declare dividends out of the free profits; and finally, the contract declares that, if it shall at any time appear, on balancing the company's books, that one-fourth of the capital is lost, such loss shall *ipso facto* dissolve the company. The bank commenced business under the contract from which the preceding excerpts and abridgements are made, and existed till November, 1857. Mr Donald Smith was appointed manager in 1835, and continued in office till 1853. He was succeeded by Mr John Taylor, who was dismissed three weeks before the bank suspended payment. Waiving for the present the legal effect, in a question with the directors, of the culpable mismanagement of those gentlemen, it may be assumed as a fact—we have the proof before us—that the periodical statements made by them to the directors were systematic misrepresentations, and as different from the true facts of the case as words and figures could make them. However, to do Mr Taylor justice, he created no new system. He found one in operation which had satisfied all parties, and under the advice of his predecessor he adopted it. In his earlier intercourse with the directors, he seems to have been hard pressed with disagreeable questions. He regarded these interrogatories as an evil, and applied to Mr Smith for a cure. Mr Smith sent the following prescription, to which Mr Taylor seems to have had recourse, and which proved a specific:—"It used to be part of my "care to have as much for discussion on the Tues- "days as would occupy our friends sufficiently to "prevent such desultory conversation as you allude "to. There is seldom any good resulting from such "discussions, and sometimes unintentional evil arises, "and the bank might suffer. . . . A. B. are "still more ticklish ground than C. D. I believe "them to be solvent. Should, however, discussions "injure their credit, the result would be fatal to "them, and very hurtful to ourselves."

On 10th June, 1853, Mr Smith writes to Mr Taylor —"If you were winding up, you must make what you "call a 'clean breast of it'—that is, you must value "everything, tell everything, and realise everything; "but as a going concern, you cannot do this. It is "impossible; and if possible, it would be impolitic. "I believe it is for the advantage of all concerned, "that our annual statement should be as short as "possible, and no handle given for discussion, even "were we doubly stronger than we are; and if our "profits were much larger than they are likely to be, "the partners, *for their own good*, should be kept in "ignorance *of all the good in store for them*. You "would otherwise have a pressure for higher divi- "dends, which would eventually be injurious. The "only mistake I ever made in my reports was, I am "satisfied, in telling *too* much."

Under the direction of Mr Smith, whose policy and practice were to keep the ordinary board in the dark, that board quietly sat on in their obscure ignorance up to 1847, issuing their reports and declaring dividends. We fix on the year 1847 at present, because at that date we will assume that, notwithstanding the vicious management, the bank was in a favourable position, as exhibited by the books and accounts. Nevertheless, many things had occurred previously to warn the directors of the dangerous system which was being pursued; and these must be borne in mind as we trace the downward course of the company for the next ten years. This will be best done by comparing the reports by the directors with the actual state of the bank, as disclosed in the books.

(*To be continued.*)

TRIAL BY JURY IN CIVIL CASES.

Lord Eldon is entitled to the credit of having carried the measure through the House of Lords by which Jury trial in civil cases was introduced into Scotland. That it was likely to be an improvement in the administration of justice, would not have been

to him a sufficient reason for the change; for he was no reformer of abuses, and did not make any attempt to improve the complex and cumbrous machinery of the courts in which he practised and presided. "One "great object," says Lord Campbell, "which he had "in view was to get rid of the immense number of "appeals from the Court of Session to the House of "Lords on mere questions of fact, by which his time "had been most unprofitably and vexatiously con-"sumed." Thus, in 1816, while the Chancellor doubted, and arrears in the Court of Chancery and House of Lords increased, trial by Jury in civil cases was added to the judicial institutions of Scotland, against the wishes, and in spite of the remonstrances of those who were best able to judge of its expediency. Their opposition was of no avail; and their worst fears have been realised. It was said then that this mode of trial worked most beneficially in England, where its long existence had made the procedure familiar, and had reconciled it to the feelings of the people, and the same thing is said now.

In the trial a few days ago of the case Smith against the Great Northern Railway Company, in which the pursuer sought to recover damages for serious personal injuries, Lord Campbell is reported to have said, that "trial by Jury has long flourished in England, "to the great benefit of the land, by reason of jury-"men deliberately and calmly consulting each other, "and coming to a conclusion on one side or other." The Jury with which he was then dealing had agreed to find for the plaintiff, and to assess the damages at one farthing. This was against Lord Campbell's ruling, for he had told the Jury that if they found for the plaintiff, they should give adequate but moderate damages. It was also against common sense and justice; but the Jury would not be convinced. His Lordship relates, in his "Lives of the Chancellors," how Juries sometimes gave damages to the amount of £100,000 for *scandalum magnatum*. No doubt this is an old story, and that in this more refined age feelings and reputations are not valued so highly. But to do Juries justice, it is proper to say, that in most cases they estimate a good name at something higher than the small coin which the intelligent Jury in Smith's case agreed was sufficient compensation to the plaintiff, whose head had been cut open, his clothes torn, and his pocket-book containing £13 lost.

Such a case as this suggests a doubt whether, even in England, civil cases are satisfactorily disposed of by such a trial. That they are *disposed of*—that the Judge is saved a great deal of trouble and responsibility—and that the result may be attained in a short time, are, we suspect, the chief recommendations of the Civil Jury Court. In Scotland it has been tried for forty years, and it will be admitted by those who have had experience of it that for uncertainty, delay, and expense, no form of trial exceeds that by Jury. The delay might be diminished, and there would be a consequent saving of expense. There is no good reason why a year, or sometimes two years, should be consumed in ascertaining what the Jury is to try. It is possible surely in a month or two to bring the parties to the question of fact on which the dispute turns.

But how are we to get rid of the uncertainty and the enormous expense which accompany a Jury trial? The uncertainty arises from the very nature of the trial itself. Jurymen, of various stations in life, brought together for the first time into a jury-box, are expected to hear patiently and attentively, to weigh and sift evidence, and to balance conflicting arguments, and decide between them. They are totally irresponsible—their names are called as they are ballotted, and being scarcely heard, are soon forgotten. The labours of the trial over, they return to their various avocations; and whatever may ultimately come of the case—whether the verdict be applied or a new trial granted—they never hear, and do not require to care. Their reputation for intelligence and discernment is not at stake. They are flattered by the counsel, and complimented by the Judge; and there's an end of it. To the consideration then of what their duties are, add this element of irresponsibility, and add, too, the want of experience and of training, which must almost of necessity be found in a Jury; and how can the result of any such trial occasion surprise? The Jury is chosen by lot, and the game of hazard is not finished till the verdict is recorded.

But not only does this uncertainty seem necessarily to attend the result of such a trial, but the trial itself is only to be obtained at an enormous expense—an expense often out of all proportion to the interests at stake. The fees of counsel and agents are large, and each party must provide for every turn which the case may take. Witnesses, who may never be required, must be in attendance. Documents that may be of no use must be produced and copied and printed. And the number of counsel must be such as to provide for every contingency. A Jury trial is truly a most costly luxury. No wonder that the cases actually tried form but a small proportion of the number which are at the outset intended for trial. One would almost think, as case after case drops from the roll, that the Jury Court was a great peacemaker—an institution by which the most litigious were made reasonable. It is not solely, however, because of the expense that so many cases are compromised; for one of the curiosities of the system lies in the fact that it is just as the case comes nearer to a final issue that the anxiety to have it compromised increases. The forces are all marshalled before peace is concluded, nay, often before any overtures are made. There is the risk still which each of the parties runs of requiring

to bear the whole costs; but as a compensation for this, there is the hope of success with the relief which that may bring from the burden of any great share of expense. There remains, however, the uncertainty of what the verdict may be—the conflict as to its being applied—bills of exceptions—motions for new trials—and all the ills of the law's delay. To a reasonable mind, some sacrifice is fully compensated by the avoidance of dangers and annoyances such as these.

English lawyers of course attribute all this to our ignorance of the procedure—the failure at the outset to separate the facts from the law—and mistakes in applying the rules of evidence. Such an explanation formed a good argument against the introduction of Jury trials in civil causes; but it then admitted of this answer—that experience would remove these difficulties. Now, when this country has enjoyed—or rather endured—the system for forty years, and if this be still the cause of its failure, the only way of accounting for it must be that there is something in the constitution of the Scottish mind adverse to the full and fair development of such a tribunal. Before we could admit this, we should desiderate some better evidence than we now possess in support of such a theory. The case to which we have referred, and the expressed desire of Lord Campbell and others to have the absurd rule which requires the Jury in England to be unanimous, so altered as to allow of the verdict being returned by a majority, indicates pretty clearly that it is an unjustifiable assumption to speak of the failure of the Jury Court in Scotland as a singular result.

Strange as it may seem, with this failure before us, we hear of proposals to extend the summary jurisdiction of the Sheriff to causes of the value of £50, and to copy the County Court system of England by introducing trials by Jury in such cases where questions of fact are raised. When we have so many law reformers, it is not unreasonable to expect to find some strange notions of what law reform is, but certainly this one is a delusion and a snare. Jury trials, as we have them at present, are abundant enough, and unless some means are devised by which they shall better serve the purposes of a judicial tribunal, their abolition, not their extension, would be the better step.

Review.

A Dictionary and Digest of the Law of Scotland, with Short Explanations of the most ordinary English Law Terms. By the late William Bell, Esq., Advocate. Revised and Corrected, with numerous Additions by George Ross, Esq., Advocate. Part I. Edinburgh: Bell & Bradfute. 1858.

This is the first part of a new edition of Mr Bell's Dictionary. The last edition was published twenty years ago, and, considering the many alterations which the legislation of that period has made upon the laws of Scotland, the necessity of a new edition is apparent. Mr Bell's work had long been of essential service to the student and the practitioner; but just as the changes of the law multiplied, its usefulness decreased. Law terms and phrases are explained in alphabetical order, and the rules of practice and principles of law are shortly but lucidly stated, and references given to institutional works, text-books, decided cases, and statutes. The plan is comprehensive, and having been carefully executed, the work was both an index to others, and in itself a valuable repertory of legal information. The whole field of Scotch law is embraced in it; and besides this, the more common terms and phrases of English law are stated and shortly defined. A glance, then, at the nature of the work will convince any one that its usefulness could only be maintained by careful revision and correction. Notwithstanding the ever-increasing number of legal treatises, the promise of a new edition by the present editor must have given general satisfaction. Already favourably known by his "Leading Cases," Mr Ross appeared in every way well qualified for the task which he had assumed. It required care and labour—and with these it could not fail to be satisfactorily performed. Whether, however, the editor's other avocations have diverted his attention from this work, and led him to do it carelessly, or he has divided the duty with some less experienced and less careful lawyer, the result certainly does not verify the promise. There is, as yet, no preface; but we read on the title-page of the book that it has been "revised and corrected," and is now published "with numerous additions;" and we learn from the cover, "that the numerous changes "in the law of Scotland since the former edition of this "work was published, have delayed the publication of "the present edition much beyond the time originally "contemplated;" and we are further informed, that the revision of the work has so far proceeded, that, in "compliance with the request of numerous correspon-"dents," it has been resolved to publish the work in parts, of which we have now the first instalment. It would be interesting to know how these "numerous "correspondents" are pleased with the return made to their request. They must be satisfied that the work has suffered by their impatience. Mr Ross recently favoured us with an analysis of the Titles to Land Act, 21 and 22 Vict., c. 76; and it is quite evident that had more time been given to him for the revision of this his lastest contribution to law libraries, he would have said something different under the phrase "*Annus deliberandi*," which, as he explains, adhering to Mr Bell's text, "Is the "year allowed by the law to the heir to deliberate "whether he will enter and represent his ancestor;" and again, "Within the year he is not bound to answer in "any action in which he must appear as heir." Afterwards, under "Apparent Heir," he says, "An apparent "heir is entitled to the *Annus deliberandi*, within which "time he may consider the consequences of his entry, "and resolve to take up or to renounce the succession." Mr Ross knows well that all this applies to the law as it once stood, but that it has been altered; and that now by the 27th sect. of the statute referred to, "Actions of "constitution, and actions of constitution and adjudica-

"tion against an apparent heir, on account of his ances-
"tor's debt or obligation, for the purpose of attaching
"the ancestor's heritable estate, and actions of adjudica-
"tion against such heir on account of his own debt or
"obligation for the purpose of attaching such estate,
"may be insisted in at any time after the lapse of six
"months from the date of his becoming apparent heir."
There is therefore an end to the *Annus deliberandi;* and
there is no notice of this in the present edition, although
the Act had come into operation before the publication
commenced. Again, in treating of adjudication *contra
hæreditatem jacentem*, Mr Ross loses sight entirely of the
provisions of the Titles to Land Act, and in doing so he
forgets his own analysis of the Statute. Contrasting
these, we find

In the Dictionary—	In the Analysis of the Titles to Land Act, p. 15—
"In a combined action of con- "stitution and adjudication "*contra hæreditatem jacentem*, "if the heir does not renounce, "the pursuer must drop the ad- "judication, and raise a sepa- "rate adjudication against him. "The principle of this is, that "where the heir does not re- "nounce, he must be vested "with his ancestor's estate, "and the estate must then be "adjudged from him." And again, "Where, therefore, the "heir does not renounce, it is "still necessary to drop the "adjudication *contra hæredi-* "*tatem jacentem*, and bring a "separate adjudication against "the heir." And he then re- fers to the case of Brown *v.* Wood, 28th January, 1851, where it was held that "in a "combined action of consti- "tution and adjudication "against an unentered heir, "no decree of adjudication "could be pronounced, in re- "spect that there was no re- "nunciation by the defender "to be heir."	"If the heir refused to re- "nounce, after the combined "action was brought into "Court, the conclusions of ad- "judication were departed "from, and the action was "dealt with simply as an ac- "tion of constitution. The "law on this subject was clearly "established by the case of "Brown *v.* Wood, January "28, 1851. This defect in "the law is remedied by the "present statute, and in future "the action of constitution "and of adjudication may be "combined in every case, the "Act declaring that it shall "be no longer necessary to "raise a separate summons of "adjudication, but that both "actions may be combined "in one summons, whether "the heir renounces the suc- "cession or not."

The Analysis was published before the Dictionary, and
it might very reasonably be doubted, not only whether
they had the same author, but whether the editor of the
latter had heard of the Titles to Land Act, far less seen the
"Analysis." Some time ago, a well-known French author
was sued for a sum said to be owing by him for the writ-
ing of a novel which had appeared in his name, and the
profits of which he had received. Such a case in this
country would be a novelty; but the recollection of what
happened in France is forced upon us by the appearance
of two books by the same author, the one of which shows
so much ignorance of the subject which the other ex-
pounds. Suppose that such a case were to arise from
the publication in question, and that Mr Ross had had
no special agreement or undertaking as to the sufficiency
of the thing supplied, the claimant might say that he
was "without knowledge," that what he had written
"was defective or of bad quality." But then the an-
swer is furnished by himself. Turning to "*Actio Red-
"hibitoria*" in the Dictionary, we find it stated that this
"was an action in the Roman law (founded on the im-
"plied warrandice of the contract of sale), by which,
"when the purchaser discovered a latent fault in the com-
"modity purchased, such as rendered it unfit for the pur-
"pose for which it was intended, he was entitled within
"six months to return the goods and claim repetition of
"the price." . . . . "By the law of Scotland, an
"action of this kind is admitted, where it is brought
"immediately, that is, within a few days after the sale;
"for if it be longer delayed, the presumption is that the
"purchaser is satisfied." And again, "that the law of
"England differs from the Roman and Scotch law in
"this respect, and that by the English law, express
"warrandice from the seller is necessary, in order to
"entitle the purchaser to any remedy." By this
time we suspect he would have discovered that the
law of Scotland was, by the Mercantile Amendment
Act of 1856, made in this respect similar to the law of
England, so that if he was "without knowledge that the
"same (the goods) were defective or of bad quality," he
would not be held to have warranted the quality or suf-
ficiency, unless the sale had been made for a specified or
particular purpose. A like ignorance of the provisions
of this Act is manifested under the title "Assignation."
"An assignation of moveables," we are told, "*retenta*
"*possessione*, *i. e.*, while the cedent himself retains posses-
"sion cannot prejudice his onerous creditors. Neither
"will an assignation of moveables, followed by sym-
"bolical delivery and an instrument of possession, but
"without an actual change of possession, be effectual to
"exclude creditors." Such was the law; but the Mer-
cantile Amendment Act provides, "That where goods
"have been sold"—and an absolute assignation may be
the form of conveyance—"but the same have not been
"delivered to the purchaser, and have been allowed to
"remain in the custody of the seller, it shall not be com-
"petent for any creditor of such seller, after the date of
"such sale, to attach such goods as belonging to the
"seller by any diligence or process of law, including
"sequestration."

Under the same head, the assignation of leases is
treated of, and it is stated that the "General point
"whether a lease can be effectually transferred with-
"out an actual change of possession, still remains unde-
"termined." No notice whatever is taken of the Regis-
tration of Leases Act, 20 and 21 Vict., cap. 26, by which
it is provided, that a lease for thirty-one years or up-
wards may be assigned either absolutely or in security,
and that the recording of the lease and the assignation
will complete the assignee's right.

All these are errors and omissions of serious importance
quite sufficient to shake the confidence which the profes-
sion might otherwise have had in the work as a book of re-
ference. In short, unless the parts to come are more abreast
of the law as it now is, this edition of Bell's Dictionary will
fall to be added to the long catalogue of works which
owe their existence to a love of book-making, which may
prove profitable at the outset, but in the end is sure to
meet with its due reward. On the legal profession no
inconsiderable labour is entailed by the many changes
to which the law is, session after session, subjected, and
if those who, under the pretence of lightening these
labours, produce treatises which mislead rather than
guide, that labour is incalculably increased. In conclu-
sion, we would say to those "numerous correspondents"
who have hastened the appearance of this first part of
the Dictionary, that they will now find a more profitable
use for their pens in compiling *corrigenda et addenda* to
appear in supplement to the work which they have been
so impatient to receive.

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*Our readers will observe, that in the present Number
there is a Digest of English Cases. It is proposed to con-
tinue this Digest monthly, and in this way to bring under
notice the various cases decided in England that may be of
service to the profession in Scotland.*

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, FEBRUARY, 1859.

REPUTED OWNERSHIP.

Reputed or apparent ownership, as a separate and distinct principle of law, entitling creditors to attach moveable property in possession of their debtors, is not very well known in the law of Scotland. Professor Bell's Commentaries is the first work in which the subject is distinctly treated of; and it is there stated and confirmed, principally upon the authority of English decisions. The reason is obvious. Until the passing of the Mercantile Law Amendment Act of 1856, property in moveables could not be transferred without delivery, and this principle, together with the presumption flowing from possession, was found sufficient to determine the many questions which arose between the creditors of the possessor, and those who opposed their claims. Accordingly, on turning to the reported cases, it will be found that the many decisions under the title of "Reputed Ownership," may be divided into these three classes: *First*, Cases in which the right of creditors to attach goods in possession of their debtor, and the title of a trustee in bankruptcy, were disputed (1) by purchasers who had not obtained delivery, (2) by holders of mortgages who had permitted the granter to remain in possession, (3) by trustees under deeds for behoof of creditors who had not completed their title by procuring delivery, and (4) by trustees or others who relied upon the provisions of a marriage contract, in which the debtor had conveyed his furniture to or for behoof of his wife and family, but had continued in the use of it. All these cases illustrate the principle that a conveyance of moveables—whether by contract of sale or other ways—was ineffectual without delivery. *Second*, Cases in which a question of *personal* responsibility only was raised and settled. As an instance, we have Dougall *v.* Marshall, (23d July, 1833,) in which it was found that the elder of two brothers was liable for the debts of the younger, on the ground that he had fraudulently induced the creditors to give him credit, as the proprietor of certain houses. The elder brother was the proprietor, but he had led the creditors to believe that his younger brother was the proprietor, and, therefore, on the bankruptcy of the latter, when he put forward his claim to the property, he was found liable to his brother's creditors, whom he had imposed upon. This is reported as a case of reputed ownership; but it was not an action to attach the property, and the decision clearly depended on another principle. There was no question and no doubt as to the ownership of the property. It could not have been made available to the creditors by any proceeding against the younger brother. And, *Third*, Cases in which the doctrine of reputed ownership alone was relied upon. These are, (1), cases in which those who had acquired their rights from parties in the ostensible possession of the property transferred, were found entitled to retain it. As for example, Attwood *v.* Kinnear & Sons, (11th July, 1832), in which it was held that a conveyance of certain shares in security, by stockbrokers who had purchased the shares for the pursuer, and been allowed by him to take the transfers in their own names was valid: And, (2), cases in which creditors relied upon the reputed ownership had by their debtors—and upon that only—in attempting to attach property, as available to them for payment of their debts. In Dingwall *v.* M'Combie, (6th June, 1822,) and Gordon *v.* Cheyne, (5th February, 1824,) the property was of the same kind as in Attwood's case. The bankrupts, although registered as owners, held the shares in reality in trust, and it was found that they were not attachable by their creditors. There was thus established a marked distinction between the title of a *bona fide* purchaser or pledgee, and the trustee for a general body of creditors.

The consulted Judges, in the case of Shearer *v.* Christie, (Nov. 18, 1842,) stated that, "reputed ownership has the effect of causing moveable property, that really is transferred *habili modo*, to be held in a question with creditors, as the property of the disposer, their debtor, in whose possession it had been allowed to remain." This deals only with the case of a conveyance by the owner of moveables, as to

which there was no necessity for resorting to the doctrine at all; for where creditors were concerned, if delivery had been given, there was no possession, and if not, there was no valid transference. It will be found that this is the test by which the greater number of such cases has been determined. On the other hand, the law is familiar with many contracts under which, and many honest occasions upon which, the possession is for a time separated from the property, and these will not be interfered with to benefit creditors. Goods deposited or pledged, and furniture life-rented, do not become available to the creditors of the possessor. The owner may relinquish the possession without forfeiting his goods; and he may bestow a limited use of them, and retain the right to resume the possession, or give it to another.

In reviewing, then, the judgments of the Supreme Court, it will be seen that there has hitherto been little, if any, occasion to illustrate or enforce the doctrine under consideration, and that, consequently, now that the occasion has arisen, we must look for instruction to some other source.

The statute already referred to makes delivery no longer necessary to the transference of goods sold. So far as regards every contract but that of sale, the necessity for delivery remains; but it is easy to see how, under colour of such a contract, another and totally different one may be entered into. A conveyance of moveables in security may be easily accomplished by an absolute assignation with a declaration of trust, just as in England they have "Bills of Sale," by which goods are "bargained, sold, and assigned, with a proviso for redemption." The facilities thus afforded for disposing of property and retaining the appearance of still having it, and of deceiving creditors and bestowing preferences, must necessarily give rise to a good deal of litigation, in the course of which the law of reputed ownership will fall to be examined and applied.

"The rule," says Professor Bell,* "that every appa-"rent ownership of moveables which is either fraudu-"lent, or at least careless or collusive, as not being "necessary in the course of honest contracts, should "entitle the creditors of the holder to take the subject "as if it actually were his property, is admitted both "in England and Scotland, but upon different foot-"ings and to a different extent. In England it is the "mere creature of statute, in Scotland it is a rule of "the common law, grounded on principles of equity." And again,† "The rule may be stated in this proposi-"tion—that where one is unnecessarily, or by collu-"sion or gross negligence of the true owner, permitted "to give himself an appearance to the world, as if he "were proprietor of goods and wares not belonging "to himself; and this by exercising acts of owner-"ship, and by holding a possession seemingly uncon-"trolled, his creditors will be entitled to proceed "against the goods, as if they really belonged to him." There is thus claimed for the law of Scotland a result as equitable and as easy of attainment upon the principles of common law as that effected in England by the statute law. We have already said that the doctrine of reputed ownership forms a part of our law, although in questions with creditors it has not been often applied. It has been said that we borrowed it,* as most likely we did, from the law of England, but it may be disputed whether, without express enactment, we are entitled at once to adopt it, in its whole length and breadth, as a part of our own system. At all events we may, not unprofitably, see what its effects are where it has been so often applied.

It is, as has been said, "the mere creature of statute." By the 13th Eliz. c. 5, it is enacted that the buyer's right should be void in a question with creditors, where the goods had been left in possession of the seller under circumstances indicating fraud. By the 21st James I., chap. 19, sec. 11, and 6 Geo. IV., chap. 16, the assignees of a seller who had been allowed by the buyer to remain in possession of the goods, were entitled to keep possession. This has been re-enacted by the 12 & 13 Vict. c. 106, sec. 126, by which, "If any bankrupt, at the time he "becomes bankrupt, shall, by the consent and permis-"sion of the true owner thereof, have in his possession, "order, or disposition, any goods or chattels whereof "he was reputed owner, or whereof he had taken upon "himself the sale, alteration, or disposition as owner, "the Court shall have power to order the same to be "sold and disposed of for the benefit of the creditors "under the bankruptcy."

To entitle the Court to deal with goods and chattels under this provision, three conditions must be fulfilled:—

1st, The possession by the bankrupt must have continued till the time of the bankruptcy.

2nd, He must have had possession as reputed owner with consent of the true owner, or have taken upon himself, with the owner's consent, the sale, alteration, or disposition thereof.

3rd, The possession must have been such as fairly and reasonably to induce the public to believe that he was the owner.

It will be observed, that it is not necessary, in order to entitle the Court to deal with the goods for the benefit of creditors, that the bankrupt was at any time the owner. It is sufficient if he had the consent

* Shaw's Edition, vol. 1, p. 518. † Page 519.

* Lord Cunningham's opinion in "Shearer v. Christie," 18th Nov., 1842.

of the owner to a possession which tended to deceive the public. Thus, furniture lent on hire to a hotel-keeper, and used in the course of his business, (*Mullett* v. *Green*, 2 *Car. & P.*, 382,) and barges lent to a coal merchant, who had his name painted on them, and used them for five or six years, (*Watson* v. *Reach*, 1 *Scott*, 149,) were held to be attachable by the assignees, for the benefit of creditors. In both of these cases, the plea of reputed ownership was unsuccessfully met by the answer that the public could not be deceived, because it was customary to hire such goods, and possession was therefore no test of property. In *Mullett's case*, Baron Gurney told the Jury, that the question was, "Whether the custom is so general as to induce a fair doubt and suspicion in the minds of persons trusting, that the goods were not the goods of the person in whose possession they were."

The material difference between cases in which the bankrupt has once been the owner, and cases where he has not, is as to the evidence required to establish the assignee's right. Justice Bayley, in delivering his opinion in *Lingard* v. *Messiter*, (1 *Barn. and Cress.*, p. 308,) distinguishing between these two classes of cases, said, "The evidence required to esta-"blish reputed ownership in each of these cases is "different. In the former case, when it is once proved "that the bankrupt has been the owner, and has con-"tinued in the possession till the time of the act of "bankruptcy, the presumption is, that he then con-"tinued in the possession in the character of owner, "and, therefore, proof of these facts is *prima facie* evi-"dence that the bankrupt is both reputed and real "owner. In the latter case, the mere possession may "not of itself be sufficient to show that the bankrupt "was the reputed owner of them; and it may then be "necessary for the assignees to establish that fact by "other circumstances."

It is, however, to be kept in view, that in both classes of cases the goods must be in the possession, order, *or* disposition of the bankrupt, as reputed owner, with consent of the true owner, and that it must be shown, according to the principle laid down in the case of *Hamilton* v. *Bell*, 18th November, 1854 (*Dasent's Common Law Reports*, 1854–55, *vol.* 3, *p.* 308), that the bankrupt not only had possession of the goods, but *their order and disposition*, with consent of the true owner, unless the possession was, with the owner's consent, such as to deceive the public. Chief Baron Pollock said—"The bankrupt here had the "possession of the clocks, but he had not their order "and disposition, and no one had a right to presume "them to be his from the fact of their being in his "shop." Baron Alderson states the reason thus—"If I send my property into a shop where nothing is "usually sold except what belongs to the proprietor "of the shop, I put my property in the reputed owner-"ship of the shopkeeper, and the statute applies; but "if, as in the present case, I put my goods into a "shop where it is notorious that goods are put for "repair, and for other purposes than for sale, the con-"clusion that these goods are the property of the shop-"keeper is one which no reasonable person would "draw." Possession, therefore, will not infer reputed ownership, unless it necessarily gives rise to a presumption of ownership. In the case of *Lingard*, before referred to, the possession was held to establish reputed ownership. At the date of the bankruptcy the bankrupt possessed and used certain machinery. Some years before the bankruptcy the machinery had been seized under an execution at the defendant's instance. The sheriff and the bankrupt then assigned the same to the defendant, who thereafter put his initials upon each article, and let the whole to the bankrupt at a monthly rent which was paid from that time. In these circumstances it was held that there was no evidence of the notoriety of the change of property, and that consequently there was no evidence to go to the Jury that the bankrupt had ever ceased to be the reputed owner. An averment that, by the custom of the place, machinery was frequently let on hire, was found not to have been proved. In deciding *Hamilton* v. *Bell*, the Judges concurred in stating that the custom to let out machinery had become so notorious that Lingard's case would now be differently decided although it was rightly decided at the time. But they seem to have overlooked the distinction between the cases in which the bankrupt has been at one time owner of the goods, and the cases in which he never was the real owner. It has been settled by a series of decisions that a trader cannot mortgage or pledge his goods so as to secure them to the mortgagee or pledgee in case of bankruptcy, if he retains the possession of them until that happens.* And it has been ruled in the Court of Bankruptcy (*ex parte Ashley*, June 5, 1855,) that the registration of a Bill of Sale, under the Act 17 and 18 Vict., cap. 36, does not so complete the mortgagee's title as to defeat the right of the assignees. Commissioner Holroyd held that such a registration, although necessary to the validity of the Bill of Sale, did not make a title good which would have been bad before, and that the public were not bound to consult the register before relying upon the fact of possession.

In as far as the law of England brings into the common fund to be distributed among creditors, goods in possession of the bankrupt which have at no time been his property, there appears to be no principle in our law leading to a like result. Professor Bell

* Archbold's Law of Bankruptcy, by Flather, p. 271, and cases there cited.

states, that in Scotland the rule of the common law founded on the principles of equity is the same as the rule in England which is founded on statute. But there is no decision to give countenance to the statement that the laws are so completely similar. The cases of Dingwall and Gordon, when contrasted with cases decided in England in like circumstances, show that there is in this respect a direct variance between the laws of the two countries. In several cases in England it was decided that shares in a joint-stock company held by the bankrupt in trust, but standing in his name, passed to the assignees upon his bankruptcy.* Besides this, our law has been long familiar with many contracts under which possession and property are fairly and honestly separated, and it has been repeatedly ruled that moveable property, which is not generally held on a written title, is subject to many latent equities.† It has never been held necessary to establish a custom to hire furniture, in order to entitle the owner to recover it in a question with the creditors of the possessor.

It is different, however, we apprehend, where the bankrupt has at one time been the owner of the goods. By 19 and 20 Vict., c. 60, s. 1, the contract of sale, although not followed by delivery, prevents the creditors of the seller attaching the goods, "as belonging to him by any diligence or process of law, including sequestration." There is thus taken away the principle upon which the rights of creditors were protected against latent contracts; but then it has always been admitted, that the doctrine of reputed ownership concurred with the principle, that delivery was necessary to effect a transference of moveables. And in England, where the contract of sale has all along had the effect now given to it in Scotland by statute, the doctrine of reputed ownership has been held to control it in favour of creditors. A purchaser who needlessly allows goods to remain with the seller, without separation and without reasonable cause, is not entitled to recover them when the seller becomes bankrupt; far less is a mortgagee entitled to delivery of goods which he has left in the order and disposition of the bankrupt. There seems no reason why similar rules should not be adopted in the law of Scotland.

The sole object of the Act was to assimilate the law of this country to that of England; and there is nothing opposed to any decision in our books, or to any principle of our law, in maintaining that a contract under which goods are conveyed, absolutely by way of sale, should have no effect in the event of the supervening bankruptcy of the owner prior to delivery, in a question with his creditors, in cases in which the goods are left in the order and disposition of the bankrupt as owner, or an unnecessary and careless possession is permitted to be maintained by him, so that the public are led to believe that he is the owner. The ordinary exigencies of business require that a seller should sometimes be left in possession of goods sold, and in such cases the buyer is clearly entitled to the benefit of the statute; but where the transaction has been gone into with the avowed or apparent object of leaving the goods under the control and at the disposal of the seller, if the principle of reputed ownership is a part of our law at all, the purchaser, if he may be so called, is not entitled to the benefit of the Act. It is not uncommon, we believe, since the passing of this Act, to assign machinery, implements, and utensils used in manufactories and other works, in security of loans. The transaction generally assumes the form of a sale evidenced by an assignation. The assignation is qualified by a back-bond; and then the assignee enters into a lease with the assignor of the effects pretended to be sold. The possession continues as before. It is very generally thought that in this way an effectual security is obtained; but if the cases which have been decided in England—where the law of sale has been all along what it now is in Scotland as regards the delivery of the goods sold—are ultimately held to be correct applications of the doctrine of reputed ownership which is common to the law of both countries, it will be found that such securities cannot compete with creditors when the estates of the grantor come to be administered under the bankruptcy statutes.

* Archbold, *ut supra*, p. 260, and cases there cited.

† See Lord Cunningham's opinion in *Shearer* v. *Christie*, 18th Nov., 1812.

JOINT-STOCK COMPANIES AND THE WESTERN BANK.

(*Continued from page* 29.)

On 8th November, 1847, Messrs Jones, Lloyd & Co. of London, addressed to the Chairman of the Board of Directors, a letter of remonstrance and warning as to the system previously pursued in the management of the Bank. After referring to some matters of detail, these gentlemen use in that document the following remarkable language:—"We avail ourselves "of this opportunity to express our anxious wish that "your Board should direct its attention to our private "notes, addressed to Mr Smith from the beginning "of 1846 till the present time. From these you "will learn with what earnestness and incessant repe-"tition we pressed upon the Managers of your concern "the perilous character of the course it was pursuing, "and the absolute necessity of a different manage-"ment of its cash transactions. . . . We request "your reference to our private correspondence, for

"the purpose of satisfying your Board that we have "discharged our duty both by early warning, and by "continuous remonstrance. The present state of "your concern is most critical and serious; and it will "require on your part the most prompt, energetic, and "decided measures to render the limited assistance now "obtained effectual for its intended purpose. . . . "We confess that it would have been more satisfac- "tory to us if the bills which we hold in account had "been of a more solid and unquestionable character. "We return to you, almost daily, unpaid bills to a "considerable amount, and we fear that there are a "great number still remaining in account, which will "not be regularly paid at maturity." The gentlemen who at this date composed the Board of Directors were many of them repeatedly again elected members, but the bills got more numerous, and of a still more questionable character, and the system of *re-discounting*, against which they were also warned, was eventually alarmingly extended. Indeed, not until towards the close of the Bank's career, do we find in the records of the Board's proceedings the slightest trace of an inquiry into the discount business of the Bank. The following table is instructive in the matter of the discounting.

The sums represent, in round numbers, the total discounts in each year, and annexed is the per centage of re-discounts for the same year.

			Per Cent.
1847, ...	nearly	£16,000,000.....	4 nearly.
1850, ...	"	12,000,000.....2-5	"
1853, ...	"	15,000,000..... 11	"
1854, ...	"	18,000,000 20	"
1855, ...	"	20,000,000..... 25	"
1856, ...	"	20,000,000..... 25	"
1857, ...	"	20,000,000..... 25	"

Such was the ultimate result of the admonition and prudent advice of the first bankers in the kingdom. It will not easily be credited that several of the gentlemen to whom Jones, Lloyd & Co.'s letter was submitted for their guidance had actually seats at the Board of Directors during the latter years which exhibit so marked an extension of the imprudent and dangerous system of re-discounting.

We now contrast some of the reports by the Directors with the actual state of the Bank as discoverable from the books. It may be well here to notice that although the Directors never did, in point of fact, investigate the affairs of the Bank with anything approaching to care till the year 1856, yet the shareholders and public were led to believe that the annual reports were the true result of a careful scrutiny of the whole transactions of the concern.

The docquet appended to the annual reports was generally in these or similar words:—"We, the Sub- "scribers, the Ordinary Directors of the Western "Bank of Scotland, have examined the abstract of "the Bank's affairs, and are satisfied with the same, "and we do hereby declare the balance-sheet to be a "true, and faithful, and correct analysis and state- "ment thereof, as made out by the principal accoun- "tant of the Bank." Such was the docquet appended to the Report of June, 1848, declaring a dividend of eight per cent., and in which we find the following remarkable statement. After narrating the severe pressure and losses of the year, the Directors "are "prepared to show, that the Bank is not only in a "position to meet the losses which have been sus- "tained without any serious effort, but at the same "time to pay a dividend equal to that declared at "their last meeting." In point of fact, the dividend of 1848 was paid out of capital, if not the whole, at least a portion of it. This is apparent from the Bank books themselves, and was discoverable *at the time*.

In June, 1853, the Directors had the "satisfaction "of assuring the proprietors that the establishment "never was in a more sound and prosperous condi- "tion." In their report of this year, the first issued after Mr Taylor's appointment as Manager, they inform the proprietors that "this was felt by the "Directors to be a proper occasion to *revise the whole* "*affairs of the Bank*, and to simplify and *adjust some* "*of its accounts*." In the balance-sheet there is brought out an apparent profit of £126,817. There were written off as bad, during this year, debts to the amount of £18,548. This sum was written off in respect of bad debts included in "sundry debtors' accounts." Now, among the Bank papers there exists a document, called "Note of balances at debit of sun- "dry debtors' account, and amount supposed recover- "able." The amount due, as appears therein, is £400,000, or thereby. The amount noted as recoverable is £125,000. The amount irrecoverable, as Mr Taylor and certain others knew, was therefore, at the date of the report, £275,000, a sum which exceeds the sum written off by more than double the whole year's apparent profit. But this is not all. It appears from the Bank books and documents, that there existed irrecoverable balances in other branches of the business, viz.:—Protested Bills, Cash Credits, Agencies, Deposit Accounts—amounting, with the above sum, to about £500,000. The true state of the Bank, then, in June, 1853, as was known to the Manager, and discoverable by the Directors, is this:—

Excess of assets over liabilities, as brought out by the Directors in their Report,...	£1,765,000
Irrecoverable debts,.....	500,000
True surplus of assets over liabilities, ...	£1,265,000

This surplus is less than the proprietors' capital, as at date, by the sum of £235,000, or thereby. The dividend paid, amounted in whole to £105,000, so

that in June, 1853, nearly one-fourth part of the capital was lost, and so might it have been ascertained, and that, too, without including among the irrecoverable debts the enormous sums advanced to the four larger firms whose failure preceded the stoppage of the Bank. The Directors appended to the Report and Balance-sheet the usual docquet certifying its accuracy.

In the Reports for 1854, 1855, 1856, we find a change introduced for the first time. In all previous Reports, the profits were declared either simply as "nett profit," or as "nett profit under all necessary "deductions." In the Reports of these three years, they are styled "nett profits, after payment of "all expenses, *and providing for bad and doubtful "debts.*" The greater portion of the sum of £500,000, known as *bad* in 1853, and an equal sum known then as at least doubtful, were not written off till 1857. These Reports and the relative balance-sheets were issued with the usual docquet. We analyse the Report and balance of 1856. The others are similarly, though, perhaps, to a less degree, erroneous. The nett profits of 1856, after providing for bad and doubtful debts, is declared to amount to £166,000; £31,000 are carried to rest, and the remainder divided among the proprietors at the rate of 9 per cent. on their stock. The Directors justify the large dividend on the ground that they feel bound to recognise the right of existing proprietors, especially those possessing merely life interests, or solely dependent on present income, to participate in profits as they are made and declared from year to year. It does not seem to have occurred to the Board of Directors that they were at least equally bound to recognise the correlative of that right of existing proprietors, namely, the obligation to bear a proportionate share of the losses as they were made and as they *should* have been declared from year to year. It appears from the balance-sheet, that the surplus of assets over liabilities, in June, 1856, was £1,900,000. Now, in addition to the sum of £500,000, known as irrecoverable and entered as assets from 1853 downwards, there had emerged hopeless debts at Paisley, and known as such before June, 1856, amounting to nearly £200,000. At least an equal sum, which a sanguine man might have called doubtful in 1853, had become utterly bad in 1856. In short, there was within reach of the Directors, had they sought it, in 1856, when they declared a 9 per cent. dividend, evidence which none but the wilfully blind would reject, that from ascertained or undeniable losses the Bank had lost at least one-third of its capital.

On the 24th of June, 1857, was issued the twenty-fifth and last annual Report of the Directors of the Bank. "While, therefore," they report, "the *discount "and loan departments of the Bank have been very re-"munerative*, a relatively high rate on deposits has "necessarily been allowed, and the profit and loss "account thereby materially affected." A dividend of 9 per cent. was, however, declared. Now, in this Report and a relative minute, there are two things which seem to indicate a want of belief by the Directors in their own Report. It is no longer "nett profits, after deducting ex-"penses and providing for bad and doubtful debts." The old style is reverted to, and we have simply, "Nett Profits." The balance-sheet has no longer the absolute sanction of the solemn docquet, "We do "hereby declare this balance-sheet to be a true and "faithful, and correct statement and analysis," etc. But we find a minute of the Directors, of date the 23d June, to the effect, that "the Directors having "compared the balance-sheet of the Bank's affairs "for the past year ending 27th May, 1857, with the "entries in the Bank ledgers, found the same to "agree, and *accordingly* signed the docquet appended "to the balance-sheet, in terms of the contract of "co-partnership of the Bank." Such is the cautious minute. But it does not find its way to the public to temper the effect of the declaration of the dividend. That the true state of the affairs of the Bank was at this time easily ascertainable by the Directors is beyond dispute. That the Bank was hopelessly insolvent it is hardly necessary to state, and that some, if not all, who issued that flagrantly false Report, suspected how matters stood, the following facts place, we think, beyond doubt.

Early in January, 1856, the state of the Discounts and unsecured over-drafts began to occupy the serious attention of the Directors, and during that month the Discount Ledger and Accounts appear to have undergone investigation at various meetings. Explanations were received from the Manager, and instructions given to him on several occasions to effect a reduction and permanent curtailment of the accounts of various parties transacting with the Bank. On the 4th February they again called the Manager's attention to these matters, and to the state of over-drafts on credits and unaccepted bills, and open accounts without security. Throughout February and subsequent months, even up to the date of their last Report, they had under their serious consideration all the sources of the bad and doubtful debts to which we have already alluded. The Credit Ledger was examined. Returns were ordered from the Branches, and the "Sundry Debtors' Account" carefully gone into. The Directors were thus, before declaring the last dividend, thoroughly awakened to the necessity of strict and energetic surveillance. They had ascertained, too, with certainty, the existence of hopelessly bad debts to a large amount, and knew the quarters to which to look for more. One of their number thus writes to Mr Taylor in January,

alluding to the stoppage of a firm indebted to the Bank: "What makes me most uneasy is not the failure "itself, but the effect of it upon the credit of other "firms, and one particularly of large dimensions, "which had your and the Directors' anxious atten- "tion for a long time past. You must of course see "that I allude to J. M. & Co."

The meeting to which the Report was submitted, was held on 24th June. On the 23d another Director thus addresses Mr Taylor:—"I hope the meet- "ing to-morrow may go on quietly and well, and "that there may be no disagreeable questions put as "to the amount of our losses with the Ayrshire "Banking Company, and at Paisley." Unfortunately for many, all was tranquil. These losses, amounting to a quarter of a million, had been previously ascertained, and were included as available assets in the balance-sheet of that year. These things explain the cautious minute. They scarcely justified the 9 per cent. dividend. We have only to add, as a fact, that several of the Directors were informed of the existence in the Bank books, under the class "Assets," of many irrecoverable debts, and of the system of carrying these from balance-sheet to balance-sheet as available property.

The scope of our papers do not require us to consider the history of the Bank subsequent to June, 1857.

We now address ourselves to the first general question proposed, viz., What in law is the relation between a Director and Shareholder, what between a Director and the public, and what, if anything, does a Director guarantee by signing and publishing reports and declaring dividends?

SHERIFF-SUBSTITUTES.

In a recent Number we endeavoured to remove a somewhat erroneous impression entertained by the Sheriff-Substitutes, relative to the conditions under which they were entitled to retire from office; and we suggested what, whether right or wrong, was a more dispassionate and impartial view of the question than could be expected from parties whose interests were immediately concerned, and whose *amour propre* had confessedly been hurt by the awkward expressions in one of the Acts regulating the matter. We have re-considered the question, and are satisfied that our view of the spirit and intention of the various statutory provisions is correct, and that the object of the Legislature was not to hinder or prevent, but to encourage and facilitate the honourable and comfortable retirement into private life of public servants who had meritoriously discharged their duty.

We are glad to learn that these views have been adopted by several of the Sheriff-Substitutes, who, on account of long service, feel that they are entitled to pass the rest of their days in the dignified leisure of private life; and, in consequence, we anticipate that within a few months there will be several vacancies in the Sheriff Courts.

With this prospect in view, it becomes our duty, as an organ of the Sheriff Courts, to protest against the monopoly of those appointments which the Parliament House has hitherto enjoyed. With the greatest respect for the Edinburgh Bar, we think it not unreasonable to hold that the local Bars could supply men fully as adequate to discharge the duties of Sheriff-Substitutes; and we submit that their right to these appointments is more in accordance with the ordinary principles on which promotion in general is conferred.

We admit, of course, that the public advantage is the paramount consideration; but we think it not difficult of proof that in this point of view the claims of provincial Lawyers are superior to those of Advocates, for it is notorious that it is only junior Counsel, barely above three years' standing, or Advocates who have failed to get business in the Parliament House, who will accept of Sheriff-Substituteships.

To those who know what a very comfortable thing the office of Sheriff-Substitute is, this may appear an extraordinary assertion. To most men a minimum income of £500 a-year, paid quarterly, with no excessive degree of labour, a very dignified position in society, and a substantial retiring pension, will appear to be one of the most enticing prospects in life. But the Edinburgh Bar are not of this opinion, and it is not difficult to discover the reason; for, besides the ordinary reward of professional employment, which no Advocate of ambition, and who has not discovered that his abilities are under mediocrity, will willingly abandon, there are a great number of most substantial prizes, which the fortunate wearers of wigs may reasonably aspire to, and which are all more desirable than Sheriff-Substituteships.

Not to mention the Bench, and the appointments under the Crown, which very few young Advocates think beyond their reach, there are the Sheriff Principalships for all the counties in Scotland—offices which combine the delightful conditions of a trifling amount of work and a considerable salary, and which, so far from obstructing success in general business, in reality facilitate it. Then there are the Clerkships of Session, desirable appointments of £1000 a-year each, entailing one hour's work per day for six months in the year; there are all the different Boards, Commissions, etc., to be supplied with secretaries. Besides, colonial Judgeships are open to Advocates, although they do not know a word of the language of the country, and have to learn its laws after they are appointed

to administer them. No wonder, with such a mass of patronage, that it is not the cleverest, not even the tolerably clever—not the most successful, not even the tolerably successful members, of the Bar who will accept the office of Sheriff-Substitute. Of course there are exceptional cases, where Sheriff-Substituteships are selected as affording literary leisure and the opportunity of cultivating tastes and pursuits which could not be followed amidst the eager contention of the Bar, or where, through want of means, an Advocate grasps at a Substituteship as a competency and a certainty; but these motives are not such as should be appealed to if the object were to secure able lawyers as Judges.

On the other hand, there are but few of the official good things of this life open to the provincial practitioners, and there are certainly none so attractive as the office of Sheriff-Substitute. Hitherto very few have been fortunate enough to attain to that dignity. The resources, or, perhaps more correctly, the necessities of the Parliament House, have been too great. The Edinburgh Bar, notwithstanding its more valuable prizes, has always a host of candidates for every vacant office; and practically the local Bars have been excluded from the only judicial office for which their members are eligible. We maintain that the office and the profession have alike suffered from this. The office—because experience and ability have not been required from those who aspired to it; and the profession — because what would otherwise have formed a strong incentive to progress on the part of the provincial practitioner has been taken away. It is beyond dispute that the office itself is generally filled by young advocates, who, with influence and education, have failed to acquire a decent practice; and although it is not to be denied that in the course of time such men may come to discharge the duties of the office satisfactorily, the first years of their Judgeship are often too distinctly marked by ignorance of practical details and of mercantile usages, and a want of business habits, which seriously detract from the usefulness of the local tribunal. The other result to which we have referred is more of a negative character. But it is unquestionably true that under another system the provincial practitioner would have a stronger motive than any now held out to him, to labour diligently and perseveringly in his profession, and to maintain its integrity.

MANDATE OR AGENCY.

The Law of Mandate or Agency has long formed an important branch of the municipal law of commercial states. It is most intimately connected with all the leading departments of commercial and maritime jurisprudence, and deserves the most careful consideration.

While considering the law of mandate or agency as more particularly developed in the law of Scotland, it is necessary to keep in view the diversities in the law of other nations, arising from the peculiar customs and relations of independent states, and the genius of each particular nation.

In the Roman law, the contract of mandate was gratuitous, being grounded entirely on personal considerations of friendship, and it has been treated in that light by our early institutional writers. But this contract has, in modern practice, been almost entirely superseded by the contract of agency or factory, which is undertaken in consideration of hire or reward for services rendered, and is of a more onerous and useful character than the other. The modern contract, indeed, is more properly referable to *locatio operarum* than to mandate, or perhaps it may be viewed as combining the essential qualities of both.

The scanty references to the contract of agency are collected by our early institutional writers under the general head of "Mandate," while in our modern Scottish practice, and in the works of English and American Jurists, it is discussed under the title of "Principal and Agent." The reciprocal duties and obligations which this contract imposes on the parties to it—the rights and powers which it confers—and the important relations which it creates with third parties, ought to be accurately as well as generally understood.

I.—CONSTITUTION OF AGENCY.

According to the Roman law, mandate was that contract by which one party employed another to transact his affairs, or any branch of them, without hire or remuneration. It was reckoned among the consensual contracts, and perfected by the acceptance of the mandatory. This gratuitous contract is now rarely met with in practice, and we pass on to the constitution of that which has been substituted in its room, the more onerous and important modern contract of mandate or agency.

In mercantile agency there is a great variety of ways in which one party may invest another with authority to act for him, whether that be of a general or limited description. Besides the occasional authority by procuration to draw or accept bills of exchange, the charge given to a clerk or manager to conduct the general business of a shop, which is called *institorial* power; the extensive trust given to shipmasters, called *exercitorial* power; and the powers of factors, agents, and brokers, are all comprehended under this contract.

It has been stated as a general maxim of law, subject only to a few exceptions, that whatever a man,

sui juris, may do of himself, he may do by another; and as a correlative of the maxim, that what is done by another is to be deemed as done by the party himself. *Qui facit per alium, per seipsum facere videtur.* The party, then, in that position, who confides to another the management of some business to be transacted in his name, or for his behoof, is commonly called the *principal*, *constituent*, or *employer;* and the party so employed is described as *agent*, *factor*, *attorney*, or *delegate* of the principal. And the relation thus created is termed *agency.*

Agency is founded upon a contract, either express or implied. The authority of the agent may be created by writing or verbal commission; and, for the ordinary purposes of commerce, it is now well established that the latter mode is sufficient. In the management of the affairs of foreigners, especially where there is occasion to discharge debts and receive money, or to carry on judicial proceedings, a formal deed, called a power of attorney, is the proper evidence of authority. This deed usually confers upon the factor ample powers of a discretionary character, whereby he is enabled to exercise his own judgment freely and without restraint. It empowers him, in short, to represent the principal *fully*, and to act as the latter might have done, if personally present. In all important agencies, a power of attorney should constantly be granted; but factors and other agents are generally appointed in mercantile affairs by letter merely, by means of which parties are frequently invested with the most extensive powers.

Agency may also be inferred from the relation of parties, the nature of the employment, and other circumstances, without proof of any express appointment. To constitute the contract, it is quite sufficient that there be satisfactory evidence of the fact that the principal employed the agent, and that the agent undertook the commission. If the powers conferred are special, they form the limits of the agent's authority. But if, on the other hand, these are general, they will receive a liberal construction according to the pressure of circumstances, the necessities of the occasion, and the ordinary usages of trade.

Where the principal, in the full knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, any after attempt on his part to repudiate or impeach them, under pretence that they were done without authority, or even contrary to instructions, will not be attended with success. When the principal has been made aware of the transactions that have taken place, he must notify his dissent within a reasonable time; and if he fail to do so, his assent and concurrence will fairly be presumed, and the transactions thus be ratified and confirmed. *Semper qui non prohibit pro se intervenire mandare creditur.* An interesting and instructive case is stated by Emerigon in his *Traité des Assurances*, Tome 1, p. 144.

The implied authority, arising from employment, continues after the agency has ceased, unless the parties giving credit to either may be presumed to have received notice of the change, or, from length of time, or other circumstances, ought not to have inferred its continuance. Mr Chitty has suggested, in his able Treatise on Bills, that in the case of a mercantile agent, it will be prudent to give notice in the *Gazette*, and by circulars, of the determination of his employment.

In the course of mercantile dealings, goods are frequently entrusted to the care of general agents, or sent to public warehouses, and their disposal committed to brokers. In such cases an agency is constituted without writing of any kind. It is a very common arrangement in trade thus to consign goods to a likely market, getting perhaps an advance of money on them, or being allowed to draw bills on the faith of the consignment. In these circumstances, a mandate is implied empowering the consignee to sell the goods at such price and time as he shall judge to be most beneficial or expedient, (*O'Reilly*, *9th June*, 1821, 1 *Sh.*, 60), and if the consignee has made advances on the goods, or accepted bills, his mandate to sell is held to subsist, and to be assignable till he is either reimbursed or relieved. (*Broughton*, *17th December*, 1814, *F. C.; Gillies*, *10th June*, 1828, 4 *Sh.*, 939.)

Mercantile agents, as before remarked, have frequently authority conferred on them by the force of mere implication; and this for the most part is grounded on the sanction given by the employer to credit raised by a person acting in his name. Take the case of a servant, for example. If he has been allowed by his master to buy upon credit, the latter will be held responsible for what is bought by that servant, though—as it may happen in particular instances—without his authority. In one case the rule was laid down by Lord Chief-Justice Holt as follows:—If a man send his servant *with ready money* to buy goods, and the servant buy *upon credit*, the master is not chargeable. But if the servant usually buy for the master upon tick, and the servant buy some things without the master's order, yet if the master were trusted by the trader, he is liable. But without any previous dealing upon credit, sanctioned by the master, a shopkeeper or other party who trusts a servant does so at his peril. The master could only be held accountable for so much of the goods as were used by him, and not even for that, if he can show that the servant received money previously to pay for it. These salutary rules, which hold in the case of a servant, will be found equally applicable to

that of an agent. Whether the whole circumstances be sufficient to warrant the inference of such an authority, it rests with the Jury to decide. (*Vide Paley's Treatise on the Law of Principal and Agent.* Lloyd's Edition, pp. 162–167.)

When one becomes a party to a bill or note by the subscription of his agent, he is said to act *by procuration.* Such procuration, though most regularly constituted by a written power of attorney or letter of procuration, may also be proved by circumstances inferring acquiescence and implied authority in the particular instance; or it may be presumed from acts of recognition in previous cases. This doctrine, contrary to our former practice in Scotland, was first established by a decision of the House of Lords, as being conformable to the mercantile law of England, in the case of Davidson, 4th July, 1815. (3 *Dow's App.*, 218.) In that complicated case, the point worthy of attention may be found in the following passages of Lord Eldon's judgment:—"That a greater "error here occurred than he ever remembered to "have met with, if the commercial law was the same "in England and in Scotland, viz., that an indorsa-"tion per procuration requires a special mandate." His opinion was that no such thing was absolutely necessary; "for if, from the general nature of the "acts permitted to be done, the law would infer an "authority, the law would say that such an authority "might exist without a special mandate, and that an "indorsement per procuration might be good though "there was no such mandate."

A delegation of power is conferred by presumption of law when one places another at the head of an establishment; and the principal is held to bind himself in such circumstances by the dealings of his substitute. The maxim of law here applies with full force, *Qui facit per alium, facit per se.* A few examples may be given in which this delegated authority is presumed.

1. *Praepositura.*—Where a wife is by her husband *praeposita negotiis*—that is to say, entrusted with the management either of his affairs generally, or of any particular branch of business—all the engagements which she forms in the legitimate exercise of her *praepositura* are effectual against the husband. A *praepositura* may be constituted not only in a formal way by writing, but also tacitly by the wife's being in use, for a tract of time together, to act for her husband, while he either approves of it by fulfilling her engagements, or at least being in the full knowledge thereof, connives at the agency. (*Ersk. Prin.*, 1, 6, 15.) Certain departments of domestic economy naturally fall within the scope of the wife's management, and her power is held to exist either by tacit or express delegation from the husband. A wife, while she remains in family with her husband, is considered as *praeposita negotiis domesticis*, and empowered, as if by mandate, to bind the husband for proper furnishings to the family, for the price whereof he is liable though they should be misapplied, or though he should have given her money to provide them elsewhere. (*Robertson, 22d May*, 1801; *Hume's Reports*, 208.) But this *presumed* authority does not extend to transactions unconnected with the ordinary management of the family. The presumption of *praepositura* can only be removed by the use of inhibition at the husband's instance; but such a painful diligence is seldom resorted to except in cases of extreme necessity.

2. *Exercitor.*—One in the command of a ship has the sole direction of its course and conduct, and as the agent for the owners, has an implied power to bind them for expenditure in fitting out, victualling, and manning the ship. But though the shipowners are held to have entrusted their master with ample powers in regard to the management of the vessel, he is not entitled to alter or vary any contract relative to the vessel into which they may have entered. (*Scrimgeour, 2d March*, 1769.)

(*To be Continued.*)

THE LATE MR SHERIFF STEELE.

We think it is due to the members of the legal profession, with many of whom Mr Steele was on intimate terms, and to all of whom he was well known, to give a short sketch of his professional career. As every one knows, Mr Steele was trained under the late Mr Hugh M'Lachlan—a man of somewhat rough and uncouth manners, but one of the soundest lawyers of his day. At that time the junior members of Faculty had not been compelled to trust so much to themselves in matters of difficulty as the recent changes in the mode of pleading have necessitated, and Mr M'Lachlan, the late Mr Patrick Murray, our present venerable Dean of Faculty, and others of like standing, were often troubled, and we doubt not sometimes annoyed, by their junior brethren craving advice and opinions from them. Advice, however, was never withheld, or grudgingly given, although we recollect an exceptional case, where a respected friend, now no more, having consulted Mr Murray on some plain point of law, got the sarcastic advice to "read Erskine." Mr M'Lachlan had an extensive practice both in Conveyancing and Court business, and Mr Steele had thus the best opportunity of acquiring, not only a knowledge of the theory, but also of the practice of law. Mr M'Lachlan early discovered his talents, and entrusted in a great measure to him the management of his Court business. In these days the mode of procedure in Court was very different from what it is now. Clerks or apprentices were allowed to appear and make all sort of statements before the Judge, and a very sorry appearance they often made. The

man, or as it often was the boy, who made the boldest statement and stuck most firmly to it, generally carried the day in the various discussions as to circumduction and other points of incidental procedure, which occupied a large portion of the sittings of the Court; and when we recall to memory the able, amiable, and gentlemanly lawyer who presided over the Burgh Court, then the great forum of litigation, we feel something like a blush of shame at the part we have sometimes taken in these unseemly contentions. When we look now on our local Bar, and the way in which its business is conducted, we often wonder how it was that in our earlier days the evils of the system of judicial procedure were not sooner discovered and remedied. We are no advocates for mere formalism, but, looking to the extent and importance of the cases before our Courts, we hail with satisfaction the rule, now made imperative by our Sheriffs, that no one but a member of Faculty is allowed to address them. We have seen and noted the advantage thence arising both to the litigants and the profession. Cases are now discussed with an intelligence and ability which can scarcely be surpassed elsewhere, while a tone of courtesy and gentlemanly feeling pervades the members of the Bar, which is refreshing to us, who are only occasionally brought into contact with them, and all the more striking by contrasting with the present the times of which we have been speaking.

In those days Mr Steele was not behind the other juniors in zeal and occasional lack of discretion, but his great talent was even then manifest. Mr M'Lachlan showed his appreciation of it by assuming him as a partner soon after his indenture expired. Mr Steele was now fairly launched on professional life, and with his admirable talents few men had a better prospect of success. Well read, both in literature and in law, and with a memory retentive beyond that of any man we ever knew, had he steadily adhered to his chamber practice he might have been, in a pecuniary point of view, on a par with any of his brethren who have in that respect been more fortunate. He was constitutionally, however, of a combative disposition, and nothing rejoiced him so much as an opportunity for a keen intellectual contest with a professional brother, and the abler his opponent was the better was he pleased. He was not very particular as to the kind of case he undertook, and he had pet cases, sometimes of a trashy enough description, into which he threw his whole heart and soul, to the neglect of others of a more important nature. From the immense extent of his Court business, he was seldom without a dozen Court captions hanging over him to force the return of processes. When fairly driven to the wall by the officer insisting either for the process or his person, we have known him again and again to dictate off-hand an important paper, and seldom was it found defective. It will be kept in mind that our present strict forms of judicial procedure did not then exist. On one pretence or another all sorts of papers—Answers, Replies, Duplies, Triplies, Quadruplies, and even Quintuplies, not to speak of Minutes without end, were freely imported into a process; and we have a lively recollection of a case in which we ultimately came to be concerned, which commenced in 1813 and lasted till 1830, in which the Sheriff-Depute for the time regularly relieved it of its superfluous load whenever it came before him on appeal.

Soon after Mr Steele entered the Faculty (in the year 1829) a society was instituted—if society it could be called, for it had neither rules nor regulations—among certain of the junior members of Faculty, of whom Mr Steele was one. Its constitution was of the simplest kind, the members agreeing to meet on an evening once a week, to talk over the points of difficulty that occurred to them in actual practice, and to get the benefit of each other's views and experience. It is with a mixed feeling of pleasure and sadness that we recall these meetings to our memory. Many changes have since occurred, but we feel that we are indebted to them, not only for much social intercourse, but for real knowledge of our profession. There was no discussion of abstract principles unconnected with real practice, and nothing in the way of speechifying; but each member in succession stated his doubts and difficulties, which were fully discussed; and we have reason to believe that litigations were thereby often avoided which might otherwise have been advised. In these discussions Mr Steele took a prominent part. His knowledge of law was extensive, but above all, his memory was so retentive that he could refer his brethren not only to decisions but to the particular pages of the Reports where they would be found. The society existed for a good many years, but most of the members having married, its stated meetings were discontinued, although for years private social meetings were occasionally held in the houses of the different members. Alas! many of these valued friends are now gone, but there still survive Mr Robert Jamieson, Mr Nicolson, Mr Lamond, Mr Towers, Mr Hamilton, Mr Knox, Mr Kennedy, now Chief Justice at Demerara, Mr William Brown, junior, Mr John Harry Brown, and Mr Thomson.

After the Sheriff Court Act was passed, by which oral pleading was substituted for written debates, Mr Steele devoted himself almost exclusively to Court practice, and became the acknowledged leader of the local Bar. With his knowledge of law and minute acquaintance with practice, he was at all times a formidable opponent. He had great fluency of language, and at the same time a vigorous and emphatic manner of stating his case. He was not, however, according to our view, at all times a judicious adviser. Not that we would insinuate for a moment that he encouraged litigation for the sake of personal emolument, for it is well known that no man in the profession was more indifferent, we may say careless, in the matter of accounts, and we have reason to believe that he thereby lost thousands of pounds. The constitution of his mind, however, was such that he identified himself with his client, and was too apt to enter into the client's feelings and prejudices without that calm judicial discrimination which is such a valuable qualification in a professional man. When at the Bar, Mr Steele was popular with his brethren, and although occasions were not wanting which led to acrimonious discussions, no ill feeling remained. It was, indeed, one of his characteristics that while he would fight day by day with a professional brother, sometimes, as we thought, with undue keenness, nothing delighted him

more than to spend the evenings of these days in social intercourse with his opponent. An instance of this occurs to us, in the case of a clergyman in the north country, who was libelled by the Presbytery for some clerical delinquency, in which Mr Steele was retained for the accused. We would be afraid to specify the weeks, we may say months, during which the investigation lasted, and as the meetings of Presbytery were held at Dunkeld, the professional sacrifices Mr Steele made in conducting such a case may easily be understood. His legal opponent, a north country practitioner, was a fit match for him, and day by day the reverend brethren were puzzled by the skilful tactics and legal acumen of the Bar. The sederunt for the day being closed, the two legal gladiators were in use to leave the Court arm in arm to spend the evening together, and to return the following morning to resume the combat, to the great astonishment of the reverend brethren, who could not understand how two men who fought all day should fraternise all night. As an instance of Mr Steele's physical endurance, we may mention that, in finally addressing the Court in that case, he spoke for upwards of six hours without intermission.

An additional Sheriff-Substitute for Lanarkshire, at Glasgow, having been resolved on in the year 1855, Sheriff Alison, with great propriety, as it appears to us, appointed Mr Steele to the office. His appointment was viewed with much satisfaction by the profession, not only because of Mr Steele's fitness, but as a mark of the Sheriff's estimation of the qualifications of his own Bar. In token of their appreciation of the appointment, Mr Steele was entertained at a public dinner by the profession, the Dean of Faculty presiding. Mr Steele brought with him to the Bench many qualifications for a good Judge. He had knowledge both of the theory and practice of law; but we cannot say that as a Judge he was faultless. He was strictly upright and anxious to be impartial, but he carried with him to the Bench, to some extent, the failings which he had at the Bar. He was apt sometimes to form hasty impressions, and these once formed it was difficult to dislodge from his mind. His quickness of perception was so great that in the outset of the case he thought he saw where the point lay, and he was generally correct; but having taken up a view, he had a tendency to merge the Judge into the Advocate, while all the time he conscientiously believed he was furthering the ends of justice. The peculiar constitution of his mind was strongly manifested in the lengthened notes which he often appended to his Interlocutors. Many of these rather resembled minutes of debate, than the expression of judicial views. They were sometimes loose in their structure, but all of them displayed great research both into the text writers and decisions bearing on the points involved. We canuot help thinking that Mr Steele's promotion to the Bench had, humanly speaking, some effect in shortening his days. He had all his life been a man of restless activity, often travelling on professional business, and we can easily suppose that the unintermitting sedentary habits and fagging work to which his office subjected him, told injuriously upon a constitution naturally vigorous. Now that he is gone, we feel assured that we speak what the profession feel, when we say that his loss is lamented, and that his memory, as an able practitioner and efficient, conscientious Judge, will long be retained by his brethren. We have purposely abstained from saying anything as to his non-professional talents, or the many estimable qualities which distinguished him in private and social life. These have already been adverted to through other channels; but we cannot close these few hurried remarks without saying, that we knew few men who had a warmer heart, and with whom we have had more pleasant intercourse.

Correspondence.

(*To the Editor of the Scottish Law Journal and Sheriff Court Record.*)

Edinburgh, 19th January, 1859.

Sir,—We have had our attention called to a Review, which appeared in the *Scottish Law Journal and Sheriff Court Record* for January, of Bell's Law Dictionary, by Mr Ross, the first part of which appeared a few weeks ago.

In noticing this work, the reviewer complains that Mr Ross takes no notice in the Dictionary of the changes effected by the Titles to Land Act; which he shows he could not be ignorant of, as he had published previously an Analysis of it.

In explanation of this, we beg to say that a considerable portion of the Dictionary, including the part now published, was printed off before the passing of the Titles to Land Act, and also before the passing of the Registration of Leases Act. This of course is to be regretted, but opportunities under other heads in the Dictionary will occur of pointing out these alterations, or they may be embodied under the head "*Addenda et Corrigenda*," as was done in the previous edition.

In publishing such a work as Bell's Law Dictionary, embracing every department of the Law of Scotland, we can hardly expect that during the time it is passing through the press, no change in the Law by new Legislation should take place. Your readers, however, may rest assured that no effort will be awanting to render the work in question worthy of the reputation it has hitherto held.

We are,

Sir,

Your obedient Servants,

Bell & Bradfute.

The "Scottish Law Journal" will be published in the first week of each month, Price One Shilling, post free.

The Editors are desirous that the Journal should contain the Reports of all Cases decided in the various Sheriff Courts in Scotland involving points useful or interesting to the Profession, and would therefore solicit a Report from either of the Agents in each such case, or from the Sheriff. It will be necessary to have the Report signed by one of the Agents or the Sheriff, to ensure its correctness, except in those cases where the party reporting is known personally to the Editors.

The Editors will take no notice of anonymous communications, and will not hold themselves bound to return articles or communications not found suitable.

Advertisements can be received till the evening of the 23d of each month. All communications to be addressed to the Editors, care of the Publishers.

Any error or delay occurring in the transmission of this Journal to Subscribers, should be immediately communicated to the Publishers.

The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, MARCH, 1859.

JUSTICE OF PEACE COURTS.

However well adapted the Justice of Peace Court may have been to the condition of society and the exigencies of the times in which it was instituted, it is now apparent that it has served its day, and that it is altogether unfitted to discharge the important judicial duties which the legislation of the last fifty years has thrown upon it. We can well understand that during the seventeenth and eighteenth centuries, the Justice of Peace Court may have been a valuable institution, and the Justice of the Peace a useful and necessary magistrate. But times have changed. The days of "penny weddings" have passed away; shearers' wages cannot now be fixed by any rule, except that of demand and supply; it is now too late to enforce by civil authority the censures of the Church,* and the public peace can be preserved without a Justice or his constable. Although nearly all the evils which the Justice was originally appointed to prevent have ceased to disturb the country, and very few of the offences of which he was entitled to take cognisance are now regarded as criminal, still the Court has not only continued to exist, but has received from each succeeding Parliament an extended jurisdiction. Indeed, the questions which are now submitted for determination to the Justice of Peace Court, are as different in character and number from those it was instituted to try, as can well be imagined. The repression of village brawls, and the punishment of drunken farm servants, which must at one time have afforded the principal occasions for the display of his judicial sagacity, form now a scarcely appreciable branch of the manifold duties of a Justice of the Peace.

We shall not attempt either to sketch the history or to detail the jurisdiction of the Justice of Peace Court, but will merely refer to some of the more important questions which come before it, and to the manner in which these questions are considered and disposed of. We do not intend to suggest any alterations in its system of procedure, nor any reform in its mode of dispensing justice. The only reform of which it seems to us to be susceptible, is a total and immediate abolition.

In the first place, the Justice of Peace Court takes cognisance of all offences against the revenue laws. In prosecutions for these offences, the ordinary forms of judicial procedure are dispensed with, and in some of them the ordinary rules of evidence are modified by statute. The process is as summary as the conviction is certain. The amount of the fine which follows a conviction is in many cases practically unlimited, and default of payment subjects the offender to imprisonment during Her Majesty's pleasure, or in other words, to imprisonment for life; and yet this jurisdiction is exercised by an unpaid, uneducated, and irresponsible magistracy; and a trial which involves so seriously the reputation and the liberty of their fellow-citizens, is conducted by two gentlemen, who may be highly respectable in private life, who may be perfectly well acquainted with the rotation of crops and the management of farms, who may be learned in the secrets of the iron trade, and versed in the mysteries of cotton broking, but who may be, and not unfrequently are, as ignorant of the rules of judicial procedure, and less able to analyse evidence, than the constable who executes their warrant.

Again, the Justices have jurisdiction under the Act 4 Geo. IV. cap. 34, which regulates the enforcement of contracts of service. The provisions of this Act are very stringent, and the punishment prescribed for a servant's breach of an engagement is very severe; and yet all cases under it may be tried before *one* Justice of the Peace. Although we do not believe that in a multitude of such councillors there is much wisdom, still the risk of an erroneous judgment being pronounced is less when there are two or more Judges on the Bench than when there is only one. But the Legislature has here thought proper to confer on an unpaid magistrate a summary jurisdiction, more extensive and important than that of the Sheriff. It has given power to a Justice of

* Hutcheson, p. 23.

the Peace, on the complaint of a master (who may be engaged in the same trade with himself, and the punishment of whose servant will intimidate his own) to send to prison for three months with hard labour—or, in other words, to degrade and ruin—a mechanic or an apprentice, who may be equal to the Justice in respectability, and is often superior to him in intelligence.

The power to grant licenses for the sale of spirits without burgh, and to review, in Quarter Sessions, the decisions of the licensing magistrates, is also an important branch of the jurisdiction of the Justices, and one, with the exercise of which the public is most familiar. Cases of this description seldom involve any point of law, and it might reasonably be expected that if Justices of the Peace were fit for anything judicial, they would be able to determine whether or not, in a given case, a license should or should not be granted. But even here their Court has proved a failure. It is impossible for any one to predict whether a license will be granted or refused in a particular case, the result depending apparently more on the pre-conceived opinions of the gentlemen who are presiding at the time, than upon any regulating principle. The Courts fluctuate from their commencement to their close. At one period of the sitting there may be fifteen or twenty Justices present, at another eight or ten. The number, in short, depends upon the activity of those who interest themselves in the great question as to the moral or immoral influences of a particular trade. In a Court so irregular, it not unfrequently happens that in one case a license is granted at the commencement of the sitting, under certain circumstances, while it is refused in another case, under similar circumstances, towards the conclusion. To show that this is no fanciful statement, we might give many instances which have come under our own notice. For example, a renewal of license was refused to parties who had been once convicted of a breach of their certificates, while, in the same Court, a renewal was granted to parties against whom there were two convictions for precisely the same offence; and in a few cases a renewal of license was refused although there had been no conviction or even complaint, so that the applicants in the last case were placed in a worse position than parties against whom there were two convictions. We might multiply illustrations of the capricious irregularity of the Licensing Court, but these will suffice. Altogether, its decisions are most unsatisfactory, alike to the unfortunate applicants and to the agents whose business leads them to be present.

We do not intend to enter more fully into the question of the Justice of Peace jurisdiction, as the branches of it we have noticed are sufficient for our present purpose, but we shall very briefly inquire who are the parties who exercise this jurisdiction, and how far they are qualified to do so. Dr Boyd remarks, page 3, in reference to this office, "That "when exercised by a wise and enlightened Judge, "acquainted at the same time with the extent and "limits of the jurisdiction, the office may be pro-"nounced one of the most beneficial institutions "which lawyers have invented for mankind." We do not know whether such Judges ever held the office, but there are not many in office now. Mr Hutcheson says "That this magistracy may either be productive of "much good or of much evil to the community, just "as those who exercise it possess or not the qualifica-"tions necessary for the able, active, and independent "discharge of its various duties, and particularly for "the safe, prudent, and upright employment of that "discretionary power which in so many instances is "entrusted to him." No one will hesitate to endorse Mr Hutcheson's proposition, which amounts simply to this, that if a good Judge be appointed a Justice of the Peace, his magistracy will be productive of good. But this has rarely happened, at least in later times.

There is no educational test required from any one who may wish to have his name added to the Commission of the Peace. It is not necessary that the applicant should have, and indeed he very rarely has, in any way shown himself to be fitted for the office. The success of the application, if we may judge from some of the more recent appointments, seems to depend altogether upon the extent of the applicant's territorial possessions, his family influence, the amount of money which he has amassed, or the value of his electioneering services. We have never heard of any one being appointed simply because his education and experience qualified him for the office; and evidence is not awanting, that in the case of many, ignorance of its duties, and inaptitude for learning what they are and how they ought to be discharged, are at least the only qualifications which their appearances in public indicate to have been the causes of their election. It is no doubt true, that the Justices have, or are presumed to have, the benefit of the legal advice and assistance of their clerk, who is generally a procurator distinguished more for his political activity than for his legal attainments. We are afraid that the advice of this learned officer is rarely asked, and is still more rarely acted upon.

The danger and impropriety of permitting any one who has not been trained and educated as a lawyer, to exercise judicial functions, must be obvious. No amount of learning or experience in other branches of knowledge will compensate for a deficiency in this. A cautious intelligent man, although not educated to the legal profession, may be able to

say whether certain things have been proved or not proved, and such a man is fit to be a juryman. But he is not fit to be a judge—and a Justice of the Peace is a judge as well as a juryman. He has not only to ascertain the facts, but to apply the law. Questions of the greatest difficulty, in point of law, frequently occur in the course of a summary trial, and the Justice must determine them at once. In doing so, he has the benefit of his clerk's opinion; but, if he act upon it, the clerk becomes practically a Judge, which is a dangerous anomaly. If the Justice reject the clerk's advice, the probability is that his judgment is unsound. We might forgive Justices for not being acquainted with the law, but we cannot excuse the obstinacy with which in so many cases they persist in misunderstanding the facts, and act upon their own preconceived notions of the merits and justice of the cause. They will neither be persuaded by the Bar, nor directed by their assessor. They must be allowed to blunder, and blunder they certainly do. We have heard more than one gentleman holding Her Majesty's Commission, explain in Court that his notion of the appellate jurisdiction of the Quarter Sessions was to confirm, *simpliciter*, and without argument or inquiry, the judgment of the Court below.

It may, at first sight, appear surprising that such a state of matters should have been tolerated so long. But the explanation is simple enough. The profession has not taken the trouble, and the public have not had the means of exposing the Justice of Peace Court. If a Parliamentary inquiry be instituted, as we trust it will, the result must be an immediate and almost total abolition of the jurisdiction of the Justices. They may, possibly, be permitted to retain the dignified privileges of taking affidavits, and celebrating irregular marriages, but they will not be allowed to pretend to dispense justice. The country and the legislature will be satisfied, as the legal profession has long been, of the danger and the folly of entrusting the exercise of important and extensive judicial authority to men, who, generally speaking, are as destitute of discretion as they are ignorant of law.

MANDATE OR AGENCY.

(Continued from page 42.)

I.—CONSTITUTION OF AGENCY.

3. *Institor.*—The person who has the management of a shop is *institor* or *præpositus*, having a presumed general authority to bind his principal by his proper acts of administration, as in the selling or buying of goods, or in the receiving and discharging of money in the fair and ordinary course of trade. A woman managing the shop of her husband, or keeping a shop herself, with his sanction or permission, is likewise *institor*, and for her contracts the husband is liable, *actione institoria*. (*Wilson* v. *Deans*, 17th Dec., 1675, Mor. 6021; *Anderson*, 2 Starkie, 204.) In the Roman Jurisprudence, the Prætor introduced the *actio institoria*, whereby principals might be sued upon the contracts of their institors or superintendents; and the principle of that remedy has, as we have seen, been adopted in the law of Scotland. (Erak. Inst. 3-3-46; 1 Bell Com. 480.)

4. *Bank Agency.*—The managers or other officers of a bank are viewed as *institors*, whose transactions with the public in that capacity are binding on their constituents. While this holds good as a general rule, particular care must be taken to avoid stretching the implied authority too far; and a distinction of some practical importance seems admissible between the managers and officers at the principal office or head-quarters of the bank, and agents of bank establishments at a distance. In the former case (as Professor Bell has stated in his Principles, sec. 231), the public is entitled to trust to the full unlimited institorial power in dealing with any officer placed in the apparent trust of receiving money; in the latter, the agent or manager has certain general powers, but which are to be relied upon with great caution, as such an agency is to be viewed as limited and regulated by the terms of his appointment, the principal, i.e., the bank, being liable only for acts done by the agent in his proper character as agent. This important distinction was first drawn by the House of Lords, in an action against the Bank of Scotland, which concluded for payment of a sum of money deposited with their agents at Brechin. The action was defended on the ground that the agents acted under limited powers for the bank, and received the money in question in their own names and not as bank agents. To this plea it was answered that the money was paid in the bank office, on a receipt bearing "Bank Office, Brechin," on its face, and that the agents were, in receiving the money and granting the receipt, believed to be acting for the bank. The Court of Session (by a majority of the Judges), holding that it would be a dangerous consequence to the public, as well as contrary to the implied nature of such a business, if banks were not answerable for the transactions at their known office, by the clerks and servants employed by them in the common operations of banking, decerned against the bank, and found it liable. But the House of Lords, on the case being appealed, took a different view, and reversed the judgment pronounced by the Court of Session. Lord Chancellor Eldon remarked, that there was nothing in the document or receipt showing it to be that of the bank, unless it could be said that

"Bank Office, Brechin," was the same as for the "Governor and Company of the Bank of Scotland," and that there was nothing peculiar, so far as he knew, in bank agency, to take it out of the rule that an agent could not bind his principal beyond the limits of his authority. This was the ultimate decision pronounced in the instructive case of Watson against the Bank of Scotland, 15th May, 1806, Mor. Dict., under "Mandate," Appx. No. 3, Reversed on Appeal, 26th March, 1813, 1 Dow, 40. Reference may also be made to the subsequent case of Normand, 4th July, 1823, 2 Sh. 482.

5. Traveller or *Rider.*—A traveller or rider for a manufacturing or mercantile house is a limited agent. His authority may depend either on the definite instructions which he receives, or on the custom of trade, or on the extent to which his exercise of authority has been acquiesced in, and recognised by the principal. In general an agent of this description has not only implied authority to receive payment for his principal of the monies due to him, and to grant valid discharges thereof, but also to receive orders, by which the principal shall be bound as effectually as if he himself had personally received and undertaken to perform them. (*Milne*, 14th June, 1803, M. 8463.) This rule, though in some cases it may entail considerable hardship, and create unexpected liabilities, having reference to the existing state of matters in mercantile communities, is based on principles of the soundest policy. If it did not receive full effect, the interests of commerce would be seriously endangered.

A few remarks may be here introduced as to the *capability* of parties to become principals and agents. On this point, it may be observed generally, that any person *sui juris* is capable of becoming both a principal and an agent unless there exists some disability or prohibition by the municipal law which regulates his rights and duties. Let us briefly examine some of these exceptions. And, 1st, with respect to *Principals*, it may be stated that every person of mature age and not otherwise disabled has a complete capacity. But pupils, married women, idiots, lunatics, and others labouring under mental imbecility, or not *sui juris*, are either wholly or partially incapable of appointing agents. The civil law recognised similar disabilities, (see Inst. 3, 20, sec. 8, 9) 2d, With respect to *Agents*, on the other hand, a wider latitude is allowed. Few persons, indeed, are excluded from acting as agents, or from exercising an authority delegated to them by others. And it is by no means necessary for a person to be *sui juris*, or capable of acting in his own right, in order to qualify him to act for others. But an idiot, lunatic, or other imbecile person cannot, of course, do any act as agent binding upon the principal, for they have no legal discretion or understanding to bestow upon the affairs of others, any more than on their own. (*Story's Commentaries on Agency*, sec. 7.) Distinctions similar to those above indicated also existed in the civil law; for by that code a minor, a married woman, a slave, a kinsman, or an alien might be appointed as an agent. But although all persons *sui juris* are in general capable of becoming agents, yet it is well settled that they cannot at the same time take upon themselves incompatible duties and characters, or become agents in a transaction where they have an adverse interest or employment. Thus, a person cannot act as agent in buying for another goods belonging to himself; and at a sale made for his principal, he cannot become the buyer. Neither can he, when holding a fiduciary relation, contract with the same general force with his principal as in ordinary cases where such a relation does not exist. (1 *Story on Equity*, sec. 308–328.)

Negotiorum Gestio.—In conclusion, under this branch of the subject, it may be proper to offer a few explanatory observations regarding the *Negotiorum Gestio*, which, according to the civilians, was a species of spontaneous factory, or the management by one of the affairs of another in his absence, usually undertaken from motives of benevolence or friendship, and without authority. The Roman law would oblige a person to indemnify an assumed agent, acting without authority, and without any assent or acquiescence given to the act, provided it was an act necessary and useful at its commencement. But the English law has never gone to that extent. It has been said that if any relation exists between the parties, a payment without authority may be binding on the person for whose use it was made, if it be made under the pressure of a situation, in which one party was involved by the other's breach of faith. So in a case mentioned by Lord Kenyon, (8 Term. Rep. 614,) from *Rolle's Abridgement*, where a party met to dine at a tavern, and all except one went away after dinner, without paying their quota of the tavern bill, and the one remaining paid the whole, he was held entitled to recover from the others their aliquot proportions. The recovery—as a learned American Jurist has observed—must have been upon the principle that, as a special association, they stood in the light of sureties for each other, and each was under an obligation to see that the bill was paid. (Vide *Chancellor Kent's Commentaries on American Law*, Vol. ii., p. 617). The rules of the obligation raised by legal construction from *Negotiorum Gestio*, according to the law of Scotland, have been stated and expounded by Mr Bell in his usual perspicuous manner.—1. That the *Negotiorum Gestor* is bound, (1) to complete the performance of the act which he has begun, as if he held a proper mandate, unless the

principal shall relieve him; (2) to account for his intromissions, and restore all that he has received; (3) to bestow a degree of care and diligence varying with circumstances, subjecting him for *culpa levissima*, if his interference be officious, exclusive, and interested; for *culpa levis* only if he have interfered in the fair course of friendly intercourse, without any strong necessity; and for no more than *culpa lata*, in cases of necessary interference or sudden emergency (3 Erak. 3, sec. 53, *Maule*, 4th March, 1757, M. 3529) 2. The person for whom the *Negotiorum Gestor* interferes is bound, (1) to indemnify him for expenditure, necessarily or usefully, or even reasonably, and *in bona fide* laid out; (2) to relieve him from all engagements undertaken for his benefit in the course of his interference. (*Bell's Principles*, sec. 540, 541.)

II.—POWERS, DUTIES, AND OBLIGATIONS OF AGENTS.

1. *General and Special Agents.*—The authority which may be delegated to an agent has been conveniently divided into two sorts,—(1) a special agency, and (2) a general agency, and it is very important that the distinction between these, both as in relation to the parties themselves, and to the public, should be carefully observed, as the doctrines applicable to the one often totally fail in regard to the other. The true distinction, as commonly recognised between a *general* and a *special* agent is this,—a general agency does not import an unqualified authority, but that which is derived from a multitude of instances, or in the general course of employment or business, whereas a special agency is confined to an individual transaction. (*Story's Commentaries*, sec 19.) Mr Paley has drawn the distinction between those two classes of agents in the following terms:—"By a general agent is understood, not merely a "person substituted in the place of another for transacting all manner of business, but a person whom "a man puts in a place to transact all his business "of a particular kind, as to buy and sell certain kinds "of wares, to negotiate certain contracts, and the "like. An authority of this kind empowers the "agent to bind his employer by all acts within the "scope of his employment, and that power cannot be "limited by any private order or direction not known "to the party dealing with the agent. And this "seems to be founded, not so much upon the presumption of an authority given, as upon the principle that where one of two innocent persons must "suffer by the fraud of a third, he who enabled the "person, by giving him credit to commit the fraud, "ought to be the sufferer. But a special agent, who "is employed about one specific act or certain specific "acts only, does not bind his employer unless his "authority be strictly pursued, for it is the business "of the party dealing with him to examine his authority, and therefore, if there be any qualification or "express restriction annexed to the commission, it "must be observed, otherwise the principal is discharged. A general power to buy or sell binds the "person giving it as to all others dealing *bona fide*, "however disadvantageous the terms of contract may "be. But a special authority must be strictly pursued." (*Lloyd's Paley*, p. 199, 208.) And the principle of this distinction has been lucidly explained by Chancellor Kent. "The principle that pervades the distinction on this subject, he says, "rests on sound and elevated morality. There must "be no deception anywhere. The principal is bound "by the acts of his agent, if he clothe him with "powers calculated to induce innocent third persons "to believe the agent had due authority to act in "the given case; on the other hand, if there be no "authority, nor the show or colour of authority from "the principal to do an act beyond his powers, the "party who deals with the agent in any such transaction must look to the agent only." (2 *Kent's Commentaries*, p. 620, Note C.) The same distinction between a general and special agency was well known in the civil law,—thus, *Procurator vel omnium rerum vel unius rei esse potest.* It may be proper, at this stage, to explain that *general* agents are to be carefully distinguished from *universal* agents, that is, from agents who may be appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an universal agency, as has been well observed, may potentially exist, but it must be of the very rarest occurrence, and it is very certain that the law will not, from any general expressions, however broad, infer its existence. (*Story's Commentaries*, sec. 21, 22)

2. *Different kinds of Agents.*—We now proceed to a consideration of the different kinds of agents, general and special, in the course of which we shall point out, as briefly and concisely as possible, the powers and duties belonging and attaching to each respectively.

(1.) *General Factor.*—A factor is commonly said to be an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for a compensation generally called *factorage* or *commission*. Hence he is often called a *commission merchant* or *consignee;* the goods received by him for sale are called a *consignment;* and when, for an additional allowance or compensation in case of sale, he undertakes to guarantee to his principal the payment of the debt due by the buyer, he is said to receive a *del credere* commission, of which we shall have occasion to speak more fully hereafter. A *factor* is distinguished from a *merchant* in this, that a merchant buys and sells for his own direct mercantile profit; a

factor buys or sells on commission only. A factor may buy and sell in his own name, as well as in the name of the principal; he is also entrusted with the possession and apparent ownership, as well as with the management and disposal of the property of the principal, and in these respects he differs from a *broker*. Again, a general factor's authority is extended to the management and direction of all the principal's affairs in the place where he resides, or in a particular department, and in this he is distinguished from an *agent*. A factor is generally the correspondent of a foreign house, or of a merchant at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal, and has an implied authority to do so. Justice Story, in his excellent Commentaries on Agency (sect. 268–290), states the general rule as to the liability of agents or factors for merchants residing in foreign countries, to be that they are personally liable on contracts made by them for their principals, whether they describe themselves in the contracts as agents or not, the legal presumption being that the credit is given to the agent. He adds, that this presumption may be overcome by proof that credit was given to the principal only, or that the usage of trade does not extend to such a case. Chancellor Kent has observed that the policy of the rule, as laid down by Mr Story, has been seriously questioned; but it seems to be established on grounds of general convenience and the usage of trade. It must be kept in view that the presumption is one of law, and that it must yield to the intention of parties as that may be ascertained from the terms of the contract or other circumstances. In one case (*Burgess*, 2d July, 1829, 7 Sh. 824,) Lord Pitmilly stated that an agent ordering goods for a person abroad, necessarily rendered himself liable for the price, and upon the authority of this case the principle has since been broadly laid down by various writers. In that case it was pleaded by the agent that he had merely transferred an order he had received from Nova Scotia to the pursuer, who had made the furnishings on that order. It was found that the defence was not well founded in point of fact, so that there was no decision on the general principle. In England, many cases involving this principle have occurred. One of the most recent is that of *Green* v. *Kopke* (2 Jur. N.S., p. 1050), in which it was held "that there is no rule "of law that a person contracting in England as agent "of a foreign principal is personally liable on the con-"tract." Justice Willes said, "In this, as in all "similar cases, whether the agent contracted as agent "or not is a question of fact, and not a conclusion of "law. Each case must depend on its own circum-"stances." This is in perfect conformity with the law, as stated by Justice Story, and will, it is thought, be followed by our Courts should the question come to be tried.

A factor may, in certain cases, bind his principal to the performance of a contract, although it was entered into against the terms of special instructions. Thus where factors had a general authority to buy and sell, and did so in their own names in many cases, it was held that a sale under the price stated by their principal was binding on him in a question with the purchaser, and that their authority to sell was to be inferred from their general dealing, and not merely from their private instructions as to the particular parcel of goods.

The factor must follow his instructions, and exercise a sound discretion in his acts of management. He is bound to keep the goods consigned to him with the same care that a prudent man would keep his own; he is not liable in case of robbery, fire, or other accidental damage happening without his default. (*Smith's Mercantile Law*, *p.* 108.) The goods entrusted to a factor or agent, or the price of them, are liable to be impledged for his advances, and to retention for the general balance. (1 *Bell Com.*, *p.* 477.)

(2.) *Common Agents.*—An agent is one entrusted with the accomplishment of a particular act, or employed in a particular line or course of dealing. His powers are similar to those of a factor, but limited to the particular branch or line of business entrusted to him. The names of *agent* and *factor*, though not precisely synonymous, are generally confounded, and used indiscriminately in common language—factors being included under the name of agents.

(3.) *Brokers.*—The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons, in matters of trade or navigation, for a compensation commonly called *brokerage*. He makes it his chief business to find out the buyers and sellers of commodities. He is strictly a middle man, or intermediate negotiator between the parties. The property in the negotiation of contracts, relative to which brokers are employed, is not entrusted to their custody; and they ought not, therefore, to sell in their own names. They have power to bind the principals in relation to the particular transaction, by the entry in their books, and the passing of "Bought and Sold Notes" between the parties, reserving to the principal a power of objecting to the credit of the buyer. It has been already suggested that a broker is, for some purposes, treated as the agent of both parties. But, primarily, he is deemed merely the agent of the party by whom he is originally employed; and he becomes the agent of the other party only when the bargain or contract is definitively settled as to its terms between the principals. It would be a fraud in the broker to act for

both parties, concealing his agency for one from the other, in a case where he was entrusted by both with a discretion as to buying and selling, and, of course, where his judgment was relied on. This office of a *broker*, though sometimes confounded with that of *factor*, is carefully to be distinguished, as he is in *no* shape empowered to bind the principal without particular mandate, or the possession of the goods. (*Black & Co.*, 22nd June, 1820—2 Sh. App. 188.) Brokers were a class of persons well known in the civil law, under the description of *Proxenetæ*, and their functions among the Romans were not unlike those which are performed by them among all modern commercial nations. Brokers take their distinguishing appellation from the particular object to which they attach themselves, as *Stockbrokers*, *Insurance Brokers*, &c. *Stockbrokers* are those who buy and sell in the public funds, or in the funds of joint-stock companies. They are ranked as special agents. *Shipbrokers*, employed in the buying and selling and freighting of ships, are also special agents; they adjust the terms of venditions, charter-parties and bills of lading, and settle with passengers the room and terms of their passage. *Insurance Brokers* are also special agents for effecting insurance, selecting proper underwriters, arranging the premium and terms of the policy, and keeping an account on the one hand with the assured, and on the other with the underwriters, debiting or crediting each with the premium, as middleman, for settling the payment of it. (*See Bell's Principles*, sec. 219.)

(4.) *Supercargoes* are special agents, but approach very closely to the character of general factors. They are presumed to be invested with full power over the cargo of the ship, and its destination, and the investment of the proceeds for a return, being so accredited by the possession of the goods. Their business is to manage the sales and superintend all the commercial concerns of the voyage. (*Davidson*, 12 East. 396.)

(5.) *Ship-Husbands.*—A *ship's-husband* is a common expressive maritime phrase, to denote a peculiar sort of agent, delegated by the owner, in regard to the repairs, equipment, management, and other concerns of a ship. He is the agent or commissioner for the owners, and may be either a part-owner or a stranger. His duties are to arrange everything for the outfit and repair of the ship, stores, repairs, furnishings; to enter into contracts of affreightment, and to superintend the papers of the ship. He has no power to borrow money, nor to insure for the owner's interest, without special authority, and he cannot delegate his powers, (*Forbes*, 13th Dec. 1822, 2 Sh. 87). For more particular information as to the powers and duties of this class of agents, reference may be made to *Bell's Commentaries*, Vol. i., p. 410, *et seq.*

(6.) *Procurator to draw or accept Bills* is a special agent, and his powers must be examined in order effectually to bind his principal. Procuration is generally and most regularly constituted by a written power of attorney, or letter of procuration, and while unrecalled, or recalled without notice, the writer will be bound by the signature of his representative. (*Thomson on Bills*, p. 220.) Procuration may also be proved by circumstances inferring acquiescence and implied authority, contrary to our former salutary practice in Scotland, which required writing to the constitution of such a power. The doctrine, as we have seen, was established by a decision of the House of Lords, as conformable to the Mercantile Law of England, in the case of Davidson before cited. (See also, in confirmation of the doctrine as there laid down, the decisions pronounced in the subsequent cases of *Miller*, 22d Jan., 1831, 9 Sh. 328; and *Maiklem*, 16th Nov., 1833, 12 Sh. 53.) But every limitation of a power so extraordinary must be strictly observed, and where the subscription bears to be by procuration, third parties must use due caution in taking the bill, otherwise they run the risk of the limitation of the procurator's powers. (*Bell's Principles*, sect. 321.)

(7.) *Wharfingers.*—These are special agents, and though they are entrusted with the custody of goods, they possess no power beyond their particular business or special mandate.

(8.) *Commercial Travellers.*—These are a numerous and important class of mandatories. They are generally employed to receive payments, and take orders for manufacturing or mercantile establishments over particular districts of the country. Their powers are, if not expressly restricted, limited only by the custom of their trade. In general it appears that a riding or travelling agent has not only authority to receive payment for his principal of the monies due to him, but to take orders by which the principal shall be bound as effectually as if he himself had entered into the contract. (See 1 *Bell's Com.*, 481.)

(9.) *Law Agents.*—A law agent is not a general but a limited mandatory. A mandate to a law agent to conduct a suit will be presumed, so far as the client is concerned, from his knowing that the suit is carried on in his name, and not disclaiming it. (*Brown* v. *Murdoch*, 13th Nov., 1824.) His powers are those necessary or usual in that business or employment. A power to recover payment of debt was held to confer a discretionary power in the use of diligence (*M'Kenzie*, 14th Jan., 1830); and in another case where a current bill had been transmitted to a law agent without special instructions, there was an implied mandate to the agent to demand payment and do diligence; and partial payments having been made by the acceptor of the bill, and the creditor having

agreed to renew it without informing the agent, it was held that the latter was justifiable in proceeding with diligence. (*M'Donald*, 5th July, 1821, 1 Sh. 101.) Neither agent nor counsel has power to enter into a reference of the cause in which he is employed, this being reckoned an extraordinary act, out of the scope of his implied authority, and requiring, therefore, a special mandate to bind his client. (*Livingston*, 23d Feb., 1830.) A law agent, as we shall afterwards find, has a lien or right of retention of the title-deeds or documents of debt of his client coming into his hands in the usual course of business, for the amount of his professional account. And he is held responsible for the consequences of professional negligence, or want of ordinary skill in the conduct of the business entrusted to his charge.

(10.) *Masters of Ships.*—This is a well-known class of agents possessing what Jurists have termed the *exercitorial* power in relation to the equipment, outfit, repair, management, and usual employment of the vessels committed to their charge. The master of a ship, in our law, corresponds very closely to the description of the *magister navis* of the civil law. (1 *Stair* 1–12–18 and 19.) The nomination requires no written contract; it, along with the acceptance, binds the parties. His power to enter into contracts for the employment, repairs, and necessaries of the ship, is absolute abroad; in a home port, it is exercised under the authority of the owners. The master also possesses the power of delegating his authority in cases of urgency or necessity.

(11.) *Partners.*—These are regarded as mutual agents of each other in all things which pertain to the partnership business. Each partner has, in the eye of the public, an unlimited right of management, and is entitled to contract for the company, and pledge its credit in all matters within the scope of the business carried on.

For more full and particular information respecting the different classes of agents above enumerated, whose characters and powers respectively we have indicated in a general manner, reference may be made to *Mr Story's Commentaries on Agency*, sect. 23–37.

(To be continued.)

The continuation of the article on Joint Stock Companies will appear next month.

Correspondence.

(To the Editor of the Scottish Law Journal.)

Sir,—In common with the large majority of the members of the provincial Bars, I observed with much satisfaction the commencement of a Journal having for its objects the dissemination of legal knowledge among local practitioners, and the promotion of reforms in the Sheriff Courts of Scotland. One of the most interesting, and perhaps practically the most useful portion of the Journal, is that portion of it devoted to the Reports of Cases decided in Sheriff Courts. Many of those cases never go beyond the Sheriff Court where they commence. Indeed, in very many cases the jurisdiction of the Sheriff is privative; so that without such a Journal as yours, the practitioner in the local Courts must commence every case with that information only which his own experience may have given him, instead of having (what your Journal affords) access to Reports of every variety of cases which come before our local Courts, elaborately discussed and carefully decided.

I think, however, Sir, that the usefulness of the Journal might be very considerably extended if advantage were taken of its pages to discuss the correctness of any decisions reported in your Journal, which appear open to doubt or criticism; and I venture to commence the communications of this nature by questioning the correctness of a decision which appeared in your Journal of last month.

The decision to which I refer is that by the Sheriff-Substitute at Linlithgow, holding that a dissenting clergyman visiting his hearers is entitled to exemption from tolls under the General Turnpike Act. I take the liberty to doubt the correctness of this interpretation of the Act. The exemption is claimed under section 37, which enacts that no toll shall be demanded or taken "from any clergyman going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish." Now, there is no doubt that "clergyman" is a title common to dissenting and Established preachers of the Gospel, and had there been no other indication of the intention of the Legislature, there is no doubt that the exemption would have extended to clergymen of all denominations. But with great submission to the learned Sheriff-Substitute at Linlithgow, I cannot think that such is the meaning of the clause as it stands. The clergyman referred to in it must be a proper "parochial" clergyman. He must have his "parishioners" and his "parish," and these terms, both in legal and ordinary phraseology, are only properly applicable to Established clergymen, and the districts and people under their charge. A dissenting minister cannot be called the minister of a parish, or what is generally styled a parochial clergyman.

And I think that the distinction which is thus pointed out has been recognised in England in interpreting similar statutes. In the case of *Lewis* v. *Hammond*, 2 B. & A. 206, where a local Act exempted persons from toll in going to and returning from their proper "parochial" church, chapel, or other place of religious worship, it was held that the word "parochial" controlled the whole clause, and that it was not applicable to dissenters. If this is a sound decision—and I think it is—then I contend that the exemption above referred to can only be held to apply to Established parochial clergymen.

I am,

Sir,

Your obedt. Servant,

Viator.

The "Scottish Law Journal" will be published in the first week of each month, Price One Shilling, post free.

The Editors are desirous that the Journal should contain the Reports of all Cases decided in the various Sheriff Courts in Scotland involving points useful or interesting to the Profession, and would therefore solicit a Report from either of the Agents in each such case, or from the Sheriff. It will be necessary to have the Report signed by one of the Agents or the Sheriff, to ensure its correctness, except in those cases where the party reporting is known personally to the Editors.

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, APRIL, 1859.

SHERIFF COURTS—APPEAL.

The right of appeal, although often abused, is of the highest value; and no obstacle should be placed in the way of its due exercise. It should of course be limited. There must be a court of last resort, and a measure of money value, below which the benefits to be obtained by the continuation of litigation would be over-balanced by the expense and delay. It may be said, no doubt, that while the sum in dispute in any case is large or small absolutely, its recovery or its loss is serious or trifling, just as the parties at issue with each other are in circumstances to pay or to lose. This must be granted, but in choosing betwixt two evils, it is better to take the less; and it is therefore wiser to run the risk of the error into which a single Judge, who has not the check of a possible appeal before his eyes may fall, than in cases where the sums involved are trifling, to give opportunities for continuing a contest, the expense of which would soon exceed the whole sum in dispute. Such is the policy of the Small Debt Act. There is, it is true, an appeal from the decision of the Sheriff sitting in the Small Debt Court, but it is of the most limited nature. It is competent "only when founded on the "ground of corruption or malice, and oppression on "the part of the Sheriff, or on such deviations in point "of form from the statutory enactments as the Court "shall think took place wilfully, or have prevented "substantial justice from having been done, or on in-"competency, including defect of jurisdiction." It was said by a late Judge that the object of this provision was to give the appearance of a right to appeal without much of its reality. Whether this was the object or not, it has certainly answered it, and the result, although involving hardship in some cases, has undoubtedly proved beneficial upon the whole. It may be said, then, that in cases in which the debt or sum claimed does not exceed £12, (except where imprisonment is competent, and has followed) the judgment of the Sheriff presiding in the Small Debt Court is final. Beyond this, however, there is a right of appeal in causes involving sums not exceeding £25 from the Sheriff-Substitute to the Sheriff, and in causes of higher value to the Court of Session and House of Lords. The right of appeal has, we think, been wisely limited; and with certain improvements upon the constitution of Inferior Courts, might advantageously be still further curtailed.

We propose to offer a few suggestions—1st, On the constitution of the Appeal Court of the Sheriff; and 2d, On the forms by which the right of appeal to the Court of Session is now exercised.

I. It is frequently remarked that an appeal from one Judge to another is unsatisfactory, because, if sustained, each of the parties has one Judge in his favour—if dismissed, it has caused unnecessary expense. The force of this objection to the appellate jurisdiction of the Sheriff is considerable; but between an appeal to the Sheriff, and no cheap and speedy appeal at all, there is, as the Court is at present constituted, unfortunately no choice. We therefore hold by this privilege. There are many reasons which commend it as one not to be lightly esteemed. It is a continuous check upon the Judge who first decides the case. Without such an immediate check, the Sheriff-Substitutes would doubtless conscientiously and carefully discharge their onerous duties; but constant supervision gives to them a stimulus, and to the public a guarantee, the existence of which at once removes suspicion and imparts confidence. Then, again, the merits of each case are generally well ascertained by the discussion before the Sheriff-Substitute. The point in dispute is thereby, in most cases, clearly seen; and the discussion on appeal must necessarily be more strictly confined to the very questions at issue. Besides, in cases—and these are the greater number—in which the Sheriff affirms the judgment of his Substitute, there are two Judges against one of the parties. It would, however, be an unquestionable improvement if the Appeal Court of the Sheriff carried greater weight than can possibly attach to the opinion of a single Judge. It does seem that this improvement could be effected very easily. In Glasgow, for instance, where the business of the Sheriff Court is so great and important,

an Appeal Court might be formed at once without trenching on the interests or rights of any one, and without adding to the expense of the judicial establishments of the country.

It is generally understood that an additional Sheriff-Substitute is to be appointed for the increasing business of the Glasgow Court. There will then be four Sheriff-Substitutes and one Sheriff resident in Glasgow. A Court of Appeal, consisting of the Sheriff as President, and two of the Substitutes in rotation, might at once be formed. Pursuing the same plan throughout the country, making the Sheriff-Substitutes judges in appeals in their own county, where their numbers suffice, and where not, uniting counties, or resorting to the Registration Appeal Courts—the Sheriff Appeal Court would, without the slightest violence to its constitution, and without burden to the country, be made by many degrees more valuable than it now is. It would be a waste of time to enlarge on the advantages of such an alteration. We would just add, by way of qualification, that the benefit of an appeal to this Court should be reserved till the final decision of the case by the Sheriff-Substitute, and that all the appeals which are still competent in the course of a cause should be taken to the Sheriff alone. By such a provision, the time of the Appeal Court would be reserved for the consideration of causes, finally disposed of by the Sheriff-Substitute.

It is not within the scope of this paper, but we may just remark, that the decisions of such a Court as is proposed might be advantageously declared final in causes of no higher value than £100 in matters of fact at least.

II. The right of appeal to the Court of Session, in all cases in which it is allowed, should be available without unnecessary expense. The regulations as to finding caution for expenses, and in certain cases as to the obtaining of a report on the *probabilis causa*, are wholesome checks on the exercise of the right. But when these are complied with, there is no reason why additional and unnecessary expense should be entailed upon the parties. In the Sheriff Court, the form of appeal is by a writing of a few words on the Interlocutor sheets. When a case is taken to the Supreme Court, there must be a note of advocation, with service of a copy on the opposite party or his agent. The note is a mere form. It contains neither argument, reason, nor plea. The preliminary of finding caution must have been gone through before it is presented, and everything, in short, really essential to the advocation, must have been done before the note can appear. It would surely, therefore, serve the same purpose, if, when a party intended to advocate a cause to the Court of Session, he, after finding caution, should write on the Interlocutor sheets, "I appeal to the Court of Session," and the Sheriff Clerk should forthwith transmit the proceedings to the Clerk of the Bill Chamber. There seems no reason for maintaining the present form, which serves no object but that of increasing an expense, which is so great as to deter many from seeking the benefit of a judgment of the Supreme Court.

JOINT-STOCK COMPANIES AND THE WESTERN BANK.

(Continued from page 39.)

I. The claims of the Liquidators against the late Directors are based upon allegations of mismanagement and neglect of duty.

The relation of the Directors of a joint-stock company to the shareholders does not differ materially, so far as the legal principles governing such relationships are concerned, from that existing betwixt other fiduciaries and mandatories, and those whose interests are committed to their charge. At common law, therefore, and irrespective of the clause of exemption contained in the contract of copartnery, the Directors, as well as the Manager, (neither office being gratuitous), were responsible for culpæ leves. They were bound to exercise in the management of the affairs of the Bank that degree of application, caution, and discretion which a prudent man exercises in the management of his own affairs. All that the court and the jury would have had to consider, would have been whether the Directors, being energetic and prudent men, had displayed the same energy and foresight in conducting the business of the Bank, which they displayed in the conduct of their own private business.

But the contract of copartnery contains a clause of exemption conceived in very broad terms. It provides that "the said ordinary Board of Directors "shall not be liable for omissions, nor shall they, "nor the manager, cashier, or other officer, be liable "for the responsibility of persons dealing with the "company, nor for the sufficiency of the securities of "properties in which the funds of the company may be "invested as aforesaid; nor shall the said Directors "be liable for the acts and intromissions of the "manager or other officers of the company, appointed "or to be appointed as aforesaid, or of any other "person intrusted with the business of the company, "nor shall they be liable in solidum, nor for the "intromissions of each other; but each of them for "his own actings and intromissions allenarly."

If this clause be strictly and literally interpreted, it could hardly be held that responsibility attached to any one of the Directors, unless it could be shown

that he had actually himself embezzled, or actively co-operated with others in stealing or embezzling the funds and property of the Bank. Interpreting the clause in this way, the Directors would not be responsible, although they had lent every shilling of the stock of the Bank to persons notoriously bankrupt—nay, even though the Directors themselves could be proved to have known the utter and hopeless insolvency of the borrowers.

But though this be the *literal*, Is it the true construction of the clause in question? This clause seems to be identical in substance, and almost identical even in expression, with the clause of exemption usually inserted in deeds constituting private trusts, viz., that the Trustees named "shall noways be obliged to "do diligence, otherways than as he or they shall think "fit; nor shall they be liable for omissions, but only "each of them for himself, and his actual or personal "intromissions; nor shall they be farther liable for "their factors than that they shall be habit and re-"pute responsible at the time of entering upon their "office."

This clause of exemption is not one whit less broad, nor less explicit than that contained in the contract of copartnery of the Western Bank, but it is fixed law that, notwithstanding of such a clause, the Trustees continue liable for gross negligence or *culpa lata*, as well as for illegal acts, and acts beyond their powers. The result of the cases in which this question has been discussed is very clearly stated by Mr Forsyth, (*Law of Trusts and Trustees*, page 305.) As to "the "legal, or rather more properly equitable, interpreta-"tion and effect of this clause, as determined and "applied by courts of justice, it has been held that it "will not protect Trustees where they *exceed their* "*powers* or do illegal acts; for it is evident that no "Truster, in declaring that accepting and acting "Trustees shall not be liable for the consequences "which may attend their performance of specified "or implied duties of the office, or for incidental "omissions which may occur in the performance of "them, can possibly provide for their doing acts not "authorised by him. Neither is it the nature or object "of this clause to interfere with, or in any way affect, "the positive duties undertaken by the Trustees "on assuming their office, but merely from incidental "liability incurred in fulfilling these duties." And with reference to omissions, Mr Forsyth afterwards observes, (p. 307,) "that under omissions are not to "be included matters amounting to that *culpa lata*, "which is equivalent in its civil effect to fraud, and "that, therefore, in judging of liability where there "is an exemption for omissions, the question is, "whether the Trustee has been guilty of *culpa lata*? "It undoubtedly appears that the principle of our "law is, that the usual protecting clause cannot be "held to liberate Trustees from the consequences of "gross negligence, amounting, or equivalent to, what "is called *culpa lata*."

The appointment of Directors by the shareholders of a Joint Stock Bank, is substantially the constitution of a trust. The shareholders having confidence in the persons selected as Directors, delegate to them the uncontrolled management of the affairs of the company, without even reserving to themselves a power of supervision or inquiry into the details of their own business. The confidence reposed is exuberant and unbounded, and there can be no reason why a clause of exemption of the Trustees from liability should, in such a case, be less strictly construed than in the case of an ordinary private trust.

If, therefore, the shareholders can show that a Director was guilty of any illegal act, of any act unauthorised by the constitution of the company, and beyond the powers delegated to him, or any act or series of acts of gross negligence, that Director must be held responsible to his constituents for any loss which the company has sustained through such illegal or unauthorised act, or gross and culpable negligence.

It is hardly necessary to add, that, in the case of absolute and wilful breach of trust, the guilty party would be liable to his constituents for the injurious consequences of his crime.

II. The next class of questions arise betwixt the public, or rather those members of the public who alleged that they were induced by the improper conduct and erroneous representations of the Directors to become shareholders on the one hand, and the Directors or certain of their number on the other.

The statements of the affairs of the company, and the Reports made by the Directors at the annual meetings of the company, had unquestionably the effect, and were intended to have the effect of raising or keeping up the price of the shares of the company in the market, and inducing multitudes to become shareholders in reliance on the veracity of these statements. Copies or abstracts of these statements were handed to the newspapers for the purpose of publication, and they were otherwise circulated and brought under the notice of the public.

The Directors are accused of having wilfully or negligently issued Reports in which the position of the company was grossly misrepresented—of having represented, at a time when the concern was really insolvent, that profits had been made sufficient to warrant them in declaring dividends of eight and nine per cent. By these misrepresentations, the claimants say they were induced to become shareholders of this insolvent company, and in consequence have lost large sums of money, and they now seek indemnification from the Directors for the loss which they allege

they have sustained through their fraudulent or culpably negligent conduct.

It is evident that in this class of cases the Directors can derive no benefit from the clause of exemption in the contract of copartnery. At the date of the alleged delict or quasi delict which forms the ground of the claim, the contract of copartnery was *res inter alios acta*, so far as those individuals, who were not then, but subsequently became shareholders, were concerned. The questions, therefore, arise divested of specialties, (1) Was there culpa, (whether fraud or negligence,) on the part of the Directors? and (2) if so, were the claimants sufferers thereby, and what was the extent of their loss?

If these questions are answered in the affirmative, the claimants must prevail to the extent of the damage which they may be able to prove that they have suffered.

SEARCHES FOR INCUMBRANCES.

As the Lord Advocate has intimated his intention to introduce a Bill into Parliament during the present Session, with the view to lessening the present heavy expense of searches for incumbrances affecting heritable subjects, it may be not out of place for us to state generally what is at present necessary in order to procure a search for the prescriptive period; and to suggest a mode by which the expense may be lessened without in the least detracting from the accuracy of the search itself.

The Registers usually examined, are the General Register of Sasines, in which it is competent to record deeds affecting lands in any part of the kingdom, and the Particular Registers of Sasines, in which it is only competent to record deeds affecting lands within the district to which the Register is applicable. Besides these, it is also necessary to examine the General Register of Inhibitions, the Particular Register of Inhibitions for the district in which the lands are situated, and also the Register of Adjudications. There are thus five different Records to be searched, for a period of forty years, in order to exhibit a complete search. The course usually followed is for the agent to forward to the Searcher of Records in Edinburgh a memorandum for search, containing a copy of the description of the lands, and the names and designations of the parties against whom he wishes the search to be made. When the search has been completed at Edinburgh, it is necessary to have it continued in the Particular Registers of Sasines, and Inhibitions, in order that it may be brought down to the date of the settlement of the transaction. The expense incurred from the necessity of examining so many records usually amounts to from £12 to £15, and while the burden is not much felt where the value of the lands is considerable, it is found to be heavy and grievous where the subjects are of small value; so much so, indeed, that in transactions concerning such subjects, searches are frequently dispensed with.

The suggestion which we would offer (and for which we cannot claim any originality) as a means of reducing the expense of a search, is the following:—Let there be only one Register of Sasines, and one Register for Inhibitions and Adjudications, and let these be kept at Edinburgh. To this course we do not think that there can be any objection. If adopted, there would be only two Records to search in place of five, and necessarily less risk of omissions in the course of the search. While there appears to be serious difficulties in the way of reducing the period of the long prescription in reference to heritable rights, we think that the search in the Register of Inhibitions and Adjudications might be reduced to a period of ten or twelve years, without the least injury or risk to any one. A creditor delaying to carry out his diligence during such a period, should be held to have departed from it.

As omissions frequently occur from the similarity of description, and the consequent difficulty of distinguishing subjects, we would recommend one of two courses to be adopted, by either of which greater accuracy would be attained:—(1.) That the keeper of the Register of Sasines should keep a book, containing a copy of the description of the lands, with a distinctive number and letter; that after the lands have been once entered therein, the number and letter should be added to the docquet appended to the registered deed by the keeper, and that all subsequent deeds affecting the lands should contain the distinctive number and letter assigned to them, so that when presented for registration a short entry might be inserted in the book so kept, under the proper head, somewhat in the form of the present Inventories of Writs. If a method similar to this were adopted, a search in the Sasine Record would consist of a certified copy of the entries under the hand of the keeper. Or (2) the Registrar of Sasines might keep an inventory or abstract of titles applicable to each separate subject marked with a distinctive number and letter; and when a deed is to be recorded, a short abstract thereof might be added to it. The deed should, of course, bear the number and letter, so that the Registrar might at once lay his hands on the inventory or abstract referring to the lands contained in the deed. When a search was required in the Sasine Record, a certified copy of the inventory or abstract would serve the purpose. Of course, it would take a number of years before the public could obtain the full benefit of either of the two courses proposed; but in a large number of cases where searches have already been brought down to a recent date, or in the case of new feus, the advantages

would be at once felt—a search would be almost certain to be accurate, and in place of having to pay from £12 to £15, a complete search might be obtained at an expense of from £2 to £3.

MANDATE OR AGENCY.

(Continued from page 52.)

II.—POWERS, DUTIES, AND OBLIGATIONS OF AGENTS.

3. *Delegation of Agent's Authority.*—It is a well established principle of law, that an agent in ordinary circumstances, and without express authority, or a fair presumption of one growing out of the particular transaction, or of the usage of trade, has no power to delegate his authority by employing a sub-agent to do the business which he has undertaken, without the knowledge or consent of his principal. The reason is obvious since an exclusive personal trust and confidence has been reposed in the particular party chosen, and elected by the mandant *propter delectum personæ*. And hence is derived the maxim of the common law, *delegata potestas non potest delegari*. It would appear that by the Roman Code, a mandatory might have committed the execution of his commission to a third party, but the law of Scotland does not permit such a delegation of authority, (*See Stair*, 1–12–7, *and Erskine*, 3, 3, 34); when it is intended, therefore, that an agent should have power to delegate, it ought to be conferred expressly by the principal. Certain cases indeed may occur where such an authority will be implied, as where it is indispensable by the law in order to accomplish the end proposed; or it is the ordinary custom of trade; or it is understood by the parties to be the mode in which the particular business would or might be done. But it is always proper and advisable to confer the power by express terms of substitution, because where this is done all questions respecting the legality of the act of delegation will be obviated. Although an agent cannot, without such express or implied permission, delegate his authority so far as the principal is concerned, yet the substituted agent may still be responsible to the original agent for his acts under the substitution, as much as the latter is responsible to the principal. (*Erskine*, 3, 3, 34.) The original agent must answer to the principal for delegates named by him, whether with or without permission; in the latter case, he must answer absolutely; in the former, he will be safe if in *bona fide* he believed the delegate to be competent and solvent. (*Thomson & Duncan*, 16th July, 1754–5, *Brown's Sup.*, 276.)

4. *Joint Principals and Joint Agents.*—In regard to cases of two or more principals, it may be generally laid down, that if they have a several and distinct interest, no one of them can ordinarily appoint an agent for all the others without their assent and concurrence. Upon the same grounds, where different persons have separate and distinct, though undivided interests in the same personal property, one of them cannot appoint an agent for all. But it is proper to observe, that in case of partnership a different rule obtains; and that with respect to part-owners of ships, there is some peculiarity in the law. (*See 2 Bell's Com.*, p. 638.) With regard to joint-agents, on the other hand, it is a general and well established rule of the Common Law, that where an authority is conferred on two or more persons to do an act without a power to the plurality or any determinate number to act as a quorum, the act is valid to bind the principal only when all of them concur in doing it, for the authority in such a case is construed strictly, and the power is understood to be joint and not several. (*Stair*, 1–12–13; *Erskine*, 3, 3, 34.) But though the rule of the Common Law is thus strict, yet it cannot be regarded as inflexible, and in commercial transactions a more liberal interpretation in favour of trade is admitted as tending to promote public confidence. (Vide *Stair* and *Erskine ut supra*, also *Story's Commentaries*, sec. 38–43.) The general rule, also, is admitted to be different in a matter of public trust, or of power conferred for public purposes, and if all meet, in the latter case the act of the majority will bind.

5. *Nature and Extent of Agent's Authority.*—The chief obligation arising from the contract which we are now discussing, lies upon the agent, who, by his acceptance, is bound to execute the mandate. The authority conferred, as we have already seen, is always construed to include the necessary and usual means of executing it with effect. All written powers, such as letters of attorney or of instructions, receive a strict interpretation, and the authority is never extended beyond that which is given in terms, or is necessary and proper for carrying the commission into full effect. In written instruments also, of a less formal character, the like construction generally prevails, and they are never interpreted, so as to authorise acts obviously without the scope and intent of the particular matter to which they refer. Principles very similar may be traced back to the Civil Law, and the doctrine with us has been very accurately laid down by Lord Stair: "where, in general mandates, some things are specially expressed, the generality is not extended to cases of greater importance than those expressed." (*Stair*, 1–12–15.) When a written authority is known to exist, or is by the very nature of the transaction pre-supposed, it is a duty incumbent on all parties dealing with the agent, to examine the terms thereof, and satisfy themselves of the extent of his powers. Mercantile

instruments, such as orders and letters of instruction, are generally, out of favour to commerce, construed with great liberality, and pronounced free from the application of technical rules. The construction of mere commissions is to be extended, restrained, qualified, and in general, assisted by the usages of trade. Thus, if it is the question to sell goods upon credit, an agent employed to sell without special restraint may follow that course. But he cannot sell on credit, in a case where it is not the usage, unless he be expressly authorised, because this would be to sell in an unusual manner. Nor can he bind his own principal to other modes of payment, than a payment of money at the time of sale, or on the usual credit.

In general, the maxim holds good, that where an express power is conferred by writing, it cannot be enlarged or controlled by parole evidence. A general agent must exercise a sound discretion, and he has, as we have seen, all the implied powers which are within the scope of the employment. The principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although the latter violates by those acts the private instructions and directions given to him by the principal. If the agent's powers are special and limited, he must strictly follow them, and if he exceed his limited authority, the principal is not bound by his acts, unless indeed he has held him out as possessing a more ample commission. The ground of this distinction is the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealing with agents. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must prove injurious to himself, or to another innocent party, shall himself suffer the injury, rather than the innocent party who has placed confidence in him. The general ground on which this distinction is taken, has been ably explained by Mr Lloyd, in a note to Paley's Treatise on Agency, p. 199. Of course, the maxim fails in its application when the party dealing with the agent has a full knowledge of the private instructions of the agent, or that he is exceeding his authority. The same rule was also recognised, and applied with rigorous exactness in the Roman Law, (*Story on Eq. Jurispr.*, Vol. I., sec. 394.) Pothier has laid down the rule in a very satisfactory manner, and with characteristic clearness, (1 *Poth. on Oblig.* by Ivans, N. 79.) This distinction between cases of general agency, and those of special agency, seems at first view to import a difference of doctrine founded more on arbitrary rules than on just reasoning. But properly considered, the same principle pervades and governs each of the cases. Mr Smith, in his useful Compendium of Mercantile Law, (pp. 46, 47,) has stated the distinction with clearness and brevity. The appointment of the agent is his only authority. It may be *general*, to act in all his principal's affairs, or *special*, concerning some particular object. It may be limited by certain instructions as to the conduct he is to pursue, or unlimited, leaving his conduct to his own discretion. But whether there be a special authority conferred on the agent to do a particular act, or whether there be a general authority to do all acts in a particular business, each case includes the usual and appropriate means to accomplish the end. (*Lloyd's Paley*, 197–200.) Valin, an eminent French jurist, has remarked that it is permitted in the usage of trade for factors to go a little beyond their orders, when these are not very precise or absolute, (*Valin's Com.*, sur l' ord. de la Mertom II., p. 32;) but Chancellor Kent disapproves of the opinion so expressed by Valin, founded as it was on a particular case decided by the French Admiralty. (2 *Kent's Com.*, 618.) Whatever would be sufficient, if done by the principal, is sufficient to be done by his representative, though the inability which excuses the principal from doing more does not affect the agent. (*Coke's Lit.*, 258.)

By far the most numerous cases of agency arise from verbal instructions, or by implication from the particular business of the principal or agent, or from the usual dealings between them, or from the general usages of commerce. An implied agency is never construed to extend beyond the obvious purposes for which it is apparently created. The intention of the parties, deduced from the nature and circumstances of the particular case, constitutes the true ground of every exposition of the extent of the authority, and when that intention cannot be clearly discovered, the agency ceases to be recognised or implied—*Obligatio mandati consensu contrahentium consistit.* The Roman law fully recognised the same doctrine as to the nature and extent of the limitations of an implied agency. Where a man stands by knowingly, and suffers another person to do acts in his name, without any opposition or objection, he is presumed to have given an authority to do those acts. It is now clearly established that if the true owner of property stands by and knowingly suffers a stranger to sell the same in his own name, as his own property, without objection, the sale will be valid against the true owner. (*Story's Com.*, sec. 91.) The same rule applies to cases where a clerk accepts or indorses bills or notes for his master, which the master afterwards pays as legitimately accepted or indorsed—for his acquiescence under such circumstances will be treated as equivalent to an affirmance of the authority of the clerk to do such acts. In like manner, an implied authority may be deduced from the nature and circumstances of the particular act done by the principal. Thus, if the

owner should send goods to an auction-room, or other place where it is the ordinary business of the person to whom they are confided to sell, a power of sale is implied; the principal will be bound by the sale, and the purchaser will be safe. In like manner, the tacit consent or acquiescence of the principal may be deduced from the usual habits of dealing between the parties. The known usages of trade, also, often become the true exponents of the nature and extent of the implied authority. As to the incidents which are implied by law, from the direct or principal authority, we have already stated that every such authority carries with it, or includes in it, as an incident, all the powers which are necessary, or proper, or usual, as means to effectuate the purposes for which it was created. In some cases the nature and extent of the incidental authority turn upon very nice considerations, either of actual usage or implication of law. Incidental powers are generally deduced either from the nature and objects of the particular act of agency, or from the particular business, employment, or character, of the agent himself. In some cases the deduction is, in the absence of all contrary proofs, a mere inference of law; in others, it is a mere matter of fact, or an inference of fact; in others again it is a mixed question of law and fact. For practical illustrations of these distinctions, reference may be made to *Story's Commentaries on Agency*, sec. 101–125. As to incidental powers by inference of law, it is a universally recognised principle that an authority to buy or sell goods includes the authority to execute the proper vouchers therefor; and Justice Story has laid down the rule, that the possession of a negotiable instrument is generally deemed sufficient *prima facie* evidence of the title of the possessor to receive payment of it. The question, whether the mere possession of a bill of exchange by a factor does of itself imply authority to uplift the principal sum, was mooted, but not decided, in a recent case before our Court. (*River Clyde Trustees*, 17th March, 1853, 15 D. 36, since decided and affirmed in House of Lords.) But by far the largest portion of incidental powers is deduced from the particular business, employment, or character, of the agents themselves. Whatever acts are usually done by particular classes of agents, whatever rights are usually exercised by them, and whatever duties are usually attached to them, all such acts, rights, and duties, are deemed to be incidents of the authority confided to them in their particular business, employment, or character. Some of the incidental powers belonging to each of those classes of agents, before enumerated, have been stated by Justice Story in his *Commentaries*, sec. 107, et seq., and it is unnecessary for us to examine them more particularly.

If it be intended to confer power on a factor or agent to do extraordinary acts, the factory must be special, and we will therefore specify a few things which cannot be done without special authority :—(1.) It is incompetent for a factor, not specially authorised, to sell an heritable estate, or even a moveable article of great value. (*Thomas*, 4th July, 1829, 7 Sh. 828.) (2.) Nor can he, without express powers, enter his constituent heir to a succession so as to incur any risk of representation. It is proper to remark, however, that the responsibility here is now greatly avoided by the Service of Heirs Act (10 and 11 Vict., c. 47), whereby the liability to be incurred may be restricted to the value of the succession. When the factor has power to enter his constituent as heir, it implies power to do what is requisite to establish and enforce the claim to the succession, and therefore to reduce an adverse service, (*Gifford*, 11th Feb., 1834, 12 Sh. 421), and a general authority has been held a sufficient warrant for the factor to serve the constituent heir to a lucrative succession. (*Maule*, 13th Dec., 1811, F.C.) (3.) Special powers are required to enable the factor to compromise his constituent's claims, or to accept a composition, or to submit to arbiters any debateable right arising between the constituent and a third party. (*Hollingworth*, 21st Jan., 1813, F.C.; *Bridges*, 22d Nov., 1831, 10 Sh. 43.) On this point (says *Mr Erskine*) the power of tutors is greater than that of general mandatories. For which this reason may be given, that the power of tutors ought to extend even to uncommon acts of administration when they appear profitable to the pupil, because pupils, having tutors can do no deed; but there is no such necessity to stretch the powers of a general mandatory, for the mandant is capable by himself of transacting or referring to arbiters any debateable claim, and if he wants to devolve that power on a mandatory he may do it by a special commission, (*Ersk.* 3, 3, 39.) (4.) If the factor is to have power to borrow money, and to convey the personal or heritable security of his constituent, it must be expressly conferred, and the clause of registration in the deed of factory should contain a consent to execution against the constituent. In special circumstances, as to preserve the estate in order and repair, the Court have extended the general power of a factor to borrowing money for these purposes. (*Thomson*, 23d Dec., 1842, 5 D. 379.) (5.) In one old case it was held that a factor with general powers had no title to pursue removing, (*York's Building Coy.*, 14th Nov., 1764, *Mor.* 4054), and in another that a factory or commission did not give power to change a debt from heritable to moveable, (*Brown*, 26th Jan., 1779, F.C.) If, in a general mandate, some particular cases are expressed, the mandate is not to be extended to cases of a different kind from those which are ex-

pressed for, though such mandate be in the form of words general, yet the subjoining of certain particulars makes it special, and so restricts it to the particulars of the same kind and nature with those which are expressed. (*See Ersk.* 3, 3, 39.)

It may be stated generally, that no representations, declarations, or admissions of an agent will bind his principal, except in cases within the scope of the authority confided to him, subject, however, to the same distinction, of which notice has been already taken, between general and limited agents. For where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*. (*Story's Com.*, sec. 134.) Thus, a warranty given on the sale of a horse by a servant ordinarily employed to sell is binding upon the master; but to affect an employer with a warranty made by his agent on a sale, it must be made at the time of sale, or must be connected by direct reference with the sale. In contracts of *insurance*, where the mis-statement or suppression of any fact which could influence the judgment of the underwriter goes to the very foundation of the contract itself; it is not less fatal to the right of the party claiming the benefit of the insurance that the error was produced by the act of his agent than if it had been wilfully occasioned by himself; and therefore the most explicit disclosure by the assured to his agent of all the facts within his knowledge, with the intention that they should be communicated to the insurers, will not assist his right to recover, if any part of that intelligence, or of what the agent may be in possession of from other sources, *if material*, have been withheld. As Mr Lloyd justly remarks:—"A man "cannot adopt another as his agent for making a con- "tract and repudiate his responsibility for the conduct "of the agent in making it." (*Lloyd's Paley*, foot-note p. 260.) Upon the principle that whatever is known to the agent must be presumed to be known to the principal, it is immaterial through what channel the fact concealed happens to be known to the agent. (See case of *Dunlop* v. *Stewart*, affirmed by House of Lords—*Park*, 209.) As the concealment of a material fact invalidates the policy, *a fortiori* the representation of one which is false has the same effect, and it makes no difference that the representation is without fraud, and that the fact alleged is true in the belief of the agent making it. (*Lloyd's Paley*, p. 256–260.) Upon a similar ground notice to an agent operates as constructive notice to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency. But it must be kept in view, that notice, in order to affect the principal in reference to a contract completed by the interposition of an agent, must be to an agent empowered to treat, and not to one who is merely employed to carry proposals from one side to the other.

The admissions of agents concerning those transactions in which they are employed are, for some purposes, equivalent to the acknowledgment of the employers themselves. It is not, however, to be concluded that the declarations of an agent have always the same force, for the purpose of dispensing with proof of the fact, as the admission of the principal himself would have, though that force may always be attributed to them when they are the foundations of a contract which the agent has power to make. The distinction between those cases in which the declarations of agents affect the principal, and those where other evidence is necessary, was discussed at great length and with much anxiety in the English case of *Fairlie* against *Hastings*, (10 *Ve. Jun.*, 123), and the principle there laid down has been recognised and followed in subsequent decisions.

We have already had occasion to remark, that although the powers of agents are ordinarily limited to particular acts, yet that extraordinary emergencies may arise in which a person who is an agent may, from the very necessities of the case, be justified in assuming extraordinary powers, and that his acts, fairly done under such circumstances, will be binding upon his principal. The same doctrine would seem to apply to the case of a mere stranger under circumstances of the most urgent necessity, as, for example, in cases of irreparable injury to perishable property, occasioned by fire, shipwreck, inundation, or other casualties, and found without any known owner or agent. In such cases he performs the functions of the *negotiorum gestor* of the civil law, and seems justified in doing what is indispensable for preserving the property, or to prevent its total destruction. (*Stair*, 1, 8, 3; *Erskine*, 3, 3, 52.)

(To be continued.)

Review.

TREATISE ON THE LAW OF STOPPAGE IN TRANSITU. By THOMAS S. PATON, Esq., Advocate. Bell and Bradfute, Edinburgh, 1859.

THE right to stop *in transitu* is to be distinguished on the one hand, from the seller's right to retain while the price is unpaid, and on the other, from his right to demand restitution where delivery has actually been made. Irrespective altogether of the question, whether the property of goods sold has passed to the buyer, it is fixed law, both in England and Scotland, that the vendor is entitled to keep the goods until the price has been paid—and that, even where they have been sold upon the condition that the price should be paid at a future date or by bill, if the vendee has become insolvent. In Scotland, this right of retention is so extensive, that even although the price of the goods

has been paid, a vendor is entitled, in a question with the creditors of a vendee who has become bankrupt, to retain the goods sold for other debts. It is different, however, when this right of retention is pleaded against a second purchaser; for now, by statute, the right in such a case is limited to one of retention for payment of the price, or for performance of the obligations or conditions of the contract of sale, or of other express contract with the purchaser. In questions with the purchaser or his creditors, the right of retention remains as before. The vendor is also entitled to restitution, even after actual delivery of the goods sold, if the delivery has been procured by false promises and fraudulent concealment. Thus, where a purchaser induced the seller to deliver goods to him on the promise that the balance of the price, part of which had been paid, would be settled in a few days, and concealed the fact that he was then taking steps to have his estates sequestrated, it was held that the trustee on his estate was not entitled to the goods without paying the balance of the price, (*Watt* v. *Findlay and Hendrie*, 20th Feb., 1846, 8 D. 529.)

The remedy of stoppage *in transitu* was introduced to meet the case where the vendor had parted with the possession of the goods, and the vendee had not yet acquired it. It can only be applied where the goods are on the way to the vendee. So soon as they have come into his possession or under his control, the transit is ended and the remedy lost. While, therefore, they are in the hands of a carrier, hired by the vendor or vendee, for conveyance to the latter, they are in transit, and may be stopped. It is, however, absolutely essential to the exercise of this remedy, that the possession of the carrier should be a possession in that character, and for the purpose of conveyance to the vendee. If the ultimate destination of the goods be from, and not to the buyer, and the power to direct and control the despatch of the goods to such a destination be committed to him, the transit is at an end when delivery is made to the carrier who undertakes, with or for the vendee, to convey the goods to that place. And again, the carrier may, at the journey's end, where delivery to the vendee was contemplated, agree to become his agent—may keep them in store for him under a new contract, and in such a case, the transit will be accomplished, and the remedy of stoppage excluded.

The right of stoppage *in transitu* may therefore be defined to be a right competent to an unpaid vendor, or one substantially in such a situation, who has parted with the possession of goods to prevent that possession being acquired by an insolvent vendee. This definition excludes a great many cases which have been dealt with as belonging to this branch of Mercantile Law. As to these, Mr Paton correctly says (p. 68), "In all sales effected while the goods "are lying in bonded and other warehouses, where "there is generally no transit to be performed but "simple delivery, actual or constructive, to be effected, "there is much reason for holding that it is not a "question of stoppage *in transitu* that arises, but a "question of lien or retention." In such cases there is a transference, but no transit, from the seller to the buyer contemplated; and, therefore, it is by a mere fiction that this remedy is made applicable. The real question in these cases is, whether the vendor has parted with the possession which he held by the warehouseman or the storekeeper. It is a misnomer to designate the change of agency—the act by which the custodier becomes the vendee's agent—as a transit. But a great many cases have been pleaded and decided as cases of stoppage *in transitu*, where no transit was contemplated, and we must, therefore, look to them as authorities in this branch of law.

Still, when the seller is the actual custodier of the goods, the distinction between a right of retention and a right to stop *in transitu* has been properly observed; and it is necessary in any treatise on the subject to keep this clearly in view. Mr Paton devotes a separate section to the consideration of such cases; and any one will naturally turn to this first to ascertain what stoppage *in transitu* really is, by the ordinary process of distinguishing it from that with which it may be confounded or to which it is akin. We do not wish to be censorious or to deal hardly with the author, but the perusal of this somewhat lengthy section naturally brought us to look at the Introduction for some account of the plan and pretensions of the work. We there find that it was the author's intention "In many instances to make the "Judges, who are the great expounders of the law, and "with whom resides that wisdom which in an eminent "degree is conversant with its principles, speak for "themselves." We were satisfied that this intention had been carried out. There is no reason why the Judges should not be allowed to speak for themselves; but then we have the Reports in which they do speak for themselves, at some length too; and we object to any treatise which is but a *réchauffé* of these Reports, or as in the present instance, to a great extent, a series of copious quotations from "Leading Cases," and a re-print of whole Acts of Parliament.

But to keep to this section, the first thing that strikes us is the sad puzzle in which Mr Paton has involved himself about a distinction which he seems to suppose exists between the transference of goods in bonded and free warehouses. He sets out by saying that goods which are bonded in the seller's own warehouse, are, while they remain there, subject to his right of retention, and that the doctrine of stoppage *in transitu* does not apply. Quite right, but suppose it is a free warehouse, what difference does this make? After stating that when goods are sold in store, and no transit is contemplated, the vendor's right on the insolvency of the vendee is properly one of retention and not one of stoppage *in transitu*, he proceeds:— "It might be difficult, in the face of the decisions, to "hold that this could apply to all warehouses or "wharfs, because by the older decisions both in "England and Scotland, the doctrine of stoppage *in* "*transitu* has been frequently applied to sales in such "warehouses; but in regard to sales of goods in "bonded warehouses, when goods are imported, "and on arrival at their place of destination, are "placed in a bonded warehouse in the importer's "name, the transit is at end, and the goods held to "be delivered into his possession." Would the transit not be at end if the warehouse were free

and not bonded? Besides, what place is there for the exercise of the right of retention or of stoppage *in transitu*, when the transit is at end, and the goods have been delivered to the purchaser? "But," he goes on to say, "in such a case he (the "importer) has got more, (than constructive possession,) he has got actual possession, because the express object of the Bonding Acts is to give him "power to sell while the goods are lying in the "bonded warehouse; and every facility for that purpose is afforded, so much so, that he has access to "them at any time, and has complete control over his "goods, as much as if they were placed in his own "warehouse. In this way the goods are placed in "his own warehouse. . . . . 'The warehouse "is his'—and 'the right which such a party has "when he sells to a third party, is one of lien or retention, and not stoppage *in transitu*." There is a two-fold cause of confusion here. We have first the transit to the importer of goods lodged in bonded warehouses, confounded with the delivery of those goods to a purchaser from him, while they remain in the warehouse. And then there is the supposed distinction between bonded and free warehouses. Now, the Bonded Warehouse Acts do not put the keeper or any other person who has goods therein, in a better position than the owner of goods in a free warehouse. The whole effect of these Acts, as regards sales of goods in a bonded warehouse, is by the observance of a particular form to take them out of the reputed possession of the seller; and, therefore, it is quite a mistake to draw distinctions between the rights of vendors to retain or stop goods in the one or other. Mr Paton gets satisfied of this to some extent as he proceeds. (Vide page 83.) It is unfortunate that he should surround himself with difficulties that do not exist, or at all events, that do not in any degree interfere with or affect the subject in hand. As another instance of this, in a note at the very outset, he says that in England the property of goods sold, passes by the contract, while in Scotland it does not; but that the difference seems to be one of form rather than substance, except in one particular. For this exception, he refers us to the section which we have just referred to, where he says, "There is one "distinction, however, between the law of England "and Scotland of vital importance, and which arises "from the different rule which prevails in each, as "to the passing of the property;" and to point out this distinction, he quotes from Bell on Sale, to show that on the bankruptcy of a seller, who is still in the possession of the goods, his creditors "are entitled "to consider the property as still untransferred from "the seller, leaving the buyer to claim as a personal "creditor for the price paid, or for damages for non-"delivery." Looking to the provisions of the Mercantile Amendment Act, (Scotland,) 1856, we are inclined to differ from the author, (page 98,) when he says that "The rule in Scotland undoubtedly is that the property "of the thing sold passes to the buyer only by delivery." But whatever doubt may remain as to this, it is quite clear that what Professor Bell, in the continuation of the passage quoted by Mr Paton, terms "an unhappy "and unjust consequence of the general principle of "the Scottish law," is now removed by the first section of that statute. The omission to notice this alteration is quite unaccountable, not more because of its "vital importance," than because in a few pages further on, Mr Paton quotes the second section of the Act, and points out the effect which it has on the seller's general right of retention, when a sub-purchaser claims delivery. Having thus omitted to notice the limitation of the rights of the creditors of the seller, as regards goods sold, but not delivered, Mr Paton says that "it is sometimes material in discussing questions of retention and stoppage *in transitu*, "to ascertain whether the property of the goods has "passed." Of course, he is dealing with the unpaid vendor's right to retain or stop; and it is plain beyond question, that such a right must stand or fall, as the possession has or has not been completely transferred. In England, whence we have our Law of stoppage *in transitu*, the completion of the contract of sale has always passed the property, and from the first, therefore, the state of the possession of the goods sold was the criterion of the seller's right to stop. There is no place for the exercise of it, unless the goods have been delivered for conveyance—or, in its widest sense, ordered to be transferred to the purchaser. The proprietary right in the goods is only involved to this extent—that the remedy is competent to one who was before the sale owner of the goods—or substantially so in a question with the vendee—and to no other. Mr Paton himself says in an earlier chapter, "The main point to consider, is whether "the goods are in the course of transit from the "seller to the buyer when sought to be stopped." So much then for the subject of which Mr Paton treats. The book opens with a short account of the nature and effect of stoppage *in transitu*. This is followed by an answer to the question "Who has the right "to stop?" and a chapter on "*Transitus*." This latter is decidedly the best in the book. The result of the various cases is stated with precision, and we cannot avoid contrasting it with other parts of the work. It shows that a little care would have insured a better result. The arrangement of the succeeding chapter is most faulty. The portion of it to which we have already alluded, should have been found in the first chapter; but instead of that, it is one of the subdivisions of the chapter, titled "Delivery cuts off the right to stop." The question to be answered in this part of the treatise properly is, How is the right to stop defeated? And the answer—to be illustrated by the principles ascertained in the various cases on the point is—By delivery to the vendee or the indorsation of the bill of lading for the goods, although still in transit, to a *bona fide* onerous indorsee, who has no reason to suspect that the price will not be paid. In the remaining portion of the work are discussed the effect of the rejection of the goods by the buyer—the powers of factors to pledge or assign bills of lading—the transference of goods by delivery of documents—and the mode of exercising the right to stop.

It will be seen from this sketch that the treatise embraces all the matters falling within the scope of a work on the subject with which it deals,—and upon these a great deal of information is given. But it is

not well digested. The execution of the work is careless. For instance, what meaning is there in this passage—

"There seems to exist an equally divided opinion in England upon the EFFECT of stoppage *in transitu*, the question raised being—Does stoppage *in transitu* rescind the contract altogether, as if it were null *ab initio*?" . . .

"In England, this question has been much discussed, and with so much difference of opinion, that it would be rash to postulate too confidently on either side. The question in itself is not unimportant; because, if the effect of stoppage *in transitu* be to rescind the contract entirely, then, in that case, the vendor has not parted with the right of property in his goods. As Justice Buller said, in Lickbarrow *v.* Mason,—'If the goods be his, he has a right to the possession of them, whether they be *in transitu* or not;' and therefore into whose hands soever the goods may pass, whether into the hands of the buyer or his assignee, the vendor would be entitled to action for recovery of the goods,—Litt. *v.* Cowley and others, 7 Taunt., 169. At same time, it does not seem to follow that, if stoppage *in transitu* operates as a rescission of the contract, that the vendor can no longer be a creditor for the price, because up to the moment that legal effect is given to his right to stop, he seems to have also in him the right of a creditor; and therefore, operating in this way, the two are not incompatible, but may combine in giving effect to the exercise of this right."

In endeavouring to show the importance of the question proposed, he says that if it be answered in the affirmative, then the vendor has not parted with the right of property. If he had been attempting to prove that the negative of the question proposed was the true answer, we would have said he was proceeding by the process of *reductio ad absurdum* to establish his conclusion. The remainder of the passage is to us totally unintelligible. This is not a solitary instance. We might quote many more passages manifesting want of precision of ideas upon the subject in hand, or at least indicative of carelessness in the manner of communicating them. Indeed, we doubt much if Mr Paton has got farther with the work which he proposed to himself than the collection of materials.

Correspondence.

WE have to acknowledge receipt of communications from Linlithgow and Lauder, with reference to the case of Dobie *v.* Anderson, (Reports p. 29), and the letter of "Viator" in our last number. Our Lauder correspondent says that Mr Sheriff Wood, in the Small Debt Court there, ruled in a recent case (*Robson v. Spence*,) that dissenting ministers were *not* clergymen in the meaning of the Act, and therefore not entitled to exemption from toll dues.

Our Linlithgow correspondent says, with reference to the case of Dobie *v.* Anderson, that the defender, dissatisfied with the judgment in that case, has brought an action against the minister of the Free Church there, for dues, payment of which had been refused by that gentleman on similar grounds to those urged by Mr Dobie; and that this action has been remitted to the Ordinary Sheriff Court Roll, in order that the matter may be more deliberately discussed.—ED.

(*To the Editor of the Scottish Law Journal.*)

SIR,—The case of *Walker and Son* v. *Ure*, reported in your last number, appears to me to deserve farther consideration, not only on account of the importance of the point involved, but because it is, so far as I am aware, the only case in which the question, whether a female may be an instrumentary witness, has been raised and decided. I therefore venture to offer a few remarks upon it.

In the early ages of the history of this country, when writing was an art known to very few, the granter of a deed subscribed his name if he could write, and if unable to do so, he merely affixed the mark of a cross. In England, after the Conquest, the practice of subscribing fell into disuse, and there, as well as in Scotland about the same time, sealing was the only method of attesting writings. At the end of these deeds the writer was in the habit of inserting the names of a number of witnesses, who, however, did not subscribe. Among these are to be found both males and females. Mr Ross, in his *Lectures*, vol. i., p. 125, says: "In Scotland the "witnesses accidentally present, or standing by, as Spel-"man says, continued to be inserted, whether men or "women. Thus, a charter by David, Earl of Hunting-"don, afterwards David I., is tested in this manner: "Testimonio Mathildis Reginae et Willielmie filli sui." Matters appear to have continued in this state down to 1540, when the subscription of the parties and witnesses was first required. As the purpose of that Statute seems to have been misapprehended, or at least disregarded, the matter was finally placed as it now stands by the Statute of 1681, c. 5, said to have been prepared by Lord Stair. In none of these Statutes is anything said regarding the parties by whom deeds are to be attested, but it is simply stated, that they are to be authenticated by the subscription of *witnesses*. Thus, in the Statute 1540, cap. 117, it is declared that "na faith be given in time cumming to ony obligation, "bond, or uther writing under ane seale, without the "subscription of him that awe the samin, and *witnesse*." Again, in the Statute 1681, cap. 5, it is enacted "that "only subscribing witnesses, in writs to be subscribed by "any partie hereafter, shall be probative," etc. Here nothing is said which, either directly or inferentially, excludes females. At first sight it may appear to be strange, that the question has never before come under the consideration of our Courts. But the universal practice of conveyancers has been to get all deeds attested by males, and for very obvious reasons. In an earlier age, and down even to a comparatively recent period, very few females, even in the higher ranks of life, could write, and were therefore incapable of being witnesses. Mr Ross, vol. i., p. 148, says: "Men who could write their "names were long very scarce in both kingdoms, but "women much scarcer: writing to them is a very modern "piece of education."

Till within a very late period, women were excluded from giving evidence in a court of law, except in a limited number of cases. Erskine specially enumerated these in his *Institutes*, B. iv., tit. 2, sec. 23: "Women "are admitted to bear testimony in criminal trials; in "clandestine marriages; in facts happening during child-"bed; in the maltreatment of wives by their husbands;

"and other facts of a domestic nature; *but not in bar-* "*gains proveable by witnesses*, nor in settling of marches," etc. He then adds: "It is absurd to affirm that the "law hath rejected the testimony of women, in these "last instances, from *any supposed incapacity* of judging "rightly concerning them, since it allows them to be "named tutrixes, and even sole tutrixes, an office which "requires a much greater degree of judgment than the "understanding the import of the most intricate of the "above particulars. It would, therefore, be more agree- "able to the character justly due to the softer sex, in "point of capacity, to say, not that women are debarred, "*but that they are excused*, from bearing testimony in "courts of law, except where there is a penury of wit- "nesses, in which case their giving evidence is necessary."

At another part of his work Mr Erskine says, that women cannot be instrumentary witnesses. But he gives no authority for this doctrine, and it is not easy to see for what reason they are excluded. It cannot be from want of capacity; for if they are capable of giving evidence in the most complicated cases before the courts, they are certainly qualified to be instrumentary witnesses? All that an instrumentary witness requires to do is, to certify the fact that he saw the party adhibit his signature to the deed, or heard him acknowledge it. He does not require to know anything of the contents of the deed, or the purpose for which it is granted. Surely a woman is as able to perform it as a boy of fourteen years. The reason assigned by Mr Tait in his work on Evidence for the exclusion is, that women are inexperienced in business and are liable to deception. What knowledge of business does the Act require? In what manner could they be deceived in the matter? I confess I cannot see the difficulty or the danger which Mr Tait suggests.

In the case of *Seton*, 24th February, 1816, 1 M. 9, the question whether the signature of a female instrumentary witness was genuine, was sent to a jury. With the greatest deference to the opinion of Mr Sheriff Bell, I maintain that the only inference to be drawn from this case must be, that if the signature had been proved to be genuine, the deed would have been held to be valid. Would an issue have been sent to a jury to ascertain a fact which was not relevant? Mr Menzies, in his *Lectures*, p. 109, expresly says, that from the fact of such being sent to a jury, "it was assumed, if found genuine, "to be sufficient to authenticate the deed." Mr Munro in Notes to Stair, vol. ii., p. 399, makes the same statement. And Mr Dickson in his work on Evidence, p. 370, where he treats on instrumentary witnesses, remarks that, according to some eminent authorities, women are disqualified, but he says that this is now more than doubtful; and that although they were excluded in practice, from the fact that the Statutes required the witnesses to subscribe, "there seems to be no good "ground for excluding them in modern times, when "they are perfectly fit for the office. Accordingly, in "the only modern case in which the point arose, an "issue was tried whether the subscription of a female as "witness was genuine, *thereby inferring that she was* "*competent*."

Mr Sheriff Bell seems to rest his judgment principally upon the dictum of Mr Tait, that their inexperience in business renders them liable to deception; but on the other hand, we have the express statement of Erskine, that females were not debarred, but that they were excused from bearing testimony. If this be true with regard to giving evidence in cases of great intricacy, how much more strongly does it bear upon the question as regards their capacity for being instrumentary witnesses.

Sir Archibald Alison, in his note, draws a distinction between the witness in an ordinary case, and instrumentary witnesses, from the fact that the party in the latter case has the choice of witnesses. This I hold is a very strong argument in favour of the admission of females. *Erskine*, ix., 2–27, says, that witnesses who attest the subscription of deeds "are called for that purpose by the "joint consent of both parties, which *bars all challenge*." This principle has been carried so far that an infamous person, who formerly was incapable of giving evidence in a court of justice, was, nevertheless, held to be a competent instrumentary witness. I confess I am quite at a loss to understand the learned Sheriff when he says, that women "being for the most part unacquainted with "business, and easily accessible to domestic influence, they "are more liable to be made the instruments of a con- "spiracy than those of the other sex," and that that is a good reason for excluding them from being instrumentary witnesses. This might be a very good reason for holding that they should be excluded from giving evidence in courts of law, but how it can affect their eligibility for attesting the execution of deeds, I am at a loss to understand.

Women have not been excluded by Statute, and although that in practice they were almost never selected, this arose from their incapacity to write, and is no argument whatever against their competency. The doctrine of those writers who state that females cannot be instrumentary witnesses, is entirely unsupported by any authority ancient or modern, and is not in accordance with the civilisation and enlightenment of the nineteenth century. The exclusion of females can only be classed within the same category with the disability under which persons who had been born deaf and dumb laboured. *Erskine*, (iii. 1, 6,) says, that the usage of Scotland has disabled all from contracting who have been deaf and dumb from their birth. But they are now in the same position as any other person possessed of reason.

Mr More in his Notes to Stair, vol. ii., p. 399, seems to ascribe correctly the origin of the exclusion of females, to the incapacity under which they formerly laboured with regard to giving evidence before a court. He says: "Although it has been generally laid down by the text "writers, that women cannot be instrumentary witnesses, "it is extremely doubtful how far this is correct. In "old deeds women are frequently inserted as witnesses, "and it is supposed that their exclusion as instrumentary "witnesses arose from their being held, at one time, in- "competent witnesses in civil or criminal cases. But "this incompetency has been gradually relaxing, and "now it is *impossible to doubt that females are equally* "*competent to attest deeds* as instrumentary witnesses, as "they are to bear evidence regarding these deeds, or any "other matter, before courts of law." It seems an absurdity to maintain that a female may give evidence regarding the greater, and more weighty and complicated matter, while she is debarred from performing an act of the simplest possible kind, requiring no effort of reason or intelligence, beyond that which is necessary for the performance of the commonest act of every-day life.

Upon the whole, bearing in mind the terms of the Statute regarding the attestation of deeds, the almost universal opinion of modern writers in favour of their admission, and looking to the fact that those writers who state that they are excluded, wrote when the law of evidence stood upon an entirely different footing, and do not cite any authority in support of their *dictum*, I do not see how it can be held that a deed attested only by the signature of females can be said to be improbative and invalid. Cases can easily be supposed where, in a matter of urgency, no male witness could be found, and should females be excluded, great loss and hardship might be occasioned.

I am,

SIR,

Your obedt. Servant,

TERTIS.

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, MAY, 1859.

DEAN OF GUILD COURTS.

It has been, for many years back, the aim of the Legislature to simplify the forms of procedure in our Courts of Law, to diminish the expense of obtaining justice, and to introduce and foster precision and uniformity in its administration, by lessening the number of tribunals at which that desirable commodity can be procured. The jurisdiction of the Commissaries was swept away in 1824, that of the Court of Admiralty experienced a similar fate in 1830, and the funeral knell of the Court of Exchequer was tolled so lately as 1856. The appellate jurisdiction of the Commissaries of Edinburgh was transferred to the Court of Session, and that of the inferior tribunals was vested in the Sheriffs of Counties. The Court of the High Admiral of Scotland has been treated after a similar fashion; and the whole powers which heretofore belonged to the Court of Exchequer, are now centred in the Supreme Court of Scotland.

While the judicial functions which previously belonged to the magistrates of burghs of regality and barony were, with some inconsiderable exceptions, taken away by the Heritable Jurisdictions Abolition Act, the magistrates of burghs royal were left in full possession of the broad, though somewhat vague and undefined, powers which they had enjoyed before that Statute was passed; and although these powers have, by a long course of uniform usage, been much abridged in practice, it is deserving the consideration of the Legislature whether the magistrates' jurisdiction should not now be entirely abolished. The intention, in truth, of all modern legislation, has been to bring the Burgh Courts as much as possible into general disrepute. While vast improvements have been effected in the mode of administering justice by our county judges, the system of procedure in the courts of the Scotch burghs has never once been thought of; and it is gradually being enshrouded in a venerable coating of dust, which will probably engage the attention, and stimulate the curiosity of some antiquary of a future age. It would perhaps be better, however, at once to give these anomalies in our judicial system their *coup de grace*, rather than allow them to drag out this weary existence to the end—to sink at last into the grave, long after they have outlived their usefulness, and lost the confidence and respect of the community. No man in his senses, unless indeed he has some other end in view than the mere vindication of his rights, would think of knocking for justice at the door of these antiquated institutions, when he can get what he wants so much more cheaply and expeditiously in the Sheriff Court. No doubt, access to the county judge is, in some instances, denied; but the sooner this receives a legislative remedy the better. It is surely high time the absurd farce of special service in burgh (or service by ward of Court, as it is termed,) were swept away. Can any thing be more preposterous, than that fifteen gentlemen, knowing, it may be, as much of the matter as a native of Caffirland knows of the radius vector; ignorant of the rules of evidence, or how to apply them to the case in hand, should stand up, and gravely declare upon their oaths that John, who is the half-brother consanguinean of Mary, who was the neice of James, who was the son of Thomas, is the nearest lawful heir of the said Thomas, entitled to be served heir to all his lands held burgage? The sooner this interesting relic of a bygone age is delivered to the care of the Antiquarian Society the better.

The Court of the Dean of Guild is a different institution from the Burgh Courts, properly so called—the courts presided over by the bailies—and though not open to so many objections as these, we are not prepared to say that its total abolition would not be a benefit to the people at large. It is, however, an existing institution, endowed with considerable powers of vitality. It will probably keep its place in our judicial system for many years to come; and is not, therefore, undeserving the consideration of the inquirer into the legal nature of the institutions of our country.

Entertaining these views, we propose to present our readers with a short sketch of the history of this court, and the nature and extent of the jurisdiction it at present exercises. We do not presume to think that we shall bring any new facts to light, or say any thing on the subject which has not been said before; but as the matter is involved in some degree of obscurity, we dare say that a portion of our readers may find something here of which they have been hitherto ignorant. We shall endeavour to gather together what at present can only be found scattered up and down a variety of books, not always accessible to the general reader.

Guild, from the Saxon *Gild*, signifies, as Du Cange informs us, a fraternity—an assemblage of individuals into a common brotherhood for some common purpose. The formation of associations of this description appears to have been of very general occurrence in this island, as well as in the continental states, particularly in Italy, France, and the Low Countries, during the middle ages. The tie by which the members were bound together was their commercial in-

terests. It was to be expected, therefore, that such societies should early take root in busy trading towns like Paris, Bruges, and Genoa.

The powers of the Guildery appear from its early institution to have been of two kinds; the first political, to prevent encroachments on the rights of the corporation, particularly from unfreemen attempting to trade within the burgh. This, from the abolition of the exclusive rights of incorporations, has now become matter of history. The other, and the one with which we have more immediately to do, was of a judicial nature, and very extensive in its character. Besides the privilege, which the Dean of Guild still possesses, of regulating the erection of buildings within burgh, he was, in these early times, vested with a power of judging in mercantile and maritime cases of every kind. The Act of the Scottish Parliament, 1593, c. 38, sets forth how expedient it is that the Dean of Guild and his council within burgh "be appointit and allowit as is now usit in the toun of Edinburgh;" and it "ratifies and confermis the jugment of the Deane of Gild and his counsaill in all actionis concerning merchandis, as the same is set down be the provest, ballies, counsaill, and deconis of the burgh of Edr., and to have full strenth and effect in all tyms according to the lovable forme of jugment usit in all the guid tounis of franche and flanderis quhair buroes ar erected and constitute, and speciallie in paris, rowen, burdeaulx, rochell."

It is scarcely necessary to say, that the extensive mercantile and maritime jurisdiction conferred by the Act, has long ago been allowed to fall into disuse, and that the authority of the Dean of Guild is now, in a great measure, confined to questions respecting the laying out of streets and the erection of buildings, pretty much like the functions which devolved on the Edile of Rome. The reference in the Act to the usage which, at the time, prevailed in Edinburgh, is somewhat obscure, but it seems to point at certain regulations then existing in that city, sec. 3 of which provides "that the Dean of Guild and his counsel bear the haill burden and decide in all questions of neighbourhood," that is, it is presumed, questions between proprietors of conterminous tenements; and in the case of the *Magistrates of Stirling*, Dec. 14, 1732; M. 7584, where the regulation was cited, the jurisdiction of the Dean of Guild was, in such cases, held to be exclusive of that of the Sheriff. The precise limits to his judicial power, however, it must be admitted, are not very well defined, and his authority varies widely in the different burghs in Scotland. Like the endless diversity in the peculiar usages which prevailed in the election of their magistrates and council anterior to the passing of the Burgh Reform Act, each place has a distinct system of its own. Thus, while in Aberdeen the Dean's jurisdiction is limited to the inspecting of weights and measures, in Dundee he is exclusively entitled to judge in all possessory questions within the ancient royalty; he decides disputes as to marches; and his consent must be got before a house can be built or pulled down. He has, likewise, in the same class of cases, a cumulative jurisdiction with the Sheriff over the extended royalty; and in cases of nuisance he possesses a jurisdiction co-equal with the magistrates. In Glasgow the Dean's functions have been extended by local acts over the whole parliamentary burgh; in Edinburgh they are confined to the old royalty. The important towns of Dumfries, Greenock, and Falkirk, have no Dean of Guild Court at all, nor, so far as we know, do they suffer much from the privation; while in Kilmarnock and Paisley the powers of that functionary are exercised by the magistrates. In most of the burghs the Dean is assisted in his deliberations by a council, while in others, Aberdeen for example, this is not so.

The Magistrates of Edinburgh, at one time, asserted a right of control over the proceedings of the Dean of Guild; but this was denied by the Supreme Court, who adjudged that, in the exercise of his functions, he was wholly independent of the magistrates, his sentences being subject to the review of the Court of Session alone. *Adamson*, July 21, 1631; M. 7484.

The Dean, only, is entitled to give judgment in cases coming before the Court. His council may offer their opinion, but they are not allowed to have a voice in the decision,* and the interlocutors of Court proceed in his name alone. Of course, the advice of the assessor is, in matters of law, always adopted. In questions of fact, the Dean is supposed to judge for himself.

The foregoing observations have reference to the Dean of Guild Courts in Scotland generally; but that of Glasgow, from the large amount of business disposed of, and its local associations, is peculiarly deserving of consideration; and to it we shall accordingly now direct our attention.

The Dean of Guild of this city owes his existence to a decree arbitral, usually called the Letters of Guildry, pronounced by Sir George Elphinston of Blythswood, the Provost of Glasgow, David Weems, the parson, and John Bell and Robert Scott, the two ministers of the city, dated 6th of February, 1605, and proceeding on a submission entered into between the merchants and trades ranks, for the purpose of having the differences which had sprung up between them, respecting the government of the city, amicably adjusted. This deed received the sanction of the Scottish Legislature in 1672. After detailing the animosities which had arisen in the burgh, and the agreement the parties had come to, to leave the differences to arbitration, it goes on to say, that, "after great pains, long travelling, and mature deliberation, heard, seen, and considered, and ripely advised by both the states of the said merchants and craftsmen, and their assistants, has concluded that there shall be, in all time coming, a Dean of Guild, and a Deacon Convener, with one visitor of the maltmen, whose elections, statutes, and privileges, shall be as follows," etc. The several articles of the decree, fifty-four in number, are then given at length. They have been much modified, and many of them rendered altogether obsolete, by subsequent Acts of the Legislature; and also, to some extent, by certain regulations of the Merchants' House, made in 1747, and subsequently confirmed by the Town Council; but the decree

* See the opinion of the Lord President in Dunlop, Nov. 12, 1824; 3 S., 268.

is still a document of great importance, constituting, as it does, the foundation stone of the Dean of Guild Court of this city. The Dean, according to this decree, must be a merchant-sailor, or a merchant venturer (foreign merchant), but since the regulations of 1747 home traders are eligible. He was formerly chosen by the magistrates and council, out of a leet presented to them by the Merchants' House, but this was altered by the Burgh Reform Act of 1833, which vests the appointment in the latter body alone, without being subject to any foreign control. According to the Letter of Guildry, the Dean cannot hold office for more than two years at a time. It empowers him and his council, in even broader terms than the Act of 1593, "to judge and give decreets in all actions betwixt merchant and merchant, and merchant and marines, and other gild brothers, in all matters of merchandise and other such like causes," and to adjust weights and measures within the burgh, (both privileges are now in abeyance) and declares, that, "the Dean of Guild, and his council, with the master of works, shall bear the burden in decerning all questions of neighbourhood and lyning within this burgh." The right of the master of works, under this article, to take part in the deliberations of the Dean and council, has, for a long period, ceased to be exercised, and is believed now to be lost by non-usage.

The Dean's council consists of eight members—four chosen from the Merchants' House, of whom the Dean of Guild for the preceding year must, according to the Letter of Guildry, be one, although in practice this provision has been allowed to fall into disuse, and four from the Trades' House, "who shall be men of good fame, knowledge, experience, care, and zeal to the common weal, the most worthy men of both ranks." It would appear that, at one time, the council voted as well as deliberated with the Dean, and where a difference arose, the question was decided by a majority of votes. This is not the practice now, however, the Dean alone giving judgment, which appears to be the correct course according to the opinion of the Lord President in Dunlop's case.

The Dean is empowered, by the Letter of Guildry, to elect, with consent of his council, either the old Dean of Guild, or any one of his council of the merchant rank, to supply his place during his absence; and in case of his death or incapacity during the currency of his office, the immediately preceding Dean of Guild, capable of officiating, acts as such till the next time of election.*

The eighth article of the Letter of Guildry contains a provision, long ago forgotten, that "no procurator or man of law shall be admitted to speak or procure for any person before the Dean of Guild and his council, but the parties allenarly."

Such is a brief and imperfect sketch of the Dean of Guild Courts in Scotland generally, and of our local court in particular. We shall, in conclusion, venture a few observations touching the propriety of keeping these tribunals longer in existence. That the extensive powers they at present enjoy should, in any case, be very considerably abridged cannot, we think, be disputed by any reasonable man; but we are almost inclined to go the length of saying that it would be better they were abolished altogether, and their jurisdiction, in a modified form, transferred to the Sheriff, as was long ago recommended by the royal commissioners appointed to inquire into the state of the Scotch burghs. A serious objection to their continuance lies in their diversity of practice, and the extreme powers possessed by one court compared with those enjoyed by another. This must necessarily give rise to a question of a very perplexing character, when the cases are carried by appeal to the Court of Session, and render the laying down of general principles by our Supreme Court, for the guidance of these inferior judicatories, well nigh, if not altogether, impossible, seeing that a decision which fixes a principle for the regulation of the Court of Glasgow may be quite inapplicable to the Court of Dundee. The necessity proprietors of houses are under of applying to the Court for its authority before the most trifling alteration can be made, is a grievance of serious magnitude, and one which we are suprised has been so long submitted to. Surely the owners of adjoining buildings are quite capable of looking after their own interests, and may safely be trusted to repel the encroachments of unscrupulous neighbours; but is it not too much that an expense of several pounds must be incurred in the Dean of Guild Court before a door can be broken out, or a window shut up—these operations being, all the while, matters of the utmost indifference to any body except the proprietor of the building? Would any one think of requiring our marine engineer to get judicial authority before building a ship or constructing a steam-engine, simply because their proposed plans might constitute an encroachment on the patent rights of somebody else? And if not necessary in the one case, why should it be deemed indispensable in the other? In the modern parts of the city of Edinburgh, where the jurisdiction of the Dean of Guild does not extend, its absence has been felt as a blessing rather than a hardship; and while such places as Dumfries and Kilmarnock can do without the services of any such functionary, we do not think he would be at all missed in the city of Glasgow.

It may not be out of place to advert to a misapprehension which exists among some, at least, of our practitioners as to the proper form of instituting proceedings at the Dean of Guild Court. It is pretty generally thought that the petition for a lining should be conceived, as nearly as possible, in terms similar to the form given in the Sheriff Court Act of 1853. This is a mistake. That Act does not apply to Dean of Guild Courts at all. The Act of Sederunt, July 18, 1851, "as to records in Sheriff Courts," is the rule; and such petitions should have a condescendence and note of pleas in law annexed, in the same way as was done in the Sheriff Court provision to the Act of 1853. The clause in the Act 1 and 2 Vic. cap. 119, stands unrepealed, that Acts of Sederunt made for regulating the procedure in the Sheriff Courts "shall apply to, and receive effect in, the Courts of the royal burghs in Scotland, as well as in the Sheriff Courts," sec. 31 *in fine*. We would venture to recommend that this provision should not be disregarded in practice.

* Regulations of 1747.

MANDATE OR AGENCY.

(Continued from page 60.)

II.—POWERS, DUTIES, AND OBLIGATIONS OF AGENTS.

We now proceed to examine some of the more important duties and obligations of agents, and in doing so, shall consider (1), what is the proper mode of exercising their authority, and what will be regarded a fair execution thereof; (2), the degree of diligence required of agents in the proper exercise of their functions; and (3), the other incidental acts which are required of them by law to fulfil their duties and obligations.

(1.) We have already found that in ordinary circumstances, and without the consent and permission of the principal, either express or necessarily implied, an agent cannot delegate his authority to a third party; and hence it follows that the act must be done by himself, *propriâ persona*, as it is a matter of personal trust and confidence. But then there remains a most material consideration as to the particular mode or form in which the agent, when he acts personally, is to execute the authority conferred, so as to bind the principal. And with reference to this, Justice Story has observed that the general rule in cases of contracts (subject, however, to certain exceptions,) is, "that in order to bind the principal, and "to make it his contract, it must purport on its face "to be the contract of the principal; and his name "must be inserted in it and signed to it, and not "merely the name of the agent, even though the latter "be described as agent in the instrument. This is re-"gularly true in regard to all solemn instruments "under seal." And he proceeds to say, "but where "an act is to be done *in pais*, or in any other manner "than by a written instrument, under seal, there the "act will be so construed, if it may be, as most effec-"tually to accomplish the end required by the prin-"cipal." (*Story's Commentaries*, section 151.) The general rule as laid down by the eminent jurist above mentioned, is more particularly applicable to the practice in regard to sealed instruments, as existing in England and America. But it also applies, in a limited degree, to the practice in Scotland, where the agent, in granting obligations for debt or deeds for behoof of the principal, in virtue of authority contained in a power of attorney, or deed of factory, should always declare his representative character. Whatever the factor does, ought to be done *factorio nomine*, in order to save himself from personal responsibility. (*Ainslie*, 6th January, 1739, Mar. 4065.) Where the mandatory acts under the powers given to him, and in the name of his constituent, he binds his employer and incurs no personal responsibility in the transaction. (*Brown* v. *M'Dougall*, 30th November, 1802.) It has even been held that, according to the practice of Scotland, a factor, with authority to uplift and recover a debt, may raise action for payment thereof in his own name, as the acting factor commissioner and attorney nominated and appointed by the constituent, without making him a party to the action. (*Whyte*, 1st June, 1850, 12 D., 955.) Mr Story has further stated, that a liberal exposition is allowed in cases of unsolemn instruments, and especially of commercial and maritime contracts, which are usually drawn up in a loose and inartificial manner. In such cases, in furtherance of the public policy of encouraging trade, if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not merely the agent. Courts of justice will adopt that construction of it, however informally it may be expressed. But he adds that the general doctrine so laid down, is not universally true, and that there are exceptions to it, as well established as the rule itself. Thus, for example, a written contract made by a factor, in his own name, for the purchase or sale of goods for his principal, will bind the principal; and he may be sued thereon, exactly as if he were named in it, for it is treated as the contract of the principal, as well as that of the agent. (*Story's Com.*, sec. 154–161; *Lloyd's Paley*, 207; 1 *Bell's Com.*) The true principle, however, upon which all such cases stand, undoubtedly is, that the principal authorises the agent to contract in his own name, and thereby to bind his principal also; and then the common law, acting upon the intention of the parties, makes the party who would be *ultimately* liable, *immediately* liable to the other, whenever its forms of procedure will enable it to do so. (*Story's Com.*, sec. 162; *Stair*, 1–12, 16; *Pothier on Oblig.*, N. 82.)

It may be stated as a general rule of universal application, that in order effectually to bind the principal, the act done must be within the scope of the authority committed to the agent. In other words, his authority or commission must be strictly pursued, and its extent and limitations attended to and observed. It follows, therefore, that if the act vary substantially (and not merely in form) from the authority or commission in its nature, extent, or degree, it is void as far as the principal is concerned, and does not bind him. But the question may and often does arise, whether an act is wholly void or not when the agent does more or does less than he is authorised to do. If the agent acts up to his commission and does something more, it will be good, as we have seen, so far as he was authorised to go, and the excess only will be void. "A mandatory," says *Mr Erskine*, "who purchases a subject for the mandant at a lower "price than is contained in the commission, does not "exceed his powers, for a greater sum includes the "lesser, and though he should go beyond his com-"mission, by purchasing at a higher price, action is "competent to him against the mandant for relieving "him of the bargain, if he shall restrict his claim for "the price to the sum expressed in the commission." (*Ersk.* 3, 3, 35.) If the agent, on the other hand, execute the commission of his principal in part only, it then becomes a question whether the principal is bound to the extent of the execution. A distinction, it is thought, must be made according to the nature of the subject. The Roman lawyers discussed the question with their usual sagacity. The general rule in the Roman law undoubtedly was, that the *fines mandati*, *i.e.*, the limits of the authority, must be strictly observed—and that whatever the mandatory did *ultra fines mandati* was without authority, and could not bind his constituents. Whether the principal would or would not be bound by an act executed *in part only*, depends, in a great measure, upon the reason

of the thing, and in such cases it is necessary to distinguish whether the mandate be indivisible, or such as may be executed effectually in parts.—(2 *Kent's Com.*, 219; *Bell's Principles*, sec. 224, 5.) If the agent transacts a different business from that he was authorised to do, the principal is not bound, because the agent has departed from the subject-matter of the instruction; and the mere fact, that the bargain which is made may be more beneficial for the principal, will not avail the agent if it be a departure from the substance of the authority. As *Mr Erskine* has well remarked, "it is "not a sufficient defence to the mandatory that the "method he took was more natural than that which "was pointed out by the mandant, for in that his "employer and not he was the proper judge."—(*Ersk. Inst.*, 3, 3, 35.) Upon a broader ground, any deviation from the authority, which would defeat the manifest inducements of the principal to make the purchase, would be void, whether the bargain were beneficial or not.—(*Story's Com.*, sec. 176.) In cases of mercantile sales of personal property, a very liberal construction of the authority would no doubt be generally adopted. When the factor has doubts regarding his duty in particular circumstances, the safest and most expedient course for him is to notify them to the constituent, and if the latter do not thereupon interfere or direct him, the factor may act according to his own discretion without incurring personal responsibility. —(*M'Call*, 8th Feb., 1740; *Mor.*, 3524.) Where an agent has a general authority to receive payment of a debt, he is ordinarily bound to receive the whole of it in money only, and cannot vary from his authority by accepting a bill.—(*Story's Com.*, sec. 181.) Even a general agent cannot, *without particular authority*, commute the payment by receiving another thing, as a horse, in discharge of the debt, unless it be immediately delivered over to the employer, who accepts of it, and thereby ratifies the transaction. It may be here observed, that the delivery of goods or money to an agent or servant, in the usual course of his employment, is, for most purposes, equivalent to a delivery to the employer.—(*Lloyd's Paley*, 291–293.)

(2.) We shall now inquire what degree of diligence is required of agents in the proper exercise of their functions. The doctrine upon this important subject, as Justice Story has observed, is often laid down in very loose and indeterminate expressions. According to that eminent authority the true rule undoubtedly is, that as the contract of agency is one for the benefit of both parties, the agent is understood to contract for reasonable skill and ordinary diligence, and he is consequently liable for injuries to his employer occasioned by ordinary negligence, or by the want of reasonable skill. By *reasonable skill* we are to understand such as is ordinarily possessed, or exercised, by persons of common capacity engaged in the same line of employment. By *ordinary diligence* we are to understand that degree of diligence which persons of ordinary prudence are understood to bestow upon their own business or affairs, (*Story's Com.*, sec. 183.) This seems also to have been the rule of the Roman law, where *culpa* or *levis culpa* is deemed to be equivalent to ordinary neglect, or the want of ordinary diligence. In regard to the skill requisite by that law it is proper to explain, however, that civilians are not agreed. The diligence prestable by a *proper mandatory*, as understood, in Scottish jurisprudence, to be grounded on the equity of the Roman law, is only for his actual intromissions and such diligence as he employs in his own affairs, (*Ersk.*, 3, 3, 36.) But the diligence implied in the onerous office of a mercantile agent is that of a prudent man in managing his own affairs, (1 *Bell Com.*, 453.) The same equitable rule in regard to diligence prevails not only in the law of Scotland, but also in that of France, and indeed in all the continental nations of Europe who derive their jurisprudence from the Roman law, (*Pothier on Oblig.*, N. 141; *Jones on Bailments*, 30.) The question whether the proper degree of diligence and skill which the law requires of agents, in performing their duties, has been applied in a particular employment or business, is for the most part, a matter of fact open for inquiry, and sometimes involving points of great delicacy and difficulty. The general usages of trade, the common rules of the particular business, and the special mode of dealing between the principal and agent, will often explain and expound the duties required of the agent as to diligence and skill. A factor is bound to do such diligence as the security of the property under his charge requires, *e.g.*, to use sequestration for rents, etc. Every agent is bound faithfully and punctiliously to execute the duties of his office and the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them, otherwise he will be liable in damages. But there is an *exception* to this, where by illness, or inevitable accident, the agent is prevented from performing the undertaking, (*Bell's Pr.*, sec. 220.)

(3.) The remarks already made naturally conduct us to the next head of inquiry, and that is, what are the incidental acts which the law requires of agents in the discharge of their duties and obligations. And here it may be stated to be the primary obligation of an agent whose authority is limited by instructions, to adhere faithfully to those instructions in all cases to which they ought properly to be applied. It is a general and a sound principle that the agent is liable to his principal for all losses and damages arising from violations of his duty as agent, by reason of misconduct, delinquency, stretch or abuse of power, or negligence, provided the loss or damage be reasonably attributed to the same. If he unnecessarily exceeds his commission, or risk the property of his principal, he renders himself thereby responsible for all losses and damages which are the natural consequence of his act. And it will constitute no defence for him, that he intended the act to be beneficial to the principal. On the other hand, if, by the violation of his instructions, he obtains a profit or advantage, he is not allowed to retain it, but the principal is entitled to the full benefit. In regard to instructions two qualifications have been mentioned as naturally, and perhaps necessarily, implied in every case of mercantile agency. The first is that they are applicable only to the ordinary course of things, and the agent will be justified in cases of extreme necessity and unforeseen emergency in deviating from them. The second is, that if the instructions require the agent to do an illegal or immoral act, he may violate his instructions with impunity, for the law will not

sanction or enforce a contract illegal in itself, and by the execution of which the rules of morality would be transgressed. "This doctrine, (says Justice Story,) "is founded on the principles of eternal justice, and it is "greatly to be lamented that it has not been followed "out in our intercourse with foreign nations to the "extent of refusing to interfere in contracts even "between our own citizens, which are made in viola- "tion of the laws and public policy of foreign nations." And the same liberal and enlightened jurist then proceeds to express a hope that the time may arrive when the general cultivation of international law, enlightened and reformed by Christian morals, will introduce a better system, which shall declare that the common interests of all nations are best promoted by a steady support of all the municipal laws of each, not inconsistent with justice, rational liberty, and liberal intercourse.—(*Story's Com.*, sec. 192–197.)

In the next place, it may be laid down as a general rule, in the absence of specific directions, that if there be a known usage of trade, or mode of transacting business applicable to the particular agency or analogous to it, in such a case it will be the agent's duty to conform thereto; and any manifest departure from it, not warranted by the stern dictates of necessity, will be at the peril of the agent, and involve him in full responsibility for any loss or damage occasioned thereby. For example, when an agent, in the absence of instructions, sells his principal's goods on credit, when, by the usual practice of trade, he should have received ready money in return, he will be liable to the principal on default of payment by the purchaser. On the other hand, when the agent has given only the usual credit, or has conducted himself fairly according to the common course of business, and has employed the usual diligence in his agency, he will not be responsible for any loss occasioned by the subsequent insolvency of the persons whom he has trusted, or to whom he has sold the property, if, at the time of the sale, they were solvent and in good credit.—(*Story's Com.*, sec. 202.) It has been repeatedly decided by our Court, that an agent or factor, at a distance from the principal, and in difficult circumstances, will be discharged if he act with sound discretion.—(*Hay*, 4th June, 1675—*Mor.* 10,083; *Auchie & Co.*, 4th July, 1822—1 *Sh.* 538.) Where a mandate or commission is given to a person of skill in any particular department, it is understood that he may exercise his discretion to a certain extent in fulfilling the orders given to him.—(*See Professor More's Notes on Stair*, vol. i. p. 72.) Thus it has been held that a farrier, employed to cure a diseased horse, and desired to give a particular medicine, is entitled to give the medicine in such a form or with such accompaniments as his skill shall point out to be proper.—(*Burnet* v. *Clark*, 10th Dec., 1771.)

It is a duty incumbent on an agent, where the business in which he is employed admits of it, or requires it, to keep regular accounts of the transactions and intromissions, and to render such accounts to his principal at all reasonable times, without suppression, concealment, or overcharge. So it is in general, or at least in many cases, the duty of an agent to keep the property of his principal separate from his own, and not to mix it with the latter; and if he does not, in cases where it is properly his duty, and afterwards he is unable to distinguish between the one and the other, the whole will, as a sort of penalty for his negligence, be adjudged to belong to the principal. In many cases, also, agents become depositaries or shareholders of property, as well as agents strictly so called, and in such cases the ordinary duties of depositaries, of the same nature and character, belong to them. It may also be stated as generally true, that all profits which are made by the agent, in the course of the business of the principal, belong to the latter.—(*Story's Com.*, sec. 203–207.)

Besides the particular duties of agents, which have been already incidentally stated, there are others which seem to be the proper result of law; and a deviation from them can only be justified by some clear usage of trade, or by the sanction of the principal, or by an overruling necessity. Thus, in regard to agents receiving money for their principals, the rules seem to be (1), that the agent must, in remitting money, follow any directions given by the principals, or take the risk of the remittance; (2), that he must, when no directions are given, remit through a chartered bank, or at least a banker, reputed at the time to be in good credit, or follow the mercantile custom or local usage; (3), that if he pay into his own general account, he will be liable to the risk of the banker's failure; (4), that if he put his own name as drawer or indorser on the bill by which the money is sent, he will be liable as indorser. (*Bell's Pr.*, sec. 222.) Another rule of general application in regard to the duties of agents, is that in matters touching the agency. Agents cannot act so as to bind their principal, where they have an adverse interest in themselves. The doctrine which we have been considering, is capable of a great variety of applications; but in all the cases it is founded on the same beneficial and enlightened policy—the protection of the principal, and the advancement of his interests. (*Story's Com.*, sec. 214.)

There is a distinction in the books between *public* and *private* agents, on the point of personal responsibility. If an agent on behalf of government makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. But there is nothing, at the same time, to prevent such a public agent undertaking a personal liability in his contracts, if he choose to do so.

In conclusion, under this head, we shall say a few words regarding the factor's powers to *pledge*. It has been a question much agitated, both in this country and on the continent of Europe, what power a factor has to pledge the goods of his principal. In England, at common law, he had no such power. In Scotland, it has been decided that he has the power, to the effect of conferring on one who lends money on the security of the goods, an unexceptionable real right, or of raising to a sub-factor, or other person receiving the goods, and advancing money on them, an effectual lien. And on this point, the law of England has, by late Statutes, been placed nearly on the footing of the law of Scotland. The doctrine of the

law on this subject has been reduced by Mr Bell to the following propositions:—

First, Where a factor, having made advances on goods sent to him for sale, transfers to another the right of pledge or lien which he himself holds, the transfer is effectual. As the creditor, to whom the lien is assigned, holds only the qualified possession which his debtor was entitled to, his right, like that of the assignee to a liferent, expires with his original lien; but to this extent the security is as complete as the factor's own—that is to say, the creditor will be entitled to avail himself of the pledge to the extent of the balance due to the factor.

Second, Although at first it was held that a factor, having goods in his possession, could not pledge those goods or receive advances on them, to the effect of constituting a lien available against the owner; yet, this soon yielded to views of commercial expediency, first, in a foreign case, in deference to the laws of Holland, (*See case of Mitchell*, 11th December, 1746, *with Lord Kilkerran's Review of the Judgment—Kilk.*, 206); and afterwards, it was held that a person, holding goods in this country, as factor for a trader abroad, could place those goods with another, as his factor or consignee, and take advances on the security of them, to the effect of conferring an unexceptionable lien for the advances available against the true proprietor of the goods. (*Colquhoun*, 15th November, 1816, F.C.; *Johnston*, 14th November, 1818, F.C.)

Third, Where a factor, however, places goods in the hands of another as factor, or for any other purpose, which in the case of his own goods would confer a lien for a general balance, the sub-factor, though ignorant of the true ownership of the goods, must, in so far as he has not made *actual advances* on the consignment, but claims only a *general* balance, take the goods under the qualification of the limited right which the factor himself had in them, (*Black*, 22d June, 1820.)

But although these were the rules followed in Scotland, they had been established chiefly on grounds of public expediency and from favour to commerce, though undoubtedly based on a sound principle of law, by which property in moveables is presumed from possession. The same course was followed on the Continent, and against authorities of great weight the bias of favour and encouragement to the free transfer of goods in trade had influenced the whole practical jurisprudence of the trading nations of Europe. The general maxim of the civil law was, "*Nemo plus juris ad alium transferre potest quam ipse haberet.*" And under this general rule the power to pledge was absolutely denied. In France it was held, that one could not pledge the property of another for his own debt. In Holland, and also in Italy, the same law was established.

But an abstract rule, (continues Mr Bell,) laid down in law books sometimes does not square with the actual business of life, and in favour of commerce a relaxation of the above rule was introduced, to the effect of allowing the possession of moveables, and those otherwise in the apparent right of commodities, not only to sell but to pledge them.

In England the law had, towards the middle of the last century, taken a bias against the direction which it had received, both here and abroad, and which is said not to have accorded with the spirit of the former law. This was the famous case of *Paterson* v. *Tash*, in 1743, (2 *Stearge*, 1178,) tried before Chief Justice Lee, who is reported to have held, that though a factor had power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt; and so the jury found. This doctrine appears to have been first shaken by the authority of Lord Eldon in 1800. But still the course of decisions proceeded against the right implied in possession. The bad effects of this doctrine in trade were so sensibly felt that, after the report of a Parliamentary Committee had been given in, the Legislature interponed to remedy the grievance, and the statute of 4 Geo. IV., c. 83, was the result. This statute has been amended, 1st, by the Act of 6 Geo. IV., c. 94; and, 2d, by that of the 5 and 6 Vic., c. 39, whereby the law is now placed on a more satisfactory footing.—(*See Bell's Com.*, p. 483–487; *Lloyd's Paley*, p. 222 *et seq.*; 2 *Kent's Com.*, p. 625–629.)

Having thus discussed the powers, duties, and obligations of agents in general, and laid down rules relative thereto, of broad and almost universal application, we shall proceed, in the next place, to consider the effect of the relation of principal and agent, *first*, with respect to the parties themselves, viz., their mutual rights and liabilities; *secondly*, with respect to third parties who may be affected by it.

(*To be continued.*)

Legislation.

BILL TO AFFORD FACILITIES FOR THE MORE CERTAIN ASCERTAINMENT OF THE LAW ADMINISTERED IN ONE PART OF HER MAJESTY'S DOMINIONS, WHEN PLEADED IN THE COURTS OF ANOTHER PART THEREOF. Prepared and brought in by Mr Dunlop, Sir Richard Bethell, Mr Fitzgerald, and Mr Malins. Ordered by the House of Commons to be printed, 8th March, 1859.

THE measure contemplated by this Bill, is one of great importance, the want of which has led to grievous delay and expense, whilst the law of one part of the kingdom, as ascertained by the Judges of another section, has been far from being satisfactorily determined.

The principle which has hitherto regulated this important matter, has been to hold *the law* of one part of the kingdom to be *matter of fact* in another. The Judges in each section have rather unnecessarily boasted of their entire ignorance of any law but that of their own country. It has not been unusual to hear a Scotch Judge declare from the bench, that he was equally ignorant of the law of England as he was of Japan.

In England, so far was the principle carried, that *foreign law* was with them *matter of fact*, that it has been made a jury question. The law of Scotch marriage, amongst others, has been submitted to twelve yeomen, and on the conflicting evidence of Scotch advocates, a

verdict has been given on what, in the opinion of the rustic jury, was, or ought to be, Scotch law.

In Scotland, where trial by jury has not as yet been made the paladium of justice, and the only mode of arriving at the truth, the course followed has been to obtain the opinion of eminent English counsel on a case approved by the Court

This Bill, which has been introduced into Parliament, by members representing the three portions of the United Kingdom, (but giving to Ireland a double representation,) is well calculated to place this branch of legal practice on a more satisfactory footing.

We give the Bill at length, by which it will be seen that the Courts of each section of the kingdom are made auxiliary the one to the other. As soon as a Court in one portion of the kingdom, and having jurisdiction in the action, discover, judicially, that the law of another section of the kingdom must rule, and where the parties are at variance as to the application of that law to the case as heard, then the aid of the Court in that other portion of the country is called in to take cognisance of the point, and judicially decide thereon. The decision thus authoritatively given, forms part of the procedure in the original action, and may in the end be carried by appeal to the House of Lords, with the final decision of the original cause.

It will be observed that the provisions of this Act are intended to reach all Courts, supreme and local, civil as well as ecclesiastical. The Courts of Sheriffs in Scotland, and County Courts in England are, therefore, within its scope. It will also be noticed that the Courts to be consulted are not named—therefore, as there are several supreme and independent Courts in England and Ireland, besides several tribunals of equity and ecclesiastical law, it will be in the discretion of the Scotch Courts; and sometimes a question, to what Court, in England or Ireland, the case is to be sent. Or, as the law of England rules in both the sister kingdoms, it may be a question, where the locality of the law is in Ireland, the English Courts may yet adjudicate on the law common to both countries. So too, as the Act is extended to the law as administered *in any part of Her Majesty's dominions*, it would seem competent for Judges in the colonies, and in India, to take the benefit of the Act, and *vice versa*.

It will be observed as an omission, that there is no power in the Bill given to award the costs of the engrafted case. This may perhaps be held as covered by the general power inherent to award the costs of the secondary cause as part of the ordinary expenses in the original action. But it might be well to make special provision for this case, and the audit of such costs would require to be ascertained by the proper taxing master of the interposed Court.

Now that there is a recognition of the law of Scotland by Irish members, it is to be hoped that, their senseless opposition to Mr Craufurd's Bill for the reciprocity of execution on decrees between all parts of the United Kingdom will be withdrawn, and this much wanted measure speedily follow in the wake of the present Bill. The law of Scotland cannot be that rude system of barbarism which it was proclaimed to be in the House of Commons, since now it is admitted to be of equal authority as that of the other portions of the United Kingdom.

"Whereas great Improvement in the Administration of the Law would ensue if Facilities were afforded for more certainly ascertaining the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof: Be it therefore enacted, by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

"I. If in any Action depending in any Court within Her Majesty's Dominions, it shall be the Opinion of such Court, that it is necessary or expedient for the proper Disposal of such Action to ascertain the Law applicable to the Facts of the Case as administered in any other Part of Her Majesty's Dominions, it shall be competent to the Court in which such Action may depend to direct a Case to be prepared setting forth the Facts, as these may be ascertained by Verdict of a Jury or other Mode competent, or may be agreed upon by the Parties, or settled by such Person or Persons as may have been appointed by the Court for that Purpose in the event of the Parties not agreeing, and upon such Case being approved of by such Court, they shall pronounce an Order remitting the same to the Court in such other Part of Her Majesty's Dominions whose Opinion is desired upon the Law administered by them as applicable to the Facts set forth in such Case; and it shall be competent to any of the Parties to the Action to present a Copy of such Case, duly certified by One of the Clerks or other proper Officer of such Court, to the Court whose Opinion is to be obtained, along with a Petition praying such last-mentioned Court to hear Parties or their Counsel and to pronounce their Opinion thereon in Terms of this Act; and the Court to which such Petition shall be presented shall appoint an early Day for hearing Parties or their Counsel on such Case, according to such Form of Procedure as such Court shall direct, and shall thereafter pronounce their Opinion upon the Questions of Law as administered by them which are involved in or arise out of the Facts specified in such Case; and in order to their pronouncing such Opinion they shall be entitled to take such further Procedure thereupon as to them shall seem proper.

"II. Upon such Opinion being pronounced, the same shall be written out and authenticated according to the Practice of the Court by which it shall have been pronounced, and a Copy thereof and of all previous Orders or Interlocutors, certified by One of the Clerks or other proper Officer of the Court, shall be given to each of the Parties to the Action by whom the same shall be required, and shall be deemed and held to contain a correct Record of such Opinion and Orders or Interlocutors; and the certified Copy of the Case herein-before mentioned, together with the principal Opinion, and Orders or Interlocutors, shall remain Part of the Records of the Court by which such Opinion and Orders or Interlocutors shall have been pronounced.

"III. It shall be competent to any of the Parties to the Action, after having obtained such certified Copy of such Opinion and Orders or Interlocutors, to lodge the same with any of the Clerks or other proper Officer of the Court in which the Action may be depending, who may have the official Charge thereof, together with a Notice of Motion, setting forth that the Party will, on a certain Day named in such Notice, move the Court to apply the Opinion contained in such certified Copy thereof to the Facts set forth in the Case herein-before specified, and the said Court shall thereupon apply such Opinion to such Facts, in the same Manner as if the same had been pronounced by such Court itself upon a Case reserved for Opinion of the Court, or upon special Verdict of a Jury.

"IV. In the event of an Appeal to the House of Lords in any such Action, it shall be competent to bring under the Review of that House the Opinion pronounced by the Court whose Opinion shall have been obtained, and the House of Lords may adopt or reject such Opinion as the same shall appear to them to be well founded or not in Law.

"V. The Word 'Action' shall include every judicial Proceeding instituted in any Court, Civil, Criminal, or Ecclesiastical."

The "Scottish Law Journal" will be published in the first week of each month, Price One Shilling, post free.

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, JUNE, 1859.

THE TITLES TO LAND (SCOTLAND) BILL, 1859.

This Bill forms one of the measures, the progress of which was arrested by the Reform Debate and its important results, and there has thus been afforded to the profession and the public an opportunity, which does not appear, however, to have been much used, of more minutely considering the proposed alterations in our system of conveyancing. In the Preamble it is stated that the object of the Bill is to extend certain provisions of the Titles to Land Act of 1858, to Titles to Land held by Burgage Tenure, and to amend the said Act. This scarcely, however, gives a sufficient idea of the importance of the proposed measure, whose clauses provide for considerably more than would naturally be gathered from the terms of the Preamble. For example, by section 36, it is provided that no deed, by which lands are conveyed, shall be held to be invalid, on the ground of the want of the word "dispone," or other word imparting a conveyance de presenti; and all such deeds shall be held to be valid which clearly express an act of conveyance by the granter, and whether by words of conveyance de presenti, or mortis causa, or by words of bequest. We need scarcely remind our readers that hitherto it has been held as an invariable rule, that in order to make a deed an effectual conveyance of land, it must contain words of absolute de presenti disposition; and in order to produce that effect, the word "dispone" has been regarded as indispensable. Should the clause, however, we have alluded to become law, and certainly it is only consonant with common sense that it should do so, the existing state of matters will be completely altered, and the somewhat startling spectacle will present itself of important legal doctrines, founded on a long series of decisions, which have formed the subject of much and varied discussion by many learned writers, being superseded and destroyed by a short section of eight lines and a-half introduced, as if incidentally, at the close of this Bill. We repeat, however, that at the present day most people will regard the new short clause as more reasonable and sensible than the old long decisions and metaphysical disquisitions, and therefore the alteration will probably be accepted as an important improvement. At the same time, it is rather interesting to speculate on what may be the appearance of a progress of title deeds, twenty years hence. We fear it will be motley, and that the Records will be often resorted to, in order, by means of extracts, to give an appearance of business-like uniformity to that which would otherwise be a thing of shreds and patches. It is to be regretted, we may remark in passing, that the provision in the former Bill, that deeds may be partly written and partly printed, is repeated in the present measure. It was generally understood last year, that had the Bill passed a little less expeditiously, this clause, so likely to lead to slovenliness and error, would have been expunged; and we cannot help thinking that the present opportunity should be seized to effect that object, by amending the former rather than to continue the mischief in the new Act.

Our limits prevent us from adverting at present to various other points in the proposed Bill, which are worthy of much attention. But there is one section —the 23d—which it is impossible to overlook, and which, in its rapacious effrontery merits, and we trust will receive at the hands of the profession, the public, and the legislature, the most emphatic condemnation, and immediate expulsion from the Bill, which it disgraces. It provides that "The existing town "clerks of royal and other burghs in Scotland, who, "according to the present law and practice, are ex- "clusively entitled to prepare instruments of sasine, or "of resignation and sasine, upon conveyances of sub- "jects situated in burghs, shall, during the existence "of their respective rights of office, be entitled to claim "and receive from the party in whose favour a convey- "ance of such subjects shall be recorded in the appro- "priate register of sasines in virtue of the present Act, "the same fees as such town clerks would, before the "passing of this Act, have been legally entitled to "exact and receive on their own account, in respect of

"preparing such instruments according to the present "law and practice, and the party in whose favour a "conveyance of such subjects shall have been so re- "corded, shall be bound to pay such fees to such town "clerks; and the keepers of the registers of sasines "shall, upon recording such conveyances in virtue of "the present Act, be entitled to exact the same fees as "such keeper would have been entitled to exact upon "recording an instrument of sasine, or of resignation "and sasine, of the same length as the conveyance "recorded." The mere perusal of this brazen proposition will enable the professional reader to see at once the iniquity to which the public is to be subjected in order to provide most lucrative sinecures for the officials in question. But the good, easy public itself knows nothing of the clauses of a Conveyancing Bill, and indeed appears to care so little about the matter, that we almost despair of success though we may attempt to awaken it to the enormous amount of fees which, should this clause become law, will be transferred from its pockets to those of its town clerks, without return, on the part of the latter, in the shape of head-work or hand-work, or any work whatever. At present the town clerk prepares the Instrument of Sasine himself, executes, and records it, and for so doing he charges a very heavy fee, calculated partly according to the pecuniary amount of the transaction, and partly according to the length of the sasine. Thus, a sasine which may be uplifted from the General or Particular Register for a payment of £3 or £4, cannot be procured from a town clerk under £12 or £15, and the reason assigned is, that the town clerk has to prepare, execute, and record the sasine, while the other keepers have merely to record it. Even admitting the validity of the reason, the charge is exorbitant; but mark the effrontery of the 23d section of the present Bill. The town clerk is to cease to do a single thing which requires the slightest exertion of brain, or which entails anything but the most nominal responsibility, and he is, nevertheless, to extort from the pockets of the public, for the simple duty of copying a writ, supplied to him by the agent, into his record book, the same enormous fee that he at present exacts for drawing, executing, and recording the Instrument of Sasine! But it will be said, this system is merely to endure while vested interests continue—only until the present town clerks cease to hold their offices. This consolation, most patient public, may be substantial enough for the generation which succeeds yourself, but so far as you are concerned, you must, if this clause pass, make up your mind in many, if not in most instances, to submit to the extortion, in all humility. Take for example the case of Glasgow. If the clause pass, is there any but the most distant chance of the present generation of adults ever benefiting from the lamented departure of the very astute and tenacious gentlemen who fill the office there? We honestly believe, that if the proposed plan of no work and enormous fees be adopted, the temptation to prolong the happy system will be irresistible, and the power of vitality and tenacity of office—already evidently not indifferent—in some corners of the County Buildings, will become almost miraculous. It is impossible to refrain from congratulating the Lord Provost and Magistrates on the felicitous prospect of the continuation, for half a century or so, of that dignified and edifying career which they recently originated, and which has since been distinguished by so many tokens of harmony, confidence, and universal satisfaction. But seriously the matter is no laughing one, and unless the public is really willing to submit to this most glaring imposition, it will look a little more sharply after the provisions of this Bill, than it has yet shown any tendency to do. Every penny so extorted is, we repeat, drawn, without return and without reason, from its own pockets. The profession also is, we think, called upon to attend to its own interests in regard to this Bill. Without a murmur its members furthered and acceded to the reforms which swept a large proportion of their profits from them, and that when they had a claim for compensation at least as good as the proctors of Doctors' Commons, or the town clerks of Scotland. But it is for them to consider whether the latter should now be allowed to fatten, not only on the ill-gotten gear of section 23 (if it pass), but also on the monopoly of the instruments to be expede in carrying out the new Act. For our part we can see no reason why the deed should require to be presented to "the notary public and town clerk of the said burgh." It would be only fair and proper that the profession generally should get the benefit of the preparation of these instruments, and the town clerks, receiving suitable remuneration for their registration, they would certainly have no reason to complain. We trust that the profession will for once see the propriety of looking a little after its own interests, and not with supine indifference see the emoluments which its members may fairly claim, descend into the rapacious maw of officials who too often appear to be actuated by no motive higher than their own pecuniary aggrandisement.

MANDATE OR AGENCY.

(Continued from page 71.)

CHAPTER III.

RIGHTS OF THE PRINCIPAL AGAINST THE AGENT, INCLUDING THE LIABILITIES OF THE LATTER TO THE FORMER.

THE duties of the agent to his principal must, of

course, depend on the express or implied instructions contained in his appointment; for be these what they may, his duty is faithfully to perform and carry them into effect, if possible to the letter, unless, indeed, his obedience would involve a fraud on third parties; for no contract can oblige a man to make himself the instrument of fraud.

From a person standing in a situation of confidence with regard to another the strictest *bona fides* is required. This applies in full force to an agent, and it is a very essential part of the good faith required from him, that he should keep a clear account and communicate the result, from time to time, to his employer. In stating this account, the principal will be entitled to every increase made from his own property. The agent will also be charged with all payments actually made to him, and with all losses incurred through his own negligence and dereliction of duty. But he will not be chargeable with any loss incurred by him, without fault or negligence, while he is engaged in the prudent exercise of his discretion, and in pursuance of the regular and accustomed course of trade. It has been ruled in England that if he place his principal's money to his own account at his banker's, he will be responsible for it if the banker fail.

A factor is not answerable against all events for the safety of goods which he has in charge; and it is sufficient if he do all that by his industry he may for their preservation and protection, (*Coke's Littl.* 89.) The rule is that he is bound to keep them with as much care as a man of *average prudence* would bestow in the keeping of his own. This doctrine is founded on the civil law. One of the most important duties which the safety of merchandise requires in factors and consignees, who act as factors, is that of protecting it by insurance. In an action against an agent for failure to effect an insurance, as he stands in the place of an insurer, so he is entitled to any defence which an insurer could have made, for if nothing could have been recovered upon the policy, no actual damage has been sustained by the want of it. If the agent do all that is usually done to get the insurance effected, it is sufficient. Where duties are payable upon the importation or exportation of goods, it is the business of the agent employed in the receipt or despatch of them to take care that the proper entries are made, and the duties satisfied, to save him from liability for loss in the event of forfeiture, (*Lloyd's Paley*, 18–23.)

In contracts of sale, if any price be limited by his instructions, the agent must sell for that. If no price be limited then he must sell for what the goods are fairly worth; and if the property be of a description commonly sold for ready money only, he must not sell upon credit; for an agent employed generally to do any act is authorised to do it only in the usual way of business. But if he be factor in a sort of dealing or trade, where the usage is to sell upon credit, then if he sell to a person of good credit at the time, he is discharged, and will be entitled to his commission though the purchaser may afterwards become insolvent, provided always that the credit given was reasonable and usual, and that his principal was made acquainted with the transaction within a reasonable and usual space of time. However, as some merchants do not choose to run this risk, and to trust so implicitly to the discretion of their factors, an agreement, called "*del credere*," has been invented, under which a factor employed to sell goods, in consideration of an additional premium or commission, is held liable to the principal for the price stipulated at the term of payment, whether he ever receives it or not. This sort of guarantee (according to Mr Bell) is not, on the one hand, a cautionary obligation in the common sense of that expression, for the factor with a *del credere* commission is liable directly and without any benefit of discussion; neither is it, on the other hand, to all intents and purposes a *delegatio debiti*, for if the agent fail, the principal is entitled to resume his character and recover from the proper debtor, if he have not previously paid. This doctrine was distinctly laid down by Lord Mansfield, in *Grove* v. *Dubois*, 1786, 1 Term Rep. 112; but it has been questioned, and at last overturned in England by subsequent authorities, which have settled that an agent, acting under a *del credere* commission, is a mere surety binding himself to warrant the solvency of the purchasers, (*Smith's Compendium of Mercantile Law*, p. 111.) In the case of a foreign factor, where the principal cannot possibly know the buyers, it seems to be held that where nothing is said as to commission, *a del credere* commission is to be paid and the sales guaranteed. *A del credere* guarantee may be undertaken, not only expressly, but also by implication, where goods are sent to a factor on the footing of a *del credere* commission, and he keeps the goods without declining the guarantee, (*Watson & Coy.*, 16th February, 1826, 4 Sh., 475. See also 1 *Bell Com.*, 481.)

As no agent can lawfully exceed his orders, it follows that if he do so, his principal, though he may perhaps insist upon keeping them if he think it for his advantage, has a right to refuse the goods improperly purchased. But, then, he must repudiate the transaction, and give notice of his disagreement to the agent within a reasonable time, else he will be held to have adopted it, and the loss, if any, will fall upon him. If the factor buy a commodity, which afterwards becomes damnified, he is not answerable for the loss. It is a fundamental rule, applicable to both sales and purchases, that an agent employed to sell

cannot make himself the purchaser; nor if employed to purchase can he be himself the seller. The expediency and justice of this rule are too obvious to require observation. A commission agent is bound to give immediate notice to his employer that the goods consigned to him are of such inferior quality that they will not realise the current market price of the day, and to render his account immediately on a sale being effected; and if he fail to do so, the *onus* will be on him to show that the goods consigned to him did not realise the market price, (*Simpson*, 1st June, 1849, 11 D., 1097.)

There is a difference between the principal's right against a *remunerated* and against a *gratuitous* agent. The former, having once engaged, may be compelled to perform the duty which he has undertaken—the latter cannot, for his promise to do so being induced by no consideration, the rule *ex nudo pacto non oritur actio* applies. But if he do commence his task, and afterwards be guilty of misconduct in performing it, he will, though unremunerated, be liable for the damage so occasioned. Less skill, however, is required from him than from a paid agent; and it is for gross negligence alone that he can be held answerable. This rule applies in England.

On the bankruptcy of the principal, his creditors claims against the factor are to recover all the property entrusted to him, and to have an account of all the proceeds and of the result of the contracts which he has entered into, under deduction of the commission and of any balance that may arise on the factor's transactions. (1 *Bell Com.*, 491.)

From what has been already said it is sufficiently clear that, whenever an agent violates the duties or obligations which he owes to his principal, whether it be by exceeding his authority or by positive misconduct, or by mere negligence or omissions in the proper functions of his agency or in any other manner, and loss or damage thereby falls on his principal, he is responsible therefor, and bound to make a full indemnity. In such cases it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation which he has been obliged to make to third parties in discharge of his liability to them for the acts and omissions of his agent. The loss or damage need not be directly or immediately caused by the act done, or omitted to be done. It will be sufficient if it be attributable to it as a natural result or just consequence. But it will not be sufficient if it be merely a remote consequence or an accidental mischief. It must be a real loss and actual damage, not merely a probable or possible one. (*Story's Com.*, sec. 216–234.)

In this connection the consideration naturally arises of those matters which may properly be urged by agents, by way of defence or excuse, to repel the actions and claims brought against them by their principals for violations or omissions of duty, or other delinquencies touching the subject-matter of their agencies.

(1.) The agent may insist, as a matter of defence, that the subject-matter of the agency was an illegal or immoral transaction, or founded on fraud or against public policy; in all which cases the principal will not be allowed to maintain any suit for redress of any sort against the agent touching that transaction. The rule in all such cases is *melior est conditio possidentis*.

(2.) It is a good defence, or rather excuse, that the misconduct of the agent has been followed by no loss or damage whatever to the principal.

(3.) In the next place, the agent may defend himself by showing that, although he has violated his instructions or orders, or has not otherwise performed his undertaking, yet he has acted under an overwhelming necessity, or has been prevented from acting by a like calamity, or what he has done has been from an unexpected or unforeseen emergency, to which the instructions or orders did not or could not apply; or, if they did apply, that he was compelled to act in order to prevent a greater loss or absolute ruin to his principal.

(4.) But the most important point of defence, usually occurring in practice to actions for breach of duty by agents, is that which involves the question of a ratification by the principal of the acts or doings or omissions of his agent. Where the principal, upon a full knowledge of all the circumstances of the case deliberately ratifies the acts, doings, or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority to the extent which such acts, doings, or omissions, reach. The maxim of the common law—and it has been fully adopted into maritime and commercial jurisprudence — is *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. This most useful and convenient rule was fully recognised in the Roman law. In the common law, however, there is a distinction between the ratification of acts which are *void*, and that of acts which are *voidable*. In the former case, the ratification is inoperative for any purpose whatsoever; in the latter, it gives full validity to the acts. Hence it follows that if an agent has, by a deviation from orders or by his other misconduct or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts or omissions by the principal, if made with a full knowledge of all the facts and circumstances. A ratification, also, when fairly made, will have the same effect as an original authority to bind the principal, not only in regard to the agent himself, but also in

regard to third parties. Another consideration, very important in cases of this sort, is, that the principal cannot, of his own mere authority, ratify a transaction in part and repudiate it as to the rest. He must either adopt the whole or none. (*Story's Com.*, sec. 235–260.)

CHAPTER IV.

RIGHTS OF THE AGENT AGAINST THE PRINCIPAL, INCLUDING THE LIABILITIES OF THE LATTER TO THE FORMER.

THE chief rights of the agent against the principal are to receive payment of his remuneration or commission, and reimbursement of his advances.

1. The commission of an agent is either ordinary or *del credere*. Its amount is either regulated by a particular contract in each instance, or determined by the usage of trade, or in certain cases it is settled by Act of Parliament. The general rule of law as to commission undoubtedly is, that the whole service or duty must be performed before the claim to any commission accrues, either ordinary or extraordinary; for the agent must complete the thing required of him before he is entitled to charge for it. But cases may occur in which an agent may be entitled to a remuneration for his services in proportion to what he has done, although he has not done the whole service or duty originally contemplated. An agent employed in the management of an illegal contract cannot recover any compensation for his labour from the person at whose request it was performed, and who has enjoyed the benefit of it. The right to commission may also be forfeited by the misconduct of the agent. Thus, an agent whose duty it is to keep an account cannot support a charge for his labour if he have kept none. And if, in consequence of his negligence or unskilfulness, no benefit accrue to his employer from the service performed, he forfeits his right to commission, and will be held liable to his employer for any damages which he may thereby sustain. So also will he forfeit his commission, if he depart from his character of agent for his employer and act adversely to him in any part of the transaction. But we have seen that in ordinary cases the agent, if he act with ordinary discretion and fidelity, and without deviating from the regular course of business, will not be answerable for any loss that may occur to his employer's property, and will, notwithstanding such loss, be entitled to claim his commission.

2. Another right of agents is to be reimbursed of all the advance expenses and outlays made and incurred in the course of their agency for behoof of their principals. But this claim proceeds upon the ground that these advances have been incurred and paid reasonably, and in good faith, and without default on the part of the agent. Cases may occur, however, in which he would be justified in making advances without special directions, and under exigencies not provided for by the regular rules of the business. Though, as has been mentioned, urgent danger without means of referring to the principal for instructions may sometimes justify advances, otherwise unauthorised, it is certain that payments merely voluntary and officious cannot be claimed by an agent, though intended for the benefit of the principal. Nor if he has incurred unreasonable, useless, or superfluous expense, will the principal be bound to make reimbursement thereof, for it will be imputed to the fault, or negligence, or unskilfulness of the agent. This doctrine, so consonant to reason and justice, was also recognised in the civil law. In order, therefore, to entitle an agent to indemnity or allowance for disbursements made by him, they must, in general, be such as are warranted by his instructions, express, or implied, or sanctioned by the subsequent acquiescence of the principal. An agent is not justified in investing the property of his principal in any manner, not authorised by the terms of his contract, however beneficial to the principal the prospect may be. But even in the execution of his appointed duty, if an agent conduct himself with such unskilfulness as to incur unnecessary expenses, he cannot obtain reimbursement. If an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, he will be entitled to full compensation therefor. And it has been laid down as a general principle of law, that an agent who commits a trespass or other wrong to the property of a third person by the direction of his principal, if at the time he had no knowledge or suspicion that it was such a trespass or wrong, but acted *bona fide*, will be entitled to reimbursement from his principal for all the damages he may sustain. But it is not every loss or damage for which the agent will be entitled to reimbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency. If, therefore, the losses or damages are casual, accidental, oblique, or remote, the principal is not liable therefor. In short, the agency must be the cause, and not merely the occasion, of the losses or damages, to found a just right to reimbursement, (*Ersk. Inst.*, 3, 3, sec. 34, 38.) This also was the rule promulgated in the civil law, (*Pothier Tr. de Mandat*, N. 76.) It has been said that if an agent abroad, as, for example, a foreign factor, should, at his own risk and peril, evade the payment of foreign customs and duties, he would still be entitled to charge them against his principal as if they had been actually paid. But it is proper to add that Justice

Story has gravely doubted whether this doctrine is sound or maintainable, (*Story's Com.*, sec. 343.) With respect to agencies in illegal transactions, the same principles apply to advances and disbursements by agents as apply to their commissions. None are recoverable. An agent may not only forfeit his title to the repayment of advances, made on account of his principal, where the transactions are in themselves illegal; but he may also, by his own gross negligence, or fraud, or misconduct in his agency, be excluded from all remedy against his principal, even for his advances and disbursements made in the course of legal transactions. It follows, from what has been already stated, that if an agent incurs expenses or makes disbursements after his authority is revoked, and he has notice of the revocation, he cannot make his principal liable therefor. (See *Story's Com.*, sec. 323, 350; *Lloyd's Paley*, pp. 100–121.)

The factor or agent having no goods in his possession, or money in his hands, due to his principal for his security or indemnification, is entitled to claim on his bankrupt estate, (1) for the balance in account between him and the principal; and (2) for relief or indemnification from any proper liabilities which, as factor, he may have undertaken for the principal, (1 *Bell Com.* 491.)

It has been decided by the Court of Session that the quinquennial and triennial prescriptions do not apply to accounts between a commission agent and his principal, (*M'Kinlay & Co.*, 11th Dec., 1851, 24 Jur., 71.)

(To be continued.)

THE LIABILITIES OF PARTNERS OF JOINT STOCK COMPANIES.

RECENT commercial disasters have invested this branch of the law of partnership with an interest and an importance which, perhaps fortunately for Scotland, have not hitherto attached to it. We propose, in the present paper, to inquire into the extent of the liability of members of such partnerships, as it is regulated and determined by recent legislation and decisions.

The great objects of the Joint-Stock Companies Act, as now amended, are, to produce uniformity in the constitution and management of such companies—to secure such an amount of publicity regarding their affairs as may warn parties interested and the public against flagrant mismanagement—and, where embarrassment ensues, to provide statutory facilities for winding up, and for the equitable distribution of the loss among the parties involved.

All Joint-Stock Companies consisting of more than twenty persons, formed for any other purpose than that of banking or insurance, and in a limited class of cases banking companies also, are *required*, and all other banking companies are *permitted*, to register themselves under the Joint-Stock Acts. All companies established for any other purpose than insurance may be registered either with or without limited liability. Where they are limited, the shareholders are liable to the extent of the sum, if any, unpaid, on the shares held by them respectively, and little difficulty will arise in adjusting the amount of their liability. But the extent of the obligation of partners, in companies registered with unlimited liability, is not always so easily determined.

Before registration each individual member of an unlimited company is subject to action and diligence at the instance of the creditors of the company. In this respect *registration* operates no change. By sec. 116 of the Joint-Stock Companies Act, (19 and 20 Vict., cap. 47) it is provided that "the registration of "any existing company under this Act shall not, nor "shall any act of the company subsequent to such "registration, prejudice any right which, previously "to such registration, has, or which would, if no "such registration had taken place, have accrued "to any creditor or other person against the com- "pany in its corporate capacity, or *against any "person then being, or having been, a member of "such company;* but every such creditor, or other "person, shall be entitled to all such remedies against "the company in its corporate capacity, *and against "every person then being, or having been, a member of "such company*, as he would have been entitled to in "case such registration had not taken place."

In the case of banking companies, it would rather appear to have been intended to deprive creditors of the right of execution against individual shareholders. But if this was the intention, the enactment is clearly ineffectual. It is provided by sec. 10 of the Joint Stock Banking Companies' Act, 1857, (20 and 21 Vict., cap. 49), that "all such actions *as may at the time of the registration have been commenced*," by, or against a company, or the public officer thereof, may be continued; "nevertheless execution shall not issue against the *effects* of any individual shareholder," upon any decree obtained against the company in any action "*so commenced as aforesaid.*" So that protection is only given in the few cases in which proceedings may have been actually *commenced* at the time of registration—and that only to the *effects*, and not to the person of the shareholder. The right of direct *action*, at the instance of a creditor, against individual shareholders, is not cut off,—and execution may issue against the effects as well as the persons of shareholders, on a decree obtained against the company in proceedings commenced *after* the date of registration.

When the affairs of a company become embarrassed, the shareholders are subjected to another liability—or rather to another mode of enforcing their limited liability,—that is, *contribution*. This obligation emerges when a winding up has commenced. The winding up may be either (1) purely voluntary, or (2) purely judicial, or (3) it may partake of both characters, and be voluntary in its origin, but carried on under the supervision of the Court. It is in any case conducted by Liquidators, who are appointed by the company in voluntary, and by the Court in judicial liquidation.

The measure of the obligation to contribute to the assets of the company, is declared to be (sec. 61, Joint-Stock Companies' Act, 1856), an amount sufficient to pay the debts of the company, and the expenses of winding up; and in the case of banking companies (sec. 9 of the Banking Companies' Act), "the same amount that he [the contributory] would, "if this Act had not been passed, have been liable to "pay to the company, or for or on account of any "debt of the company, in pursuance of any action "that might, if this Act had not been passed, have "been instituted or enforced against himself or the "company."

The phraseology of the section last quoted leads to the belief that it was intended to substitute the liability of shareholders to contribute for their individual and direct liability to creditors, but there is no provision in voluntary liquidation, superseding, or in any way controlling the right of action and diligence of the creditors. It would therefore appear that a creditor of a company, being wound up voluntarily, is entitled to select and sue any individual shareholder for payment of his debt, although, at the same moment, the liquidators may be enforcing payment of calls made by them upon the general body of the shareholders. In judicial or semi-judicial liquidators, however, a discretionary power is conferred on the Court to protect individual shareholders from such proceedings, by sec. 6 of the Amendment Act, 1858 (21 and 22 Vict., cap. 60), which enacts that in such cases, "No suit, action, or other legal "proceedings shall be proceeded with or commenced "against the company, or the public officer thereof, "*or any member of the company, in respect of a debt of "the company, except with the leave of the Court, and "subject to such terms as the Court may impose.*"

The Liquidators in voluntary, and the court in judicial liquidations, may at any time after the commencement of the winding up, "and before they have "ascertained the sufficiency of the assets of the com-"pany, or the debts in respect of which the several "classes of contributories are liable, call on all, or any "of the contributories, *to the extent of their liability*," (i.e., if a limited company, to the extent of the sums unpaid on the shares held by each contributory; and if an unlimited company, to the extent necessary to pay the debts and expenses) "to pay all or any sums "they deem necessary to satisfy the debts of the "company, and the costs of winding it up." The calls so made may be enforced summarily, the Court being required—on production of a list of contributories in arrear, certified by the liquidators—to grant decree therefor, of which no suspension is competent, except on caution or consignation, unless with special leave of the Court or the Lord Ordinary, sec. 5 and 14, 21 and 22 Vict., cap. 60. Lumsden, 11th December, 1858.

Having shown the *extent* of the liability of shareholders, first, to creditors directly, and, secondly, by way of contribution, we shall, in resuming this subject, examine the provisions of the statutes and the decisions, as bearing upon and defining the parties who are liable to contribute, and the special circumstances in which exemption from that liability has been allowed.

FEES FOR BUSINESS IN SHERIFF COURTS.

The Court of Session is now about to frame a Table of Fees for business done in the Sheriff Court, and with this view, the Sheriffs have been requested to consider and report upon the subject. The matter deeply affects the local practitioner, and it is desirable that the various Faculties and Societies should take up the question, and press upon the committee of Sheriffs, or if need be, the Court of Session, or the Secretary of State for the Home Department, whose sanction must be obtained to any table, the result of their experience, and their views in regard to the principle and amount of fees to be allowed. The Procurators in the Sheriff Court at Greenock have already issued a memorandum on the subject, which will be found in this number, and to which we would solicit attention, as containing a clear statement of sound principles on which they have agreed the table should be framed. The Faculty of Procurators in Glasgow have also taken up the subject, and have caused communications to be made to all the more important local bodies with the view of ascertaining what fees are now allowed, and what is the difference between the expense of a process now, and that of one prior to the passing of the Sheriff Court Act of 1853.

Meantime, it may not be inopportune to notice a few of the points on which a decided expression of opinion should, we think, be given.

I. The amount of the fees should depend upon the value of the cause. By the Act of Sederunt of

1849, this principle was recognised, but to too limited an extent. It provided that there should be two scales—one for causes where the sum concluded for does not exceed £25, and another for causes where the sum concluded for exceeds that sum. It has been urged that in large cities and towns the fees should exceed those allowed in other places, and there is some reason in the request; but substantially the same result will be obtained by adopting three instead of only two scales. A third and higher scale for cases whose value exceeds £100, would be principally applicable to cases arising in the larger cities and towns, and the practitioners there would thereby justly earn an enhanced remuneration, without introducing any invidious distinction between them and their brethren in the less important districts.

It will not, we believe, be disputed that the value of a cause, as it determines the amount of the agent's responsibility, and as it increases his anxiety, is and should be an essential element in estimating his remuneration. It does not appear to be practicable, nor is it desirable, to reduce the fee to a commission or poundage—it is enough to draw a distinction between cases involving a certain sum, and others involving a greater sum, by making the fees generally so much lower in the one than the other.

II. The fees for debates ought to be fixed irrespective of the time occupied. In Courts where counsel only are heard, the agents, who are familiar with the cases, and can calculate the amount of labour required to master it and to argue it, may and do judge of the amount of the honorarium, so that the fee in each case depends very much upon the nature of the case itself. It is impossible, however, to carry this into practice in the Sheriff Courts. The time consumed in argument is not by any means a criterion of the difficulty or importance of a case. Three or four hours may be consumed by one, while another would state the same case, more ably and logically, in one hour. So that in very many—we believe in the majority of cases—payment by time would be a profit to dulness, and a reward to prolixity. Besides, it is a recognised fact, that preparation leads to brevity; and it is pretty well known that the judge is sometimes compelled to listen, while the pleader reads a tedious record, that he may learn what his case is about, because, till then, he has not taken the trouble to look into it. Under a system of payment by the hour, this would be a lucrative, as well as a lazy style of conducting a debate. The principle, reduced to practice, would be just this,—the less preparation, the larger fee, and the more preparation, the smaller fee. We do not maintain that a fixed fee for a debate, in every case involving a certain sum, would absolutely meet the circumstances of each case. In some it may be too large, and in many it may be too small; but it is the only practicable rule which can be found to meet the greater number of cases.

III. The whole fees allowed for preparing for, and conducting proofs should be revised. At present, a fee of 5s per hour for attending the proof, and a merely nominal sum for precognoscing, only are allowed. The importance of this stage of a process cannot be over-estimated. Omissions cannot afterwards be supplied, nor can mistakes be remedied. A closed proof contains all, in point of fact, on which either party can rely in dealing with disputed averments. It is necessarily, therefore, an anxious and harassing duty to examine and cross-examine witnesses. All possible turns of the case must be provided for—the competency of every question watched—objections stated and answered—and questions carefully framed and put. In short, the case is very often lost or gained by the manner in which the proof is conducted. For this, 5s, and in some cases 4s an hour is considered adequate remuneration! It is not a compensation for the wear and tear of the body. It would be difficult to apply the same rule to proofs as to debates; and so far as we see at present, the remuneration must be regulated by the time occupied in leading the proof; but it should certainly be double what it now is. There are just as much labour and anxiety and skill required in examining witnesses before the Sheriff as before a jury. In the one case the whole rests upon one person, in the other we have counsel and agents. The difference between the two cases is most apparent in the remuneration.

MEMORANDUM BY THE FACULTY OF PROCURATORS IN GREENOCK AS TO THE FEES TO BE ALLOWED TO PROCURATORS IN THE SHERIFF AND COMMISSARY COURTS.

This Faculty having been invited by the respected Sheriff of the County to state their views as to the fees for business transacted by Sheriff and Commissary Court Procurators, appointed a committee of their number to consider the whole matter. That committee had under consideration the tables of fees proposed by Faculties and Societies of Procurators in other parts of the country, and after carefully going over them, prepared a table which, with some alterations, was approved of by the Faculty. The table, as approved, is now annexed; and as, with the exception of the Cupar Procurators, this Faculty, so far as the members are aware, is the only body which has ventured upon a revision of the whole table,—and as, in several instances, the charges proposed in the Greenock table are higher than those suggested in the Cupar table, the following explanation of the principles on which the Greenock table has been constructed is considered necessary:—

1st. It is an admitted principle, that when a professional man has to deal with important interests, involving on his part the exercise of much care and skill, and implying a heavy responsibility, he should be adequately remunerated. The tendency of legislation, and the mode of conducting professional business for many years past, have been such, that the country practitioner is now entrusted with transactions of the most important description, and has to apply himself to questions of the greatest nicety and difficulty; and, while his brethren in the metropolis can at all times have the benefit and the protection of the advice of counsel, he is obliged to discharge his duties, often in a great emergency, without the benefit of any advice, and without relief from the heaviest responsibility. But while all this is the case, and while his responsibilities have increased, his remuneration has been lessened. Under the present system, when the Record happens to be made up without a Condescendence and Defences, the remuneration to the agent for preparing the Record is merely nominal. The Summons, under the present form, is scarcely ever more than one sheet in length; and for this, whatever be the amount at stake, the agent is only entitled to five shillings! The fees at present allowed for Court Attendances and Debates are also very inadequate. The Auditor will not allow a fee for attendance in the Court unless a decision is pronounced by the Sheriff; and an agent is often obliged to waste a forenoon in waiting on the calling of a cause, without receiving a farthing for his trouble:—And the fees allowed for Debates do not at all remunerate the agent for his labour and anxiety. In important cases, in which there is much detail, and necessity for reference to many authorities, an agent is often engaged for some days in arranging the details of the case, and in collecting authorities, and the case itself may occupy some days in the discussion. Were such a case debated in the Court of Session, the Agent would have instructed Counsel in a memorial, for which a considerable charge would have been allowed, and would have fees for consultation with, and writing to Counsel, etc., and for attendance in Court at the Debate, and a large fee would also be paid to Counsel; but the highest fee which, under any circumstances, a Procurator before our Court can receive for a Debate in the most important cases, including all previous trouble, does not exceed £2 2s. By the annexed table an attempt is made to remedy in some measure the injustice to which Procurators are at present subjected in these respects.

2d. While it is the fact, that cases of great importance, and involving serious professional responsibility, are now tried before the inferior tribunals—such is peculiarly the fact as regards a largely frequented seaport and wealthy community like Greenock. The questions discussed before the Court at Greenock principally relate to mercantile transactions connected with delivery of cargoes, recovery of freights, or of furnishings or repairs to vessels, collisions, average losses, damages, arrestments of vessels and of persons in *meditatione fugæ*, stoppage in transitu, etc. In these cases the necessity for promptitude in applying the legal remedy is generally such, that the Agent cannot get the benefit of the advice of Counsel, but must act without much time given him to deliberate, and on his own knowledge and responsibility; and large sums are often at stake in the proceedings. In all such cases, and particularly where diligence is required against persons or property, a fee should be allowed proportioned to the responsibility incurred by the Agent. In England, the Officials known as the "Sheriffs," who are responsible for the execution of such diligence, are allowed a per centage on the debt to cover their responsibility. This Faculty conceive that an Agent can only be properly remunerated in such cases by adopting a similar principle, and accordingly the table is framed on this principle so far as regards the business relating to this class of cases. Under this head it may be remarked that the fees allowed for Protesting Bills stand at present as they were fixed in 1833, and scarcely afford to the Notary the remuneration which would be given to a common porter. By a recent Statute a Protest has been dispensed with for the preservation of recourse, and is only required as the foundation of summary diligence. It is thus at all times an act involving considerable professional responsibility, and as it requires the services of a person who is not only an Agent but a Notary, the fee for it ought to be raised at least to the amount stated in the table.

3rd. The only other point on which remarks seem necessary is as regards the fees allowed to the Country Agent for business sent by him to the Court of Session. In such cases the Country Agent has often much trouble, and often renders material service, but the practice of the last and of the present Auditor has been to allow him almost nothing as remuneration. In Jury cases especially his knowledge of the facts and of the Witnesses is most useful, particularly at the trial—and fees ought to be allowed him in all cases in which the Edinburgh Agent and Counsel shall certify that he did the work for which he charges, and that it was of service in the case.

4th. The Faculty propose that there should be three Scales of Charges:—1st, for causes under £25; 2d, for causes under £100; and 3d, for causes above £100.

PROPOSED TABLE OF FEES.

Table of Fees.	Scale I.	Scale II.	Scale III.
	£ s. d.	£ s. d.	£ s. d.
1. Taking instructions and noting information for framing Summons or *Petition* or Defences, ...	0 5 0	0 7 0	0 10 0
2. All original writings, comprehending Summons, Petitions, *Petitions* of Executry, Tutorial, Curatorial, or other *Edict*; Petitions under Brieves, Exeambion Law-boroughs,			

Table of Fees.	Scale I. £ s. d.	Scale II. £ s. d.	Scale III. £ s. d.
Cessio Bonorum, or for Sealing Repositories, Complaints for Breach of Sequestration, and under the Poor-Law or Bankrupt Statute, *Petitions for Commission*, and generally for the writing by which any Process or Application is first brought before the Court, *except Petitions for Service*, and also for drawing Inventories in Processes of Cessio Bonorum and Juratory Caution; and for Condescendences and Defences, and for all necessary States, Schedules of Intimation, Requisition, and Protest, and Precepts of Arrestment, per sheet,...	0 4 0	0 5 0	0 6 0
In addition to the above, an ad valorem Fee to be added to the charge for Framing Summons and Petitions, and Precepts of Arrestment, ...	0 10 0	0 15 0	1 0 0
3. *Notices of Appearance, Reponing Notes*, per sheet, ...	0 4 0	0 5 0	0 5 0
4. Drawing Papers of any other description than the above, and Diligence against Witnesses, or Havers, per sheet, excepting as under No. 11, ...	0 3 0	0 4 0	0 5 0
Note.—Where a Paper necessarily exceeds 20 sheets, each sheet above 20 sheets to be charged, ...	0 2 0	0 3 0	0 4 0
5. All necessary Copies *of Papers*, per sheet,...	0 1 0	0 1 0	0 1 0
6. Making up Accounts of Expenses of Process for Taxation, *in actions defended and undefended*, and also necessary Copies of States, Copies of Accounts of Expenses *for Process*, and to be furnished to opposite party, and Notarial Copies, per sheet, ...	0 1 6	0 1 6	0 1 6
7. After the Record is closed and a *Debate* or Proof is allowed, a full Copy of the Record on both sides and Minutes of Procedure *and of important productions* will be allowed, and a Copy of the Proof will be allowed to each party if a Debate on the Proof is ordered otherwise than to take place instantly on the conclusion of the Proof.			
Note.—It is recommended that the full copy of the Record shall be made up with the Answers following the relative averments, or in columns, so as to present the statements of parties as nearly as possible together.			
8. *Drawing* Inventory of *Production or* productions lodged (with or *without* any written pleading or application) not exceeding 10 numbers, ...	0 1 0	0 1 6	0 2 6
9. And for each additional 10 numbers or *any fractional portion of* 10, ...	0 1 0	0 1 6	0 2 6
10. Each necessary Letter and intimation *of appearance to defend an Action or of an Appeal*, or of Diet of Proof, *and prorogations thereof*, exclusive of Letters intimating an Interlocutor or step, for which a separate charge is allowed, and those excluded by Regulation V., referred to in Table of Fees of 10th March, 1849. (This not to regulate letters as between Agent and Client,) ...	0 2 6	0 3 4	0 3 4
11. Revised Condescendence or Answers, or other Papers, appointed by the Judge to be revised, *if made a separate Paper*, per sheet,	0 1 6	0 2 0	0 2 6
APPEALS.			
12. Drawing and Lodging or Minuting a Note of Appeal, ...	0 2 6	0 3 6	0 5 0
13. *Note craving an Oral Hearing*, ...	0 2 6	0 3 6	0 5 0
14. Enquiries as to whether Appeal Minuted, ...	0 2 6	0 3 0	0 5 0
COURT AND OTHER ATTENDANCE.			
15. Fee for each Interlocutor, and attendance at each calling of the cause at which anything, not being a prorogation or renewal of a previous order, is done, or minuted, ...	0 2 6	0 3 6	0 5 0

Table of Fees.	Scale I. £ s. d.	Scale II. £ s. d.	Scale III. £ s. d.
Note.—This Fee includes intimating to the client the business done at the attendance for which it is allowed, *but copies of important Interlocutors and notes sent to clients to be allowed besides.*			
16. *Enquiring for and procuring copy of each Interlocutor, besides charge of copy*, ...	0 1 0	0 1 0	0 1 0
17. Fee for attendance at, or connected with the adjustment and closing of the Record, where there are Condescendence and Defences, inclusive of writing minute consenting (once only); see Regulation VI. and VII. referred to in Table of Fees of 10th March, 1842, ...	0 7 0	0 10 0	0 15 0
18. Where the Record is closed under the Summary Form of Schedule D of the Statute, including preparation and Fee for closing,...	1 1 0	1 11 6	2 2 0
19. Procurator's Fee for Debates, viz—			
(1.) *Debating Preliminary Pleas*, ...	0 15 0	1 1 0	1 11 6
(2.) *Debating Relevancy, or Incidental points before or after the Record is closed, if at different Diet from closing Record, and ordered or allowed by the Judge*, ...	0 15 0	1 1 0	1 11 6
(3.) At the Debates under the 5th, 12th, 16th, and 22d Sections of the Statute, 16 and 17 Victoria, cap. 80,	1 1 0	2 2 0	3 3 0
20. Attendances at Proofs, Depositions, Declarations, Examinations, or Judicial Inspections, or before Reporters or Judicial Referees, or at Consignation of money, or uplifting same, per hour,...	0 4 0	0 5 0	0 7 0
Note.—No Fee to be exigible for any Debates written during the Diets of Proof. The Fee exigible by a Procurator acting as Commissioner, where the proof is necessarily taken by a Commissioner, to be the same as that of the Agent, exclusive of the Agent's Precognition Fee.			
21. To the Commissioner's Clerk for writing per sheet, ...	0 0 6	0 1 0	0 1 0
22. For time spent in preparing for Proof and in Precognoscing each Witness actually examined, or whose examination has been rendered unnecessary by procedure subsequent to precognition,...	0 2 6	0 3 6	0 5 0
Note.—The Sheriff may disallow the expenses of evidence which he considers to have been unnecessary. The Auditor shall satisfy himself that a Precognition was actually taken.			
23. The necessary outlay of Agents incurred in travelling to attend Inspections, Commissioners, Reporters, or Judicial Referees, and to precognosce Witnesses, serve a Protest, or any similar necessary business, to be allowed only when they are necessarily required to go to a distance from the place where the Court is held, and when vouched to the satisfaction of the Auditor. (No charges for subsistence to be allowed.)			
GENERAL AGENCY.			
24. *Getting Summons signed*, obtaining Extracts of Decrees Interim or Final, *and Protests*, and for procuring warrants of any kind, for which a fee is not specially allowed, and which are not embraced in an Interlocutor for which a fee is allowed, *including certified copies of Interlocutors*,...	0 2 6	0 3 6	0 5 0
25. Instructing Officer to Serve Summons, Petition, Edict, Brieve, or other instrument requiring Service, excluding Arrestments, or instructing the Clerk of Court or Officer to execute any Warrant and Revising Execution, ...	0 2 6	0 3 6	0 5 0
Note 1.—When more Executions than one at the same stage of the Process are necessary, one-half of this Fee is to be allowed for revising each necessarily separate Execution.			

Table of Fees.	Scale I. £ s. d.	Scale II. £ s. d.	Scale III. £ s. d.
NOTE 2.—*If in the circumstances it shall be expedient to send an Officer from the seat of Court, the Officer's proper charges to be allowed.*			
26. Instructing Counsel to prepare written Pleadings, or to attend a verbal Debate, wherever the Judge shall either authorise or subsequently approve of such employment,.....	0 3 4	0 6 8	0 6 8
27. Revising a Paper, prepared by Counsel, or attendance at oral debate by Counsel, when such employment is so authorised and approved of, ...	0 7 6	0 10 0	0 15 0
28. Presenting Summons or Petition after Service, *and making inquiries if compearance by defender*, ...	0 3 6	0 5 0	0 5 0
29. Presenting any other Paper at the Clerk's Office and getting it marked and entered in the Process Inventory, and for ordering caption to force back papers, ...	0 1 0	0 1 0	0 1 0
30. *Enrolling and intimating object of Enrolment*,	0 1 6	0 2 6	0 3 6
NOTE.—*This Fee to be allowed only where 12 hours' notice is given before calling.*			
31. Each necessary Borrowing, ...	0 0 6	0 0 6	0 0 6
32. *Fee for returning the process and getting receipt dated by Clerk*, ...	0 0 6	0 0 6	0 0 6
TAXATION			
33. Attendance at Taxation of Expenses by Auditor when Decree is in Absence, ...	0 1 0	0 1 6	0 2 0
34. Attendance at Taxation of Expense by Auditor in a litigated Process, and under Diligence where the Account of Expenses is under £5, ...	0 3 6	0 3 6	0 3 6
Above £5, and under £20, ...	0 3 6	0 5 0	0 5 0
Above £20, *and under £50*, ...	0 5 0	0 7 6	0 7 6
Above £50, ...	0 7 6	0 10 0	0 15 0
35. Auditor's Fee Taxing Accounts in Decrees in absence, ...	0 1 6	0 1 6	0 2 6
In litigated Cases when Account is under £5	0 3 6	0 3 6	0 3 6
£5, and under £20, ...	0 6 0	0 6 0	0 6 0
£20, and under £50, ...	0 10 0	0 10 0	0 10 0
Above £50, ...	1 0 0	1 0 0	1 0 0
PERSONAL AND OTHER DILIGENCE.			
36. *Agency taking instructions to record a Protest of Bill*, ...	0 2 6	0 3 6	0 5 0
37. Instructing Officer to charge or arrest, and revising his Execution, ...	0 5 0	0 7 6	0 10 0
38. Copy Executions for Record, per sheet,... ...	0 1 0	0 1 0	0 1 0
39. Procuring Executions recorded, ...	0 2 6	0 3 6	0 5 0
40. Drawing Minute for Fiat, ...	0 4 6	0 5 0	0 6 0
41. Agency procuring Fiat, ...	0 2 6	0 3 6	0 5 0
42. Instructing Officer to apprehend upon a Fiat or any other Warrant,...	0 5 0	0 7 6	0 15 0
43. Framing State of Debt, per sheet, ...	0 2 6	0 3 6	0 4 6
44. *Copy of do., per sheet*, ...	0 1 6	0 1 6	0 1 6
45. *If the Debt shall be recovered by the Agent or Officer, after a charge given, or Arrestment used, the Agent shall be allowed*, ...	0 5 0	0 7 6	0 10 0
And at the rate of Ten Shillings for every Hundred Pounds or part of a Hundred, ...			
POINDINGS.			
46. Instructing Officer to Poind, ...	0 3 6	0 7 6	0 10 0

Table of Fees.	Scale I. £ s. d.	Scale II. £ s. d.	Scale III. £ s. d.
47. Reporting Poinding and Attendance at procuring warrant to Sell, ...	0 4 0	0 5 0	0 7 6
48. Copy Warrant for Service, Instructing Officer, making out Account of Expenses for Taxation, Attending Auditor and Framing State of Debt for Sale, including ordering Sale. Nos. 5, 24, 6, 34, 43, and 44.			
SALE.			
49. Fee on Reporting Sales under Poindings or Sequestrations, or any other Judicial Sales, including procuring approval of Roup Roll,	0 3 6	0 5 0	0 7 6
50. Fee on obtaining warrant to pay, ...	0 2 6	0 3 6	0 3 6
51. Fee for conducting Sale, whether by the Procurator or a person not the Procurator; Roup Roll, *under £50, 7½ per cent.; above that and below £100, 5 per cent.; for all above £100, 5 per cent. for the first £100, and £2 10s per cent. for surplus, besides Auctioneer's Fee*, and the necessary outlay, and 1s per sheet for an Assistant Clerk.			
DILIGENCE AFFECTING HERITAGE.			
52. Applying for Letters of Inhibition, Interdiction, General and Special Charge, Hornings against Superiors, and the like, ...	0 3 6	0 5 0	0 7 6
53. Instructing Officer to Charge, ...	0 5 0	0 7 6	0 10 0
NOTE.—Where separate Executions are necessary, half-fee additional for each to be allowed.			
54. Fee getting Recorded, ...	0 5 0	0 7 6	0 10 0
55. Copies for Record, per diet, ...	0 1 0	0 1 0	0 1 0
NOTE.—Where Inhibition or Introduction, etc., requires to be recorded in different Counties, half-fee additional to be allowed for getting Recorded in each additional County.			
ADVOCATIONS.			
56. Intimating to Clerk of Court and opposite party, ...	0 0 0	0 5 0	0 7 6
57. To Advocator's Agent for procuring Bond of Caution, and getting it executed and lodged,	0 0 0	0 5 0	0 7 6
58. To Agent of opposite party for inquiries as to sufficiency of Cautioner, ...	0 0 0	0 5 0	0 7 6
59. Any Discussion or other proceedings will be regulated as in secs. 3, 4, 9, 12, 13, 15, etc., of Table of Fees of 10th March, 1849 (*Nos. 2, 4, 10, 15, 19, 20, of this Table.*)			
LOOSING ARRESTMENTS.			
60. Fee procuring Bond of Caution and getting it executed and lodged, ...	0 4 0	0 5 0	0 7 6
61. Fee obtaining Loosing, ...	0 2 6	0 3 6	0 3 6
62. The Fees for any Inquiries or Discussions occurring here to be regulated as in Advocations.			
AFFIDAVITS.			
63. Same as in *Nos. 1, 2, and 5 of this Table.*			

Table of Fees.	Scale I. £ s. d.	Scale II. £ s. d.	Scale III. £ s. d.
ADVERTISEMENTS.			
64. Of Sales, or wherever ordered by Statute or by the Judge, per sheet, ...	0 4 0	0 5 0	0 6 0
65. One Fee only for ordering insertion whether in one or more Newspapers, ...	0 3 6	0 5 0	0 7 6
APPEALS TO CIRCUIT COURT OF JUSTICIARY.			
66. Drawing Appeal, per sheet, ...	0 4 0	0 6 0	0 8 0

Table of Fees.	Scale I. £ s. d.	Scale II. £ s. d.	Scale III. £ s. d.
67. Procuring Bond and getting signed and lodged, ...	0 4 0	0 6 0	0 8 0
68. Serving Copy, Indorsing Certificate, and Lodging with Clerk, ...	0 4 0	0 6 0	0 8 0
69. All the other Business to be charged for according to the Fees for similar Business in the foregoing Table, excepting Attendance in Court when the Appeal is discussed, for which a charge per hour will be allowed of,	0 4 0	0 6 0	0 8 0
PROCURATOR FISCAL.			
70. For his concurrence when required, ...	0 2 6	0 3 0	0 3 6

Table of Fees.	£ s. d.
TUTORIAL, CURATORIAL, AND EXECUTRY.	
71. Drawing Tutorial or Curatorial Inventories, or Inventories of Executry, where the value of the Estate is under £100, per sheet, ...	0 6 0
£100, and under £500, ...	0 8 0
£500 and upwards, ...	0 10 0
72. Agency conducting proceeding under Tutorial or Curatorial Edicts and Brieves where the value of the Estate is under £100, ...	0 5 0
£100, and under £250, ...	0 10 0
£250, and under £500, ...	0 15 0
£500, and under £1000, ...	1 1 0
£1000, and under £2000, ...	1 11 6
£2000 and upwards, ...	2 2 0
73. *Ad valorem Agency Fee in Confirmation of Executry, viz., where the value of the Estate is under £100,*	0 10 6
£100, and under £300, ...	1 1 0
£300, and under £750, ...	1 11 6
£750, and under £1000, ...	2 2 0
£1000, and under £2000, ...	3 3 0
Thereafter add £1 1s a thousand up to £5000, and thereafter 10s 6d per thousand up to £10,000.	
74. *Ad valorem Agency Fee for preparing and passing Residue and Succession Duty Accounts respectively, viz., where the value of the Estate is under £100,*	0 10 6
£100, and under £300, ...	1 1 0
£300, and under £750, ...	1 11 6
£750, and under £1500, ...	2 2 0
£1500, and under £3500, ...	3 3 0
£3500, and upwards, ...	5 5 0
SERVICES.	
75. Drawing Petition for Services, first sheet, 10s; each subsequent sheet, 6s.	
76. *Ad valorem Agency Fee in Service, where the value of the Heritage falling to the heir, estimated at 20 years' purchase of the Rental, is under £100,*	0 10 6
£100, and under £300, ...	1 1 0
£300, and under £750, ...	2 2 0
£750, and under £2000, ...	3 3 0
£2000, and upwards, ...	4 4 0
PROTESTING BILLS.	
(1) Noting.	
77. When the Sum does not exceed £12, ...	0 2 6
When above £12 and not exceeding £25, ...	0 3 6
When above £25 and not exceeding £100, ...	0 5 0
When above £100 and not exceeding £250, ...	0 7 6
When above £250 and not exceeding £500, ...	0 10 0
When above £500 and not exceeding £1000, ...	1 0 0
When above £1000, at the rate of £1 per every £1000 or part of £1000.	

Table of Fees.	£ s. d.
(2) Protesting Foreign Bills and Entering in Protocol.	
78. One Fourth of the above Fees to be allowed additional.	
(3) When Protest Extended.	
79. For extending the Protest, the Notary to be allowed 2s 6d additional to the Fees for Noting.	
80. If the Notary has to travel beyond the town he resides in, he will be allowed an additional charge of 2s for each mile, which shall include his travelling charges.	
FEES IN BANKRUPTCY PROCEEDINGS.	
81. Meeting with Bankrupt and concurring Creditor, receiving instructions to apply for sequestration, ...	0 10 0
82. Drawing Affidavit by concurring Creditor, same as No. 69; drawing Petition for Sequestration, same as No. 2; any other Petition, Letter by Trustee to Creditors of Notice of Dividend, or of Application for Discharge, Trustee's Report to Sheriff or Lord Ordinary, same as No. 4.	
83. Attending Statutory and other General Meetings of Creditors—	
If not exceeding an hour, and Minutes not longer than two sheets, ...	0 10 6
For every hour beyond the first, ...	0 7 6
If Minutes more than two sheets, and charged according to length, per sheet, ...	0 6 0
But *not* to be charged both by time and according to length.	
85. Agency lodging Minutes and Oaths of Creditors with Sheriff, obtaining deliverance by Sheriff declaring Interim-Factor or Trustee elected, Diet fixed by Sheriff for Bankrupt's examination, Agency getting Bond of Caution signed by Trustee, taking out Act and Warrant from Sheriff-Clerk, and transmitting same as Bill Chamber Clerk.	
For each of these separate acts, ...	0 6 8
86. Drawing Abbreviate of Trustee's Confirmation, ...	0 6 0
87. Consultations with Trustee as to interrogatories to Bankrupt, or in regard to affairs of estate, attending at Bankrupt's examination or his declaration on offer of Composition, advising Trustee as to deliverance on claims of Creditors.	
For each hour, ...	0 6 8
88. Attendance at Decree of Exoneration and Discharge being pronounced, or Deliverance approving of Composition.	
Fee for each act, ...	0 6 8
89. Ordering and taking out extracts of Decree, approving of Composition or Discharge, and attendance getting up Trustee's Bond of Caution.	
Fee for each act, ...	0 6 8
90. Attending Meetings of Trustee and Commissioners.	
Each hour, ...	0 6 8
91. Drawing Bond of Caution for Composition.	
Same as Personal Bonds, according to value of estate as shown by Trustee's Report.	
Note.—All these fees for Bankruptcy proceedings to be charged under Scale III.	

The "Scottish Law Journal" will be published in the first week of each month, Price One Shilling, post free.

The Editors are desirous that the Journal should contain the Reports of all Cases decided in the various Sheriff Courts in Scotland involving points useful or interesting to the Profession, and would therefore solicit a Report from either of the Agents in each such case, or from the Sheriff. It will be necessary to have the Report signed by one of the Agents or the Sheriff, to ensure its correctness, except in those cases where the party reporting is known personally to the Editors.

The Editors will take no notice of anonymous communications, and will not hold themselves bound to return articles or communications not found suitable.

Advertisements can be received till the evening of the 23d of each month. All communications to be addressed to the Editors, care of the Publishers.

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, JULY, 1859.

ADMIRALTY JURISDICTION OF THE SHERIFF.

THE High Court of Admiralty of Scotland was abolished in 1830; and its jurisdiction was then transferred to the Court of Session and the Sheriff Court. By the 22d section of the Statute 1, William IV. cap. 69, it is enacted "That the Sheriffs of Scot-"land, and their Substitutes shall, within their re-"spective sheriffdoms, including the navigable rivers, "ports, harbours, creeks, shores, and anchoring "grounds, in or adjoining sheriffdoms, hold and "exercise original jurisdiction in all maritime causes "and proceedings, civil and criminal, including such "as may apply to persons residing furth of Scotland "of the same nature as that heretofore held and "exercised by the High Court of Admiralty." By the immediately preceding section, it is enacted that all such causes, not exceeding the value of £25, shall be instituted and carried on, in the first instance, in the Sheriff Court. To remove doubts, which are said to have arisen as to the extent of the jurisdiction thus conferred upon the Sheriff, it is, by the 21st section of the Statute 1st and 2d Victoria, cap. 119, enacted and declared that "the powers and jurisdic-"tions formerly competent to the High Court of Ad-"miralty of Scotland in all maritime causes and pro-"ceedings, civil and criminal, shall be competent to "the said Sheriffs and their Substitutes, provided the "defender shall, upon any legal ground of jurisdic-"tion, be amenable to the jurisdiction of the Sheriff "before whom such cause or proceeding may be "raised."

These are the enactments on which the Admiralty Jurisdiction of the Sheriff rests; and the important question to be considered by the local practitioner is, whether, and if so, in what cases civil actions against foreigners can be competently instituted in the Sheriff Court.

In the case of *Morrison* v. *Munnoch*, 11th July, 1837, which was decided before the passing of the Statute last referred to, it was held by the Lord Ordinary (Fullarton) that an action against a party who resided in England, concluding for payment of an account for ship furnishings made in Leith, by a ship chandler there, could only be competently brought, in the first instance, before the Sheriff of Edinburgh. After a reclaiming note had been lodged, the case was compromised; and the question does not seem to have been again raised. The terms of the Statute are so explicit, that it is difficult to conceive what argument could have been urged against the judgment of the Lord Ordinary. The provision of the 22d section of the Statute first referred to seems equally clear—to this extent, at least, that jurisdiction in all maritime causes, whether brought against persons residing in or furth of Scotland, is thereby conferred on the Sheriff. According to this reading of the Statute, however, the Sheriffs undoubtedly had a cumulative jurisdiction, so that the pursuer in a maritime cause, where the defender was furth of Scotland, might have resorted to any Sheriff Court in the country. This has been remedied by the subsequent Statute, by which it is required that the defender in such an action shall, upon some legal ground of jurisdiction, be amenable to the jurisdiction of the Sheriff. So qualified, the Admiralty Jurisdiction conferred on the Sheriff extends no further, as regards persons furth of Scotland, than his jurisdiction in other cases. The question must always be whether the defender is, on any legal ground, apart from the Statute of 1 William IV., amenable to the jurisdiction of the Sheriff. Where the defender is furth of the kingdom, the Sheriff's jurisdiction must arise *rationæ rei sitæ* or *rationæ contractus;* and in many maritime causes jurisdiction is so conferred. On no other grounds does it seem competent to institute an action against a foreigner in the Sheriff Court; and in this respect a maritime cause is in no more favoured position than any other.

Under the Merchant Shipping Act, 1854, all actions or proceedings under the Act, other than prosecutions for felonies or misdemeanors, may be brought in a summary form before the Sheriff of the County, where the cause of such prosecution or action arises, or where the defender may be for the

time; and provision is made for these actions and proceedings being conducted in the most summary way. This jurisdiction, however, is an exception to the ordinary Admiralty Jurisdiction of the Sheriff —and in all cases in which his claim is not founded on the Statute, the pursuer must see that the defender is, on some legal ground, amenable to the jurisdiction of the Sheriff.

MANDATE OR AGENCY.

(Continued from page 78.)

CHAPTER V.

THE RIGHTS OF THIRD PARTIES AGAINST THE PRINCIPAL, INCLUDING THE LIABILITIES OF THE LATTER TO THE FORMER.

As far as the agent's authority extends, he has a right to bind his principal to third parties. His authority may be either expressly given or inferred from the acts of his principal. When it is expressly given, there can be no doubt as to its extent, except from the uncertainty of the words employed in delegating it. If it is to be inferred from the conduct of the principal, that furnishes the evidence of its extent, and it must be measured by the extent of his usual employment. The nature of the authority to be inferred, and the sufficiency of the principal's acts to raise the inference, must, of course, depend on the special circumstances of each case, and involve questions fit for the consideration of a jury. However, as the employment is the measure of the authority to be inferred, if there was no previous employment, there can of course be no inference of authority; and an employment in one line of business affords no inference of authority to act in another. An agent may thus be tied down by very strict directions as between himself and principal, whom he may, notwithstanding, have power to bind by contracts, unauthorised by, and even in defiance of such directions. Cases of this sort occur when a *general* agent, as he is called, exceeds his instructions. The authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him. But the rule is directly the reverse concerning a *particular* agent, *i.e.*, an agent employed specially in one single transaction; for it is the duty of the party dealing with such an one to ascertain the extent of his authority, and if he do not, he must abide the consequences. The Courts are so far liberal in construing authority given to agents, that they will hold it to include permission to use all necessary, or even usual means, of carrying the main intention of the principal into effect. Though the foregoing observations chiefly refer to contracts, the principal will be equally bound by any act done by the agent in the course of his employment, and with reference to the object of it; for a man cannot delegate another to transact his business and refuse to be responsible for his conduct in transacting it. *Chancellor Kent*, in his learned commentaries, uses the following language: "It is a "general rule, standing on a strong foundation and "pervading every system of jurisprudence, that where "an agent is duly constituted, and names his princi- "pal, and contracts in his name, the principal is re- "sponsible and not the agent."

When an agent having a proper authority purchases in the name of his principal, it is clear that the principal is bound to the vendor; if, however, the vendor, preferring the credit of the agent to that of the principal, agree with the former to accept him as debtor instead of the latter, he cannot afterwards alter his election, turn round, and charge the principal. It seems also to be a general rule that whenever the agent is a British and the principal a foreign merchant, the seller will be considered as having given credit to the former, and that he and not the foreigner is liable.

Payment or tender of payment to an agent in the course of his employment is reckoned payment or tender of payment to the principal; but the payment must be in the course of his employment, for otherwise he will have no express authority, and there will be nothing whence to deduce the existence of an implied one. It is a general rule of law that if a creditor employ an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal. A factor is, by the nature of his employment, authorised to receive payment for the goods of which he disposes; yet a payment to him will not exonerate a debtor who has received express notice from the creditor not to pay his factor.

As payment to an authorised agent is payment to his principal, so a delivery to the former is a delivery to the latter—thus a delivery of goods to a carrier's servant is delivery to the carrier himself. This instance and many others only exemplify that general maxim upon which the whole law of principal and agent hinges, *qui facit per alium facit per se.*

Where credit has been properly given to an agent on a purchase for the use of his principal, the vendor has in general a right to come upon the latter for payment, without regard to any transaction or account between the principal and the agent. Therefore, no private agreement, by which it is stipulated between the principal and agent that the latter only is to be answerable to the seller, can affect the right of the latter. What is here said, however, does not affect the case of servants to whom money is paid *in advance* to purchase goods with, and who notwithstanding are allowed by the sellers to deal upon credit—in such cases, the credit itself being unauthorised by the

masters, they are not liable. It was before hinted that in all those cases where the principal, notwithstanding his having paid his own agent, would remain liable, yet the vendor may, by his conduct in giving credit to the agent, discharge the principal of that liability. Thus also if a vendor neglect to call upon the principal till long after the credit expires, the principal may have a right to presume either that the money is paid over by the agent, or that the creditor takes him for his debtor.

There is a material distinction between the character of a factor and that of a broker, which it is proper here to point out. The latter, when selling for a *known* principal, has not in general authority to receive payment, and if payment be made to him, it is at the risk of the purchaser. But if he act for a principal *undisclosed*, he has authority to receive payment. An insurance broker has authority from the assured to adjust and receive payment of a loss. By the general rule of law, the sale by a factor creates a contract between the buyer and the principal, and therefore, in general, the buyer, *after notice* from the principal not to pay the factor, is not justified in doing so. If the principal allow the broker to deal with goods as if he were the principal, payment to him discharges the debt of the buyer. This subject underwent much consideration and discussion in the English case of *Baring* v. *Corrie*, (2 B. & A., 137.)

By the employment of an agent, the employer becomes civilly responsible for his care and diligence to those who make use of him in his business. In noticing the authority to this purpose, reference will be directed to some which may seem to belong rather to the law of master and servant than to the proper subject of these papers; but as the principles now under discussion are derived from that source, these authorities cannot be deemed irrelevant.

1. A master is responsible for negligence or unskilfulness of a servant acting in the prosecution of his service, though not under his immediate direction. The general principle has been extended, so far in England as to make the employer responsible, at least in some cases, not only for the act of his immediate agent, but for that of a sub-agent employed by him. The Civil Law seems to have confined the liability resulting from the acts of servants to the case where the servant was chosen by the master and under his immediate control.

2. But the responsibility of the master for the servant's negligence or unlawful acts is limited to cases properly within the scope of his employment. Nor is the master liable for the wilful and malicious act of his servant whereby damage is occasioned to another. This constructive negligence or misconduct arising from the acts of an agent has been held not to attach to some public offices.

3. The principal has been thought to be responsible, not merely for the negligence, but for the deliberate fraud of his agent committed in the execution of his employment, though without the principal's authority, as for instance, by selling false jewels for true ones. Such, certainly, was the opinion of the Roman lawyers: *Procuratoris scientiam et dolum nocere debere domino neque Pomponius dubitat neque nos dubitamus.* (Dig. 14, lib. 4, *Ulpian.*)

4. The principal is never answerable for the criminal act of his deputy—they must each answer for their own acts, and stand or fall by their own behaviour.

Any unlawful meddling with, or conversion of property by a servant or agent in the service of his employer, subjects the latter to an action. The previous command or subsequent assent of the master to the trespass of his servant, makes him liable as a trespasser. But he is not liable for trespasses committed by his servant beyond what his directions extend to, nor is he answerable for any excess committed in the execution of his lawful command. The responsibility of the principal is confined to acts done either under his express directions, or in his service, and therefore under his constructive command. Where several agents are employed, the remedy for the injuries sustained by the act of one of them, must be either against the first employer, or against the party by whom the injury is immediately occasioned.

The party who avails himself of the act of an agent, must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by a power of attorney, it must be proved by the production of the instrument itself, that it may appear whether the authority has been pursued. And if the act be such as could only be done under a written authority, it seems requisite to produce it, or to account for its non-production. But in other cases it is sufficient to prove that the agent has acquired credit by acting in that capacity, and has been recognised by the principal in other instances. In all actions founded on the acts of agents, whether upon contracts, or for injuries done by them, for which damages are sought against the principal, it is necessary to give such evidence as establishes the relation between master and servant. When the general relation does not exist, it must be shown in the particular instance. In all mercantile transactions, except where the authority is specially given by power of attorney, or other express commission in writing, the fact of usual employment from which the public is justified in giving credit to the person so employed, forms the usual evidence of authority; or where no previous authority can be proved, it is often sufficient to prove a subsequent

assent by the person for whom the act is done, and his accepting the benefit of the act amounts, in many instances, to proof of such assent.

We have next to inquire how the agent's power to commit his principal to third parties may be determined. It will be so by the revocation of his authority; by his own renunciation of it, at all events if accepted by his principal; by performance of the commission; by the death of the principal; or by his bankruptcy. The effect of insanity upon the relation of principal and agent seems not yet well settled. (See the question discussed in *Story's Com.*, p. 435.) The power of revoking an authority may be exercised at any moment before the actual fulfilment of it. An authority conferred by letter of attorney must be executed during the life of the principal; for a power to represent another can only continue as long as there is some one to be represented. "A power coupled with an interest," (said Lord Ellenborough,) "cannot be revoked by the person "granting it, but it is necessarily revoked by his "death." It has been questioned, with respect to an agent acting under a power of attorney, whether acts done by him before he knows of the revocation of his warrant are good against the principal, and it seems that the principal in such case could not avoid the acts of his agent done *bona fide*, even if they were to his disadvantage, though he might consent to avoid such as were for his benefit. In general, the credit arising from ostensible employment continues, at least with regard to those who have been accustomed to deal upon the faith of that employment, until they have received notice of its being at an end, or till its termination is notorious. The rule of the Civil Law guarded against detriment, either to the agent or to those contracting with him by the sudden revocation of his authority. *Nemo potest mutare consilium suum in alterius injuriam.* (Dig. 50, lib. 17.) *Si tibi mandassem ut fundum emeres postea scripsissem ne emeras tu antiquam scias me vetuisse emisses mandato tibi obligatus ero ne damno officiatur is qui suscipit mandatum.* Pothier goes further, and lays it down that an agent has, in such cases, a right *faire cequi est une suite necessaire de ce qu'il avait commence.* (Pothier de Mandat. N. 121.)

The claims of third parties against the principal and his estate have been enumerated by Mr Bell in his Commentaries (Vol. 1,) as follows:—

1. The agent's contract entered into as factor for a known principal, forms a good ground of action or claim against the principal, provided the power is proved, and the limits duly observed. And there will be no action against the factor unless the principal is abroad. In such cases, (1,) If the claim is against the principal, as the buyer of the goods for the price, it is merely for a dividend, even although the goods be still with the agent distinguishable. (2,) If the claim is against the principal as seller of the goods, for delivery or for damages, it is also in this case merely personal. But if the agent act in a neutral capacity as a general commission agent, uniting the business of a custodier with that of a broker acting for both parties, the property may, in such situations, be held as transferred to the effect of vesting a real right in the buyer.

2. When the contract is not in the principal's name, but generally as with a factor, the election will be with the third party to hold to the credit of the factor, or to seek his remedy against the principal. And the remedy against the principal will not be hurt either, 1st. By any private agreement between the principal and the factor, that the factor alone shall be responsible; or, 2d. Where the principal has paid the price to his agent who has squandered it, unless the day of payment has been allowed to pass, and the principal has been led to believe that the agent alone was relied on; or, 3d. By the circumstance of the factor failing with a large balance due to the principal.

3. Where notice is given of the principal, and the third party chooses to rely on the factor, he will be entitled so to do; but will not also have his claim against the principal.

4. Even where the factor contracts in his own name, the principal is bound to the third party on his name and interest being disclosed. "The law," says Lord Ellenborough, "has been settled by a variety of cases, "that an unknown principal, when discovered, is liable "on the contracts which his agent makes for him." But this is to be taken under these limitations:—1. That if he knowingly have elected the agent as his debtor, he will not have his remedy against the principal; and 2. That where the principal is induced to settle with the factor by means of documents, etc., furnished to the agent, the principal will be discharged. Where the principal is made liable, he and the factor will reciprocally have the benefit of their private stipulations as to responsibility, and of their corelative rights in respect to the state of the balance in account between them. The third party is entitled to hold the factor as the principal, so that a purchaser of goods from a factor may resist a demand for the price by the principal on the ground of compensation or set-off. An exception is admitted to this rule in England in the case of a broker, who is so far different from a factor that a factor is trusted with possession of the goods, and persons dealing with him cannot know whether he is proprietor or not, whereas a broker is not so trusted, and the employer is entitled to rely on his own name, while third parties can be deceived only through their own neglect. (*Baring* v. *Currie*, 1818, 2 *B. and A.* 137.)

5. A *del credere* commission affects the settlement only between the principal and factor relative to money to be received from third parties—as a factor with a *del credere* is responsible that the buyer shall pay the price. But although the factor will, on the buyer's failure (himself being solvent) have a right to claim on the buyer's estate in satisfaction of his obligation to guarantee, he is not so much a creditor as, on the one hand, to deprive the buyer of the benefit of retention or compensation against the principal, nor, on the other, to give to his own creditors the benefit of the claim against the buyer, while they pay only a dividend to the principal. In the former case, compensation or retention against the principal will discharge the guarantee, and so be a good answer to the factor's claim. In the latter the principal will have his claim against the buyer in the bankruptcy, and also against the factor on his guarantee.

6. Claims may sometimes be available to third parties against the estate of the principal, in consequence of the acts of the agent, though unauthorised by the principal. Thus—1. Representation by the agent in the strict course of the contract will be taken to form a part of the contract with the principal, and the concealment or misrepresentation of the agent will also affect the principal. 2. On the same principle, notice to a factor or agent will be held as notice to the principal, provided such factor has power to treat and negotiate the contract. And 3. The principal is liable civilly for the neglect or fraud of his agent, committed in execution of the authority with which he is invested. (See *Story's Com. on Agency; Lloyd's Paley*, pp. 155–318; *Smith's Compend.*, pp. 116–142.)

CHAPTER VI.

RIGHTS OF PRINCIPAL AGAINST THIRD PARTIES.

As the principal is bound by the acts and contracts of his authorised agent, so he may reap the advantage of them, and if one person contract even without authority in the name of another, that other, though he may repudiate the contract, may, if he think fit, adopt and enforce it. Such contracts made for the benefit of another, but without his priority or sanction, may be rejected or affirmed at his election. But then he must adopt the contract *in toto*—he cannot ratify what is beneficial to himself and reject the remainder. It is a maxim which is daily acted upon, that if a factor sell goods for his principal, the action may be brought against the purchaser for payment either in his own name or in that of the principal. And even if an agent, acting for an undisclosed principal, have made a contract *in his own name*, the principal may sue upon it. If, however, an agent be permitted to deal as if he were a principal, the party dealing with him, and ignorant of his representative character, is entitled to the same rights against him, as if he were in fact the principal. Thus, if the factor should sell in his own name, as owner, and not disclose his principal, and act ostensibly as the real and sole owner, though the principal may afterwards bring his action upon the contract against the purchaser, the latter, if he *bona fide* dealt with the factor as owner, will be entitled to set off any claim he may have against the factor in answer to the demand of the principal. It has been seen that a purchaser is discharged by payment to a factor, unless where notice has been given by the principal not to pay to him, and the payment, even after such notice, is warranted in the following circumstances:—(1), Where the factor acts under a *del credere* commission in which the principal gives credit to him, and he to the buyer. (2), Where the factor has a lien upon the price which entitles him to receive the payment. Upon the same principle that a party contracting with a factor as principal is entitled to the same right of set-off in an action by the principal that he could have had in an action by the agent, he may also discharge himself in such action by any payment to the agent, which would have operated as such to the principal.

The right of the principal to receive money or goods, paid or wrongfully transferred by an agent, is next to be considered. Money paid by an agent may be recovered back by the principal under any of the following circumstances:—(1), Where the consideration fails. (2), Where money is paid by an agent through mistake. (3), If money be illegally extorted from an agent in the course of his employment, the principal may sue for it. (4), Where the money of the principal has been fraudulently applied by the agent to an illegal and prohibited purpose, it may be recovered back by the principal from the fraudulent holder if it can be clearly traced, and by that means shown to be his.

When property is entrusted by an agent for any purpose, as for sale, etc., a transfer by him, agreeably to that purpose, and according to the usual course of trade, or his express commission, conveys a complete title to the holder. But a delivery, for a different purpose, or in a manner not authorised by the commission, passes no property in the thing delivered, and the principal, though he may affirm the transaction, may, if he please, repudiate it and recover the property thus improperly or fraudulently disposed of.

There are certain claims competent to the creditors or bankrupt estate of the principal as against third parties, which we shall now examine—

1. The creditors of the principal are entitled against the party with whom the factor has contracted to demand performance of the contract, but under certain qualifications. Thus, (1) where the factor has acted in his own name, and has been

relied on as principal, the third party cannot be deprived of the benefit of the securities which he could fairly contemplate as resulting from the contract; and so, as we have seen, he may set off against the demand of the principal for the price of goods sold by the factor, a debt due by the factor to himself. (2) Where the contract is impeachable for fraud or concealment by the agent, the objection equally affects the principal. (3) Even where the bargain has been made, as with a factor, the principal's claim will be affected by the factor's lien for his general balance, or by the factor's right to recover from the third party under a *del credere* commission.

2. The creditors of the principal are entitled to recover from a third party, to whom the agent has given over his goods, or paid his money, in the following cases:—1. Where the third party has the goods in temporary custody from the agent; but the demand will be subject to all legal liens, where the name of the principal was not disclosed. 2. Where the goods have been delivered, or money paid on such mistake, misrepresentation, concealment, or fraud, as would give the agent a remedy had he been the principal, there is *rei vindicatio* or *condictio indebiti* to the defender, as the true owner. 3. Where the contract is with the agent *factoriô nomine*, but beyond the terms of his power.

3. The estate of the principal has the full benefit of the delivery of goods to the agent, where he is not merely an intermediate agent to forward the goods, but the person in whose administration the goods are to be after delivery. (See 1 *Bell Com.*, p. 200, *et seq.* 490, 491, *Story's Commentaries on Agency*, *Lloyd's Paley*, pp. 223–347, 2 *Kent's Com.*, 632.)

CHAPTER VII.

RIGHTS OF AGENT AGAINST THIRD PARTIES.

THE rights which belong to agents are referable either to their representative or individual character, according as the object is the advantage of the principal, or their own indemnity.

With respect to the first, it is clearly admitted that, where a contract is made by a factor, an action may be brought upon it in his own name. And it is the same thing whether the contract be made by the factor solely upon his own credit, as is generally the case with factors abroad, or as the known representative of another, and it is indifferent whether he act under a *del credere* commission or not, for it is a right which is incident to his employment. And it is equally true of every other agent who has a special property in, and not the bare custody of that which forms the subject of the contract.

A factor may also have a right to enforce the payment of money to himself, in opposition to the claim of the principal. When a factor has a lien upon goods entrusted to him for sale, and which he has sold, pursuant to that trust, the lien attaches upon the price, and the factor has a right to receive it for his own indemnity.

Against third parties, the agent's estate has a right of action to the effect of preserving any lien or other security for indemnity against the principal. (See *Lloyd's Paley*, p. 361–364; *Smith's Comp.*, 148–149; *Bell Com.*, 493.)

CHAPTER VIII.

RIGHTS OF THIRD PARTIES AGAINST THE AGENT, INCLUDING THE LIABILITIES OF THE LATTER TO THE FORMER.

AN agent, contracting as such for a known and responsible employer, is not subject to personal liability to third parties. If the individual with whom he contracted knew him to be an agent, knew his principal, and knew that he intended to bind that principal, he will be taken to have trusted to the credit of the principal, and the agent will not be bound. No rule of law, it has been said, is better ascertained or stands upon a stronger foundation than this—that where an agent names his principal the principal is responsible and not the agent, (*Per Lord Erskine, ex parte Hartop*, 12 *Ves.* 352.) And factors or brokers, therefore, acting for their principals under a proper authority, are not in general liable in their individual capacities. There is one exception to this rule, viz., the case of masters of ships, who are responsible as well as their owners, on contracts for repairs or stores, or loans of money for those purposes.

Wherever a party undertakes to do any act or business as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible to the person with whom he is dealing for or on account of his principal. This doctrine proceeds upon a plain principle of justice, but it is founded upon the supposition that the want of authority is unknown to the other party, or if known, that the agent undertakes to guarantee a ratification of the act by the principal.

An agent contracting will be personally responsible where, at the time of making the contract, he does not disclose the fact of his agency, but treats with the other party as principal, for in such a case it follows irresistibly that credit is given to him on account of the contract; but in such a case the principal, when afterwards discovered, may also be liable. The same principle will apply to contracts made by agents, where they are known to be agents, and acting in that character, but the name of their principal is not disclosed. It is partly upon this ground, and partly upon the ground of convenience and the usage of trade, that the general rule obtains that agents or

factors, acting for merchants resident in a foreign country, are held personally liable upon all contracts made by them for their employers, and this without any distinction whether they describe themselves in the contract as agents or not, unless it appear that credit was given to the principal and not to the agent. Mr Smith observes that this is said to be for the benefit of trade, or is perhaps a branch of the following general rule, viz., that where there is no responsible employer the agent shall be held personally liable. (*Smith's Compend.*, p. 151.)

A person contracting as agent will be liable whether he is known to be an agent or not, in all cases where he voluntarily incurs a personal responsibility to third parties, either express or implied. He may bind himself by an express undertaking. He will be personally liable in all cases where he makes the contract in his own name. If the agent exceed his authority, so that his principal is not bound, he will himself be liable for the damage thus occasioned to the other contracting party, although he may have been innocent of any intention to defraud.

The question, whether an agent is personally liable for money paid to him for the use of his principal, under circumstances which would entitle some person to recover it from that principal, involves much difficulty. In the first place, it is clear that if the agent has, without notice to act otherwise, paid over the money to his principal, he never can be called on to refund it. (*See English Cases of Butler* v. *Harrison*, —*Coup.* 565, *and Stephens* v. *Badcock*—3 *B. and A.*, 354.) But an agent cannot defend himself, even on the ground of payment over to his principal, if he receive money *illegally* from a party who is not prevented from suing him by the rule, *pari delicto potior est conditio defendentis*. (*Miller* v. *Aris, Selw. N. P.* 8 *Ed.* 93.) Of course, if an agent pay money to his principal which was not entrusted to him for that purpose, he will not be discharged, *e.g.*, if a shareholder pay over the deposit before the condition on which it was to become due is performed.

Persons contracting as agents are nevertheless ordinarily held personally responsible where there is no other responsible principal to whom resort can be had. Justice Story has remarked that this doctrine proceeds upon the plain principle that he who is capable of contracting, and does contract in his own name, although he is the agent of another who is incapable of contracting, intends to bind himself, since in no other way can the contract possess any validity, but it would perish from its own intrinsic infirmity. (*Story's Com., sec.* 281.) The law in all these cases pronounces the same decision, that he to whom credit is knowingly and exclusively given is the proper person who incurs liability, whether he be the principal or the agent.

Hitherto we have been considering the personal liability of agents, on contracts with third parties, in cases of mere private agency. But a very different rule in general prevails in regard to public agents, for, in the ordinary course of things, an agent, contracting in behalf of the government, or of the public, is not personally bound by such a contract, even though he would be, by the terms of the contract, if it were an agency of private nature. But although this is the general rule, it is founded upon a presumption liable to be rebutted by circumstances, which clearly establish an intention between the parties to the contract, to create and rely upon a personal responsibility on the part of a public agent; but the proof ought to be exceedingly cogent and clear, in order to overcome the presumption of law, founded as it is upon the most obvious principles of expediency.

We come in the next place to the consideration of the liability of agents to third parties in regard to wrongs (or *torts* in English law), done by them in the course of their agency. And here (according to Story) the distinction ordinarily taken is between acts of *misfeasance* or positive wrong, and *nonfeasance* or mere omissions of duty. The law on this subject, as to principal and agent, is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances, and neglects, and omissions of duty of his servant, in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, neglects, and omissions of duty of his agent, leaving him to his remedy against the agent, in all cases where the tort is of such a nature that he is entitled to compensation. The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not so liable for his nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons, that existing only between him and his principal. And hence the general maxim as to all such negligences and omissions of duty is *respondeat superior*. This doctrine was expounded at large by Lord Holt, in his celebrated judgment in *Lane* v. *Cotton*, 12 *Mod. R.* 488. (See *Story's Com.*, sec. 308–322).

In bills, an acceptance by an agent is competent, and his authority to bind his principal may be proved by written or verbal instructions, or conduct importing due authority. It has been doubted if in this case summary diligence is competent, but it was held to be so in *Turnbull*, 26th Feb., 1822, 1 *Sh.* 353. The signature must be as agent or procurator—if the agent sign his own name merely, his principal is not liable as debtor in the bill (*Telfer*, 5th February, 1822, 1 *Sh.* 290; Reversed 26th May, 1824, 2 *Sh. App.* 219). An acceptance by a factor in his individual name, though expressly for value received by his constituent named, was yet held a personal obligation on the factor. (*Chiene*, 20th July, 1848,

10 D., 1523. *Wixon* v. *Deans*, 22d June, 1849, 11, D., 1188).

Claims by third parties against the agent's estate. It is a general rule (unless in the case of shipmasters), that agents, properly authorised, contracting for a known principal, are not personally responsible on such contracts. Therefore, where both the principal and the agent have failed, there is a claim only against the estate of the principal, not against that of the agent, unless the credit of the agent has been specially relied on, or the name of the principal has been concealed. But where the agent specially engages his personal credit, or where he exceeds his instructions, or where he is guilty of any fraud or misrepresentation, or negligence, a claim will rest against his estate by the third party. (1 *Bell Com.*, 494; *Story's Commentaries*, sec, 261–322; *Lloyd's Paley*, p. 368–402; *Smith's Compendium*, p. 150–156).

CHAPTER IX.

AGENT'S RIGHT OF LIEN OR RETENTION.

BESIDES the means of indemnity which all agents have by action or set-off, the law allows to factors and agents the additional security of a lien or right of retention upon goods and property in their hands. A lien has been defined to be a right in man to retain that which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied. It is a qualified right, therefore, which may be exercised over the property of another person; it is founded in natural justice, and has been pronounced to be for the general convenience of commerce. The lien of agents generally falls within the common definition above alluded to.

With reference to the general doctrine of lien or retention, it has been stated that this right results from possession, and so far is different from hypothec, and analogous to pledge. But it is not in every case that the mere circumstance of possession confers a right of retention. It is a right which arises only (1,) as the counterpart of a mutual contract, or (2,) by usage and common understanding in certain known cases, in which, for the convenience of commerce, it is held to be acquiesced in and implied between the parties. Within these limits, retention has been described as a right to retain a subject legitimately in one's possession until a debt shall be paid, or an engagement performed, the *jus exigendi* of which is in the possessor.

Liens are divisible into two sorts—particular and general. A *particular* lien is usually defined to be the right to retain a thing for some charge or claim, growing out of, or connected with, the identical property detained. The right rests on principles of natural equity and commercial necessity, and it prevents circuity of action, and affords security and confidence to agents. This lien is accordingly viewed with favour by the common law, and its privileges have been conferred on persons concerned in various trades and occupations which are necessary for the accommodation of the public. A *general* lien is a right to retain a thing, not only for charges and claims specifically arising out of or connected with that identical thing, but also for a general balance of accounts between the parties in respect to other dealings of the like nature. It is less favoured, and is construed somewhat more strictly by Courts of Law than a particular lien, although, certainly, the tendency of late years, in the commercial community, has been rather to expand than restrict the cases in which it is to be implied by the usage of trade. In regard to *particular* liens, they may arise in various ways: 1st, By an express contract. 2d, By an implied contract, resulting from the usage of trade, or the manner of dealing between the parties; or 3d, By mere operation of law from the legal relation and acts of the parties, independently of any contract. But *general* liens not being favoured by the law, they must be maintained upon some one of the two former grounds—that is to say, the ground of an express contract or that of an implied contract, resulting from the usage of trade or the previous dealings between the parties. The civil law, it may be observed, derived its own liens, whether they were pledges or hypothecations, or simple privileges, from similar sources. They might arise from contract either express or implied, or they might arise by mere operation of law. (*See Evans' Pothier on Oblig., N.* 589.) Having thus considered the nature of liens, particular as well as general, it may be proper to say a few words—

I. As to the manner and circumstances under which a lien may be acquired. To create a valid lien, it is essential that the party through whom or by whom it is acquired, should himself either have the absolute ownership of the property, or at least a right to vest it. If, therefore, he is not the owner of the property, or if he has no rightful power to dispose of the same, or to create a lien, or if he exceed his authority, or if he is a mere wrong-doer, in these and the like cases, it is obvious that he cannot ordinarily create a lien or confer it on others. If the rule were otherwise it would enable the party to give to others what he did not himself possess, which would violate the general maxim that he who has no title himself cannot transfer a title to another—*Nemo plus juris ad alium transferre potest quam ipse haberet.* In the next place, to found a valid lien, there must be an actual or constructive possession of the thing by the party asserting it with the express or implied assent of the party against whom it is asserted. This follows, as a natural consequence, from what has been already said, for a lien is a right to retain a thing which pre-supposes a lawful possession which can arise only from a just possession under the owner or other party against whom the claim exists. It will not be sufficient to constitute retention that there has been an intention of delivering possession, nor even that this intention has been partially executed if legitimate possession has not been actually completed. And the possession must be lawful, not acquired by fraud, nor by a void contract, nor by informal diligence, nor by mere accident. In the next place, no right of lien can arise where, from the nature of the contract between the parties, it would be inconsistent with the express terms, or the clear intent of the contract. This doctrine is entirely coincident with that of the Roman Law, which, in cases of sales, gave a lien for the purchase money on the thing sold, unless personal credit was given to the buyer.

(*To be concluded in our next.*)

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, AUGUST, 1859.

THE COURT OF SESSION.*

WHAT a field for improvement the Court of Session presents! In the light of modern progress its obstructive capabilities are its most striking characteristics. It looks in its constitution and procedure like some complicated machine, constructed for the very purpose of making difficult and tedious a process of the simplest kind. The wonder is that it has endured so long. Its venerable antiquity and our decidedly conservative spirit have been its safeguard. The members of the Court have hitherto shown no great love of reform in matters near themselves. In other departments of the law—in conveyancing, and in the procedure of Inferior Courts, the legislation of late years has done much to simplify and improve forms, and lessen delay and expense. These reforms have originated with the profession, and have been effected with its co-operation and approval. It is almost literally true to affirm that none of these changes have reached the Court of Session. It remains the cumbrous, expensive, unsatisfactory tribunal that it ever has been. Sitting scarcely six months in the year, and encumbered by forms and distinctions leading to interminable delay and serious expense, it is no marvel that the business of the Courts should be in arrear. The greater wonder is that the system has been so long tolerated. The very gentle changes which have been made have failed to produce any permanent improvement, just because they were so insignificant that they have not met the increasing requirements of the country, and far less, therefore, have they removed the grounds of complaint which set them in motion. We are unwilling to believe that this state of matters is the result of a selfish opposition to progress on the part of any branch of the profession. In other departments, as we have already remarked, the profession has shown no disinclination to improvements, even when these directly involved large pecuniary sacrifices; and it is not to be lightly assumed that the members of the Supreme Court are opposed to changes which the circumstances of a country increasing in wealth so urgently require. It may be that a feeling of jealousy—which unquestionably exists in some quarters—has prevented the progress, or more correctly, the inception of reform. Where the contest rages between classes, there is little attention to the general good. Now, no doubt the distinction between counsel and agent, which is so scrupulously maintained, and by the one at least so zealously insisted on, is one, if not the very greatest cause of the delay and expense of which so just complaints are continually made. The remedy may begin at other parts, but the result will not be complete until this source of the evils is taken away.

We are glad, therefore, to see that the writer of this pamphlet proposes to introduce the end of the wedge, by making it optional to employ an agent to plead before the Lords Ordinary. There will, of course, be opposition to this, not only because of its antagonism to the interests of the Bar, but because of the necessary result should it be found to work advantageously. We must expect to hear a good deal of the dignity of the Bench and the Bar, and the necessities of a high standard of education, and so on,—with all these we do not quarrel, let them be maintained and guarded with the most anxious care; but it must be admitted that the Bench and the Bar do not absorb the whole legal knowledge of the country—and surely the dignity of neither would materially suffer because the one came into immediate contact with the other, and the other listened to one whose instructions had come direct from his client. There is no mysterious result enhancing the dignity of the judge and the advocate by the knowledge of the fact that the instructions of the client, whose interests are at stake, have come not directly from him, but through an agent, or perhaps two. The only person benefited by the process is the advocate, who is saved the trouble and responsibility of making preliminary inquiries and arrangements, and in the doing of his own work, for which he is handsomely paid, receives the assistance of an agent, who is familiar both with the facts and law of the case.

But the writer proposes many changes in the

* Practical Hints for the Improvement of the Constitution and Procedure of the Court of Session in Scotland, by a Member of the Court. Bell & Bradfute, Edinburgh, 1859.

constitution and procedure of the Court. After giving a slight sketch of the constitution of the Court, he makes the following practical suggestions:—

I. As regards the constitution of the Court,

1. There should only be one Judge in each Inner Chamber of the Court,—certainly, and in any view, not more than three Judges.

2. The judgments of Lords Ordinary,—whatever their number,—should be final in all causes not exceeding in value £50.

3. Agents should conduct the causes before Lords Ordinary, leaving it optional to employ Counsel.

4. Two Lords Ordinary should sit in the Outer House for disposing of the business of the Bill Chamber, preparing records, issues, and granting diligences for recovery of writings, and for the trial of causes without Juries.

These alterations are based upon the following considerations:—

1. Every one attending the hearings of causes in the Inner Chamber must be struck with the amount of irrelevant discussion which occurs, less or more, in every case,—the time thereby consumed,—and the great additional waste of time occupied in *separate* speeches from *four* Judges.

If there was only one Judge in each Inner Chamber, it would be imperative on the Crown to appoint those only who possess the confidence of the public and of the legal bodies, and not as heretofore, from political considerations.

The attention of the Judge would be given with far more care, and less distraction; and the judgments would rest on the undivided responsibility of the Judge pronouncing them.

At all events, it seems impossible to justify the retention of four Judges in each Inner Chamber, or to object to the reduction of at least one of their number in each Chamber.

In the one case, the country would be saved the unnecessary expense of six, in the other of two, Judges.

2. It is by no means expedient to extend the jurisdiction of Sheriffs. The Sheriffs Principal, except in Edinburgh and Glasgow, are non-resident,—their office is almost a sinecure, and a reward, in every case, for political partizanship. *In many instances they are inefficient; in every instance unnecessary.* By a recent Statute their numbers are liable to a partial reduction, but this leaves the objections to the office untouched and substantially unredressed.

The Lords Ordinary would do the work now done by Sheriffs, far more efficiently,—and if the compulsory employment of Counsel was dispensed with,—at an expense not greater than is now incurred in the Sheriff Court causes. The judgments of the Lords Ordinary might with safety, and the greatest advantage to the country, be final in all causes of the value of £50. It would be mercy to litigants to enact such a provision.

If the Judges were reduced, in conformity with the foregoing suggestions, their number would be in the one case 7, and in the other case 11, in place of 13 as now; which would secure a saving to the country of £18,000 a-year in the former case, or £6000 a-year in the latter: besides a corresponding reduction in the clerks and other officers of the Court. The total saving would not be less than from £8,000 to £20,000 per annum.

3. The reasons for dispensing with the services of Counsel in cases of small amount, and, indeed, in all cases where the Client and Solicitor are not inclined to resort to their services, are numerous and unanswerable. (1.) The Admiralty and Commissary Courts were abolished by the Lord-Advocate of the day, to give a pretext for raising the salaries of the Judges from £2000 to £3000 a-year on the one hand, *and* to increase the business of the bar on the other. These Courts possessed supreme jurisdiction. The causes were conducted by Solicitors, without Counsel, and at one-tenth of the expense of the same causes as now conducted before the Court of Session, with the compulsory assistance of Counsel. (2.) The business of the Bill Chamber may be, and in many cases is now, conducted by Solicitors without Counsel. The causes there originating are of the highest importance, both in number and pecuniary amount. If Agents are entitled to conduct causes *there*,—can any good reason be stated why they should be excluded and debarred from doing so, even in matters of the most *pro forma* description, before the other Lords Ordinary? (3.) The whole causes in the Sheriff Courts are well conducted by Agents, without the aid of Counsel. *These causes too are numerous and important. Besides*, the records in all cases of suspension and advocation coming before the Supreme Court on appeal from the Sheriff Courts, are prepared by Agents in the Sheriff Court. No valid reason therefore exists for excluding the Solicitors in the Supreme Courts from resuming functions which were only recently and unfairly wrested from them, for the aggrandisement of the Judges and Advocates, and which they are as well qualified to discharge as any body of legal practitioners in the country.

By the existing practice, motions, as well as debates, are often postponed two, three, and even as many as ten times, by the absence of one or other of the Counsel in the cause. The delay thus arising is incalculable,—the expense enormous. No well employed Counsel can be got to attend to either motions or debates before the Lord Ordinary after the meetings of the Inner Chambers at 11 A.M. daily; and as they practise indiscriminately before both Chambers, and before the four Lords Ordinary, who sit daily, it is impossible that Counsel can discharge their duties to their clients, as business is conducted at present. The business of the Court must continue to be impeded to a degree almost incalculable, and oppressive and unnecessary expense to be incurred, until the services of Counsel are, to a great extent, dispensed with, and Counsel are attached permanently to each Inner Chamber and each Lord Ordinary.

It is impracticable, and indeed physically impossible, for Counsel to render efficient services before six separate tribunals sitting simultaneously; and it is a notorious fact, that according to the present practice, all well employed Counsel receive very large sums of money at an enormous loss to litigants, for which they never render, nor can possibly render any services whatever.

The expense of employing Counsel to obtain a decree in absence amounts to about one-third of the entire expense of the suit, in which such decree passes as matter of course.

The time of the Lords Ordinary is occupied for two or three hours every day they sit, in discussing motions, by far the greater number of which pass of consent, or *pro forma*, as matter of course. The Counsel, except in very rare cases, do not get fees for motions; and the Agents, who are perfectly qualified to make them, would receive no extra fees for doing the duty; and would be saved the great trouble and expense which they are put to at present, in gratuitously instructing Counsel.

It is chiefly in reference to applications for diligence that discussion arises in the Motion Roll. These should be granted as matter of course. There is no necessity for withholding documents, where a case is sued or defended in *bona fide*. Where there is an absence of good faith on either side, the sooner the truth is arrived at the better for all honest litigants.

The Legislature has of late years, on the instigation of the Faculty of Advocates, by repeated statutory enactments, abolished the ancient and prescriptive privileges of the Solicitors and Law Agents over all Scotland, by the suppression of the Admiralty and Commissary

Courts, in both of which the Agents in Edinburgh carried on a large and lucrative practice, without the aid of Counsel,—and by the sweeping changes introduced by the Conveyancing Statutes, which have cut down by more than one-half the most lucrative part of the business of Scotch Solicitors and Conveyancers. The argument of exclusive privilege cannot be listened to in the present state of society. The Solicitors have never attempted to plead their privileges against the interests of the public, by which their professional emoluments have been so extensively encroached upon; and all they contend for now is, that, with *a view to the public benefit*, they should be allowed to resume the position which they previously so long enjoyed, of conducting certain suits and legal procedure without the aid of Counsel. What objection can fairly be urged to the proposal, that litigants should be saved the expense of being compelled to employ Counsel in obtaining judgment or decrees in absence, and in all *pro forma* petitions and motions? The Solicitors already conduct all such business in the Bill Chamber, which is presided over by one of the Judges. They did so in the Supreme Commissary and Admiralty Courts. Why should they be debarred from doing similar acts before all the other Judges of the Court of Session? In many cases now, the Solicitors prepare the records, although these are signed by the Counsel. In all the cases which come up for review from the County Courts, the Attorneys or Solicitors before these Courts prepare and sign the records; and it is upon these same records that the Court of Session gives judgment as a Court of Review. They constitute probably a third of all the causes before the Court.

No doubt the Court has the power to open up these records on cause shown. But this is a power which applies to the record in every cause, in certain given circumstances.

The Solicitors in the County Courts not only make all motions, but they plead all causes on the merits, without Counsel; and at every local bar, men are found thoroughly qualified for all these duties.

The Solicitors in the House of Peers subscribe petitions and other incidental applications,—they make motions before the Lord Chancellor, and discuss all questions arising before the Appeal Committees. Is there any good reason why the Solicitors in Scotland should be precluded from the like privileges?

If the suggestions now made were adopted, the *legitimate* business of the bar would be increased, and divided amongst a much wider range of its members than under the present practice.

We hail with satisfaction the commencement of what we hope may be an earnest effort to reform abuses so apparent—and that all the more because the beginning is from within. Reform can only be effected by the efforts of those who are familiar with the system; and unless, therefore, the profession generally gives its labour and its interest to the work, it will not, and cannot be done. We only regret in this beginning to see that feeling of jealousy of the Inferior Courts which is too general in the Metropolis. "It is by no means expedient to extend the jurisdiction of the Sheriffs," says this writer. The country thinks otherwise; and the increase of jurisdiction, both in kind and degree, by the legislation of late years, has only strengthened the conviction that local Courts are of all Courts the most useful. The reason assigned by the writer for his opinion is, that in many instances the Sheriffs Principal are inefficient, and in every instance unnecessary. The inefficiency of the Sheriff Principal may, or may not be, admitted; but we presume it is no part of the system. As to their being unnecessary, we will not admit this until we get a better substitute for the present right of appeal, than an appeal to the Court of Session. In another place it is admitted that "the whole causes in the Sheriff Courts are well conducted by Agents, without the aid of Counsel." If a case is well conducted, it needs only that it be well decided, and the result is all that could be wished. No complaint is made against the decisions in Sheriff Courts; and we ask, therefore, why this writer thinks it necessary, when he pleads for the much needed reform of his own Court, to seek to stem the progress of reform in the other judicial establishments of the country?

MANDATE OR AGENCY.

(Concluded from page 92.)

2. We now proceed to inquire what are the debts or claims to which liens properly attach? In general it has been stated that they attach only to certain and liquid demands, and not to those which result only in damages, and cannot be ascertained otherwise than through the intervention of a jury. (*Story's Com.*, sec. 364). But on this point Mr Bell has observed that retention is extended to debts as well as corporeal subjects—in this shape it is carefully to be distinguished from compensation. Compensation is payment and extinction of mutual debts, whereas retention of a debt is nothing more than an implied security for performance—a power of suspension or right to withhold payment or performance till satisfied of some counter demand. Compensation, therefore, can be pleaded only where the debt, in extinction of which it is meant to be applied, is due and liquid. Retention, on the other hand, may be pleaded in security of debts *future, contingent, or illiquid.* (*Bell's Principles*, sec. 1411. See also *Ersk., B.* 3, *T.* 4, sec. 20, *et seq.*) In the next place, the debt or demand for which the lien is asserted, must be due to the party claiming it, in his own right, and not merely as agent of a third person. It must also be a demand or debt due from the very person for whose benefit the party is acting, and not from a third person, although the goods may be claimed through him. So the debt or demand, if claimed for a general balance of accounts, must be a balance arising from transactions of a similar nature with that upon which the particular lien arises. (See *Story's Com., ut supra*).

3. How a lien or right of retention may be waived or lost. This may be either (1) by parting with possession, or (2) by custom of trade, or (3) by con-

tract, or (4) by writing restricting the claim to personal credit. A voluntary parting with the possession of the goods will amount to a waiver or surrender of a lien: for as it is a right founded upon possession, it must ordinarily cease when the possession ceases. Such undoubtedly is the general rule universally recognised as to possession. But there are certain cases which constitute exceptions to the application of the rule, and in which, from favour to commerce, and having reference to the apparent intention of the parties, the lien is preserved, although the possession of the property is parted with. Thus, for example, a factor, who, by lawful authority sells the goods of his principal and parts with the possession under the sale, is not deemed to lose his lien thereby, but it attaches to the proceeds of the sale, in the hands of the purchaser, and also to the securities therefor, in the hands of the factor, in lieu of the original property. Indeed a factor, as we have seen, is deemed for many purposes the owner of the property, especially when he has demands upon it for advances and debts. Cases of a similar kind may occur where there is an express agreement between the parties that the lien shall not be lost by a transfer of the possession, for in all such cases the rule *conventio vincit legem* is applicable. Another exception arises where the possession has not been voluntarily parted with, but has been taken from the party by undue means. If he has quitted possession through fraud or mistake, the lien will subsist, for in such case it would be against the first principles of justice to allow the lien to be divested. Another exception is where the party parts with the possession *sub modo* only, as upon a pledge of his own lien for security. It has been stated, as a general rule, that the right does not revive on recovering possession, if it have once effectually ceased; and there is no stopping *in transitu* to preserve a lien, that being a right only as between vendor and vendee, or those substantially in that relation. (*Bell's Prin.*, sec. 1416). But in the case of a factor, the regaining of possession by fair means, in the course of the factory, will restore the lien differently from the rule in the common case of retention. This is a consequence of the broader right on which a factor's lien rests.

4. We must now inquire in what manner a lien may be enforced and taken advantage of? In respect to the rights conferred upon a party by a lien, it may be stated that they are generally of a very limited nature. As a lien is ordinarily nothing more than a right of retaining the property, the party possessing it cannot sell or dispose of the property in order to satisfy his lien, unless with the consent of the owner, either express or implied from the nature and objects of the very transaction. Thus, for example, if goods are consigned to a factor for sale, and he makes advances upon them, he is of course invested with a right to sell them, and may, out of the proceeds, satisfy his lien, or use it by way of compensation. A factor may also transfer the lien, and on such transference raise money, the assignee having the same right to retain which his cedent had. And although when a factor sends goods to a consignee or sub-factor without giving notice of his representative character, such consignee or sub-factor will have an effectual right of retention against the principal for money advanced on the goods, he can have no lien for his general balance against the primary factor beyond the amount of the primary factor's right to retain against his principal. But except in a few and limited cases of this sort, the right of the holder of the lien seems to be confined to a mere right of retaining, which may be used as a defence to any action for the recovery of the property brought against him, or as a matter of title or special property to reclaim the property by action, if he has been unlawfully dispossessed of it. The owner has a perfect right, however, to dispose of the property, subject to the lien, as he may think proper, and the party to whom he conveys it will have a perfect title to it, upon discharging the lien. It may be added that a lien is the personal privilege of the party, and cannot be set up by any third person against the principal, either as a defence or as a ground of action.

Having disposed of these general considerations in regard to liens, let us now inquire what liens belong to agents in general, and what belong to particular classes of agents. The former may be stated in a very few words, for in cases of agency there generally exists a particular right of lien in the agent for all his commissions, expenditures, advances, and services, in and about the property or thing entrusted to his agency, whenever they were proper or necessary, or incident thereto. This is strictly true in all cases of mere private agency, unless there is some private agreement, express or implied, or some usage of trade which repels or excludes the lien. Factors and agents for the purchase of goods, have also a lien on the same goods for the disbursements made and liabilities incurred by them in respect to such purchase; and unless the usage of trade, or the particular agreement or course of dealing between the parties affects the right, they are not bound to part with the possession of the goods, or to deliver them, or to ship them, subject to the absolute control and disposal of the principal, until they are reimbursed and secured for such advances and liabilities. Particular liens, then, belong to all classes of agents. Let us in the next place inquire to what classes of agents general liens appropriately appertain.

(1.) *Factors.*—Much of the foreign trade of the country is carried on by means of factors, and is greatly promoted by the factor having a general lien entitling him, without insisting on payment or retention for each individual transaction, to rely on a right of retention in the end for the general balance that may be due to him. It is now incontrovertibly established, both in England and in Scotland, as a matter of law derived from long usage, and admitted without proof, that factors have a general lien upon every portion of the goods of their principal in their possession, and upon the price of such as are lawfully sold by them and the securities given therefor for the general balance of the accounts between them and their principals, as well as for the charges and disbursements arising upon those particular goods. (*Stair*, 1–18, 7; *Ersk.*, 3, 4, 21; *Bell Com.* 114.) The general lien of a factor will attach, not only to goods which have actually come into the factor's possession in the lifetime of the principal, but also to

goods which, at the death of the principal, are *in transitu* to the factor, and afterwards come into his hands, where he has advanced money or accepted bills on account of them, to the extent of such advances or acceptances, and the incidental charges of the consignment. (2 *Bell Com.*, sec. 800.) This general lien, given to factors, has been established upon its manifest tendency to aid the interests of trade, and to promote confidence and a liberal spirit on the part of factors in respect to advances for their principals. With regard to the extent of the lien, it may be stated that it covers all salaries, commissions, advances of cash, engagements and guarantees which the principal is aware of or has authorised. But it will not cover debts due previous to the factory, nor debts afterwards assigned to the factor by creditors of the principal, unless where he has, at the principal's desire, interposed to pay the debts. The power which a factor has now by statute in England, he has always had at common law in Scotland. He may pledge as well as sell. A factor sells either *factorio nomine*, or in his own name, without mention of the factory. And (1) in both cases he has lien over the price not to be defeated by the principal. (2), Where no balance is due to the factor for which a lien can be claimed, the principal has action for the price in preference to the factor's creditors. (3), When the factor has sold in his own name, concealing the principal, the buyer may set off a debt due to him by the factor against the principal's demand for the price.

(2.) *Insurance Brokers.*—This class of agents have now, by general usage, acquired a lien upon the policies of insurance in their hands, procured by them for their principals, as also upon the money received by them upon such policies, not only for the amount of their commissions and the premiums for the particular policies, but also for the balance of their general insurance account with their employers. But the lien does not extend to cover any balance due upon a business transaction foreign to that of effecting policies of insurance, as the usage does not reach such a claim, although in many cases it may be made available by way of compensation; and in cases of bankruptcy, by way of mutual debit and credit. (2 *Bell Com.*, sec. 807, 812.)

(3.) *Bankers.*—A banker is a money factor, and in all cases where he acts as agent, he has a right of retention extending over all unappropriated paper in his hands, belonging to customers, for security of his balance on the general account, but not including bills discounted or bills appropriated. The practice in Scotland is to endorse bills sent to a banker; and (1), if taken to account, or credit be given, it is held a discount, and the bill belongs to the banker, and on his bankruptcy goes to his creditors; (2), if not taken to account or credit, but intended to be for recovery as agent, the banker has a lien for his balance, but on his bankruptcy his creditors have no right to take the bills as his. (2 *Bell Com.*, 118.)

(4.) *Common Carriers.*—They have a lien, not only for the freight and charges of carrying the particular goods, but sometimes, also, for the general balance of accounts due to them. Still, however, as has been well observed, this general lien is so little favoured as a matter of public policy that, if disputed, it must be shown to exist in the particular case, either by a general usage, or by a special agreement, or by a particular mode of dealing between the parties.

(5.) *Law Agents.*—A law agent is entitled to retain the papers of his client, comprehending title-deeds, securities, documents of debt, and others which come lawfully into his possession in the course of his employment, until he shall receive satisfaction for the amount of his business or professional account. (*Ersk.*, 3, 4, 21.) It does not cover the balance on the cash-account between the parties, nor advances of money even where the law agent is the natural channel of communication in the transaction, nor a yearly salary as agent. But an agent, employed to borrow money, has been found entitled to retain his client's title-deeds till the account of expenses paid by him to the lender's agent shall be repaid. (*Inglis*, 23d June, 1825, 4 Sh., 113.) Comprehensive, however, as the right of retention of title-deeds, securities, and documents of debt is, there is a clear exception of all papers which have been put into the agent's hands for a special purpose inconsistent with the claim of retention. (*Chisholm*, 8th March, 1825, 3 Sh., 630.) It confers no active right, but merely entitles the agent to retain the papers until either his account shall be paid, or a preference admitted in bankruptcy if his account be unexceptionable, or security found if his accounts be disputed. (*Paul*, 2d Feb., 1826, 4 Sh., 420. *Dobie*, 19th May, 1831, 9 Sh., 609.) The effect of this right against third parties is the most extraordinary of the consequences of the principle once admitted. And 1, Against personal creditors, in bankruptcy this right is equally effectual, as against the client himself. 2, Against singular successors and heritable creditors, an agent may retain the title-deeds of his client to the effect frequently of defeating their real security, and in this respect it may be doubted whether the right, admitted at first with great reluctance, has not been carried too far. 3, It has even been held effectual to an agent employed by an apparent heir, three years in possession of the estate, but who afterwards renounced, against the heritable and personal creditors of the defunct. 4, It is not effectual by an agent of an heir of entail against a creditor of the entailer adjudging. (See *Bell's Principles*, sec. 1442, and authorities there cited.) It has been much questioned whether the agent is bound to allow inspection of the deeds or entitled absolutely to withhold them. The rules as laid down seem to be these:—(1.) That a third party is entitled to have the retained deeds exhibited in evidence of a fact, or in support of a right adverse to the client, but not to have them produced to be used as a title in any right derived from the client. (*Dalrymple*, 18th July, 1771; *Elch. Hypothec*, 17.) (2.) That the client himself is not entitled to have them produced, even in *modum probationis*. (*Finlay*, 23d Jan., 1773, M. 6250.) (3.) That although creditors, and others deriving right through the client, cannot insist on having possession of title-deeds which the client himself cannot insist for, a substitute heir of entail is not precluded from inspection of the title-deeds by the right of retention pleadable against the heir in possession. (*Murray*, 2d Dec., 1829, 8 Sh. 161.) The agent's

right of retention expires, like other liens, with the loss of possession, and it may also be waived, but this must be done expressly, and is not to be presumed.

It may be here remarked that the mere fact of an agent having a lien upon the property confided to him, either for his commissions, advances, disbursements, or expenses upon that property, or for his general balance of accounts, does not limit the right of the agent to that mere fund, but the principal is still liable to him personally in an action for the amount of the same claims. For, by the general rule of law, an agent in such cases trusts both to the funds and to the person of his principal.

We may close this branch of our subject by a brief consideration of the rights and liabilities of sub-agents in regard to their immediate employers, and also in regard to the superior or real principal. It may be generally stated that, where agents employ sub-agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations, and are bound to the same duties in regard to their immediate employers as if they were the sole and real principals. This is the general rule. (*Ersk.*, 3, 3, 49.) But it is, of course, liable to exceptions. In regard to the real principal the general rule of law is, that if an agent employs a sub-agent to do the whole or any part of the business of his agency without the knowledge or consent of the principal, express or implied, the latter will not be entitled to claim from the principal any compensation for commissions or advances in the course of his sub-agency. But his sole remedy therefor is against his immediate employer, and his sole responsibility is also to him. But where, by the usage of trade or the express or implied agreement of the parties, a sub-agent is to be employed, there a privity is deemed to exist between the principal and the sub-agent; and the latter may, under such circumstances, maintain his claim for compensation both against the principal and the immediate employer, unless exclusive credit is given to one of them, and if it is, then the remedy is limited to that party. In regard to the lien of sub-agents it may be stated that, if no privity exist between the principal and the sub-agent, no lien can be acquired by the latter against the former, unless so far as he may claim by way of substitution the lien of his immediate employer. But wherever such a privity does exist the sub-agent will incur a direct and immediate responsibility to the principal, and not merely to the agent who employs him. He will also have a reciprocal personal claim against the principal, and will be clothed with a lien against him to the extent of the services performed and advances and disbursements properly made by him on account of his sub-agency. A sub-agent, who is employed by an agent to perform a particular act of agency, without the privity or consent of the principal, may also acquire a lien upon the property thus coming into his possession, against the principal, for his commission, advances and liabilities thereon if the principal adopts his acts, or seeks to avail himself of the property or proceeds acquired in the usual course of such sub-agency. But a sub-agent has no general lien upon the property of the principal on account of any balance due to him from the immediate agent, when he knows, or has good reason to believe, that the latter is acting for another person at the time of his sub-agency. At the same time, however, he will be at liberty to avail himself of his general lien against the principal to the extent of the lien, particular or general, which the agent himself has at the same time against the principal by way of substitution to the rights of the agent, if the acts of the latter are not fraudulent. In many cases, however, a sub-agent, who acts without any knowledge or reason to believe that the party employing him is acting as an agent for another, will require a rightful lien for his general balance. Thus, if a factor should sell the goods of his principal in his own name, without any notice to the purchaser that the goods were not his own, the purchaser would be entitled to set off a debt due to him from the factor against the price of the goods. The ground of this doctrine undoubtedly is, that where any person holds himself out as a principal, with the consent of the owner, third persons who deal with him *bona fide* are entitled to all the rights which they would have if he were the real principal. (For farther information on this important subject of lien or retention, reference may be made to *Story's Commentaries*, sec. 351–390; *Erskine's Institutes; More's Notes on Stair*, p. 131; 2 *Bell's Commentaries; Bell's Principles*, sec. 1410–1454; 2 *Kent's Com.*, p. 633–641; *Lloyd's Paley*, p. 127–151.)

CHAPTER X.

THE TERMINATION OF AGENCY.

THE authority of the agent may terminate in various ways:—

(1.) By the *revocation* by the principal. A mandate or power of attorney is, in general, from its very nature, revocable at the pleasure of the granter. This revocation may be effected not only expressly, but also tacitly or by implication, as when the principal by his posterior nomination of a second mandatory to do the same act, virtually revokes the power conferred on the first, (*Walker*, 13th Dec., 1837, 16 Sh., 217.) Even where a commission has been granted for a certain or extended period, as for the factor's life, it may still be recalled upon just grounds, as gross incompetency, (*Hetherington*, 14th July, 1714; *Mor.* 4047.) But in order that such a revocation may receive effect, it is requisite, (1) that notice thereof be communicated to the agent, and all acts lawfully done by him in virtue of his powers, prior to the receipt of such notice, are binding upon the principal. This salutary doctrine, it may be observed, was recognised by the Roman law. (*Dig.*, 17, 1, 15; *Pothier Traite des Oblig.*, N. 80.) And the agent can conclude a transaction which was not entire but partly executed under the power when the notice of the revocation was received, and bind the principal by those acts which were required to consummate the business. (*Borthwick*, Dec., 1676; 3 *Br. Sup.*, 115.) The principal may, without doubt, be compelled to act in such a case and indemnify the agent, (*Ersk.*, 3, 10–40; *Story on Ag.*, 489,) though, as Chancellor Kent has observed, it seems difficult to sustain the act of the agent after his power has been revoked, for he becomes a stranger after the revocation is duly announced, (2 *Kent's Com.*, 643); (2) that in mer-

cantile commissions, where the factor is invested with a character which gives him credit with the public, the recall of his authority must be duly notified to third parties, if the constituent would relieve himself of liability for his subsequent actings. But to establiah such publication as will be deemed sufficient for the attainment of his object may often be attended with some degree of difficulty. Perhaps the analogy of the publication necessary on the dissolution of partnership might be advantageously followed, viz., special notice by circular letters to the customers, and advertisement to the world at large.

(2.) By the *death* of either party. Mandates (according to *Mr Erskine*, 3, 3, 40,) expire by the death of the mandant, both because it is presumed that the commission was accepted from a personal regard to him, and because the will of the mandant, which alone supports the commission, ceases necessarily upon his death; and they expire also by the death of the mandatory, because the commission was given from the mandant's special confidence in him. A factor's power, therefore, ceases by the death of his principal, or, if there be several constituents, by the death of any one of them, when the power of the whole is dissolved by the death of one, as in the case of tutors-dative, (*Stewart*, 29th Feb., 1832; *Revd.*, 7th April, 1834; 7 *W. & S.*, 211.) But the factor is entitled to act till he receive authoritative intelligence of his constituent's death, and his acts are binding till then. Thus a factor, for one in the West Indies, was held entitled to act (and his acts were accordingly sustained) until he received authentic information of the death of his principal, (*Campbell*, 7th Dec., 1826, 5 Sh., 86; *Affd.*, 1st May, 1829; 3 *W. & S.*, 289.) By the civil law this was a settled doctrine, and it has been followed in the laws of those countries which have adopted it. (*Dig.* 17, 1, 26; *Pothier Traite des Oblig.*, N. 81; *Emerigon Traite des Ass. tom II.*, p. 120; 1 *Bell Com.*, 488; 2 *Kent's Com.*, 645.) But this equitable principle does not prevail in the English law, which holds that the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest. According to the civil law, if the agent had entered upon the execution of his commission in his lifetime, and left it partially executed, but incomplete, at his death, his legal representatives would be bound to go on and complete it, (*Dig.* 17, 1, 14.) Pothier has adopted this principle as just and reasonable, (*Traite de Mandat*, N. 101,) and though, perhaps, it would not be admitted in our law without some qualification, it has been laid down by our institutional writers, and particularly by Mr Erskine, that "if the mandatory "should die after having begun a course of management "which required to be carried on *without delay*, his "heir may execute what was left unfinished by his "ancestor," (*Ersk.*, 3, 3, 41.) Mr Kent, in alluding to the principle as recognised by the civil law, takes occasion to remark that, by the American law, the representatives of the agent would not be so bound, unless the business be in such a situation that it cannot be performed without their intervention, (2 *Kent's Com.*, 643.) In like manner, if part of the commission had been executed before the principal's death, by which the management would suffer if the whole were not to be carried into immediate execution, the powers given by the mandate are not accounted to have expired, and the agent not only may but ought to continue his management, (*Ersk., ut supra.*) And where there are two or more agents the agency falls by the death of any one of them, if no quorum be fixed or power be not given to each, for where this is not done they are considered as joint agents, and all must act.

(3.) By the agent's *renunciation*. An agent's power may terminate by his renunciation of his authority, if not made *re infecta*. Care must be taken to give his employer due and timeous notice, otherwise he will be held responsible for all damage occasioned by a precipitate relinquishment of the office. And it has been laid down, that a mandatory who shall renounce *dolose* at a critical time, which must be attended with loss to the mandant, is also liable in damages. (*Ersk.* 3, 3, 40.)

(4.) By the *bankruptcy* of the principal. The constituent's bankruptcy extinguishes the agency—it is held a revocation of such powers, as of all delegated authority by which the principal may be bound or his property altered—and bankruptcy is notorious. But where a factor holds a power to sell, and has made advances on the consignment on goods in his hands, the bankruptcy of the principal will not operate as a recall of the mandate. The factor is still entitled to sell for his indemnification. (*Broughton*, 17th Dec., 1814, F.C.)

(5.) Effect of the principal's *insanity*. Insanity is not an implied termination to a mandate. There is no existing will to recall the previous appointment, nor is the fact generally notorious. The question as to the effect of insanity in this matter was very anxiously discussed by the Supreme Court in the case of *Pollock*, 10th Dec., 1811, F.C., and the grounds on which it was disposed of, were that insanity, considered as terminating the agent's authority, is to be distinguished from death by the want of notoriety—that a credit once raised with the trading world, subsists to bind the granter till recalled by some public act or individual notice—and that a general delegation which continues to be relied on by the public, is in general to be held as binding the principal—leaving particular cases to be distinguished by special circumstances. The case above cited, in which this interesting question was determined, was compromised after the first judgment. The opinions of the Judges, as reported, are very elaborate, and well worthy of careful perusal, not being confined to the narrow state of the question, but extending to a large and comprehensive discussion of the general question as to the effect of insanity on the agent's powers. As regards parties ignorant of the insanity, then, it may be safely laid down that their *bona fide* contractions with the factor are binding on the principal. In a recent case it was ruled that the insanity of a principal, more especially of short duration, does not operate as a recall of the authority of an agent. (*Wink* v. *Mortimer*, 8th Mar., 1849, 11 D. 995.)

(6.) Expiry of *limited mandates*. Limited mandates for doing a special act expire by performance of the act, or by death, or revocation, and are not like

general powers, capable of extension by mere inference and *bona fides*.

On the subject of the *termination of agency*, reference may be made to *Story's Com.*; *Stair's Institutions*; *Ersk. Inst.*, 3, 3, sec. 40–42, *Bell's Principles*, sec. 228; 2 *Kent's Com.*, 643–645, 1 *Bell Com.*, 488–490.

In conclusion, it may not be improper to remark that, on a careful examination of the various systems of jurisprudence adopted by different countries, we find a wonderful unanimity and concurrence on the subject which we have been discussing in all its leading principles, because they are founded on what is universally recognised as true and just. Indeed, this has been rendered sufficiently manifest in the present series of papers; and the reason of so marked an agreement is to be found in the circumstance that the law of mandate or agency forms an important branch of that body of rules known by the name of "*mercantile law*," in which men of different nations, linked together by mutual interests, have received the lessons of a common brotherhood.

Review.

TREATISE ON JUDICIAL FACTORS, CURATORS BONIS, AND MANAGERS OF BURGHS. By G. H. THOMS, Esq., Advocate. Edinburgh: Bell & Bradfute.

THIS treatise bears evidence of having been carefully prepared, and promises to be exceedingly useful to the profession. The arrangement is good, and the cases are brought down till within a very recent date. The author treats, (1.) Of the nature of office and circumstances in which factors are appointed. (2.) The parties to factorial appointments. (3.) Powers, duties, and liabilities of factors. (4.) Cautioners and Attestors; and (5.) Procedure; to which is added a variety of forms. Under the 3d division, (page 145) the following remarks occur in reference to the effect and meaning of the 21st section of the Titles to Land (Scotland) Act, 1858:—

In "The Titles to Land (Scotland) Act, 1858," 21 and 22 Vict., c. 76, a clause has been introduced, with the view of simplifying the mode of completing a title by a judicial factor *or other judicial manager*, which at first sight seems to subvert the principles which have been laid down as to the relation of the judicial guardian to the property under his management. The clause is section 21st, and is as follows:—"Where a judicial factor or other judicial manager shall apply by petition for authority to complete a title to any lands forming part of the estate under his management, and where the petition shall specify the lands to which such title is to be completed, the warrant granted for completing such title shall also specify the lands to which such title is to be completed, and such warrant shall have the legal operation and effect of a disposition of the lands in favour of such judicial factor or manager from the party whose estate is under judicial management, to be holden in the same manner as such party held or might have held the same, except in the case where the subjects contained in such warrant shall be heritable securities, in which case such judicial factor or manager, on recording such warrant in the appropriate Register of Sasines, shall be in the same position as if such party had granted in his favour an assignation of such heritable securities, and as if such assignation had been recorded in the appropriate Register of Sasines at the date of recording such warrant."

The first question that suggests itself on a perusal, and with special reference to the words "judicial factor, or other judicial manager," is one which the omission of the ur last words would have obviated; and the only case, which we shall see that they do provide, is one in which a title has never as yet been made up by the judicial officer. The question is,—Are applications for power to complete titles under the Act restricted to those cases where a title could, previous to its passing, be taken in favour of the factor, or are all judicial managers to be entitled now to make up titles to the subjects on which they are appointed in their own names? Were the answer to be returned, that the clause is to be taken in its widest sense, it would, by implication, involve a very material change on the principles of feudal conveyancing, as hitherto applied to estates under judicial management. Until the passing of the Act, titles were made up in every case, except that of judicial factor, in the names and persons of the wards, to whom the Court's officer stood merely in the relation of guardian. Now, no intention is announced of effecting the repeal of previous practice, and this would have been necessary to clear the way for such an important alteration. But why are the words "or other judicial manager" used? The judicial managers of burghs may require to complete a title in their persons; and to provide for this case it is quite conceivable that the provision was made, although such officers have never yet had to do so. This construction is the only one which admits of the words being retained as having any signification, at the same time that it enables us to say, with the more probability, that under them it was not intended to include factors *loco tutoris* and *absentis* and curators *bonis*, and, by implication, to effect the important change in practice to which it has been thought that they inevitably lead.

This construction is not necessarily affected by the subsequent enactment, that the warrant to be granted by the Court on the officer's application is to "have the legal operation and effect of a disposition of the lands in favour of such judicial factor or manager *from the party whose estate* is under judicial management." Doubtless, there is here room for contending that this only enables the officer to make up a title in his own person where he has a ward; but then this is the very case in which no title in his own person is necessary. And as a judicial factor—on a trust-estate, for instance, where all the trustees have died after infeftment, or where the trust-estate has been sequestrated and the management of the trustees thereby suspended—cannot obtain any title from the party whose estate he is managing (*i.e.*, the truster) because there is no title in his person, a literal interpretation of this enactment would render the clause nugatory.

The result, however, is obviated if the words "from the party whose estate," which create all the difficulty, and seem to point to an existing ward, are held to refer to the party in whose person the fee of the lands is vested, or, if the trustee be dead, in whose *hereditas jacens* they still are, and whose estate, as regards the feudal title, is hence under judicial management. He it was alone who could have disponed them before the Act came into operation; and therefore, if the effect of the warrant is to be that of a disposition to enable the factor to hold the lands in the same manner as such party held or might have held the same, it seems reasonable to conclude that to him the ambiguous words of the Statute really point.

This construction is further warranted by the concluding words of the clause, in reference to the completion of a title to heritable securities which form part of the estate under judicial management. In this case the judicial factor or manager, on recording the warrant (which is the technical word employed along with the word "act," to denote an interlocutor on a summary petition—thus, "act and warrant"—which has been omitted) in the appropriate Register of Sasines, "shall be in the same position as if such party had granted in his favour an assignation of such heritable securities, and as if such assignation had been recorded in the appropriate register of Sasines at the date of recording such warrant." The words "such party" refer, again, to "the party whose estate is under judicial management."

The "Scottish Law Journal" will be published in the first week of each month, Price One Shilling, post free.

The Editors are desirous that the Journal should contain the Reports of all Cases decided in the various Sheriff Courts in Scotland involving points useful or interesting to the Profession, and would therefore solicit a Report from either of the Agents in each such case, or from the Sheriff. It will be necessary to have the Report signed by one of the Agents or the Sheriff, to ensure its correctness, except in those cases where the party reporting is known personally to the Editors.

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The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, SEPTEMBER, 1859.

NON-RESIDENT SHERIFFS.

Among those who took an active part in the discussion which preceded the Sheriff Court Act of 1853, there were some who maintained that the abolition of the office of Sheriff, as distinguished from that of Sheriff-Substitute, was necessary to the usefulness of our County Courts. The office soon found a host of defenders. Apart from the merits of the question, the proposal vitally affected the interests of a powerful and influential body, whose members are always willing and able to defend its privileges. In the heat of the contest hard things were said against the system of double Sheriffships; and, on the other hand, some absurd reasons were advanced for its continuance. Of the latter, one of the chief was the fact that the Sheriffs resided in Edinburgh. This, it was said, secured independence and freedom from local prejudices; and besides, as they were thus at the fountain-head of law, and mingling daily with their brethren of the bar, it was said that greater confidence must be felt in their decisions. The safety of the office was secured by weightier reasons than these.

Now, that we have had six years' experience of the Act, and the beneficial changes which it has wrought have been seen and appreciated, attention seems of new to be turned to the machinery of our local Courts. One, if not the chief subject of attention, is the Court of Appeal. Notwithstanding the opinion expressed in the pamphlet noticed in our last, that the Sheriffs are in many instances inefficient, and the right of appeal from the Substitute to the Sheriff Principal in most cases unnecessary, by far the greater majority, both of the profession and the general community, prefer having an Appeal Court as a part of the constitution of the County Courts, and would, were such a Court *properly* constituted, and regulated, as it easily might be, rather dispense with the *miserabile remedium* of an advocation, in cases at least under £100, than with such a right of appeal. It is quite clear, however, that some change must be wrought upon the present system.

The delay attendant upon the exercise of the right of appeal must be diminished. In some counties the Sheriff Clerk retains a process after an appeal has been marked, and a petition in support of it lodged, until he has a number sufficient to fill a bag or box for transmission to the Sheriff, who generally resides in Edinburgh. Three or four weeks are consumed in this way. A month passes, and sometimes two, when at length the box is returned, and the agents note, "the Sheriff appoints the petition to be answered within fourteen days." With such an excellent example of promptitude and punctuality, the agent for the respondent takes a month to lodge the answers, and again the Sheriff Clerk takes charge of the papers till it is convenient to despatch the box. The box is perhaps not so easily exhausted this time, and the suitors have to exercise their patience for a more lengthened period. There is just cause of complaint in all this. The process should be transmitted at once to the Sheriff, and while a few days might suffice for the consideration of the most complicated case, it is known to every member of the profession that by far the greater number of cases are of the simplest and most ordinary kind, upon which a lawyer of experience may make up his mind in an hour or two. The chief reason of the delay appears to be the non-residence of the judge—the very thing that was so much relied upon by some of the defenders of the office seems to be its worst feature. The delay in transmitting the papers would be saved were the judge to hear and determine all cases at short intervals in his own county; and were he subject to "local prejudices" in favour of a speedy termination of law-suits, he might find it necessary to use greater expedition in getting through his cases. Of the Sheriffs resident in Edinburgh there are some who have a large practice at the bar, to which the discharge of the duties of Sheriff must, to some extent, be postponed at least while the session lasts. Others, again, have little or no practice, and to them the office of Sheriff is little else than a dignified repose—a competency, little to do, and metropolitan society. Is it strange that in some cases there is a good deal of unnecessary delay?

L.

Although the evil would to some extent be lessened were the Sheriff Clerk compelled to transmit the papers to the Sheriff at once, and were the lodgement of a petition to be equivalent to an order on the other party to answer it, yet one great cause of delay would remain. Advocates in large practice, or advocates in none, obtain the office. The former cannot be expected to give up a lucrative practice for a comparatively small salary, and, as regards the latter, it is charitable only to say, that want of success at the bar is a somewhat novel recommendation for a judge. Were it sought to cure the evil simply by compelling the Sheriffs to reside in their respective counties, the attempt would fail, because apart from every other reason there is no sufficient pecuniary remuneration offered to secure the services of men of first-rate ability. The true cure lies in an entire reconstruction of the Court of Appeal. Following out the views expressed in a previous paper, and those to some extent already adopted by the Legislature, several of the counties which separately do not furnish sufficient business to occupy the time of an Appeal Court, might be united, and the Sheriffs-Substitute could sit in Appeal Courts, or if it were thought necessary to have one judge at least in the position of Sheriff Principal, one with a sufficient salary might be appointed for each combination of counties. The salary of such a judge should be sufficient to secure the services of an eminent lawyer, and the office itself should, like some of the non-resident Sheriffships at present, not only be no bar to further preferment, but a stepping-stone to higher judicial honours. To such proposals as these we may expect opposition both from those who have received, and those who expect to receive, profit from the present system. But notwithstanding this, if the country becomes satisfied that the usefulness of the County Courts requires some such alteration for its continuance and extension, class interest and class prejudice must yield to public good.

STIPENDIARY MAGISTRATE FOR GLASGOW.

How long is the community of Glasgow, the "Second City of the Empire," as its citizens sometimes boastingly call it, to groan under the incubus of a system of untrained, unpaid, and irresponsible judges? The change from such a system to that of a stipendiary magistrate, or magistrates, is on all hands admitted to be merely a question of time; and, such being the case, we believe we give expression to the undivided opinion of the legal profession, when we say, *The sooner the change is accomplished the better.*

Whatever benefits may have attended the Burgh Reform Acts—and that these have, in many respects, been important, we cannot for a moment doubt—it seems to be quite an ascertained fact that, incidentally or otherwise, the status and character of the magistracy of Glasgow have not been improved, but rather the reverse. Year after year, it has been found, that citizens, whose social position, or personal character and acquirements, would have conferred dignity upon the magisterial office, and whose presence and influence would have tended, powerfully, to elevate and refine the general tone of the Municipal Council, have given place to men of smaller stature, socially and intellectually, until the enemies of popular institutions are able, with considerable appearance of truth, to taunt reformers upon the deteriorated condition of our municipal parliament, and to say with Hamlet,

"Look here, upon this picture, and upon this!"

When the reason for such a change is inquired into, one cause is assigned with almost perfect unanimity, which, however it may have been coincident with municipal reform, is not necessarily connected with it. We refer to the alleged facts, that men of higher social position naturally shrink from the drudgery attendant upon the judicial functions of the magistracy, in a community which has now become of such vast extent; while those of cultivated minds and refined habits, as naturally refuse to act the part of *judicial puppets*, set upon a bench, to be worked, it may be by a junior Town Clerk, or even by some inferior official. When the remedy is asked for, the almost unanimous answer is, that this must be found in the appointment of a stipendiary judge, or judges, who shall preside in the various Courts, where the magistrates are at present compelled to occupy such an irksome and anomalous position.

When the appointment and emoluments of Town Clerks become the subject of discussion and arrangement, and their duties, as assessors, in the Magistrate Courts, are referred to as an element to be considered and dealt with, all parties at once admit, and proceed to act upon the admission, that the system is effete and cannot last—that the change to a new system is merely a matter of time, and that therefore this particular element need scarcely affect any proposed arrangement. We have reason to believe that Magistrates, Councillors, and Town Clerks will at once recognise the truth of this representation. While the civil business, in the Burgh and Water Bailie Courts, was important in its nature, and the criminal business limited in extent; and, while the magistrates could command the assistance of such a man as the late Mr Reddie, to act as assessor, the present system might possess a certain kind of dignity, and be endurable to those who were called upon to work it out. But now, since the whole features of the case are so

different, that system becomes not merely burdensome and inefficient, but actually ridiculous. Of all this, the Magistrates and Council must have been perfectly satisfied, and they must evidently have been looking forward to a very speedy change, when they lately proceeded to fix the salary of a Town Clerk and assessor at the sum of £700 per annum. Such a salary might perhaps be adequate for a person performing the comparatively mechanical duties attaching to the office otherwise, but was altogether insufficient for one who was expected to combine with the business, habits necessary for the proper office of clerk, the acquirements and status essential to the satisfactory performance of judicial functions.

Without meaning any reflection upon the present magistrates or assessors, it is matter of notoriety that their judicial proceedings and decisions have entirely forfeited public sympathy and confidence; and that, every now and then, some erroneous, ill-considered, or ludicrous proceeding is turning up in the Burgh Courts, to excite public animadversion or ridicule. When a tender child, of respectable parents, like Thomas Gray, is taken from bed in his father's house; carried straight to the Police Office; tried (if such a proceeding could be called a trial) in absence of any legal assistance, or even his father's countenance, for alleged participation in a petty theft; sent direct to prison, and there subjected to the lash—public indignation is universally excited. And when the whole proceedings are found, upon inquiry, to have been irregular and illegal—in fact, blundered from beginning to end; when the magistrate excuses himself by saying he was in the hands of the assessor; when the assessor excuses himself by saying he had occasion to be absent, and had sent a friend to supply his place; and when the whole affair ends by the ostensible dispensers of justice, and protectors of the public, being compelled to pay a sum of money for these violent, illegal, and irregular proceedings, indignation gives place to a feeling of astonishment, that such a state of things should be tolerated in a community claiming to be civilised and enlightened. And here, again, when a remedy is asked for, the universal answer is, let the whole fabric be swept away, and replaced by a Stipendiary Magistrate, educated and trained for the judicial office, responsible, morally and legally, for the performance of his duties, and having no scape-goats upon whose heads he may lay his official sins or shortcomings.

Let us take one other illustration. A few years ago, an Act of Parliament was obtained, with the view of correcting the crying evils arising from drinking. The machinery provided was to consist of prosecutions at the instance of "Informers," for payment of penalties, to be divided between these prosecutors and public charities. In their anxiety to render this Act effective, the Magistrates of Glasgow (acting, of course, under the advice of their assessors) proceeded to establish a system by which, through an officer (the Fiscal) of their own appointment, they literally became *prosecutors in their own Courts*, pronouncing sentences in their own favour, and thereby recovering penalties which, in place of being disposed of in terms of the Statute, were paid into a fund, amounting to hundreds of pounds annually, and belonging to the Magistrates themselves, in the sense of being subject to their patronage and disposal, as a municipal body, and not in the character of judges. As the natural consequence of such an arrangement, the police force, constituted and paid for by the citizens, for other purposes altogether, was transformed into an engine for the object of working out the system—was literally converted into a huge drag-net for the purpose of catching the fish, in the shape of offenders against the Act, and bringing them into Court. Then followed the system of espionage, the demoralisation of the police force, collision with the Superior Courts, and the virtual repeal of the Forbes M'Kenzie Act, with all which our readers are familiar.

When a Government Commission is issued to inquire into the working of this Act, the same demand for a change of system, and the appointment of a Stipendiary Magistrate, is heard from every quarter. Whether such a Magistrate would be the proper person to deal with the matter of granting licenses, may be questioned; but, that he is the proper person to deal with the matter of deciding upon offences, and inflicting penalties, there can be no doubt whatever. We do not mean to impute anything like improper motives to the Magistrates, their assessors, and other officials. We are willing to believe that all and sundry have been acting in good faith; but they were placed in a false position; and it is quite certain that, had the administration of the Statute referred to been in the hands of an independent official, removed from the various influences which tended to obscure and warp the judgment of the Magistrates and Council, the monstrous results that have been briefly glanced at would never have occurred.

The fact is, that as society has advanced, and men's views regarding such matters have been matured, it has become evident, to every person who chooses to think on the subject, that the very conception of a Court, consisting of an uneducated, (in a judicial sense,) untrained, and unpaid Judge, who is to be guided by an assessor, supposed to be superior in acquirements and experience, but inferior in dignity and position, and who is paid by means of fees upon the procedure, taken either from litigants or the public, is altogether and *fundamentally*

vicious. Poor human nature is unfortunately so frail that, when placed in a position of authority and responsibility, it requires every possible motive, guide, and check, to keep it in the right course. One placed in the position of a judge over his fellows, with power to dispose of their rights and interests, civil and criminal, should not only be, in point of fact, pure, but like Cæsar's wife, "above suspicion." He ought to be thoroughly educated and trained for his important duties; he should be made to feel that the responsibility for their proper performance rests solely upon himself; and he should have no interest or motive that may obscure or bias his judgment.

In the Magistrates' Courts, and indeed all Courts similarly constituted, these conditions are positively reversed. The person acting as judge is merely nominally so. He is without judicial education and training. Acting gratuitously, and having a clerk or assessor to fall back upon, he feels, comparatively, no sense of responsibility—he has neither position nor reputation, as a judge, to maintain or to forfeit. The Clerk or assessor, on the other hand, is a subordinate personage. He may be liable in his purse, indirectly, for gross errors and irregularities, but he is not publicly responsible, in the proper sense of the term. He does not occupy the social position of a judge. On the contrary, he may be called to take his place on the Bench, from the performance of his own separate business, perhaps some merely mechanical duties—or, very likely, from the exaction of the petty fees of his office. His interest is, not to diminish, but rather to encourage, prosecutions and litigations, because from these his emoluments are, more or less, derived; nay, it often happens that he has a personal interest in the *conviction* of parties tried in his Court, seeing that upon the convictions he receives specific fees. We do not know how the matter may strike others, but to us it really appears that, if a perverted ingenuity were called upon to frame a judicial system, expressly calculated to produce evil and not good, it could scarcely do better than adopt the one we have just described. That the evils of the system always prevail, we are far from asserting. In all human institutions there are defects, and at the same time there are counterbalancing influences; so that the erroneous principles are not always found to produce their apparently natural results. But this is no reason why we should adopt or perpetuate erroneous principles, when their existence becomes so palpable that it cannot be disputed.

The ridiculous aspect of the existing arrangement is equally apparent. Who, that has had opportunity, can have failed to pity, or laugh in his sleeve at, some worthy citizen or country gentleman, very acute, intelligent, and well-informed men, in ordinary matters, invested with the insignia of office, perched upon a bench, and called upon, for the nonce, to assume the dignified aspect of a Judge—though under leading strings! Witness the stolid gravity, or it may be the fussy inaptitude, with which the examination of witnesses is gone through! Observe with what a blank countenance he listens to the legal arguments, by professional men, from the Bar! Notice the way in which the legal question is perfunctorily taken out of his hands by his subordinate, the assessor, and the manner in which that official communicates the nature and extent of the sentence to be pronounced, or supplies, *sotto voce*, the exposition or admonition with which that sentence is to be accompanied! When we look at these things, we have really no small difficulty in understanding how gentlemen, shrewd and intelligent in their own particular spheres, can be induced to place themselves in such a ludicrous position.

Returning to the special case of Glasgow, we would, in conclusion, warn our readers that, when the change comes to be made, it will be absolutely essential that the salary to be attached to the office of Stipendiary Magistrate, be adequate, if not liberal, otherwise the change may be from bad to worse. The office will be one of great importance, involving heavy and irksome duties, as well as serious responsibilities. It will require a person of legal acquirements, and mature experience; and no one properly qualified can be expected to accept of it, unless the emolument be ample. It is well known that even the largest salaries allowed to the Sheriff-Substitutes of Scotland are so limited as to prevent that office being an object of desire to parties in the higher walks of professional business. The office of Stipendiary Magistrate, in such a city as Glasgow, must be one of even greater labour and responsibility, and to secure its being efficiently supplied, it must be made an object of ambition. Our Town Clerks seem to look upon £1200 as a very moderate income. An English County Judge, with a tithe of the work falling to be performed by such a magistrate as we refer to, receives from £1200 to £1500 per annum; and unless this new office is to carry with it some such emolument, it will fall into inferior hands, and the benefits expected to be derived from it will assuredly be lost. From whatever source the funds are to be derived, therefore, our fellow-citizens must keep this aspect of the case distinctly in view. Assuming that they will do so, we have, in conclusion, to repeat—"the sooner the change is made the better."

COMPETENCY OF APPEALS AGAINST APPEALABLE INTERLOCUTORS IN SHERIFF COURTS AFTER THEY HAVE BECOME FINAL BY LAPSE OF TIME AND ACQUIESCENCE.

One object of our periodical is to state such points of practical difficulty in the form of process in which

differences of procedure and judgment exist in Sheriff Courts, and which may not have received the decision of the Supreme Court.

Our attention has been directed to one important point of practice by observing the report of a case in the Sheriff Court of Perthshire, in the *Dundee Law Chronicle*, vol. ii., p. 161.

The case was an action of aliment for a bastard at the instance of the mother against the putative father. At the first calling, the defender's agent stated as preliminary, that the defender was a minor, and his curators had not been edictally cited. The Substitute, in respect of the nature of the action, repelled the objection. This was, under the Sheriff Court Act, an appealable interlocutor. But the defender entered no appeal. A full record was then made up and closed on condescendence and defences. An interlocutor was pronounced, sending the case to probation, but still no appeal was taken. A lengthy and expensive proof was taken on both sides. The Substitute decerned against the defender. An appeal was now taken, not only against the interlocutor on the merits, but against the interlocutor long ago final repelling the preliminary plea. The Sheriff reversed the first interlocutor, and dismissed the action on the preliminary plea, but found no expenses due to the defender subsequent to that interlocutor.

The point involves some questions of difficulty, connected with the construction of the Sheriff Court Act (certainly no model of legislative precision, if there be such a quality in existence), and the right decision of the question assuredly has very important consequences on parties to processes in the Sheriff Court.

In construing the provisions of the new law, it is important to bear in mind the state of the law previous to the recent Sheriff Court Act.

By the 98th section of the Act of Sederunt, 10th July, 1839, it was declared that "parties thinking themselves aggrieved by *any* judgment of the Sheriff-Substitute, whether interlocutory or final, except in the cases otherwise provided, *may*, on or before the seventh day after the date of the interlocutor, apply for the opinion of the Sheriff." After provision is made for the mode of appeal, it is added, "It *shall* be competent to the Sheriff-Substitute to refuse to allow the appeal against *any* deliverance which in his opinion ought to be carried into immediate effect."

Under the above section, all and any interlocutors in the cause were open to appeal, and the veto given to the Substitute was rarely exercised.

This facility of appeal was found to be a grievance productive of great and unnecessary delays. But no point was better known, that, if any interlocutor was allowed to become final, without petition or appeal, it was held to become final, and to be acquiesced in, and therefore subject to no further review in the Sheriff Court. The only retroactive power given to the Sheriff, was that under the 99th section, whereby it was declared "competent for the Sheriff, when the "case is before him on appeal on any point, to open "up the record *ex proprio motu*, if it shall appear to "him not to have been properly made up."

In order to curtail the unnecessary latitude of appeals, previous to a decision on the merits, the recent Sheriff Court Act, 16 and 17 Vic., cap. 80, declares (section 19), "Until an interlocutor shall "have been pronounced, disposing in whole or in part "*of the merits* of the cause, it shall *not* be competent "to appeal to the Sheriff against *any* interlocutor of "the Sheriff-Substitute, not being an interlocutor." (1) Disposing of a dilatory defence, (2) sisting process, and (3) allowing a proof, and (4) during the leading of the proof (specially provided for.) Before a judgment on the merits, there are, therefore, only four points of the cause on which an appeal may and can be taken; and if on these points, where declared to be competent, it be omitted, then it follows, on the well-known principles of law and the uniform practice, that the interlocutor has been acquiesced in, and has become final in the Sheriff Court, in the same way as it would have been under the former law and practice.

Had the section closed as above quoted, there could have been no possible doubt. The question has arisen from the concluding clause of the 19th section, which, after the clause declaring *not* the competency, but the *incompetency* of appeal against any interlocutor other than the four specified, proceeds to declare the competency of appeal, thus, "But "it shall be competent, in every case in which an "appeal against *any* interlocutor is taken, also to "appeal against all or any of the interlocutors pre-"viously pronounced, whether before or after the "date of closing the record, or whether the record "has been closed or not, and the Sheriff shall pro-"nounce such judgment on the appeal as shall be "just."

No doubt the words in this *proviso* are unfortunately general and vague, "all or any interlocutor." But taken in connection with the previous clause, it does appear that the extension of the privilege is here meant to apply only to such incidental interlocutors as are not appealable at the time, and which are thus prevented from being held acquiesced in and final. This will be obvious when it is perceived that the primary clause is to exclude appeal from all and every interlocutor pronounced before judgment on the merits, and the *proviso* is then inserted to *modify* the rigour of the exclusion, by allowing interlocutors not appealable at the time to go up so soon, as one of the epochs of appeal has arrived.

It is worthy of notice that the form and mode of appeal is provided for by an earlier section (16th), and before the limitation on the privilege is enacted by the 19th. The words are very distinct: "Where "ANY judgment *(not interlocutor)* shall be pronounced "by the Sheriff-Substitute, which under this Act may "be brought under the review of the Sheriff, the party "who proposes to appeal against the same SHALL *(not "may)* within seven days from the date thereof" enter his note of appeal. It must follow that "any judg- "ment which under this Act *may* be brought under "the review of the Sheriff," and *not* so appealed against within the time limited, has become final in the Sheriff Court. This is made the more apparent by the 16th clause, closing with a repetition of the provision in the Act of Sederunt, rendering it competent to the Sheriff, where "the cause is before him on "appeal *on any point*, to open up the record."

The argument is much strengthened by the following section (17th), dealing with the appeal against interlocutors of the Substitute, pronounced during the leading of the proof. An appeal is declared "com- "petent on the proof being declared closed, or within "seven days thereafter, and the Sheriff SHALL pro- "nounce such judgment on the appeal as SHALL be "just, and SHALL (*not may*) appoint any evidence, "which he thinks ought not to have been required, "to be taken *before the case shall be adjudged on "the merits.*" Words cannot more strongly express, that if the appeal on questions of evidence be *not* taken at the proper time, and "before the case shall be adjudged on the merits," that such interlocutors cannot be interfered with, at any future stage of the cause.

The evils arising from a contrary reading of the Statute are manifold and obvious, and the tendency of the recent Act would be more subversive of justice, than the frequency of appeals which it was intended to curtail. Take the case before cited as the immediate occasion for these observations. Had the appeal been taken against the interlocutor, repelling the preliminary plea, the case would have been at once, and at little expense, sent out of Court, and a new action brought, and decided long since. As the case stands, a poor woman has been kept out of the aliment of her child for a length of time. But what is more, her whole case has been exposed to the defender, who is now prepared to meet any new action. This affords no small encouragement to parties to defer their right of appeal until the final result exposes the whole of their opponent's cause.

On the contrary reading of the Statute, the case may be supposed, 1st, The defender states a preliminary defence, which is repelled; 2d, Proof is allowed against a plea of irrelevancy or prescription; 3d, Several questions of admissibility of evidence have been decided against the defender in the course of the proofs; and lastly, the decision has been finally given against the defender. The defender now appeals against the last and the three previous interlocutors. If the Sheriff sustains the preliminary plea, the whole subsequent costly fabric of litigation is overthrown. Or he may find the proof incompetent, and the whole must be withdrawn. Or he may admit or reject evidence contrary to the interlocutor of the Substitute, and consequently the case on the merits is wholly different from what was decided on by the Substitute, and whose judgment on the merits was founded on a totally different state of proved facts. The Sheriff, in such a state of the case, would be found in the awkward position of being a judge of appeal, giving a judgment which is no longer a judgment in the true state of the cause, as finally adjusted by him.

It is humbly submitted that the evils of the former system of frequent appeals, which could be checked by awards of costs, were greatly less than those incident to a system which can thus give the appearance of acquiescence and finality, but which, in reality, is only encouraging procedure that in the end may be rendered wholly useless. Economy of time in dispensing justice is of great value, but if purchased at the expense of justice itself, it is beyond its price.

ON THE LAW OF FLOWING WATER.

WATER-COURSES are either public rivers or private streams. In England and America a third class are recognised, rivers which are private, and of which not only the banks are private property, but also the alveus or bed; but which being navigable, or at least, as it is expressed, boatable, are subject to public use. It is not intended to treat in the present article of the law of public rivers, nor of the rights of the public in rivers, but to examine briefly and generally the nature, extent, and limits, of private rights in the water flowing in private streams.

For that purpose we need not inquire whether the threefold classification of water-courses above mentioned would be recognised to any effect in Scotland, nor is it necessary (as it certainly would be by no means easy) to determine what the precise distinction is between a private and a public river—at what point in a river's course it ceases to become an object of merely private right, and becomes a public highway and subservient to public use. The doctrines of Erskine, that by public rivers are to be understood "navigable rivers, or those on which floats may be carried to navigable rivers;" and of Professor Bell, that not only tidal rivers are public, but also "rivers above tide water where fit for the transportation of

the country products, though that should be only down the stream," although perhaps not very serviceable in any practical question, sufficiently indicate for our purposes the grounds of the distinction between private and public water-courses.

Flowing water is a subject so peculiar in its own nature, and so partially under man's control, that it does not occasion surprise that not only the origin and nature, but even the possibility of private right of property in it, has given rise to much variety of opinion among jurists.

In our own Courts, although the subject is no doubt of practical importance and general interest, it has not frequently been made matter of discussion, and the few incidental *dicta* to be found in our institutional writers are too general, and perhaps too little consistent, to afford much assistance, either in any actual case or in determining the general principles of the law.

The rules of the Roman law on this subject, although often valuable in this as in all other questions of natural right, are not, it is believed, to be assumed without consideration. In the first place, the manner in which property was acquired, especially in the Roman colonies, frequently gave rise to considerable peculiarities in reference to the rights in streams, which, in very many instances, became the property of the state; and there is considerable danger of applying, to water-courses in general, *dicta* which may in truth have been applicable only to these public streams. Farther, the civil law on the subject is often very far from consistent with itself. Thus, in the *Institutes* II. 1, 1, it is laid down that the air, flowing water, the sea and its shores, are common to all; and this text has been followed in one passage by Erskine, where *res communes* are defined as "things, the property of which belongs to no person, but the use to all;" and among these *res communes* he particularises the light, the air, and running water. But this text in the *Institutes* is not only opposed to several other texts of the Roman law, but to what must be regarded as undoubted matter of fact, that among the Romans not only small streams but large rivers were in several cases the uncontrolled and absolute property of private parties; and Ulpian, in another passage, lays it down that a private river differs in nothing from other private places, "nihil enim differt a cæteris locis privatis flumen privatum," *Dig.* l. 43, t. 12, sec. 2.

What is the nature of the right of a private party in flowing water, has been a fruitful topic of discussion, and the point may admit of difference of opinion still. Some jurists have maintained that flowing water is in its nature *res nullius*, and incapable of being made the subject of property, and have taken the distinction (originated by Ulpian), between the river which continues the same from one age to another, and is therefore susceptible of being made an object of permanent right, and the water in it which is continually passing away; others have maintained that streams are the property of the state —a view of the law never it is thought entertained in Scotland. Again, it has been doubted whether it be more correct to speak of a party's right in flowing water, as of the nature of a servitude, or as a right of use in the water as it flows past, or as an absolute right of property.

Mr Angell, in his work on the law of water-courses, affirms that, "by all the modern, as well as by all the "ancient authorities, the right of property in water is "usufructuary, and consists not so much of the fluid "itself, as of its *momentum* or *impetus*." But while it can hardly be maintained that there is in fact any such general unanimity in opinion among jurists on this subject, there is certainly an appearance of incongruity and impropriety in the expression "usufructuary right," as applied to that which can in no sense be considered as productive of fruits; and in the statement that a right in water consists chiefly of a right to its momentum or impetus, the undoubted fact appears to be overlooked, that the right to use the momentum and impetus of water is only a secondary and subordinate right in running water, of which a party may very possibly be deprived altogether, by the superior right of use in other proprietors for domestic purposes, and for uses of more paramount necessity than any that can be made of its momentum or impetus.

This mode of expression, however, has been generally adopted in England.

In the late case of *Chasemore* v. *Richards*, 12th May, 1857, *Hurlstone & Norman, Exchequer Reports*, Vol. II., 181, Sir Cresswell Cresswell, in delivering the judgment of the majority of the Judges, adopts a statement of the law made in a prior case, "that "none can have any property in the water itself, "except in the particular portion which he may "choose to abstract and take into his possession, and "that during the time of his possession only. But "each proprietor of the adjacent land has the right "to the usufruct of the stream which flows through "it." And not to multiply quotations, reference may be made to a *dictum* of Mr Justice Story, quoted in *Angell on Water-courses*, p. 87, to the effect that "strictly speaking, a proprietor has no property in "the water itself, but a simple use of it when it "passes along."

Professor Bell in his *Principles*, sec. 1100, calls the right in flowing water a common right and interest in the several proprietors; but in the following section he affirms that opposite proprietors on the banks of a stream have no property in the water. Erskine says, that "the

"smaller rivers are *juris privati*, and consequently the "landlord within whose grounds they run may divert "their course, unless he be restrained by a servitude "or other right in favour of the inferior tenement," II. sec. 6, 17—a passage which, as appears from a note, does not, in the opinion of Lord Ivory, quite correctly state the law on this subject. His lordship, however, does not say in what particular he considers Erskine's doctrine to be erroneous, and it is rather believed that, so far as this passage goes, it affirms nothing at variance with the law as it has been generally recognised in the Court of Session.

Notwithstanding the authorities from England and America to which we have referred, it is believed to be more in accordance with just legal principle, and with the modes of expression which have been generally adopted in the Court in Scotland, to regard the private right of a proprietor, through whose lands a stream passes, as a right of property in the water rather than as a right of use, or usufructuary right.

Reference may be made more especially to the case of *Ferguson* v. *Sheriff*, 18th July, 1844; 6 D. 1363, in which all the judges of the Second Division, except Lord Medwyn, held it clear that the right was a right of property, and Lord Medwyn said it was as near a right of property as the nature of the subject permitted. Perhaps it may be a question of not very great practical importance, whether a party's right to flowing water be a right of property, limited in its use by the nature of the subject and by the rights of other parties, or whether it is more properly to be termed a right to use the water as it flows past. But it is difficult to see in what the impropriety of speaking of a right of property in flowing water consists. If it be susceptible of being made a subject of property, and if it be in the right and power of one party more than of the public in general, then it is thought the right to it must be a right of property. Unless it is in its nature *res nullius*, it must necessarily belong in property either to the Crown, which it does not, or to private parties. It may be that the nature of the subject, and the rights of other parties, impose restraints upon a proprietor of flowing water, and limit the mode and extent in which he is either physically able, or legally entitled to appropriate it. But his right in the water will be none the less a right of property because his control of it is limited. All rights of property are held *sub modo;* a proprietor in the exercise of his right to all property is limited by the right of his neighbour and by physical laws. But the amount of restraint put on his right will not alter the nature of it.

That running water is not of necessity *res nullius*, and can be made the subject of absolute property and right, cannot be proved more clearly or conclusively than by the fact that in many cases it is so. A proprietor of the land on both banks of a stream falling into the sea, has a right and property in the water of the stream which is controlled by no other right whatever. And it is not the limited nature of his right which prevents him from appropriating the whole of the water in the stream, and from preventing any portion of it from reaching the sea, but only the uselessness of such a proceeding, and the expense and difficulty of the necessary operations. It also appears clear that the right of a proprietor of lands adjoining a stream must be equally a right of property in the water of the stream, although other parties also possessing lands adjoining the same stream are participant in that right. They are, it is believed, according to the law of Scotland, the common proprietors of the water in a sense in which no other member of the public is the proprietor of it, and they can authorise the unlimited appropriation of it. That may not be so clear in England, where it has been said that water is a *bonum vacans*, in the sense that all parties may have a right of reasonable use of it who have a right of access to it, (*Embrey* v. *Owen*, 6 Exch., 369.) But that proposition appears to be quite inconsistent with the language used by all the Judges in the case already referred to of *Ferguson* v. *Sheriff*, 1844; 6 D. 1363.

It appears then that the water in private streams is certainly susceptible of appropriation, and that no one has a right to it except those possessing land adjoining the stream, or adjoining any other stream into which it falls. Perhaps there is truth in the remark, that the distinguishing feature of flowing water as a subject of property is, that it survives the use of it, and that it is this peculiarity chiefly which has occasioned difficulty in determining what the nature of the right to it is. "Si l'on compare l'usage de "l'eau a celui de toutes les choses mobiles, on recon- "nait que le premier ne differe de l'autre q'en ce que "la chose employée lui survit, tandis que le plus "souvent celui-ci la detruit. C'est precisement cette "survivance de l'eau a l'usage qui embarrasse les "legistes," M. Champonniere De la proprieté des eux courantes, p. 13, note.

The right to, or burden of, flowing water cannot be regarded as servitudes, but as rights of property subject to limitations in favour of the rights of other parties. And whether a right of property or of use, the right in flowing water has in our law been generally regarded as arising *jure naturae*, and it is carried by a disposition of the land. It appears to be incidental to the property in the banks and bed of the stream; and it does not seem that the flowing water, as distinct from the banks and bed, could be made the subject of a separate estate with us. In England the relative rights of the higher and lower proprietors on the banks of a stream, appear to have

been solved by the fiction of an assumed grant or contract that the one should receive the burden of the water, and the other should be bound to continue to send it. It would appear that this theory has, however, been abandoned, and that it is now held in England as in Scotland, that the right to the uses of running water arises *ex jure naturae*, and is incidental to property—per Lord Chief Baron Pollock, in *Dickenson* v. *The Grand Junction Canal Company*, 13th Jan., 1852; 7 Exch., 282.

The true rule of law, then, seems to us to be that each proprietor along the banks of a stream has a common right of property in the water flowing in it. In the case of water flowing through a property, the alveus belongs to the owner of the property. In the case of a river or stream bounding two properties, each proprietor is owner of the one-half of the bed of the stream which adjoins his property—a circumstance which has very important consequences in cases of alluvion, avulsion, and in regard to islands existing or forming in the bed of the stream. This rule also modifies to some extent the use to which each proprietor is entitled to put the water itself. It would appear that a proprietor whose estate is bounded by a river has a right to fish only in that half of it which adjoins his property, *Milne* v. *Smith*, 23d Nov., 1850, 13 D. 112; *Angell on Water-courses*, sec. 61. But in general the right to the water is a *pro indiviso* right, along with the adverse proprietors, to the whole bulk of the stream, and the right of a proprietor to use the water which bounds his estate, is limited by the right of the adverse proprietor as much as by that of the proprietor of an inferior tenement.

From the rule that each proprietor is entitled to use the water as it passes him, as well as from what we judge the more correct expression of the law, viz., that all the proprietors have a joint and equal property in the water, and from the principle that these rights arise *jure naturae;* it follows that water must be allowed to run in its natural channel unaltered and unaffected. "*Aqua currit et debet currere, ut currere solebat,*" is a brocard which has been interpreted and enforced with at least sufficient strictness in Scotland, and perhaps sometimes with greater strictness than has been quite consistent with the end which the rule of law was intended to secure, viz., that all the proprietors on the banks of a stream shall enjoy an equal right in the water in it. "Every man," says Lord Ellenborough, "is entitled to have the water flowing through his lands without alteration or diminution." (*Bealy* v. *Shaw*, 6 East, 206.)

That is the rule of law strictly and abstractly expressed; but then, of course, that rule must not be so interpreted as to defeat the object of it, that each proprietor shall have the like enjoyment of the water; and it is necessary, of course, to have regard to the uses to which the water may be put, for apart from the purposes which it may serve, and the uses which may be made of it, the right to running water would be but a barren property; and it is evident that the rule must be so construed and enforced, so as not to take away the use of water altogether, which would be the effect of a perfectly strict application of the rule; but on the contrary, it seems reasonable to hold, that the rule must be so construed and enforced, that the greatest possible amount of benefit which is consistent with an equality of benefit to each proprietor may be obtained. Any rule is to be avoided, in so far as it tends to render unavailable natural powers, or to abstract from the sum of the resources which nature supplies for man's use. And, therefore, in questions of right to running water, the amount of injury done to the party complaining must always necessarily be an element of great importance. Small appropriations of the water, slight alterations in the force and regularity of the currents, cannot be avoided if water is to be used at all, and any action founded on damage of such a kind and degree only would be dismissed in our Courts as irrelevant.

Any other view than this would, besides, violate the principle that each heritor should have an equal use in the water, by sacrificing the upper heritors to the lowest, who, when the water reaches his property, can make what use of it he pleases. But it is clearly as much the law that the upper heritor should not be deprived of the benefit of the water on account of the rights of the lower heritor, as that he shall not abstract the water from the lower heritor, or send it down to him in such a condition as to be unfit for use.

Now there is a subordination recognised in the purposes for which water can be made available. The distinction between the primary and secondary uses of water—nearly equivalent to that between the use of water in satisfying the natural wants of man, and its use in satisfying his artificial wants—is, it is presumed (arising as it does from the nature of human necessities), recognised every where, but at all events it is a settled distinction in the law of Scotland.

Water is employed primarily for domestic purposes —for drinking and washing—and probably for watering cattle. Its primary use in law is to satisfy these paramount necessities, and that all other uses of water must be postponed. It is plainly *ex jure naturae* that a man is entitled to satisfy those necessities with any water in which he has a right of property, or in which he has any right of use at all. A manufactory will be removed if it render the water of a stream unfit to be used for drinking or washing (although of course that rule will be modified if there have been acquiescence in the pollution by the manufactory, or if the parties complaining come to the stream after it have been polluted). *Miller*, 1791;

Bell's Cases, 8vo, 334; *Russel*, 1791; *Bell's Cases*, 8vo, 338; *Dunn*, 11th March, 1837, 15 D., 853, aff. 3; *Sh.* v. *M'L.*, 356; *Lord Melville* v. *Denniston*, 21st May, 1842, 4 D. 1231.

The watering of cattle may not *in every case* be a primary use of water, or one to be served in preference to a mill or manufactory. If a farmer be a feeder of stock, and keep for profit an unusually large number of cattle, it is not very easy to see on what principle he ought to be allowed to use the water in his trade or business of feeding cattle, before the manufacturer can be allowed to use it for the requirements of his business.

In some cases the irrigation of fields would form a primary use of water, to which the use of it for manufacturing purposes would be postponed, but that must be regarded as a question depending on circumstances, and on the whole it seems probable that a priority of right of use for that purpose would not be recognised in the general case in Scotland.

Subordinately and secondarily, water is used as a motive power, and generally to subserve the requirements of mills and manufactories. These are the chief secondary uses of water. The rights of the owners of mills and manufactories are of course to be carefully protected, and even to be regarded with favour by the Courts, tending as they do to the large development of the resources and productive powers of a country; but there seems no reason to doubt that their requirments must be postponed to the more paramount and primary necessities.

The following statement by Angell of the manner in which proprietors are entitled to use flowing water, may be accepted as expressing with sufficient correctness the law of Scotland on the subject:—"A man's wants," he says, "are either natural or artificial; natural are such as are absolutely necessary to be supplied, such as thirst of people and of cattle, and household purposes; and in arid climates, water for irrigation is referred to the class of natural wants to which artificial wants must ever be, legally subservient. So that, whether the want of water for the purpose of irrigation be a natural or artificial want, is dependent on circumstances. It may be the one or the other. If the want of water is simply for the comfort or convenience, or prosperity of a riparian proprietor, it is artificial; and under this head is referred the demand for water for manufacturing purposes, and for hydraulic purposes in general."

The general rule is that water cannot be consumed at all, nor diverted, unless it be restored to its natural channel, before leaving the proprietor's lands. But it is evident that water cannot be employed for domestic or primary purposes, without being to some extent consumed. And the rule of law appears to be clear, that each proprietor may consume as much water as he reasonably requires for these purposes.

And it would rather appear that the inferior heritor's right is, from the necessity of the case, subordinate to that of the upper heritor, to this extent, that he has only right to what remains of the water after it has satisfied the reasonable primary necessities of the upper heritor. The upper heritor seems entitled to consume the whole of the water if that be *necessary* for these purposes, so that none shall pass to the lower heritor at all. And he cannot be held bound to permit that water to pass from his lands for which he has a necessity, which in law must be regarded as absolute. In no case, so far as we are aware, has this been expressly decided in the Courts in Scotland, but it appears clearly to follow from the general rules of law on the subject, and cases in England and America to that effect are adduced in *Mr Angell's work on Water-courses*, sec. 122, *et seq.* The upper proprietor must, of course, use the water in the way which will occasion least waste and be least injurious to the lower proprietor. And in so far as the lower proprietor is *necessarily* damaged, the loss comes under the category of *damnum absque injuria*, for which there is no remedy.

If a proprietor can carry water from a stream in pitchers, it follows directly that he can do so by a pipe, and if he can take his cattle to drink in the stream in his lands, he can make sluices for containing the water, if no unreasonable waste be thereby occasioned, *Ogilvy* v. *Kincaid*, 1791; *Hume*, 508; *Lord Melville* v. *Denniston*, 1842, 4 D. 1231.

The law on this subject seems very clearly expressed in the following observations of Mr Justice Story: "I do not mean to be understood," he observed, "as holding the doctrine that there can be no diminu-"tion whatever, and no obstruction or impediment "whatsoever, by a riparian proprietor in the use of "the water as it flows, for that would be to deny any "valuable use of it. There may be, and there must be, "allowed of that which is common to all, a reasonable "use. The true test of the principle and extent of "the use is, whether it is to the injury of the other "proprietors or not. There may be a diminution in "quantity, or a retardation or acceleration of the "natural current indispensable for the general and "valuable use of the water, perfectly consistent with "the use of the common right. The diminution, "retardation, or acceleration, not positively and sen-"sibly injurious, by diminishing the value of the "common right, is an implied element in the right of "using the stream at all. The law here, as in many "other cases, acts with a reasonable reference to "public convenience and general good, and is not "betrayed into a narrow strictness subversive of

"common use, nor into an extravagant looseness "which would destroy private rights."

It is thought, then, that in the first place the upper heritor may consume the water for primary uses, and that to the entire deprivation of the lower heritor. In the second place, if the flow of water be more considerable, the natural wants of each riparian proprietor are to be satisfied, in preference to the artificial wants of any of them; and if the stream be larger still, the rule appears to be that, a use of the water which permits an equal use of it by the other riparian proprietors, is a legal use.

If a man's house be built on a level lower than the point at which a stream, passing through his lands, enters that of his neighbour, so that if he divert water from the stream to his house, he cannot possibly restore any of it before the stream leaves his lands, it is thought that in such a case, the proprietor will be entitled to divert the water for primary uses, although it is evident that in such a case more water must be diverted than is consumed. But of course he must so divert it, as not wantonly nor necessarily to occasion waste. His right, however, will no doubt depend on his power or inability to obtain water otherwise. It cannot reasonably be held that a man is bound to reside in his house without a sufficient supply of water for his absolute necessities, when he can draw it from the streams in his property. In the case of *Ritchie* v. *Johnston*, 15th February, 1822, F. C., this principle seems assumed, and Mr Angell reports precisely such a case as having been decided in Connecticut, in 1843 (sec. 127); and the law is stated in a similar way in the English work, *Gale on Easements*, p. 333 et seq.

How far can a prporietor take water from a stream in his property to his house? If a man have built his house at a considerable distance from a stream, can he supply his house with water from it? These are questions which may be of not unfrequent occurrence. Now, it would appear that the possibility of restoring the water is not an element absolutely essential to the right of diverting it for primary purposes, nor can any precise point be fixed at which it can be said that the right ceases. But on the whole, it would appear to be reasonable that a man should be entitled to take water from that place in his property from which he can most conveniently get it; and it is not easy to see how the element of distance, considered by itself, has any bearing on the question. Of course, if any such case were to arise, since the thing to be done would be to adjust conflicting rights, the injury to the lower heritor would be an element for consideration of chief importance, and if the proprietor could, by any inconsiderable additional expense, obtain water from a stream, to which he could restore it, the interest of the lower heritor would probably be protected, and the abstraction from his stream interdicted. But while it is only riparian proprietors who have a title to use water, there seems no authority for holding that they can use it only for the requirements of houses built on the banks of the stream—on the contrary, it seems consonant to reason and equity, that as a man can build on any place in his property he pleases, so he can make that use of the water on his estate, without which the house he builds could not be used as a residence. There could be little danger that this license would be carried too far, as the expense of bringing water from a distance would always prove a check sufficient.

With regard to the mode in which running water may be employed for what have been called artificial wants, the rule seems absolute, that if a proprietor divert water for these purposes, he must, in every case, restore it, before the stream leaves his property. Keeping in view the rule that an equal use, in all the proprietors, is the measure of each proprietor's right, —the owner of a mill or manufactory may *consume* a reasonable quantity of water, but it seems an absolute rule that he cannot divert any of it, without restoring what he does not consume; and there seems no other criterion of a party's right to take water for a mill or manufactory, than the possibility of restoring it.

A proprietor is not only restrained from diverting the water, but the rule is that he cannot materially affect the force and direction of the current. He has no doubt a certain reasonable right to retard the water to some extent—for to deny him the right to do so, would be to deny him the power of using the water at all. But when a company interfered with the current of a river to such an extent, that sometimes the channel was rendered nearly dry, and at other times the water sent down in comparative flood, though the company did not actually divert any of the water, their operations were interdicted. (*Lord Glenlee*, 1804, *M.* 12,834.)

From the principle that the rights of parties, as to flowing water, are determined *jure naturae*, and that a man is entitled to insist that the water shall flow according to its natural course "*ut currere solebat*," it obviously follows, that an upper heritor has just the same right to object to the water being thrown back on him, as the lower heritor has to object to the diversion of it by the upper heritor. So also, evidently, as the momentum of the water is the element in general of greatest value, although not of most absolute necessity, it would seem that a lower heritor can prevent an upper heritor from widening the channel, if he by that means should alter the force of the current. So, clearly, a proprietor has right and interest to object to any alteration of the direction in which a stream naturally falls on his lands. (*Bell's Prin.*, 1102; *Ersk.*, II., 9-13).

It seems quite a clear point, that if the course of a stream be altering naturally, a proprietor may prevent it by embankments, or otherwise prevent the alteration. But if a proprietor make a *novum opus* upon the banks of a river, he is bound to make it in such a manner as not to injure the adverse or inferior heritor; and if any damage should happen on account of the defective structure of such a work or otherwise, he will be liable, and nothing will free him, but evidence that the injury was a *damnum fatale*. (*Kerr*, 17th December, 1857, 20 D. 298).

(To be concluded in our next.)

REPORT BY THE COMMITTEE APPOINTED BY THE FACULTY OF PROCURATORS IN GLASGOW ON THE FEES FOR BUSINESS DONE IN THE SHERIFF COURT.

The Committee being of opinion that an interview with the Sheriffs who have been requested to report to the Court of Session on the fees for Sheriff Court business would, in the first instance at least, afford the best opportunity of giving expression to the views of the Faculty, communicated their appointment to the Convener of the Committee of Sheriffs, and requested the favour of a meeting. At the same time, the Committee addressed a circular to various bodies of practitioners in other Sheriff Courts, intimating their appointment, and stating that they thought it would be desirable to have a conference with the Committee of Sheriffs, at which the views of the profession, and the working of the Sheriff Court Act of 1853 in the different Courts, could be more fully explained than by correspondence, and expressing a hope that the different legal bodies throughout the country would co-operate in getting a proper table adjusted. The Committee transmitted with this circular a copy of the Interim Table sanctioned by the Sheriff of this county, and stated that, upon the whole, it gave satisfaction; but that the charges at present allowed under the Act of Sederunt, 1849, for several steps in a process, were quite inadequate.

The practitioners in Greenock and Cupar-Fife favoured the Committee with copies of the tables of fees proposed by them, and lately they have received a copy of the report by the Committee appointed by the Society of Advocates in Aberdeen.

In answer to their application for an interview with the Sheriffs, notice was received that the Committee would be ready to receive a deputation from the Faculty on Friday, the 8th of July.

The Dean of Faculty, and Messrs Dill, Naismith, and Wright were appointed a deputation, and these gentlemen attended the meeting. At the same meeting a deputation from the practitioners in Cupar-Fife were present, and your Committee found that in all matters of importance their views coincided.

The deputation laid before the Sheriffs a copy of the Interim Table in force in this county, and stated that, so far as it went, it seemed to be satisfactory to the profession, and was not burdensome to the public. In particular, they sought to impress upon the Sheriffs the many advantages of adhering to the present system of allowing a fixed fee for debates, instead of a fee depending on the amount of time occupied; and also the expediency and justice of having three scales appropriate to cases of different value.

In addition, the Committee brought under the attention of the Sheriffs the smallness of the remuneration now allowed for attending proofs, and suggested that the fee should be 5s, 7s 6d, and 10s per hour, according to the value of the cause. They also called attention to the fact that no fee was allowed for framing, lodging, and intimating a motion, and suggested that a fee of 2s 6d or 3s 6d, as the case might be, on the lowest or either of the other scales, should be allowed.

As to competitions and appeals in bankruptcy, your Committee thought that these should be treated as ordinary processes, and this was stated at the meeting.

Mr Sheriff Cay, Convener of the Committee, expressed their anxiety to consider fully the views submitted, and said that they would receive every attention at the hands of the Committee.

Your Committee understand that the report is to be made to the Court early in the ensuing session.

Review.

Styles of Writs in the Sheriff and Commissary Courts in Scotland, with Notes of Decided Cases; complied by Thomas Soutar, Solicitor, Crieff. Revised by Hugh Barclay, Esq., LL.D., Sheriff-Substitute of Perthshire. Edinburgh: T. & T. Clark, 1859.

Since the time when "Boyd's Judicial Proceedings" was the only *Vade Mecum* of the provincial practitioner, the tide of legislation and reform—slowly but surely advancing—has swept away many of the outworks and defences of the old fabric of The Law. The High Court of Admiralty, and Supreme Commissary Court, as separate judicatories, are now only matter of history; the Bailie Court, with its kindred Bench of Justices of the Peace, are, *per favorem* of an uncharitable public, and only for yet a little while, allowed to struggle for half-starved existence; while the Baron Court is now to be witnessed, only as an illustration of a charade at an evening party in the drawing-room of the village squire. The abolition or obscurity of these antique litigation-spinning machines, has not been marked with greater approbation, than has, recently, the remodelling of the forms of procedure in the existing institutions of the Sheriff and Commissary Courts.

In the current of recent legislation, which introduced into our well-known though cumbrous procedure, the most radical changes, the profession had no little difficulty in adapting itself to the new state of things, and accepted thankfully the few volumes which from time to time appeared as expositions of statutes and relative schedules, the construction of which was alike unmeaning and obscure. The volume before us is one which will be as welcome as any of its predecessors.

A General Collection of Styles, whether in Conveyancing or Court practice, is a book not for the few, but for all of the profession, and it is of paramount importance that it should emanate from careful hands. The Styles, in the present volume, many of them entirely new to the profession, are well framed; the notes of authorities, bearing upon, and appended to the more important Styles, are ample, to the point, and to the draughtsman, will prove exceedingly useful. On the whole, we are satisfied Mr Soutar has done his work carefully and well, while the revision of Dr Barclay will stamp the volume with a recommendation the legal public will appreciate.

The "Scottish Law Journal" will be published in the first week of each month, Price One Shilling, post free.

The Editors are desirous that the Journal should contain the Reports of all Cases decided in the various Sheriff Courts in Scotland involving points useful or interesting to the Profession, and would therefore solicit a Report from either of the Agents in each such case, or from the Sheriff. It will be necessary to have the Report signed by one of the Agents or the Sheriff, to ensure its correctness, except in those cases where the party reporting is known personally to the Editors.

The Editors will take no notice of anonymous communications, and will not hold themselves bound to return articles or communications not found suitable.

Advertisements can be received till the evening of the 23d of each month. All communications to be addressed to the Editors, care of the Publishers.

Any error or delay occurring in the transmission of this Journal to Subscribers, should be immediately communicated to the Publishers.

The Scottish Law Journal,

AND

SHERIFF COURT RECORD.

GLASGOW, OCTOBER, 1859.

ON THE LAW OF FLOWING WATER.

(*Concluded from page* 111.)

It is not only the ordinary body of water which a proprietor must allow to flow past his property, but the water at all seasons; he is not entitled to draw off and abstract the flood water. (*M'Lean*, 15th July, 1857, 19 D. 1006.)

Although inconsiderable diminutions or retardation of the water will not, it is thought, support an action, actual damage does not seem to be necessary—loss of the water, although it be put to no purpose, seems to be enough; and damage to amenity, and to the trouting in a stream, have been held sufficient. (*Bannatyne*, 1624, M. 12,769).

If a stream be the mark between two properties, the general right in the water is a *pro indiviso* right in the two proprietors to the whole bulk of it. It is very clear that the rights of parties cannot be extricated otherwise, and in that case, no diversion, to any extent, by one proprietor against the will of the other, would appear to be legal. (*Bell's Prin.*, sec. 1101, *Erak.* ii., 9–13).

The right of the lowest proprietor—the proprietor next the sea—appears to be uncontrolled, and he can throw a stream into the sea at any point in his property he pleases. Where one who had right to the salmon fishings in the sea, opposite the mouth of a small river, endeavoured to interdict the proprietor from cutting a new channel, on the ground that the operation, by withdrawing the fresh water, would damage the fishings, it was held that he had no right to object. (*Monro*, 7th July, 1846, 8 D., 1029).

An inferior heritor has a right to object to the pollution as well as to the abstraction of the water; he has a clear right to insist that the water shall not be rendered unfit for primary purposes, and that no manufactory shall be built on the stream which will unfit the water for use generally. For if that were not so, the owner of a manufactory might use a stream to the exclusion of every one else. Here again, however, the distinction between the primary and secondary uses of water must be kept in view, and the refuse of a house, or of many houses, may be discharged, where the discharge of the refuse of a manufactory could be prevented. That the former be carried away, is a natural necessity—that the other be carried away, is a necessity artificially essential. (*Dunn* v. *Hamilton*, 11th March, 1837, 15 D. 853, Aff. 3 Sh. & M'L. 356.)

Whether any discharge into a river is legal or not, will of course depend very much on the size of the river, for if the river be large, the injury will be less, and the necessity greater, since some conduct to the sea must be used.

If water have been made to flow in an artificial channel, and have so flowed from time immemorial, or for forty years, then in the general case the lower heritor will acquire the same extent of right over the stream as if it flowed in its natural channel, and he will be entitled to object to its being diverted even into the channel which was formerly its natural channel. (*Lord Blantyre*, 28th Jan., 1848, 10 D. 509; *M'Kenzie*, 24th Jan., 1854, 16 D. 381; *M'Lean*, 15th July, 1857, 10 D. 1006.) Erskine says that if the owner of the dominant tenement have thrown the water into this artificial channel, merely for his own convenience, or if he collect water and throw it on the servient tenement, merely for his own convenience, no prescriptive right can be constituted against him in consequence. (2 Eg. 35.) But it seems now completely settled that that is an erroneous statement of the law.

It is thought that the right thus acquired by the owner of the inferior tenement is rather a right of property than of servitude. It is true that prescription without a title and acquiescence are not recognised in our law as *habiles modi acquirendi*. (*Melville*, 29th May, 1830, 8 S. 841;) but in the case supposed, the mode of acquisition would more nearly resemble accession, because since the land over which the water is made to flow belongs, *ex hypothesi*, to the inferior tenement, all that is on the land must also be his, if no one have a right to remove it.

It seems a little doubtful whether it be necessary in such cases to plead prescription, or whether, as suggested by the Lord Justice Clerk Hope, in the

case of Lord Blantyre, the right of the lower heritor cannot be referred to a tacit understanding that he receives the water, either newly thrown on his lands, or thrown in its new channel, on the understanding and condition that he is to be entitled to take what benefit from it he can. But if he have no power to prevent the superior heritor collecting and discharging the water on his land, it seems not easy to find a foundation for any such tacit understanding. If the proprietor of the inferior tenement in such case should build a mill, on the faith of the continuance of the stream as sent by the upper heritor, and if he should do so in the knowledge of the upper heritor, it is rather thought the upper heritor could not after that, in the general case, remove the stream, although he could not be said to be barred from his objection by acquiescence, because, *ex hypothesi*, he had no title to object to the building of the mill. (*Ayton*, 1st July, 1800, F. C.; and *Ayton*, 19th May, 1801, F. C.)

But if the upper heritor have thrown the water on the lower heritor for a temporary purpose, as to drain a mine, the case will be different, and the upper heritor will not be bound to continue the discharge. Even a continuance of the discharge for forty years would probably in such a case impose no burden on the upper heritor, and confer no right on the lower, because the right acquired by the lower heritor at first would only be a right to the water so long as the cause existed; the precarious character of his tenure is an inherent condition in his right, and there would seem nothing in the continuance of the flow of the water to work away that quality and element of weakness in his title—per Lord Medwyn in Lord Blantyre's case. (*Irving* v. *Leadhills Mining Company*, 11th March, 1856, 18 D. 833.)

Although a party may not be entitled to divert the water flowing in an artificial channel, it does not follow that he is bound to keep the channel in repair. It rather appears that he is bound to do no more than permit the heritor who desires the continuance of the stream to have access for the purpose of repairing it. (*M'Lean, supra.*)

A water-course may be *created* artificially, as well as diverted to an artificial channel. Thus, the drain of a mine may create a water-course, as may the drainage of a swamp, or the drainage of the surface of the ground. The general rule is, that the servient tenement must receive the water so collected, *Bell's Pr.*, 968; and if it have received it for forty years, it would rather appear that it could not be directly diverted. If diverted in consequence of some lawful operation, of which the primary object is not the diversion of the water, it would rather appear the inferior heritor would have no remedy, as for instance, if water collected by drainage were diverted in consequence of an improved system of drainage—for there the drainage of the lower heritor would be *damnum absque injuria*.

The essential characteristic of a stream is not so much a perennial flow as a defined channel. The rights and limitations of property in running water may have place in reference to a stream, though it be not altogether perennial. (*Cruickshanks*, 1791; *Hume*, 506.) But a distinction must be taken between a stream of which the bed is occasionally dry, and a winter torrent, from which, although it may have made itself a channel, it is thought that no right will arise to the inferior proprietor, because there cannot in that case be held to be an established run of water.

The right of the inferior heritor in flowing water, extends up to the spring, or lake, or swamp, from which the water begins to flow, if the flow from them be perennial; but if the flow be not perennial, but occasional only, the water in the source is, it is thought, the uncontrolled property of the proprietor of the ground. (*Cruickshanks, ut supra; Linlithgow*, 1767; *5 Brown's Supp.*, 935; *Dudden* v. *Guardians of the Clutten Union Co.*, 1 *Hurl. and Norm. Exch.*, p. 627.) It seems probable that the rights of a proprietor to the water in his spring may be looked on as less restricted than to the water in a stream. (*Gale on Easements*, 333, 334.)

On a proprietor's right to springs we have formally rejected the rules of the civil law, according to which the right of a proprietor over the spring in his land is uncontrolled and unlimited. See the argument in the case of Cruickshank.

If a man can arrest water on his land before it assumes the characteristics of a stream, or has formed a spring so large as to afford a perennial discharge, he is held entitled to appropriate it; he may arrest and appropriate to any extent the rain falling on his lands, and he may collect and apply to his own use the surface water which would otherwise spread over his land and find its way, if not evaporated, to the nearest stream, *Bell's Pr.*, sec. 1109. "It has "never yet been held that a man might not drain his "land, and so abstract the water oozing through it, "although such water would otherwise have found its "way to a flowing stream." (*Sir C. Cresswell in Chasemore* v. *Richards.**) One reason of the law on this point seems to be that it could seldom be known whether any, or what amount of the drainage water would reach the neighbouring stream. But this cer-

* Since our last publication we notice that this case has been affirmed in the House of Lords. The principles stated by their Lordships in their elaborate opinions, in the main concur with those which we have endeavoured to explain. The case, from first to last, is highly instructive. Lord Wensleydale says it is the most important case which has come before the House of Peers since he became a member of it.

tainly is not a reason sufficient of itself to justify the rule, for if all the drainage water of a district were appropriated, the diminution of the stream into which it usually fell might certainly be sensible and important. Such was the late and very important case of *Chasemore* v. *Richards*. The local Board of Health for the town of Croydon sunk a large well near the river Wandle, and by means of pumps and steam engines they pumped water into a reservoir for the supply of the town of Croydon, to the amount of five or six hundred thousand gallons per day. This water would otherwise have flowed into the river Wandle, and would have been available as motive power for a mill built on the banks of the river, yet it was held that the owner of the mill had no title to object to the abstraction of the water. The principle seems to be, that the water, until it attains a definite course, is a mere portion of the land, and does not become in law that peculiar subject of right, *aqua profluens*. It is quite clear that the legal rules in reference to flowing water could never be strictly applied to surface water, or to water percolating through the soil, because if so, the proprietor could not drain his land at all; and yet on the other hand the injury done to the riparian proprietors by the abstraction of the drainage water of a district may be exceedingly serious. It cannot be denied, however, that there is a stage at which the right of a proprietor to the water on his lands is absolute; he can arrest it as it falls in the form of rain, although it be certain that some of the rain arrested will naturally make its way to the neighbouring stream, and the only question is, when does that absolute right cease, and the right of the owner of the inferior tenement emerge? And it appears equitable and reasonable that in order to its being affirmed that the owner of an inferior tenement has a right, *ex jure naturæ*, to certain water, although not at the time on his lands, but on the contrary in the lands of another, the course and determination of the water to the inferior tenement should be clear and defined. (*Broadbent Rambotham*, 1856, 11 *Exch.*, 613; *Dudden*, 1857, 1 *Hurl. and Norm.*, 627.) Mr Justice Coleridge, however, dissented from the judgment of the rest of the Court in the Croydon case, and delivered an elaborate opinion to the effect that the owner of the mill had a sufficient right to insist that the water should be permitted to follow its natural course through the soil and into the Wandle, an opinion not without support from previous cases.

In the case of *Irving* v. *Leadhills Mining Co.*, a proprietor adjoining a stream, into which the drainage from a mine had flowed, endeavoured to interdict the lessees of the minerals from driving a lower mine, on the ground, that in consequence of such an operation the drainage of the mine would, or probably would, be diverted from the stream. But it was held that a stream originating in the drainage of a mine along a particular level had been made not for a permanent but a temporary purpose, and that the owner could not prevent any lawful operations of the tenants in working their mines, which might have the effect of withdrawing the water from its former channel. The Justice Clerk, in the course of the judgment delivered by him for the Court, observed: "The complainer says he has such a legal interest in "the direction of the underground natural drainage "of the land, that no operation for the benefit of the "other, in his own workings, shall be allowed, which "may carry such underground drainage in another "direction. We are of opinion that there is no such "interest in law in regard to the direction of such "underground drainage, and that all the underground "water arising from mines, whether percolating from "the surface, or arising from the underground work-"ings, is wholly at the disposal of the owner of such "mines; so that he may send it off in the direction "most convenient for himself, at the least expense, "and in the readiest manner for drying his seams of "minerals." . . . "Of the natural direction of "underground drainage, law can take no account. "Not only is it a matter rarely capable of any, and "never of correct ascertainment; but it is, from the "nature of things, at the disposal of the owner in "working minerals, for his right to minerals imports "a right to direct and get rid of the underground "drainage in the way most beneficial to himself, by "any outlet of which he has the channel."

This decision and opinion bear directly only on the underground drainage of mines; but the arguments of the Justice Clerk seem to bear on subterranean water generally, at least when it merely percolates through the soil, and has no clear or defined channel. It is thought that no right would be recognised in any party to subterranean water in that condition.

In the case of *Balston* v. *Bensted*, 1808, 1 *Campb. R.* 463, where a party libelled the use of a well for two years, and stated that another party, by digging a drain in a neighbouring property, had drawn off the water from the well, Lord Ellenborough held that if it were proved as matter of fact that the diminution of the water in the well was caused by the cutting of the drain, that the latter was an illegal operation, a judgment followed by Justice Story, in the case of *Demster* v. *The Providence Aqueduct Company* in 1833.

But in the case of *Acton* v. *Bell*, 1843, 12, *Mees and Wels*, 324, it was held that a plaintiff alleging a right to certain wells, and underground springs, and water-courses, had no remedy against him who, by sinking pits for mineral operations, had drawn the water away from the plaintiff's underground water-courses, springs, and wells. There was here

no user for twenty years. Chief Justice Tindal, in delivering the judgment of the Court in favour of the defendant, said:—"The case is not to be governed "by the law which applies to rivers and flowing "streams, but rather falls within that principle which "gives to the owner of the soil all that lies beneath "his surface; the land immediately below is his "property, whether it is solid rock, or porous ground, "or venus earth, or part soil part water; the person "who owns the surface may dig therein, and apply "all that is found to his own purposes at his free-"will and pleasure; and if in the exercise of such "right, he intercepts or draws off the water collected "from underground springs in his neighbour's well, "this inconvenience to his neighbour falls within the "description of *damnum absque injuria*, which cannot "become the ground of an action."

If the law were otherwise, his lordship observed, then the drainage of any ground, however distant, might be objected to if it could be shown that the spring or well of another party were thereby affected, a remark, the justice of which is not obvious, because not even a riparian proprietor can have any remedy for the consequences of drainage. The grounds of judgment in that case seem directly opposed to those in the case of *Balston* v. *Bensted;* unless the fact that there had been a twenty years' user (a specialty of the English Law,) in the one case and not in the other, can be regarded as the ground of distinction.

The decision in the case of *Acton* v. *Bell* was supported by a text from the civil law to the effect, that if digging in your own ground you drain your neighbour's well, he has no remedy if your operation have not been executed for the purpose of injuring him. (*Dig. Lib.*, 39, T. 3, sec. 12.) And it would rather appear that it corresponds with the indications of opinion on the subject dropped in the case of the Leadhills Mining Company.

Possibly there may be ground for distinctions between different cases. In digging either for water or for any other purpose, one may drain his neighbour's spring in two different ways; he may dig below it, and if the spring drain off in consequence, the owner of it merely suffers in consequence of the natural inclination of the strata, and the other party but takes advantage of that—and certainly his right to take advantage of the direction of the underground current is not without analogy to his right to the water in its natural channel on the surface; or he may strike the underground stream which causes the spring, above the spring, and before it reaches it, and in this way it may be that he may intercept the water. In such a case, the right of the party who owns the well to object to the operation might seem more plausible, more especially if it were possible to trace and identify the course of the subterranean stream supplying the spring.

If a subterranean stream flow in a defined and ascertained channel, there does not seem reason for holding that the rights of parties on it are different from the rights over a stream on the surface. The law has been so laid down in more than one case in England, as in *Dickenson* v. *Grand Junction Canal Company*, 13th January, 1852, 7 *Exch.*, 282. On the whole, the law of subterranean water-courses is a subject which has been little canvassed in Scotland, and which is too obscure and intricate to admit of discussion within the limits of a paper already extended to an inconvenient length. Generally, it is thought that the law will recognise no right in percolating water, nor give any remedy in consequence of a party digging or sinking a pit or well in his ground, though the water from his neighbour's spring should ooze through to it; but on the other hand, the case might be different, if the underground channel were defined or capable of being traced. An analogical application of the law in regard to water flowing on the surface would seem to lead to such a distinction.

Although water be chiefly valuable for domestic and for manufacturing purposes, the right to private streams confers other rights of less importance, but not the less clearly recognised in law. For instance, the additional beauty of an estate and comfort of a residence, caused by the vicinity of a stream, are legal rights which entitle the proprietor to prevent the abstraction or pollution of the stream.

The right to a stream carries along with it the right to fish in it. In rivers of breadth, forming the marches to properties, this right, in each proprietary, extends only to the middle of the stream; in more insignificant streams, it would seem difficult to carry out this principle. The right of fishing for trout is a right subordinate to the right of salmon fishing; and, it would seem, cannot be exercised by the riparian proprietor, if injurious to the salmon fishing enjoyed by another. (*Mackenzie*, 26th May, 1830, 8 Sh., 816, Aff., 14th May, 1832, F. W. and S., 31.) It is a right possessed only by the riparian proprietors; for although trouts themselves are *feræ naturæ*, and the property of whoever catches them, the right to fish is not common, nor does the right of access to the stream confer it. A right of way along the banks of a private stream will not confer a right to fish in it, *Ferguson*, 18th July, 1844, 6 D., 1363. A man may be prevented from fishing, or subjected to an action for invading the right of another, if he do fish; but he cannot be deprived of the fish he may have caught.

Flowing water is not only a subject of right itself, but is frequently the occasion of alterations of right

in the land, in consequence of its action on the banks of the stream. But the questions that arise in reference to rights to islands in the beds of streams, to land deposited in the way of alluvion, or separated from one estate and attached to another by the force of a torrent, and the like, do not come within the scope of these observations, which apply more strictly to the nature and limits of private right in the water itself. Moreover, a party's right of property in the banks or bed, and the questions that arise in consequence of alterations thereon, depend on legal principles entirely distinct from those which regulate the law of flowing water, and thus no advantage could arise from treating them in connection.

THE LIABILITY OF THE PARTNERS OF JOINT-STOCK COMPANIES.

We proceed to inquire who are liable to contribute towards payment of the debts of a Joint-Stock Company, and the circumstances in which exemption has been granted. This liability is not a creation of the recent Acts. It has always existed at common law, and we have an instance of its enforcement in the old case of *Douglas* v. *Hair*, 24th July, 1778; *Morr.* 14,605. The partners of the insolvent bank of Douglas, Heron, & Co. resolved, at a general meeting, that each partner should be required to pay up his whole capital, and to advance a farther sum of £200 upon each share of £500. Hair resisted the demand for this contribution, pleading, that the meeting had no right to compel a contribution, and that even although the partners had the power to make a call, there was no necessity for doing so, the proper funds of the company being more than sufficient to answer all demands made by the creditors. The Court, however, decerned for the amount of the call.

This important decision seems to have been overlooked by the Lord President in the recent case of *Wryghts* v. *Lindsay*, 20th Nov., 1856, where, in speaking of calls made on the shareholders of a Joint-Stock Company under the English Winding-up Acts, he describes the liability for the calls as a statutory liability, and adds: "The company was an "English company, but we have not been told, as "matter of fact, that according to the law of England "such a demand could have been made and enforced "before the date of the statute. *We know that by "the law of Scotland it certainly could not.*"

A Contributory is defined by the Joint-Stock Companies Act, 1856, sec. 65, as any *existing* or *former* shareholder upon whom calls are authorised by that Act to be made. (1.) *Existing shareholders.* Every company is required to keep a register of shareholders, in which is to be entered the names, addresses, and occupations of the shareholders, the shares held by each, the amount paid thereon, the date of the entry of each name, and the date at which each person ceased to be a shareholder. This register is declared by the Act to be evidence of any matter directed or authorised to be inserted therein, and the parties named in the register will be deemed *existing* shareholders. It is, however, provided that if the name of any person is without sufficient cause entered in the register, such person may apply by summary petition to the Court for an order that the register may be rectified, (sec. 25.) And by the Amendment Act of 1857, (sec. 9,) it is also provided that the Court may decide on any question relating to the title of any person to have his name erased from the register, whether such question arises between two or more holders of shares or stock, *or between any holders, or alleged holders, of shares or stock, and the company;* and generally, the Court may decide any question that it may be necessary or expedient to decide for the rectification of the register. (2.) *Former shareholders.* The Act provides, (sec. 62, Act of 1856,) that any person, who has ceased to be a shareholder within the period of three years prior to the commencement of the winding-up, shall be deemed, for the purpose of contribution, to be an existing shareholder, and shall have in all respects the same rights, and be subject to the same liabilities to *creditors* as if he had not ceased to be a shareholder, with the exception that he shall not be liable for any debt contracted after he ceased to be a shareholder. The commencement of the winding-up is declared to be the time of the application to the Court in judicial liquidations, and the time of passing the resolution to wind up in voluntary liquidations.

The power to make calls on *former* shareholders will only be exercised where doubt is entertained as to the ability of existing shareholders to contribute to such an extent as will satisfy the debts of the company, and pay the expense of winding-up. Where no doubt exists on this head, it might produce grievous hardship, and would indeed serve no good end to call on former shareholders to contribute. The Act providing that every transferee of shares shall, in a degree proportioned to the shares transferred, indemnify the transferrer against all existing and future debts of the company, a provision which receives effect in the adjustment of the rights of the Contributories which the Court or the Liquidators, as the case may be, fall to make after the creditors are satisfied.

This liability to contribute has been resisted on various grounds.

Shareholders may have become such either (1) at the formation of the company, or (2) after the com-

pany had commenced business. The latter class, again, may have acquired the shares from a third party, or from the company itself. It is important to keep these distinctions clearly in view, for, as will be immediately seen, they give the key to the various cases bearing on the subject.

(1.) With regard to original shareholders of a company formed in good faith, there does not appear to be any defence to the claim for contribution. All stand on the same footing. At the outset, all agreed to engage in a speculative business which might be successful, or the reverse, and each formed his own opinion as to the probable result. And as all would share in the prosperity of the company, all must, in like manner, bear its losses.

It is conceivable, however, that a band of adventurers may unite to entrap the public into taking shares in a projected company by fraudulent misrepresentations as to its available resources—as for instance where a company is projected for the purpose of prosecuting mining operations *already in progress*, and the projectors induce a party to become a shareholder by fraudulently misrepresenting the *known* results of working the mine, or by concealing facts which render it certain that the mine cannot be wrought without loss. In such a case it is thought that whatever may be the liability of a party so misled to innocent creditors, he would not be liable as a Contributory to the effect of sharing in the loss with the parties by whom he had been deceived. To entitle a shareholder in such circumstances, however, to relief from contribution, he must repudiate his connection with the company as a shareholder the moment he becomes aware of the fraud that has been practised upon him, *ex parte Gibson*, 3d March, 1858; *English Jurist*, N. S., vol. 4, p. 1005.

(2.) With regard to those shareholders who acquired their shares after the company had commenced business, from a party selling in good faith, two grounds have been relied on in resisting the claim for contribution—*first*, that the purchase was induced by fraudulent misrepresentation or concealment on the part of the company, or of directors or officers of the company; and *second*, that an *ipso facto* dissolution of the company had taken place through the loss of the proportion of the capital declared by the contract of copartnery to operate such a dissolution.

Neither ground has been held tenable. In the recent case of Duranty, 20th Nov., 1858, 4 *Jurist* N. S. 1068, where the first was relied on, Duranty had purchased 151 shares of the Liverpool Borough Bank, a few weeks before the Bank stopped, on the faith of the annual report by the directors. He was held liable to contribute, the Master of the Rolls remarking, "It is important to keep the distinction in "mind between those cases where the misrepresentations are made by the parties to the contract, and "those where third parties make the false representations upon which one or both of the contracting "parties enter into the contract. If one of the parties "to the contract make false representations, upon the "faith of the truth of which the other party enters "into it, the Court sets such contract aside—it remits the parties to their original position. But if "a third party comes to A, and induces him by false "representations to enter into a contract with B, and "B makes no false representations, and is not privy "to the false representations made by such third "party, then A cannot come to this Court to have "the contract set aside, and his only remedy is "against such third party to obtain damages for the "loss he has sustained." In the still later Scotch case of *Inglis* v. *The Liquidators of the Western Bank*, decided by Lord Kinloch Ordinary (whose judgment was acquiesced in) on 4th Jan., 1859, the same defence was pleaded, and repelled. After pointing out the distinction between a contract made with the company and with a third party, the Lord Ordinary shows very clearly the impossibility of sustaining the plea. "What," he asks, "is to be "the practical result of sustaining the complainer's "plea for liberation from his purchase? Are the "shares to be thrown back on the sellers, and the "sellers placed under the responsibility which the "complainer repudiates? This would be against all "equity, for the sellers are entirely innocent of fraud, "as much so as the complainer himself. Are both "sellers and purchasers, then, to be free of responsibility, or in other words, are the shares to be held "annihilated? This is the remaining alternative, "but it is even less admissible than the other, for "the result would be to throw the liability attached "to these shares on the remaining shareholders, who "are quite as innocent as the others. It would be "simply to make a compulsory sale of these shares "to the remaining shareholders amongst them, at the "price of all the loss attached to them."

The defence founded on the *ipso facto* dissolution of the company, was stated in the case of *Allan* v. *Kerr's Trustees*, 7th June, 1853, 15 D. B. M. 225, where it was thus disposed of by Lord Fullerton: "Every partner is entitled to sell shares and deal as "if the company is existing, until he is made aware "that it is dissolved; and on the other hand, every "person dealing with a partner is bound to satisfy "himself and look to the chances before he enter into "the transaction. But to say that at any distance of "time, when a sale has fairly taken place between "two parties, it is to be set aside on the ground that "at the time of the transaction there was really no "company existing, that would be introducing into a "matter of fair dealing between the parties a principle

"to which I am not disposed to give effect." And in the case of *Inglis*, already referred to, Lord Kinloch ridiculed the plea as extravagant. "So long," he says, "as no balance proclaimed the specified loss, and the "company continued to subsist and do business, he "(the Lord Ordinary) conceives that all transactions "in the sale and purchase of shares *bona fide* engaged "in must stand good like the company's transactions "generally."

It may now therefore be regarded as fixed law, both in Scotland and in England, that a purchaser of shares from a *bona fide* seller is liable as a contributory, whatever may be the position of the company, or the inducements which led to the purchase. See *ex parte Ayre*, 22d May, 1858; *Jurist*, N. S. 4, 596; *Burnes and Pennel*, House of Lords, 16th July, 1849; 6 *Bell's App. Cases*, 541; *Dodgson's Case*, 3, De G. & S., p. 85.

It remains for us to review the various cases bearing upon the liability to contribute of parties who have purchased shares *from the company itself*. To this part of the subject our next paper will be directed.

EXTENSION OF THE JURISDICTION OF SHERIFF COURTS.

WITHIN the last twenty years the jurisdiction of the Sheriff Courts has been considerably extended, with results which have been generally satisfactory to the profession and to the public; while, by the recent Sheriff Court Act, the proceedings in these Courts have been simplified and accelerated. There still remains, however, several other classes of cases which we think might safely, and with advantage to the community, be brought within the competency of these Courts.

1. *Actions of Separation and Aliment.*—The privative jurisdiction of the Court of Session is, in most instances, a practical denial of justice in cases of this description. A woman who has the misfortune to be tied to a brutal husband, cannot, without a tedious and expensive litigation in the Supreme Court, obtain the *miserabile remedium* of separation—and a litigation in the Supreme Court is a luxury too expensive for all but the wealthy and educated classes—those classes in which that legal *cruelty*, which alone is held to justify a separation, is of very rare occurrence. The result is, that actions of separation in the Court of Session are of very rare occurrence, while we hardly take up a police report without finding in it the trials of one or more blackguards for abusing their wives.

The Sheriff Court is, from its constitution, really better fitted for the disposal of this class of cases than the Court of Session. For the Sheriff takes the evidence in person, and sees the parties and witnesses, while in the Court of Session the proof is taken on commission. The expense would be lessened by at least four-fifths, while the risk of an erroneous decision would be sufficiently guarded against by the right to advocate, which of course would be reserved to the losing party.

2. *Suspensions of charges on registered protests, and decrees of registration generally.*—By the Sheriff Court Act of 1838, 1 & 2 Vict. cap. 119, a jurisdiction in such suspensions is given to the Sheriff of the suspender's domicile in cases where the sum charged for is under £25 of principal, exclusive of interest and expenses. But the Sheriff has no jurisdiction in suspensions of charges for larger sums, nor can he even grant a sist of a charge for a less sum, unless upon caution.

In no class of cases is despatch of more essential importance than in suspensions. The questions involved in most instances turn upon points of mercantile law—such as are the subjects of daily discussion in the Sheriff Courts—or upon the terms and import of oaths on reference, in which most suspensions terminate. In these Courts cases are daily entertained and decided, in which the sums at issue are larger, and the questions involved more difficult and complicated than in ninety-nine out of a hundred of the suspensions brought in the Bill Chamber and the Court of Session. We would, therefore, propose that all cases of suspension of charges on registered protests of bills, should be brought within the competency of the Sheriff Court.

3. *Actions of proving the tenor of mercantile writs.*—When a bill or receipt is lost, by the present practice, it is necessary that its tenor should be proved in an action in the Court of Session. This, especially when the amount involved is small, often occasions great hardship, and even the abandonment of just claims, and there appears to be no reason why the jurisdiction of the Sheriff should not be extended to these cases.

4. *Actions of Reduction of Mercantile Contracts and other Mercantile Transactions on the ground of fraud.*—By the recent Bankrupt Act, the jurisdiction of the Sheriff has been extended to reductions of fraudulent preferences in bankruptcy, and this measure has met with the approval of the public and the profession. In practice, it is found that cases of this description are rapidly and satisfactorily disposed of in the Sheriff Court; and the experiment having been thus far suc-

cessful, it is most desirable for the interest of the mercantile community, that the same course should be adopted in relation to all cases of reductions of mercantile writs.

As indicative of the confidence entertained by the public in the Sheriff Courts, we would call attention to the fact, that out of nearly one thousand cases decided by the Sheriffs in Glasgow, during the last twelve months, only seventeen have been advocated to the Court of Session.

END OF VOL. I.

Reports of Cases decided in the Sheriff Courts.

26TH MAY, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF STEELE.)

WILLIAM LYON M'PHUN, (Paterson's Trustee), *v.* PETER AIKMAN and THOMSON AIKMAN.

Bankruptcy—Clause—Jurisdiction—Competency—Mortgage—*In an Action of Reduction under the Act* 1696, *of two Mortgages and a Bill of Sale of certain shares of a Ship at the instance of the Trustee on a Sequestrated Estate—Held, that the "Bankruptcy (Scotland) Act,* 1856," *sec.* 10, *and the "Bankruptcy and Real Securities (Scotland) Act,* 1857," *sec.* 9, *confer power on the Sheriff Courts to set aside, either by way of action or exception, all deeds made void by the first-mentioned Act, and all alienations of property by a person insolvent or Notour Bankrupt, which are voidable by statute or at common law; and that Reduction is a competent form of action to try such questions.*

Opinion, That a Mortgage in security of prior advances, although registered prior to sequestration, does not preclude challenge under the Act 1696.

THE pursuer, as Trustee on the Sequestrated Estate of Adam Paterson, raised an action in the Sheriff Court of Lanarkshire, setting forth that the defenders, to his great hurt and prejudice, had obtained from the Bankrupt two mortgages over, and a bill of sale of, certain shares of the ship "Mayflower;" and concluding, in common form, to have the same reduced; 1st, In respect that the estates of the said Adam Paterson were sequestrated on or about the 3d day of November, 1857, and that at the dates when the said respective deeds or writings were granted and registered, at least within sixty days thereafter, the said Adam Paterson was utterly insolvent and notour bankrupt, in terms of the Act of Parliament 1696, cap. 5, as extended by the Act 54 George III., cap. 137, and subsequent statutes, and that the several deeds and writings were so granted without any price or value paid therefor, or at least without any value being given therefor at the time of the same being executed or registered, and without other just and necessary cause, or in satisfaction or security to the defenders of a debt or debts previously contracted, and for the purpose of securing to the defenders an undue preference over the estate and effects of the said Adam Paterson, and of defrauding his true and lawful creditors. 2d, In respect the said several deeds or writings, or one or more of them, when signed and delivered by the said Adam Paterson, were blank in the name of the creditors or assignees, and in other essential parts; and also in respect they were not sealed by him—that they are not properly tested—are erased *in substantialibus*, and are otherwise defective in the statutory solemnities; and 3d, and *Separatim*, That the bill of sale before mentioned is null, in respect that at the date of the mortgages being granted it was specially agreed that the said deed or bill of sale should be delivered up; and the same was then acknowledged and agreed on both sides to be cancelled and set aside; but that the same had since been detained by the defenders, in breach of the said agreement, and without any right to do so.

For these reasons, and in virtue of the Act 1696, cap. 5, as extended by the Act 54 Geo. III., cap. 137, and subsequent Statutes, and the Acts 1696, cap. 25, 16 & 17 Vic., cap. 53, and 20 & 21 Vic., cap. 19, or otherwise at common law, the pursuer sought to have the several writings before-mentioned reduced, and to be restored thereagainst *in integrum*.

The defenders pleaded, (1.) Incompetency and want of jurisdiction, the action being in the form of a reduction. (2.) Incompetent, moreover, as laid, inasmuch as the deeds sought to be reduced are separate and distinct, relating to distinct transactions, and must be dealt with separately and independently; whereas in the summons they are mixed up together, and without any sufficiently specific averment as to each. (3.) A denial of the pursuer's averments generally, and of the alleged grounds of reduction in particular; and explained, (4.) That the deeds or writings referred to in the summons, and sought to be reduced, were granted for good and onerous causes, are in all respects valid and effectual, and are not struck at or affected either by the bankruptcy or sequestration of Adam Paterson, on whose estate the pursuer is trustee, or by the provisions contained in any of the statutes libelled on. (5.) More particularly the deeds of mortgage in question having been granted and duly registered prior to the alleged bankruptcy of the said Adam Paterson, cannot, by reasons of the provisions contained in the Merchant Shipping Act, 1854, be affected by any Act of bankruptcy committed or occurring subsequent to the registration of said mortgages.

The Record having been closed on the Summons and Minute of Defence, the case was debated on the preliminary pleas before the Sheriff-Substitute, whose judgment we are induced, by a consideration of the novelty and importance of the questions at issue, to give at length.

Glasgow, 23d February, 1858.—Having heard parties' procurators in terms of the foregoing appointment, Finds as to the first preliminary defence that the sound and necessary construction of "the Bankruptcy Scotland Act, 1856" (19 and 20 Vic. cap. 79, sec. 10), when construed and read together with "the Bankruptcy and Real Securities Scotland Act, 1857" (20 and 21 Vic. cap. 19, sec. 9), as expressly required by sec. 10th of the Act last mentioned, is to confer upon the Sheriff Courts in Scotland a jurisdiction to entertain, try, and determine all questions arising in bankruptcy as to deeds made void by the said first-mentioned statute, "and all alienations of "property by a party insolvent or Notour Bankrupt, which "are voidable by statute or at common law." Finds that under the said 9th section of the statute last mentioned, jurisdiction and authority are given to the Sheriff Courts to try all actions and exceptions in the ordinary Court falling within the statute, and that without distinction or exception of actions of any particular character, if so be that they are actions raised in the ordinary Court, in such form and with such conclusions as will appropriately try and enable adjudication to be given upon the questions submitted to such Court for determination; Therefore repels the said first preliminary defence, so far as applicable to the jurisdiction of this Court, and sustains the jurisdiction thereof to try the present action, as being an action which is founded upon a challenge by the trustee of a transaction by a bankrupt whose estates are now under sequestration, and which transaction is said to be void under the statute 1696, cap. 5. Finds farther, as to the form in which the present action has been brought, being that of a regular action of reduction, with rescissory conclusions as to the deeds sought to be reduced, and with petitory conclusions arising from such reduction for the vindication of the pursuers' alleged rights in the premises—that as by the said statute 1696, cap. 5, the form of reduction is pointed out and prescribed, and as by inveterate usage since the said statute the said form of reduction has been observed as the proper form of trying questions in bankruptcy arising under the said statute, and that jurisdiction has, as aforesaid, been conferred upon the Sheriff ordinary Court to try such questions in bankruptcy by action as well as by exception, without limitation as to the nature or form of the action, or process of reduction founded upon the said statute 1696, although hitherto competent only in the Supreme Court, must necessarily be held as now also competent in the ordinary Sheriff Court, so as to give due effect to, and to explicate the jurisdiction so conferred on the Sheriff Court, by enabling the same to entertain and dispose of all actions brought in the form appropriate for determining the questions submitted to the consideration of the Court: Therefore repels the said first preliminary defence so far as respects the form of the present action, and sustains the competency of the present action in the form as libelled. Finds, as to the

second preliminary defence, that at least until the production is satisfied the pursuer cannot be called upon to do more than state in his Summons, in general terms, as he has done, that the reasons of reduction, which are set forth in the usual style in such cases, apply to the said several deeds or writings, "or one or more of them," reserving to require the pursuer, after the production shall be satisfied, and, should that appear necessary, to condescend by minute or otherwise more specifically upon his grounds of challenge, as applicable to each particular deed sought to be reduced. Finds, as to the third preliminary defence, founded upon the terms of the Merchant Shipping Act, 17 and 18 Vic., cap. 104, sec. 72, under which it is contended that mortgages of ships are excluded from the operation of the said statute 1696, cap. 5, that the said defence is not, properly speaking, merely preliminary, but is rather a defence upon the merits, to be considered and disposed of after the production is satisfied; Therefore repels the same, so far as preliminary, but reserves the same, so far as involving the merits, and before farther answer, appoints the defenders to take a day to satisfy the production within six days, and therewith makes great avizandum in common form.

(Signed) WILL. STEELE.

NOTE.—The question raised in this action as to the jurisdiction of this Court is one of great general importance, and the Sheriff-Substitute has not ventured to dispose of it without not only full consideration, but also the valuable assistance of the opinions of his colleagues, and of other local judges, whose judgment and experience give weight to their advice and assistance.

Considering the tendency of recent legislation, and the importance attached by the public to securing a speedy and inexpensive administration in bankruptcy under the authority of the local Courts, it would have been a matter of regret to the Sheriff-Substitute had he been constrained to refuse the redress sought by the pursuer in the present action. But the Sheriff-Substitute is now fully persuaded, especially under the circumstances above expressed, that there is sufficient jurisdiction in this Court to try such actions in the form adopted in the present occasion by the pursuer. It is well known that when the Bankruptcy Act of 1857 was originally brought into Parliament, section 10th contained a clause as to setting aside preferences, in these terms: "And that either in the ordinary "Court of the Sheriff, or in the Court of Session." But it appears (*Murdoch on Bankruptcy, page* 9) that this clause was omitted during the passing of the bill through the House of Lords. This led to the introduction of clause 9th in the Bankruptcy and Real Securities Act of last year, to the following effect: "The tenth section of the first hereinbefore recited "Act shall be taker to apply to actions and exceptions as well "in the ordinary Court of the Sheriff as in the Court of Ses- "sion." It has since then been generally considered that the desideratum of jurisdiction in the Sheriff Court, in all questions of bankruptcy, has been obtained. It would no doubt have been better had the enactment in question conferred such jurisdiction expressly in so many words, because, as this has not been done, it has given rise to the plea stated here in defence, that jurisdiction cannot be conferred by implication, nor a large class of questions and of cases introduced at once, and, as it were, by a side wind, to the cognizance of a Court whose interference therewith had previously been strictly and anxiously excluded. But still, when the provisions of the two Acts are looked at as a whole, according to the express requirement of the 10th section of the last statute, it was difficult to resist the conclusion that ample jurisdiction has been conferred upon the Sheriff ordinary Court in trying all questions of bankruptcy of the nature here presented for determination.

For the 10th section of the Act of 1856 directly enacts that "deeds made void by the Act, and all alienations of property "by a party insolvent or Notour Bankrupt, which are void- "able by statute or at common law, may be set aside either "by way of action or exception." There is no doubt that these words do include a challenge under the Act 1696. Such was always competent by way of action, and by the above words it was also for the first time made competent by way of exception. As exception was a very common way in which such questions occurred in the inferior Courts, it was considered by many that this general proviso would let in the jurisdiction of such Courts to the whole questions referred to in the section when these arose by way of exception, and it is believed that in accordance with this view, various such questions were, *de facto*, considered and determined in this and other Sheriff Courts by way of exception since the statute passed.

But all doubt really appears to be removed by the broad terms of the 9th section of the remedial statute of last year already cited. The word "action" is used without any limitation as to character or form, and such actions are declared to be tryable in the Sheriff Ordinary Court, as well as by the Court of Session. For by the Bankruptcy Act, as it has been seen, challengeable preferences "may be set aside, either by "way of action or exception;" and if, by the Real Securities Act, that section was to apply to actions in the Sheriff Ordinary Court, it is impossible to resist the conclusion that, under the two clauses combined, the Sheriff may try all actions for setting aside voidable preferences.

It was indeed contended that as reduction was not mentioned, and as the Court of Session has privative jurisdiction in rescissory actions, the Sheriff, even if he had competent jurisdiction otherwise, could not try an action of that peculiar kind.—*Bell's Com., Shaw's Ed.*, p. 1159. But to this the answer seems plain, that the general and unlimited word "action" must comprehend all actions; and if, as is self-evident, the reduction is the proper and appropriate form for trying such questions, then by necessary inference the competent form of action may be competently tried in the Court of competent jurisdiction.

These considerations gain considerable additional force when it is seen that the present action, besides the reductive conclusions, contains petitory conclusions for vindication of the pursuer's rights. Such conclusions are always competent in the Sheriff Court in regard to moveable property, such as vessels, respecting which, indeed, peculiar and very extensive jurisdiction belongs to the Sheriff Court under its Admiralty powers.

The second preliminary defence does not seem tenable. The pursuer challenges several deeds, and all of them upon the same ground. He has set forth that ground in the usual style, and until he sees the deeds by the production being satisfied, he can do no more. Nay, it is even questionable, whether the statement in the summons is not quite explicit even for trying the case after the production is satisfied; and upon this head the Sheriff-Substitute calls the attention of parties to the following cases, where issues were sent to a jury, in terms quite similar to those employed in the summons for the purpose of trying one ground of action applicable to several distinct statements or documents, to wit—*Swayne* v. *Fife Banking Company, 27th June*, 1835; 13 *Shaw*, 1003. *Kilpatrick* v. *Irvine, 2d August*, 1850; 7 *Bell*, 186. *M'Intosh* v. *Flowerdew, 19th February and 28th November*, 1851; 13 *D.*, 726, *and* 14 *D.*, 116.

The third defence, which is not strictly preliminary, and has therefore been reserved, raises a question of even greater importance and interest than that affecting the jurisdiction of the Court. From the facilities given by the Legislature to the acquisition and transfer of property in ships, the rights thereto have become not only most extensive, but also most accessible and available instruments of commerce. For that reason, and for the security of the large property embarked in shipping, these rights ought not to be lightly interfered with. But, upon the other hand, the very facilities thus given by the Legislature render that species of property only the too ready means of enabling preferences to be given to prior creditors by venditions, absolute or in security, the printed forms of which may be filled up in a few minutes, and in a few minutes more placed upon the Customs' books, after which, as contended here, the rights of the assignee become indefeasible, however exceptionable or improper in the eye of law may have been the reason for which such right was conferred. It is therefore proper to examine very narrowly any plea, the effect of which might be summarily and conclusively to defeat the legislation and judicial determination of a century and a-half upon a branch of the law which has hitherto been favoured and extended with peculiar care, because of the important advantages thereby secured to the general interests of the mercantile community.

It appears that there is at present an action in dependence in the Supreme Court between the trustee on Richard Campbell's estate and the Western Bank of Scotland, where the same question has been raised as in the present action, touching a challenge under the Act 1696 of a mortgage registered under the Merchant Shipping Act. The Lord Ordinary Neaves has taken that case to report to the Second Division of the

Court. The Sheriff-Substitute has been privileged with a perusal of his Lordship's interlocutor and note. For various reasons, most acutely as well as elaborately given, that learned Judge adopts the opinion that the Act 1696 does still apply to mortgages of ships, notwithstanding the terms of the Merchant Shipping Act. It is hoped that the question before the Supreme Court may be decided one way or another, in time to found an authoritative precedent for the determination of this case. But as it is just possible that it may not, and as the Sheriff-Substitute has of necessity been led to come to a conclusion, at least to a certain degree, upon the branch of the case now before him, he thinks it better at once now and briefly to indicate his views. He does so, however, with the express proviso, that farther argument, if wanted, is to be open to the parties thereanent after the production is satisfied and when the merits are discussed; and it shall then be open to him to revise, and, if need be, to alter and modify these views, with the advantage which he will derive from their having been submitted for a time to the consideration of the parties.

There cannot be a doubt that before the Shipping Acts were passed, mortgages of vessels granted in security of prior debts were challengeable under the Act 1696. Now, in these Shipping Acts, no reference whatever is made to that statute, nor even to the general principles upon which the statute and the course of judicial determination under the same have all along proceeded. It is settled law that a remedial statute passed for a protection of the public against fraud, cannot be repealed by implication, *Dwarris*, p. 533; and therefore it is not to be assumed, that when the Legislature passed the Merchant Shipping Acts, it was undoing *sub silentio* the established law of the realm. It must instead be held, if that is at all possible, that the various Acts are in harmony and can stand together, (*Dwarris ut supra,*) protecting all and trenching upon none of the rights cared for by the Legislature.

Accordingly, it does appear that the effects of registration under the Merchant Shipping Act can be completely preserved without trenching upon the Act 1696. The ship being a moveable article, required actual delivery before the title of the mortgagee could be complete, and as it was expedient and necessary in multitudinous cases to confer a good title where actual delivery could not be given, the device of registration was resorted to, whereby a title could be perfected consistently with the actual employment and possession of the ship in any way, and at any place, most suitable for the parties, *Bell's Com., Shaw's Ed., p.* 371, 372. An inchoate title by vendition or mortgage would prevail against general creditors, if completed by registration and endorsed on the certificate before a trustee should complete his own title. *Ibid, Note E.*

But although a title is thus obtained by registration, it by no means follows that such title shall be indefeasible any more than the title of a mortgagee of a landed estate completed by sasine duly recorded; and the words of the Merchant Shipping Act, section 72, do not give any such indefeasible right. There is no doubt that it is said that the mortgagee's right shall not be affected by any act of bankruptcy committed by the mortgager after registration. What precise meaning in the law of Scotland is to be attached to this phrase, "act of bankruptcy," it is not easy to see. Whatever may be its import as taken in connection with a proviso or salvo, which immediately follows, and which also precedes the subsequent words applicable to the right of the assignee, it will be found that what the statute meant to provide against was the mortgager having the ship in his own order and disposition, and his being the reputed owner thereof. This salvo overrides the whole clause (*Dwarris, p.* 515 *and* 668), and renders quite clear that which might otherwise have been abundantly obscure at least in Scotland; and shows that the assignee in bankruptcy is not to pretend that the ship is his absolutely and *de plano*, because of some *secret* act of bankruptcy committed whilst the mortgager was its *apparent owner*.

But the pursuer here sets up no such plea. He admits that the mortgagee has an *ex facie* valid title, or at least may have such; but that there are circumstances inherent in the transaction, and in the very consideration given for the title itself, which, in virtue of the notour bankruptcy publicly supervening, give him a right to demand restitution of the ship in its integrity, at the hands of the mortgagee himself, as being an inducing or a concurring party in what, in law, is held to be a fraud. And there humbly appears to be neither principle nor phraseology in the Merchant Shipping Act to prevent the assertion and vindication of such demand if well founded in point of fact.

It is needless to add, in conclusion, that in so far as the action is laid upon fraud at common law, neither the Merchant Shipping Act nor any other seems to be available to protect the wrong doer.

(Initialed) W. S.

The defender appealed, and the case was fully debated before the Sheriff, who, on 28th May, 1858, pronounced the following interlocutor:—

"*Glasgow, 28th May,* 1858.—Having heard parties' procu-"rators, under the defender's appeal upon the interlocutor "appealed against, preliminary defence and whole process, "adheres to the said interlocutor for the reasons stated there-"in, as also those contained in the following note.

(Signed) "A. ALISON."

NOTE.—This is a very important question, and it depends entirely upon the two clauses in the last two Bankruptcy Acts. The first of these statutes, 19 and 20 Vict., cap. 89, enacts, sect. 10, That "Deeds made void by this Act, and all aliena-"tions of property by a party insolvent or notour bankrupt, "which are voidable by statute or common law, may be set "aside either by way of action or exception, and a Decree "setting aside the deed by way of exception, shall have the like "effect as to the party objecting to the deed as if such decree "were given in an action at his instance." It is known from the draft of this Act, in the bill as it passed the House of Commons, that after the words "action or exception," this clause contained the words "either in the Sheriff Court or the Court of Session." If these words had been in the clause in the Act as it passed they would have been decisive of the present question; but, as they are not so, it is impossible to hold that this clause gave power to this Court the same as the Court of Session, to take cognisance of such causes either by way of action or exception. But the defect that thus existed appears to have been completely removed by the subsequent Act, 20 and 21 Vict., cap. 19, which declares, section 9, That "the "tenth section of the first hereinbefore recited Act (19 and 20 "Vict., cap. 79) *shall be taken to apply to actions and excep-"tions as well in the ordinary Court of the Sheriff* as in the "Court of Session." This Act does not appear to have been drawn out by a Scotch lawyer, for if it had it would probably have contained the words, "that such action shall be com-"petent in the ordinary Court of the Sheriff as in the Court "of Session." But it is not only sufficiently apparent what the Legislature meant, but the words used are sufficient to carry their intention into effect; for taking the two Acts together they run thus:—"Deeds made void by this Act, etc., "or at common law, may be set aside either by way of action "or exception *as well in the ordinary Court of the Sheriff as "in the Court of Session.*" This seems decisive of the matter, the more especially when it is recollected that the purview and general intention of both Acts was to expedite and cheapen proceedings in sequestration in Scotland, by bringing them generally within the jurisdiction of the Sheriff, subject to the review of the Court of Session.

(Initialed) A. A.

Act. W. B. FAULDS. *Alt.* D. FORBES.

15TH SEPTEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

A. *v.* B.

Sequestration—Judicial Factor—Forum.—*Application for Sequestration of the estates of a deceased debtor refused, on the ground that a Judicial Factor had been appointed by the Court of Session under the provisions of the "Bankruptcy (Scotland) Act,* 1856," *sec.* 164, *and had entered upon the*

management of the estate, — Reserving to the petitioners to renew application to the Court of Session, which seemed to be the proper forum for discussing the question.

THIS was an application for Sequestration of the estates of a deceased debtor. The petitioners averred that they were creditors of the deceased to the extent required by the statute: That the debtor, at the date of his death, left a trust-disposition and settlement, conveying his whole estate in favour of trustees for the purposes mentioned in the deed, and, *inter alia*, for behoof of his wife and children: That they understood that in consequence of the declinature of the trustees named to accept of the trust, a petition had been presented by the widow and children to the Court of Session, craving the appointment of a judicial factor on the estates of the deceased; and that, thereupon, a factor had been appointed: That the present petitioners were not parties to that application; and that in order to realise and divide the estates of the deceased among his creditors, the present application for sequestration was necessary.

Upon this application a deliverance was pronounced, ordaining the trustees named in the deceased's settlement, the widow and children of the deceased, and the judicial factor, to be cited to appear and show cause why sequestration should not be awarded, and appointing the deliverance to be intimated in the *Gazette*, in terms of the statute.

The judicial factor opposed the awarding of sequestration, and pleaded—

That the application was incompetent and uncalled for, in respect—

(1.) A judicial factor had been appointed by the Court of Session under the provisions of the "Bankruptcy (Scotland) "Act, 1856," section 164, and that factor had entered upon the management of the estates.

(2.) Under the provisions of the foresaid section of the Bankrupt Statute, the estates were equally under the control of the accountant in bankruptcy, as if sequestration was now awarded.

The following deliverance was thereupon pronounced:—

Glasgow, 15th September, 1858.—Having resumed consideration of this petition, and heard the agent for the petitioners, and for B, the judicial factor, who opposes the awarding of sequestration of the estates of the deceased debtor, designed in the petition: In respect that the said B has been appointed judicial factor upon said estates by the Court of Session, under the provisions of section 164 of the Bankruptcy Act, and has entered upon the management of said estates in virtue of said appointment; and in respect, it does not clearly appear that it is expedient to supersede said appointment by the awarding of sequestration, and that the Court of Session, who made this appointment, seems to be the proper *forum* for discussing that question: Dismisses the petition: Reserving to the petitioners to renew their application in the Court of Session, if so advised: Finds no expenses due; and decerns.

Act., J. GEBBIE. *Alt.*, D. TURNER.

28TH SEPTEMBER, 1858.

SHERIFF SMALL DEBT COURT, GLASGOW.

(MR SHERIFF BELL.)

ADAMSON & MILLER *v.* AMBROSE.

Landlord's Hypothec—Poor Rates.—*Held, that a claim for Poor Rates is preferable to a landlord's right of hypothec.*

THIS was an action brought at the instance of Ebenezer Adamson, Inspector, and John Miller, Collector, of Poor Rates for the Parochial Board of the City Parish of Glasgow, against William Ambrose, Writer there, for the sum of £4 6s 8d, which the pursuers alleged the defender was bound to pay under the following circumstances:—In the month of February last, a poinding for poor rates at the instance of the pursuers was effected of the goods within the shop of William Freckleton, of which the defender is landlord. Soon after the poinding Freckleton became bankrupt, and the pursuers did not proceed upon the poinding—the defender having, after the term of Whitsunday, sequestrated and sold the effects in the shop for rent then due.

The defender objected to the claim, that the pursuers had lost the benefit of their poinding by *mora*—that no poinding was in existence when the sequestration was brought; and that they had no preference for poor rates over his claim as landlord.

The pursuers argued that they were not bound to carry out the poinding within any specified time—that the defender was liable, whether a poinding had been executed or not, and in support of this cited the 88th section of the Poor Law Act (1845).

Both parties having at this stage agreed to abandon their pleas in regard to the poinding, in order that the question of preference simply should be discussed and settled, the Sheriff-Substitute, after hearing agents at length, in giving judgment, said—

This is a case involving a question of very considerable public importance—the question, namely, whether the collector of parochial poor rates has a right to be paid those rates which may be resting owing by any tenant before the landlord can carry away and sell, under a sequestration, the effects of the tenant for his rent; in other words, the poor rates collector claims a preference over the effects in the house, as against the claim of the landlord for his rent. Now, that preference, as stated by the defender, was certainly not recognised in ordinary practice, or in law, previous to the passing of the existing Poor Law Act, which was passed in the year 1845. Previous to that date, I am not aware that a right to exclude the landlord from a sale under a sequestration, until he had satisfied the poor rates, had been claimed by any poor rates collector, or, if claimed, had been recognised by any court of law; but in the present case it is the terms of that Act which are founded on. By that Act provision is made which, it is said, alters the relative position of the landlord and poor rates collector, and puts the latter in a more favourable position than before, and in as favourable a position as the collector of the Crown taxes. The section that is founded upon in the Poor Law Act is the 88th section, which has two provisions, either of which, the pursuers maintain, is sufficient to justify their present claim. I take the clause at the end of the first section, which says, "All assessments for the relief of the "poor shall, in case of bankruptcy or insolvency, be paid out "of the first proceeds of the estate; and shall be preferable "to all other debts of a private nature due by the parties "assessed." Now, this is a case of bankruptcy. The tenant, Mr Freckleton, was a bankrupt at the time that the claim of the poor rates collector was demanded, and he was also a bankrupt at the time the defender sequestrated, and subsequently sold the *invecta et illata* for his rent. He was then not only bankrupt but sequestrated, and a trustee appointed on his estate. Now, the poor rates collector says that under this clause "all assessments for the relief of the poor shall be "paid out of the first proceeds of the estate, and shall be pre-"ferable to all other debts of a private nature due by the par-"ties assessed;" he has a right to go to the trustee, or any party who interferes with any portion of the bankrupt's estate, and to say, "I have a preference over you, and you are not "entitled to carry off any portion of that estate until I am "paid." I may say generally that this claim appeared to me at first sight somewhat startling from its novelty, and that I did not originally entertain a very favourable view of it; but my mind has been very materially altered by the argument which has taken place before me, and by the references to the different Acts, and to the authorities quoted, by Mr Thomson; and I have come to the opinion that the claim is a good one, and must be sustained. In the first place, this last clause of the 88th section appears to be a very strong one, and to admit of only one interpretation, namely, that as soon as a bankruptcy has taken place, the effects belonging to the bankrupt

are preferably subject to the claim for poor rates. Now, the defender said the trustee did not interfere with him; that the trustee said—"I am quite aware that the landlord has a preference over ordinary creditors, and you, Mr Ambrose, may go and sell for your rent; I will take the balance of the assets." That may be very true as between the landlord and the trustee; but the pursuer says, "Whatever bargain or arrangement may exist between the landlord and the trustee, I am not to be cut off from the benefit of the clause, which says, that in case of bankruptcy or insolvency I shall be paid out of the first proceeds of the estate, and I shall be preferable to all other debts of a private nature. Though the trustee may have allowed the landlord to go and pay himself, I am not going to do it. I stand upon this clause, which gives the preference. The landlord's rent is a debt of a private nature, and under this clause the payment of poor rates takes precedence of that, and the landlord is not entitled to interfere with my preference, whatever arrangement may have been made with the trustee to interfere with my preference, and carry off a portion of the bankrupt's estate." No doubt it is true that, if the collector of poor rates chooses, he may go to the trustee and enforce his preference over the assets in his hands. There is nothing to prevent him doing that; but, on the other hand, if he find any individual party, by consent of the trustee, carrying off a portion of the bankrupt's effects after bankruptcy, it is very difficult to hold, under this enactment, that he is not entitled to go to the party and say, "You must disgorge. You have carried off a certain portion of the estate to pay a private debt, while I was entitled to come before you, and to realise my debt out of the effects; and as you have done so in the face of this enactment, you must repay me." I think even if the Act had stood there it would have been strongly in favour of the view maintained on the part of the pursuer. But it does not rest there, for another portion of the section is still more explicit. It is this —"That the whole powers and right of issuing summary warrants and proceedings, and all remedies and provisions enacted for collecting, levying, and recovering the land and assessed taxes, or either of them, and other public taxes, shall be held to be applicable to assessments imposed for the relief of the poor." Now, what is the remedy or provision by which these public rates may be collected? By the 43d of Geo. III., chap. 150, sec. 33—an Act under which these public rates are collected—it is enacted "that no moveable goods, or effects whatever belonging to any person or persons at the time of any of the said duties assessed under the regulations of this Act become in arrear, shall be liable to be taken by virtue of any arrestment, poinding, *sequestration*, or diligence whatever, or by virtue of any assignation on any account or pretence whatever, unless the party at whose instance the said diligence shall be used, or to whom such assignation shall be made, shall, before the sale or removal of such goods or effects, pay or cause to be paid to the collector or collectors of the said duties so due, all arrears of the said duties which shall be due at the time of arresting, poinding, or seizing such goods or effects, or which shall be payable for the year in which such diligence shall be used, provided the duties shall not be claimed for more than one year." The plain import of this clause is, that one of the provisions or remedies provided for the recovery of these public rates is, that nobody shall be entitled to carry off under his arrestment, poinding, sequestration, or any diligence whatever, any effects until he shall have first satisfied the collector for the rates then in arrear for that year. If that is the law as applicable to these public rates, and if this section imports that provision into the Poor Law Act, and gives the same remedy and provision for recovery of the poor rates as it does for recovery of public taxes, it follows that no landlord using diligence or sequestration is entitled to carry off under that diligence until he has satisfied the collector of the poor rates for the arrears then due to him for the current year. At last diet, I threw out a suggestion that, while this was a prohibitory enactment against carrying off effects before taxes were paid, yet it might not necessarily mean, that if the private creditor had carried off, he should be bound to pay; but, on consideration, I think it is a sound answer to that doubt, that if you are prohibited, and if you carry off and don't pay, you must become liable for the arrears which, in the face of this enactment, you have disregarded. It is settled law, that if a poinding creditor, without settling with the landlord, carries off the effects, the landlord can come upon that poinding creditor, not only for the value of these effects, which may be a good deal less than the rent past due; but in respect it is impossible to ascertain how much damage the subject of hypothec has sustained, for the rent, whatever it was, that was past due. In the same way, it must be held that under this enactment, which says that the landlord shall not carry off against the collector of these poor rates until he satisfy him; that if he does carry off he shall be held responsible for the arrears then due. These are the grounds upon which I conclude that it is impossible to get over the fact that the Legislature, in passing this 88th section of the Act, looking at the great public necessity for the due collection of the poor rates over the country, meant to put the poor rates collector in a very favourable position, and give him a preference over all private creditors, and to prohibit the latter from carrying off the effects which might be realised to pay the poor rates until these poor rates had been satisfied. In short, to put them in the same position with regard to poor rates as had been already done in regard to the public taxes for carrying on the public business of the country. A preference is given to the tax collector against landlords and everybody else, and now the Legislature has seen fit to extend this privilege to the collector of poor rates. I have had an opportunity of advising both with Sir Archibald Alison and Sheriff Smith, and they concur in the views which I have now expressed, and think it is impossible to interpret the clause, read by the light of these previous Acts, in any other way, and therefore I decern in favour of the pursuers for the sum of £4 6s 8d, without costs.

Act. R. THOMSON. *Alt.* PARTY.

6TH OCTOBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

COMPETITION FOR TRUSTEESHIP—JOHN ROBERT SWAN *v.* JOHN CHRISTIE REID.

Trusteeship—Competition—Affidavit—Voucher.—*Held* (1.) *That a person who had acted as Manager of a Bank up till the date when it became amalgamated with, and its property assigned to, another Bank, was not thereafter entitled to make affidavit to the debts due to the Bank for which he had acted.* (2.) *Objection to an affidavit made by the Assistant-Manager of a Bank repelled.* (3.) *Where a Creditor in his affidavit had not deducted Securities held by him, the Sheriff allowed the deduction to be made in an amended affidavit.* (4.) *Circumstances in which it was held that a Creditor was not entitled to be ranked for the sum contained in an I O U granted by the Bankrupt.*

IN this competition for the Trusteeship on the estates of John Flemington, merchant in Glasgow, now deceased, Reid objected, *inter alia*, to the following votes for Swan:—

1. To the vote of the Edinburgh and Glasgow Bank, in respect—*First*, That Mr Snodgrass, by whom the affidavit was made, and mandate granted, was not, at their dates, the manager of, or in the employment of, the Bank. *Second*, That the Edinburgh and Glasgow Bank had ceased to exist at the date of the affidavit and mandate. *Third*, That the whole assets of the Edinburgh and Glasgow Bank were, previous to the date of the affidavit and mandate, assigned to the Clydesdale Banking Company, to whom they were delivered, and for whom they were held.

It appeared that, previous to the date of the affidavit, the Edinburgh and Glasgow Bank, of which Mr Snodgrass was manager, had, in terms of arrangement, assigned their whole property to, and become amalgamated with, the Clydesdale Banking Company. The Sheriff, after hearing parties, sustained the objection, and rejected the vote.

2. To the vote of the City of Glasgow Banking Company, in respect the affidavit was not made by the secretary, manager,

cashier, clerk, or other principal officer of the Company, but by the assistant-manager. Objection repelled.

3. To the vote of Peter and Thomson Aikman, in respect—*First*, That the claimants held securities over the bankrupt's estate, which they have not stated or valued. *Second*, That the debts claimed have been extinguished in whole or in part by payment, by compensation, or by novation. *Third*, That the claimants were not creditors to the extent claimed.

The Sheriff having allowed the claimants to amend their affidavit, in terms of the 51st section of the Act, they valued the securities held, and to that extent reduced their claim. The objections were *quoad ultra* repelled.

On the other hand, Swan objected to the following vote for Reid:—

To the vote of Hugh Wilson, in respect the only voucher produced in support of his claim for £3,400 was an I O U by the bankrupt, dated 1st January, 1854.

The facts are thus stated by the Sheriff in his judgment sustaining the objection:—"The Sheriff-Substitute, in holding this voucher insufficient in the whole circumstances of the present case, does not mean to lay down the general rule that an I O U may not, in certain cases, sufficiently support an affidavit to validate a vote. But in the present instance, he was induced to hold the voucher inconclusive by various concurring circumstances. The claimant, though not strictly conjunct with the bankrupt, admittedly stands in the family connection to him, that he and the bankrupt married two sisters. A diligence was granted to the competitor Swan, to recover entries in the claimant's books, tending to show that the I O U was not resting owing; and though no positive evidence of this was recovered, strong negative evidence was brought to light, in the fact, that neither the claimant's business books nor his cash book exhibit the slightest trace of any such large loan having been made by him to the bankrupt, either on the 1st January, 1854, or at any other time; whilst his bank book proves that he never drew from the Bank a larger sum at a time than £495, and that he drew no sum whatever on the 1st January, 1854. The cash book also shows one entry of an I O U received from the bankrupt for £50, which makes it more suspicious that I O Us for larger sums should not be entered. It is further quite settled that an I O U does not prove its own date, and there is nothing, therefore, to show that the I O U founded on was not granted after bankruptcy. The affidavit itself gives no explanation whatever of the circumstances under which so large an advance was made to the bankrupt, and this appears to be a very essential omission. In *Dyce and others*, 28*th May*, 1847, a voucher of this description was rejected even under more favourable circumstances than occur here. The rubric bears, "A creditor claiming to vote in a sequestration in respect of a "debt above £890, produced as his voucher a holograph letter "by the bankrupt, which merely acknowledged that sum to "be due, and which was dated shortly prior to sequestration. "*Held*, that this was not a sufficient voucher of debt, in re"spect that it did not prove its own date, and was not such a "voucher as the creditor ought, in the usual course of busi"ness, to have been possessed of." The Lord Justice Clerk remarked, that if the document had borne an old date, the utmost suspicion would have attached to it, as no one would rest for any time a large claim on such an imperfect writ. Lord Moncrieff said, "I should think it a very dangerous "thing to say, that a creditor having got such an acknow"ledgment which may be as much in confidence as if he were "a relation, may escape from all necessity of explanation by "merely producing it;" and both he and Lord Cockburn expressed a clear opinion that the affidavit should have given some account of how the debt came into existence. Similar views were given effect to in the cases of *Cullen*, 16*th July*, 1842; *Aitken*, 14*th February*, 1846; and *Gascoigne*, 10*th December*, 1847. In the face of these authorities, the vote could not be sustained."

The effect of the Sheriff's judgment was to give a majority for Mr Swan, who was accordingly declared duly elected trustee,—the other claimant, Mr Reid, being found liable in expenses.

For Swan—Thos. Brown. For Reid—John Naismith.

8th October, 1858.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Bell.)

Lange Brothers & Co. v. Forsyth.

Contract of Sale—f.o.b. Delivery.—*By a Contract of Sale it was stipulated that the seller should deliver the goods free on board ship in London.—Held, that the buyer was not entitled to demand dock warrants or delivery orders, but only shipping documents for the goods.*

This was an action brought by Lange Brothers & Co., of London, against David Forsyth, merchant in Glasgow, concluding that the defender should be decerned to grant his acceptance to them, dated the 2d July last (1857), for the sum of £436 10s., payable four months after date, and failing delivery of such acceptance, that he should be decerned to pay the said sum of £436 10s., being the price of ten hogsheads and ten quarter casks brandy, sold by the principal pursuers, through Brace & Co. of Glasgow, as brokers, to the defender, and of which brandy the defender had refused to take delivery.

The pursuers averred that the defender had purchased the brandy in question from them through Brace & Co. as Brokers, in terms of the following "Bought note:"—

"*Glasgow*, 4*th May*, 1857.—Bought for account and risk of "David Forsyth, Esq. of Glasgow, on commission, the under"mentioned brandies—say 20 hhds. and 20 qr. casks, c.v.p. "pale cognac brandy, vintage 1856, at 10s per gall. f. o. b. "ship in London. Payment by acceptance at four months "from this date. (Signed) Edmund Brace & Co., Brokers."

That, as ordered by the defender, they had shipped one-half of the quantity, the price of which had been settled: That for the remainder, the price of which was now sued for, the defender had (12th June) requested that dock warrants should be sent to him, when Brace & Co. intimated that the pursuers were not bound to give delivery orders or dock warrants, but only to place the brandy free on board ship at London: That thereafter (4th July) the pursuers, through Brace & Co., applied to the defender for instructions for shipping the same, and for his acceptance for the price, in terms of the contract, and that he then repudiated the contract.

The defences urged by the defender were—(1,) No title to sue, in respect the brandy was not, so far as known to the defender, the property of the pursuers, but of Edmund Brace & Co., with whom the defender transacted throughout. (2,) That the portion of the contract remaining unsettled, was by special agreement cancelled, when bills were accepted for the brandy, which was put on board the "Hallyards." And, (3,) That the pursuers having refused to give dock warrants or delivery orders for the brandy for more than two months, the defender was entitled to resile from the contract, in so far as not implemented, and to hold the same annulled.

After proof had been led, the defender abandoned the first defence. In regard to the second, which was founded on the terms of certain correspondence produced, it was found "that "these letters did not import a cancelling of the contract, in "as far as the undelivered brandy was concerned." Upon the issue raised by the third defence, proof was led at some length; and the case having been debated, Mr Sheriff Bell gave judgment as follows:—

Finds as regards the third defence, that it is instructed by the pursuers' letters to Edmund Brace & Co., of 17th April and 1st and 8th May, 1857, Nos. 22/1, 22/2, 22/3, that the brandy in question when sold was not in London but at Charente, although it does not appear that Edmund Brace & Co. mentioned this to the defender at the time of the sale:

Finds that had the defender ordered delivery of the 10 hhds. and 10 qr. casks now in question f. o. b. in London any time before the 4th July, when the brandy arrived from Charente, and had the pursuers been unable to obtemper the order, there would have been sufficient ground for the defender throwing up the contract: But finds that the defender never called on the pursuers to put the said brandy on board ship, but demanded instead dock warrants or delivery orders: Finds that the defender having averred in the closed record, that, under the terms of the contract, he was entitled to dock warrants, not being prepared to give immediate instructions for placing the brandy on board ship, a proof was allowed him of said averment: But finds that he has failed to prove by any general and understood practice of merchants, that the terms of the writ No. 21/1 give an option to the buyer to demand dock warrants, instead of shipping documents: Finds, on the contrary, that the defender's own witness, Mr John Hunter, who is corroborated by witnesses for the pursuers, seems correctly to have interpretated the said writ, according to the custom of merchants, when he depones—"Under said contract the buyer "would be entitled to shipping documents when called upon "to grant the bills; the buyer would not have been entitled "to instant delivery instead of getting the brandy put free on "board. According to said contract the seller was not bound "to do anything but put the brandy free on board; any "other arrangement would have required to have been made "of mutual consent. I think the seller would not be bound "to give dock warrants if the purchaser asked for them, in-"stead of shipping documents, not being prepared to advise "as to a ship. I would consider that if the buyer failed to "intimate a ship within four months, the seller was entitled "to demand the price of the brandy, he being prepared to "give delivery:" Finds that the only obligation expressly laid on the seller in the contract being to put the brandy "f. o. b. "ship in London," it would have required strong and uncontradicted evidence of the custom of merchants to extend said obligation to the granting of dock warrants or delivery orders; and in the absence of such evidence, no such extended obligation is to be presumed—(*Athya & Co.*, 16th July, 1856:) Finds that although the brandy did not reach London till about two months after the date of the sale, the defender was not put to any disadvantage, he not being prepared to have it put on board ship sooner, and was not entitled to refuse the pursuers' offer then made to him in their said letters of 4th and 23d July, the pursuers, on their part, not having called on the defender to grant his acceptance for the price of the brandy until they were ready to deliver it according to contract: Therefore repels the whole defences; and finds that as said acceptance was to have a currency of only four months from the date of the sale, and as said four months have long since expired, it is unnecessary now to ordain the defender to deliver such acceptance to the pursuers: But decerns against him for the sum of £436 10s., being the price of the said brandy, with interest as libelled; the pursuers *unico contextu* with receiving payment giving delivery of the said 10 hhds. and 10 qr. casks, on payment by the defender of the dock charges thereon: Finds the defender also liable in expenses, subject to some modification, in respect of the failure of Edmund Brace & Co. to explain that the brandy was not in London but at Charente when sold: Allows an account of said expenses to be given in; and remits the same to the auditor to tax and report; and decerns.

(Signed) HENRY GLASSFORD BELL.

Against this judgment the defender appealed; and the Sheriff-Depute, upon the case being debated before him, pronounced an interlocutor, adhering to the Sheriff-Substitute's judgment, and adding the following note:—

The Sheriff has heard this case very ably debated under the appeal by Mr Kay and Mr Wright, and at first he was inclined to entertain some doubts of the interlocutor under review; but upon more mature consideration, he has come to be satisfied that it is well founded.

The material facts of the case appear to be, that the defender purchased from the pursuers the brandy in question on 4th May, 1857, under the following missive (quoted above). The obligation of the seller is here quite distinct, to deliver the brandy "f. o. b.," that is "free on board ship" in London, in exchange for a bill at four months; and there can be no doubt that if that obligation was not implemented within a reasonable time after the 4th of May, the defender would be entitled to plead that he was liberated from the bargain. But there is nothing said in the contract about the delivery of a dock warrant for the brandy, or a storekeeper's receipt. The obligation is distinct to deliver the brandy "free on board "ship in London," and nothing more or less. Accordingly, eight days after, on the 12th day of May, the defender did name a ship for half the brandy sold, to be delivered in, which was done and the price paid. This naming of the ship and delivery of half the brandy sold was clearly a timeous act on both sides. If, therefore, the defender had specified a ship in that or the succeeding month in which he desired that the rest of the brandy should be shipped, it is quite clear that if the pursuers had not been in a situation to do that, the defender would have been liberated, and the bargain cancelled in the eye of the law. But the difficulty of the case lies here, that the defender did *not* do that, but went on in the remainder of May and throughout June insisting for delivery of a dock warrant, and he never specified a vessel at all in which the brandy was to be shipped, and the pursuers, on the 4th of July, tendered the remaining 10 hhds. and 10 qr. casks which the defender then declined to accept, upon the plea that he had lost the market through the pursuers' failure to deliver the warrants in due time. The question, therefore, turns upon this, whether *under the written contract* of parties the defender was well founded in his demand for dock warrants in lieu of a vessel designated wherein to ship. The mercantile evidence is contradictory as to whether an obligation "f. o. b. "ship in London" is *equivalent to* or *can be transmuted into an obligation to deliver London dock warrants in Glasgow*. The preponderance of the mercantile evidence does seem inclined to decide that such a transmutation is legal, and may be demanded. But looking to the rule which the courts of law have established both in England and Scotland for the interpretation of mercantile documents of that description, the Sheriff cannot say that the defender was entitled to insist on such a change of the seller's obligations, and that if it was not made, he was free of the bargain. The defender, if he had chosen, might in the contract have taken the pursuers bound to deliver the brandy free on board ship in London, or to deliver a London dock warrant in Glasgow when required by the purchaser. He has not done this, however; but stipulated for free delivery on board ship in London only, and the defender does not allege that he ever named a vessel on board of which the brandy was to be shipped. There was undoubtedly a *mora*, and a very great one, in the case, but it lay with the defender, not the pursuer. It may be very true that he would have acted wisely in stipulating for free delivery on board, or delivery of a dock warrant; but he has not done this, and he is not now entitled to call upon the Court to make a different contract for him from what he has made for himself. It is true, it may be gathered from the correspondence and proof that the pursuers really had not the remainder of the brandy, which was lying in Charente, to deliver, till the 4th of July, when they tendered it, and that in the interim they concealed this fact from the defender, and made various excuses for not delivering dock warrants. But the way to have correctly tested this, and really to impose on the pursuers the obligation of forthwith delivering the brandy free on board, would have been to have required them to do so in implement of the contract, and not endeavoured to make a new contract from what had actually been made.

Act. T. G. WRIGHT. *Alt.* JAMES RITCHIE.

22D OCTOBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

M'LEAN v. CARRICK & CO.

Suspension—Decree.—Sheriff Court Act 16 and 17 Vict., cap. 80. *Small Debt Decree obtained in absence, on which imprisonment had followed, reviewed and recalled, in respect the origin of debt or ground of action had not been correctly stated.*

THIS was a suspension under the 26th section of the Act 16 and 17 Victoria, cap. 80. The suspender stated in the petition that the respondents had incarcerated him on a decree,

obtained in the Small Debt Court, against him and others for the sum of £9 5s, and he craved that the same should be reviewed and recalled, in respect, (1.) The summons had been issued on an account in the following terms:—"Alexander "M'Lean, John Morrison, Charles Kerr, and Neil Campbell, "to Carrick & Co., 1857, Sept. 22, To lent cash, £12. By "cash, £2 15s;" and that the decree in conformity with said account was not pronounced against the defenders jointly and severally; and (2.) That he had never borrowed such a sum from the respondents, but that he was joint obligant on a promissory note, granted to the respondents by him and the other parties named, for £12, which had been advanced to John Morrison.

The respondents entered appearance, and the record having been closed, and parties heard, Mr Sheriff Bell pronounced the following judgment, which has been acquiesced in.

Glasgow, 22d October, 1858.—Having heard parties' procurators, and reviewed the process, finds that it is enacted by the 26th section of the Act 16th and 17th Vict., cap. 80, "That in any case in which a decree, pronounced by the "Sheriff in the Small Debt Court, for any sum exceeding "£8 6s 8d shall have been put into execution by imprison-"ment, the party so imprisoned shall be entitled to bring "such decree under review of the Sheriff, by way of suspension "and liberation:" Finds that, under this enactment, decrees pronounced in absence, upon which imprisonment has followed, are equally subject to review as decrees in presence; therefore repels the first preliminary defence: Finds that the statements in the petition are relevant to warrant the conclusions; therefore repels also the second preliminary defence: Finds, upon the merits, that it is enacted by Sec. 3 of the Act 1st Vict., cap. 41, that every small debt summons or complaint shall "State shortly the origin of debt or ground of action:" Finds that the origin of debt in the present instance was a promissory note for £12, granted by the suspender, jointly and severally with three other persons, to the respondents, on 22d September, 1857, and payable on demand: Finds it, however, instructed by the copy small debt summons, No. 5, that the respondents therein sue the suspender and three other persons for the sum of £9 5s, "per account," and the account accompanying said summons is in these terms, (as quoted above): Finds that there is here no reference to said promissory note, nor to the joint and several obligation thereby constituted, nor is it set forth that the suspender and other defenders are jointly and severally liable for the "lent cash," libelled, so as to justify procedure against each for the whole amount; therefore, Finds that "the origin of debt or ground of action" was not correctly set forth, as required by the statute, in said small debt summons. Repels the defences, and suspends and recalls the said decree, in so far as directed against the suspender, dismisses the said small debt action *quoad* him, and grants warrant for the liberation of the suspender, Alexander M'Lean, in so far as detained in prison on diligence proceeding on said decree. But in respect he allowed said decree to be pronounced in absence, and also a charge to run thereon without bringing a sist thereof, finds no expenses due, and decerns.

Act. J. GALBRAITH. *Alt.* T. G. WRIGHT.

22D OCTOBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

GRAHAM *v.* BREEZE.

Sale—Reference—Interdict.—*Circumstances which were held to constitute a Contract of Sale of Heritage and reference as to the price thereof.*

THE petitioner and respondent are proprietors of portions of ground situated respectively on the north and south of a statute labour road which forms the common boundary. This road being an inconvenient access to the property belonging to the respondent, he applied, with consent of the road trustees, to the petitioner for permission to make certain alterations, to effect which it would be necessary to remove part of the petitioner's boundary wall, and to form the line of road as altered upon part of his ground. After some communings between the parties, the agent for the petitioner wrote to the road surveyor, (who, on behalf of the road trustees, was anxious to have the proposed alteration completed:) "That on my (the petitioner's) "wall being taken down and rebuilt, free of expense to me, "I will give what ground is required for widening the road "at 10s per square yard;" and if the rate of price be objected to, "I am willing to refer that to Mr John Carrick, "Superintendent of Streets and Buildings." A copy of this letter was forwarded by the surveyor to the respondent, who answered, "I am not inclined to accede to Graham's request, "as I think it by far too high. I am quite willing to leave "the matter in the hands of Mr Carrick, and abide by his "award." Both of these letters were laid by the Surveyor before Mr Carrick, who, along with the parties, visited the ground, and, after hearing them as to the value, issued a note of award in the following terms: "I am of opinion that in "addition to the rebuilding of the wall, and all expenses con-"nected with the alterations, Mr Breeze should pay at the "rate of 2s 6d per square yard, making the sum of £8 13s 9d "as compensation for the ground to be surrendered by Mr "Graham."

The petitioner being dissatisfied with the sum allowed by Mr Carrick, repudiated the reference, and although repeatedly applied to by the respondent for permission to execute the proposed alterations upon the road, he refused his consent. Upon this the respondent intimated that on a particular day he would proceed with the work, and having done so, the present application was presented to interdict "him, and all others "acting under his instructions or employment, directly or in-"directly, interfering with the petitioner's boundary wall, or "in any way interfering with the petitioner's property, and to "rebuild and restore the old wall on the line, and in the "state in which it stood when he commenced his said un-"warrantable operations."

The respondent, in defence, pleaded that a valid sale of the ground required for the alterations had been made to him by the petitioner; that Mr Carrick's award fixing the price was binding upon both parties; and that, being prepared, and having offered to implement his part of the contract, he was entitled to proceed with the operations now sought to be interdicted.

Thereupon, Mr Sheriff Bell found that the circumstances did not warrant the respondent proceeding with the alterations at his own hand without judicial authority, and therefore granted interdict as craved, reserving to the respondent his right to apply to a competent Court to compel the petitioner to carry out the contemplated alterations on the road in question, and to the petitioner his defences to such application, and found neither party entitled to expenses. Both parties having appealed this judgment, the Sheriff, Sir A. Alison, pronounced the following interlocutor:—

Having heard parties' procurators, under their mutual appeals upon the interlocutor appealed against and whole process: Finds that the matter at issue between the parties depends entirely on the two letters of the pursuer and defender, dated 10th and 16th December, 1857, being Nos. 1 and 2 of No. 5: Finds that, by the first of the letters, the pursuer, Graham, through his agent, Mr Paul, wrote to Mr Ferguson, the road surveyor, as follows: "Mr Graham called to-day, "and has instructed me to say that, on his boundary wall "being taken down and rebuilt, free of expense to him, he will "give what ground is required for widening the road at 10s "per square yard, but if Mr Breeze demurs to rate of price, "he, Mr Graham, is willing to refer that to Mr John Carrick, "Superintendent of streets and buildings. Should the above "be declined, there is an end of the matter:" Finds that to that letter the defender, Breeze, in a letter also addressed to Mr

Ferguson, wrote as follows: "Your favour of the 10th current "received. I am not inclined to accede to Graham's request, "as I think it far too high. I am quite willing to leave the "matter in the hands of Mr Carrick, and abide by his award:" Finds it alleged by the defender, and not denied by the pursuer, that the parties accordingly appeared before Mr Carrick, the referee mutually chosen, who heard them verbally at full length, and visited the ground referred to, though without any written pleadings: Finds it proved, by the production No. 3, that Mr Carrick, on 29th January, 1858, issued an award, copies of which were sent to both parties, in the following terms: "I am of opinion that in addition to the "rebuilding of the wall, and all expenses connected with the "alterations, Mr Breeze should pay at the rate of 2s 6d per "square yard, making the sum of £8 13s 9d as compensa-"tion for the ground to be surrendered by Mr Graham." Finds that the foresaid letters addressed to Mr Ferguson, the road surveyor, who was the party desirous to get the alteration made, and acted in a manner for both parties, amounted in law to a concluded agreement, from which neither party was entitled to resile, and by which both were bound: Finds that some correspondence thereafter took place between the parties, in consequence, it would appear, of the pursuer being dissatisfied with the small sum awarded by Mr Carrick, and of the ground given up being taken by the defender Breeze, when he thought it was to go to the Road Trustees, in consequence of which he declined to go on with the agreement; and the defender, at his own hand, proceeded to carry the proposed alterations into effect, which gave rise to the present application for interdict at the pursuer's instance: Finds, in point of law, that, under the circumstances now set forth, the defender was entitled to insist on the agreement being carried into effect; but the proper way to do that, would have been not to have proceeded *brevi manu* at his own hand with the operations, but to have applied to the Court for authority to execute the alterations, and to have consigned in the hands of the Clerk of Court the amount found due by Mr Carrick the referee, as the compensation for the ground. Therefore alters the interlocutor complained of: Recalls the interdict: Appoints the defender to consign in the hands of the Clerk the amount found due by Mr Carrick the referee; and authorises the pursuer to uplift the same when consigned, and on this being done, dismisses the application: Finds the defender entitled to half costs only, in respect he has been found right on the merits, but wrong in the mode he took for enforcing his right; and remits the account of said expenses to the auditor to tax and report, and decerns.

Act. RICHD. M'CULLOCH. *Alt.* ALEX. YOUNG.

26TH OCTOBER, 1858.

SHERIFF SMALL DEBT COURT, GLASGOW.

(MR SHERIFF STEELE.)

WILLIAM COPLAND (MEIKLE'S TRUSTEE) *v.* DOBIE & CO.

Sale—Delivery—Restitution.—*Held, that a Seller who had delivered goods at the premises of a purchaser, after the latter, who was in insolvent circumstances, had absconded, was entitled to remove them; and that depositing the goods in the purchaser's premises, and into the custody of his shopman, did not, in the circumstances, constitute delivery.*

THIS was an action at the instance of the Trustee on the sequestrated estates of James Meikle, for payment of the value of a quantity of teas which the defenders had sold and delivered to the bankrupt, but which they subsequently removed from the bankrupt's premises.

From the proof it appeared that on 15th April last, Meikle, the bankrupt (who was then in difficulties), ordered some teas from the defenders, and that on the evening of 21st April, the defenders delivered the teas at Meikle's shop. Meikle had left his shop that morning, saying to his shopman that he was going to the country. He never returned, and his estates were shortly afterwards sequestrated. On 25th April, the defenders, finding that Meikle had not returned, removed the teas from his shop, where they were lying unopened, to their own premises.

The Sheriff, after hearing parties, held, that as the bankrupt had not returned after leaving on the 21st April, and as there was no evidence to show for what purpose he had left, the presumption was, that he had then intended to abscond *cedere foro;* that as the teas had been received after the bankrupt's departure, there was no delivery, and the trustee was not entitled to the price. His Lordship therefore assoilzied the defenders without costs.

Act. DUNCAN LENNOX. *Alt.* JOHN KIDSTON.

27TH OCTOBER, 1858.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

JOHN THOMSON and ANDREW MONCRIEFF, Suspenders and Petitioners, *v.* HUGH FRASER, Charger and Respondent.

Bill—Suspension—Stamp—*Held, that a party who had paid a Bill on behalf of the Acceptors when it became due, was entitled to insert his name as Drawer (the Bill being blank in the Drawer's name), and thereafter to charge the Acceptors for payment.*

IN the spring of last year, the suspender, Thomson, took a grass park from Mr Macduff of Bonhard, at the rent of £15 5s, for which he granted the bill in question—the other suspender, Moncrieff, having accepted the bill along with him as security. When the bill became due in November, Mr Macduff placed it in the hands of the British Linen Company's Bank at Perth for collection, without, however, inserting his name as drawer. The charger, on behalf of the suspenders, paid the amount of the bill to the Bank, and inserted his own name as drawer. Some months thereafter, he protested the bill, and charged the acceptors, who thereupon brought the present suspension—the principal ground being that the suspender, Thomson, and Fraser, the charger, were partners, not only in the park, but in other transactions. This averment was denied by Fraser, and now forms the subject of another action in Court. The Sheriff-Substitute, on hearing parties' procurators, pronounced the following interlocutor:—

Perth, 11th June, 1858.—Having heard parties' procurators, and made avizandum with the process, in respect of the regular and formal execution of charge, repels the tenth plea in law for the suspenders: Finds that the charger, being in possession of the bill charged on, and on the face thereof the drawer, is entitled to the presumption of being an onerous and *bona fide* holder: Allows the suspenders to prove the reverse, by the writing or oath of the charger: Grants diligence against havers to be reported, or a reference lodged to oath, between and this day-week.

(Signed) HUGH BARCLAY.

Note.—Bills are highly privileged documents, and the holder is entitled to the presumptions arising from their privileges. He is liable to no exception but what appears on the face of the voucher, and any contrary averment can only be proved by his writing or oath. The only limitation to this rule is a distinct averment of fraudulent acquirement, in which case *in odium* of fraud, parole evidence has been admitted. There is no such averment on the record. The suspenders' averment is, that the charger took up the bill at their request from funds arising from a copartnership. This is denied by the charger, and forms the subject of another action in Court. There is here no averment of fraud, but

merely of non-onerosity. The charger is holder of the bill, with his name filled in as drawer. It does not matter that he candidly admits that he filled in his name after the bill became due, and when he advanced the contents. It was the fault of suspenders, that they accepted a bill blank in the drawer's name. They can be in no better position, than if they had signed a blank bill stamp as a skeleton bill. Such has been found to be a general mandate to the extent of the sum carried by the bill stamp, and which rendered the subscribers liable to whomsoever the note is subsequently made payable. It mattered not at what time the skeleton bill became flesh by living words. Had the bill been subscribed by Mr Macduff, as drawer, with a blank indorsation, the charger, on retiring the bill, would have held the same position as he now does. If he had retired the bill without such indorsation, on a mere receipt, he would then not have been so connected with the bill as to warrant summary diligence; but at present he has the same privilege as Mr Macduff had previous to the charger's connection therewith. It may have been that he advanced the contents of the bill, seeing that he was entitled to become drawer; and had it not been so, he might have refused the advance, or insisted on a separate bill, so as to confer upon him the same privileges. The receipt makes no difference upon the rights of the parties. The suspenders themselves repudiate the receipt as not probative. Had it been in general terms, a presumption would have been raised, that the sum had been paid by the acceptors. If it is to have any effect, it is merely to remove this presumption. The only decision in which the suspenders have any shadow of authority is the case, 25*th November*, 1808, *Hood*, reported by Hume. That decision was not unanimous; and there appears to have been in that case the element of fraud. Be that as it may, there is a series of decisions both before and after that of *Hood*, which supports the right of a person advancing money upon a bill at any time to fill in his name as drawer thereof. 6*th June*, 1805, *Thomson* (*Hume*); 7*th June*, 1806, *Lumsden* (*Hume*); 16*th November*, 1810, *Fisher* (*Hume*); 27*th February*, 1824, *Smith*; 8*th July*, 1846, *Grassick*; 18*th December*, 1854, *Martin*.

(Initialed) H. B.

The suspenders appealed against the above interlocutor, and craved to be heard; but thereafter they withdrew the craving to be heard, leaving the matter to be disposed of by the Sheriff on a perusal of the case. The Sheriff, however, pronounced the following interlocutor:—

Edinburgh, 7*th September*, 1858.—Appoints parties to be heard in reference to the point adverted to in the following note, and that on a day to be appointed, or at next ensuing sittings.

(Signed) EDWARD S. GORDON.

Note.—The Sheriff, on considering this process, entertains some doubts whether the bill in question can be supported under the Stamp Laws, as a *bill* in which the charger and respondent stands as drawer. After a bill has been issued or put into the circle, it has been held that it is not competent to make any alteration on its terms which changes its character, even with consent of all the parties to the bill, because that in effect would be to constitute a new bill or obligation, requiring a new stamp. Can then a drawer be inserted after the bill has been placed by the person who was intended to stand in the character of drawer, in the hands of a Bank for collection, and after the bill has been paid to the Bank? Apart from this question, which does not appear to have been pleaded, the Sheriff does feel the case attended with difficulty.

(Initialed) E. S. G.

Upon hearing parties' procurators, the Sheriff pronounced the following interlocutor:—

Edinburgh, 27*th October*, 1858.—The Sheriff having heard parties' procurators as to the point referred to in the preceding interlocutor and note, and made avizandum with and considered the process: Dismisses the suspenders' appeal from the interlocutor of date 11th June, 1858, and affirms said interlocutor.

(Signed) EDWARD S. GORDON.

Note.—After again considering the objection to the bill, founded on the Stamp Laws, the Sheriff has come to be of opinion, that the objection does not apply to this case. The bill was not signed by any person as drawer until the defender signed, so that there has been no alteration on the writ, and until the defender's signature was adhibited, the document was not a completed bill. It has not been paid by the acceptors, and is still a document which might be passed from one person to another, by indorsation, without requiring any other stamp. In regard to the other points of the case, the reasons assigned by the Sheriff-Substitute appear to be conclusive.

(Initialed) E. S. G.

Act. MELVILLE JAMIESON. *Alt.* W. J. FRASER.

28TH OCTOBER, 1858.

SHERIFF SMALL DEBT COURT, AYR.

(MR SHERIFF ROBISON.)

M'ALPINE v. THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Responsibility of Common Carrier for Misdelivery of Goods. —*Held, that a Railway Company is not entitled to make a distinction between Goods delivered to them for carriage by carriers and by the general public,—and that they are liable in damages for not delivering Goods according to their addresses.*

IN this action the pursuer sues the Glasgow and South-Western Railway Company, under the following circumstances explained at the hearing of the case:—The pursuer, who is a carrier *by road* between Irvine and Glasgow, frequently receives, in the course of his business, more goods than he can conveniently convey by his carts, and has been in the habit, when this occurred, of sending the surplus by railway, previously placing his own address above, and so as to cover that of the consignees, whereby he is enabled to receive the goods from the railway company on their arrival, and deliver them himself to the consignees. On 10th September last he delivered to the defenders at Glasgow seven packages of goods with his own address placed on them as above mentioned, but on applying for the goods at Irvine Station, he was informed that none had arrived for him; in consequence of which he wrote to the Goods Manager, inquiring after the goods, who by letter informed him that they had been delivered to the parties to whom they were addressed. The pursuer then discovered that by instructions of the railway officials his addresses had been torn off, and the goods delivered by the Company's servants to the consignees. He accordingly raised this action, (1,) For loss sustained by him through the Company's refusal or failure to deliver the goods to him, being the amount of profit he would have earned on their carriage; and (2,) For damages sustained and to be sustained in his trade and business through their said refusal or failure, or through their refusal to receive and carry goods addressed to him, to the obstruction of his trade and business, and to his prejudice and disadvantage. The facts above stated were admitted by the defenders, who contended that they were entitled to remove carriers' addresses, and deliver the goods to the *bona fide* consignees, and thereby put an end to a practice which they alleged had been introduced by carriers to and from places situated along their line of railway. The pursuer, in answer, maintained, that the defenders having admitted that they accepted the goods for carriage with the defenders' addresses upon them, they were bound to deliver them to him, and that the defenders were not

entitled to make any distinction between carriers and the general public with reference to the carriage of goods, but were bound to treat all alike.

The Sheriff-Substitute found that the defenders' plea was not tenable, and that damages were due under both heads of the claim, which were assessed at £3 3s.

Act. JAS. DICKIE, Irvine. *Alt.* WM. POLLOCK, Ayr.

30TH OCTOBER, 1858.

SHERIFF COURT, GREENOCK.

(MR SHERIFF TENNENT.)

M'PHUN v. ANSTRUTHER.

Bankrupt—Retention—Ranking.—*The agent for a branch bank became bound, by the bond granted by him, to pay to the bank one-eighth of the losses that might occur in the business transacted by him. He discounted in this capacity certain bills. He had previously made a purchase of timber from the party who was one of the obligants on the bills. This party having become bankrupt, in an action at the instance of the Trustee on his sequestrated estate against the bank agent for the price of the timber,—Held, that as the bankrupt had not come under any obligation to pay to the agent the amount of loss he had bound himself to pay to the bank, and as there was no privity of contract on the part of the bankrupt with the agent and the bank, he was not entitled to plead Retention of the price of the timber, as against the bankrupt estate; and as the bank had ranked upon the estate for the full sum in the bills, to sustain the plea would be to allow a second Ranking on the estate for the same debt.*

ANSTRUTHER was agent for the branch of the Western Bank at Port-Glasgow. In that capacity he became bound, in the bond granted by him, to pay to the bank one-eighth of the losses that he might incur in the course of his agency.

In the capacity of agent he discounted certain promissory notes granted by Patterson, of which he received the proceeds, or for which he granted a guarantee. Previous to this, Anstruther had purchased from Patterson a quantity of timber. The promissory notes were not retired when they fell due, and ultimately Patterson became bankrupt and was sequestrated.

An action was brought by the trustee on his sequestrated estate against Anstruther for the price of the timber.

Anstruther pleaded in defence—that he was entitled to retain the price of the timber, as against the amount of loss that the bank might call upon him to pay arising upon the bills he had discounted for Patterson.

The Sheriff-Substitute pronounced an interlocutor, in which, after finding the facts that have been detailed, he found in point of law—"That the defender is not a creditor of the bankrupt estate, in respect of any such sum that he may be called upon to pay to the bank, and that he is not entitled to retain the price of the timber in question;" and therefore decerned in terms of the conclusions of the libel, adding the subjoined note:—

"NOTE.—The Sheriff-Substitute has been unable to find grounds for sustaining the defender's claim. He does not set forth how it is that he has become a creditor of the bankrupt estate, in respect of the loss on the notes he may be called upon to pay to the bank. He is certainly not on the footing of a cautioner for Patterson; for, on the contrary, the position of matters seems to be, that Patterson, by discounting or guaranteeing the amount of the notes to the bank, became liable to repay the amount to them alone, and the obligation of the defender, under his bond of caution, was a separate transaction with a third party, which, for anything that appears, was latent, in so far as regarded Patterson, and with which he had no concern; and that though a claim may have arisen against the defender in consequence of Patterson's failure to retire the notes, Patterson has not in any way become bound to relieve the defender from the loss he might sustain through the obligation he may have come under to the bank.

"In the case of *Christie* v. *Keith*, 29*th June*, 1838 (16 S. D., 1224), the Court allowed a party who had granted bills for the accommodation of another, to rank for what he had paid, upon the bankrupt estate of the party accommodated, although the holder of the bills had also ranked on that estate for the amount; but this case presents no analogy to the present, as the granter of the accommodation bills had an undoubted right of relief against the party for whose accommodation they had been granted.

"In the present case, the Western Bank, who are in right of the notes, have claimed upon Patterson's estate for the full amount in them; and to sustain the defender's claim of retention, in respect of the proportion of loss he has become bound to pay to the bank, would be to allow a double ranking upon the same estate for the same debt. It would therefore appear that the defender's claim of retention cannot be allowed."

The Sheriff (Macfarlane), on appeal, adhered, adding this note:—

"NOTE.—The whole argument of the defender, as addressed to the Sheriff, was based on the erroneous assumption, that the defender had, on behalf of the bankrupt, Patterson, undertaken, and was liable in a sort of cautionary obligation to the Western Bank. Now, it may be quite true that under his bond to the Western Bank the defender may be liable to the effect and extent therein stated, but that bond was not entered into for behoof of Patterson, but purely and entirely to serve the defender's own interests and purposes. In short, the Sheriff has been unable to see that there was, in connection with the bond referred to, any privity of contract whatever, as between the defender and the bankrupt, Patterson; and the defender does not pretend that Patterson is bound to him under any other obligation or contract. In order to entitle the defender to maintain the right of retention now founded on by him, it would have been necessary for him to have placed himself, by assignation or otherwise, *in titulo* of the Western Bank, but that he had not done."

Act. JAMES LADE, Port-Glasgow. *Alt.* HUGH DEMPSTER, Greenock.

1ST NOVEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

THE GREENOCK SPINNING CO. v. ROBERTSON & CO.

Principal and Agent—Contract—Compensation.—*An Agent, acting under a del credere commission, sold and delivered goods to a purchaser in his own name, concealing the name of his Principal.—Held, in an action at the instance of the Principal, for the price of the goods, that the purchaser was entitled to plead compensation in respect of a debt due him by the Agent.*

THE Greenock Spinning Co. here sued John Robertson & Co., manufacturers, Glasgow, for the sum of £34 18s 6d, being the price of cotton yarns sold by the pursuers, through William Wardlaw & Co., agents and commission merchants in Glasgow, who were employed and acted as commission agents for and on account of the pursuers in the transaction.

The pursuers averred in their summons, that the business of commission agency was "the known, recognised, and pro-"fessed business of the said William Wardlaw & Co., it being, "in particular, well known to the defenders, that commission "agency was the special business carried on and conducted by "the said William Wardlaw & Co."

The defenders pleaded—

(1.) That they never had transactions with the pursuers as to the goods in question.

(2.) That they had purchased from Wardlaw & Co., as principals, and on the faith of their being such, had subsequently given them credit.

(3.) That Wardlaw & Co., at the date of their sequestration, were indebted to them in the sum of £371 4s 6d, after crediting the price of the goods sued for.

The Record having been closed, and proof led, Mr Sheriff Bell, after hearing parties, pronounced the following judgment, which has been acquiesced in:—

Having heard parties' procurators, and resumed consideration of the proof, productions, and whole process: Finds that, on or about the 24th September, 1857, the defenders purchased the yarns in question from the parties, William Wardlaw & Co., mentioned in process: Finds that soon thereafter, and before said yarns were paid for, Wardlaw & Co. became bankrupt, and the pursuers thereupon called on the defenders for payment, on the ground that they (the pursuers) were the owners of the yarns, and the principals in the transaction, and that Wardlaw & Co. had acted only as their agents: Finds that the defenders refuse to recognise the right of the pursuers, on the ground that they did not transact with them, but, on the contrary, bought from Wardlaw & Co., as principals, against whom they plead compensation, in respect of a much larger balance owing to them by the said bankrupts: Finds that the summons sets forth that the business of commission agency was "the known, recognised, and professed "business of the said William Wardlaw & Co.," and that it was well known to the defenders that this was the special business carried on by them: Finds that, in point of fact, the yarns in question did belong to the pursuers, and had been sent to William Wardlaw & Co. to sell as agents, they receiving a *del credere* commission: Finds it proved, however, that William Wardlaw & Co. carried on a twofold business, namely, that of commission agents, and of merchants on their own account; and, in particular, that they were in the habit of buying and selling yarns on their own account, as well as on account of others: Finds it farther proved, that the defenders, who had numerous transactions with Wardlaw & Co., always dealt with them as principals; and that as regards the yarns presently in question, they were bought by the defenders at the solicitation of the witness James Pettigrew, salesman to Wardlaw and Co., who represented them as being then in Wardlaw & Co.'s stock; and although he mentioned that they were of the pursuers' spinning, he "did not say anything to "lead the defenders to believe that the yarns belonged to any "one but Wardlaw & Co.:" Finds that the defender James Robertson, who made the purchase, has deponed—"I bought "the yarns as William Wardlaw & Co.'s property. I under-"stood them to be both merchants and agents, but all our "transactions with them in yarns have been as merchants:" Finds that there is no evidence contradictory of this averment; and the only document sent by the sellers to the defenders in relation to said yarns, was the delivery-note, No. 6/1, which bears simply that the yarns are delivered to the defenders "by William Wardlaw & Co.," without any disclosure of principals, or statement that they were delivered by the bankrupts as agents: Finds, in point of law, and in the words of Lord Mansfield in *Rabine*, 7 *Term Rep.*, *p.* 360, "Where a "factor dealing for a principal, but concealing that principal, "delivers goods in his own name, the person contracting with "him has a right to consider him to all intents and purposes "as the principal; and though the real principal may appear "and bring an action upon that contract against the pur-"chaser of the goods, yet that purchaser may set off any "claim he may have against the factor in answer to the de-"mand of the principal." See also *Bell's Com.*, *vol. I.*, *p.* 226, *and vol. II.*, *p.* 131; and *Ross's Leading Cases*, *vol. I.*, *p.* 160: Therefore, finds that, in the circumstances set forth, the defenders are not liable in payment of the yarns to the pursuers, but are entitled to impute the price *pro tanto* in liquidation of the larger sum due to them on account current by Wardlaw & Co: Sustains the defences, and assoilzies the defenders: Finds the pursuers liable in expenses, of which allows an account to be given in, and remits the same to the auditor to tax and report, and decerns.

NOTE.—The case of *Fleming*, *June 29th*, 1832, founded on by the pursuers, differed *in essentialibus* from the present. There the invoice expressly bore that the goods were sold by *Watson and Lennox*, *agents*, and this, coupled with the whole course of dealing between them and the purchasers, was held sufficient to cortiorate them that the sellers had acted as agents merely. But in that very case, it was admitted that Lord Ellenborough had correctly laid down the law in *More*, 2 *Campb. Rep.*, *p.* 22, that where an agent transacts, as if he were principal, the party contracting with him is entitled to the benefit of any plea of compensation, unless he was distinctly aware of his character of agent in reference to the particular transaction. There is no evidence here that the defenders knew they were buying yarn which did not belong to William Wardlaw & Co.

Act. J. MORRISON. *Alt.* R. STEWART.

3D NOVEMBER, 1858.

SHERIFF SMALL DEBT COURT, GREENOCK.

(MR SHERIFF TENNENT.)

MILLAR v. THE MAGNETIC TELEGRAPH COMPANY.

Telegraph—Liability—Damages—Intimation of Non-Responsibility—*Held, that the occurrence of five errors in the transmission, from Greenock to Liverpool, of an unrepeated telegram of nineteen words inferred such gross carelessness on the part of the Company as to render them liable in damages, and that they were not, in such circumstances, protected by their published intimation that they are not responsible for mistakes or delays in the transmission of unrepeated messages from whatever cause arising.*

ON 10th May last, a message was delivered by the pursuer to the defenders, for transmission to Henry Woods & Company, Gorre Piazza, Liverpool, in the following terms:—

"Send me by Tuesday's steamer, forty-five fathoms inch "and quarter chain, and iron stock-anchor fifteen cwt. Reply." And there was at the same time paid to the company the ordinary charge for an unrepeated message. This message was delivered to Woods & Co. at Liverpool, in the following terms:—

"Send me by Tuesday's steamer forty five fathoms inch three "quarter chain, and iron stock-anchor eighteen hundred weight," and thus contained two material inaccuracies in the substitution of "inch three quarters" for "inch and quarter," and of "eighteen" instead of "fifteen" hundred weight. In consequence, a chain and anchor of the wrong dimensions and weight were sent from Liverpool to Greenock; and the present action was brought for the purpose of recovering from the Telegraph Company the freight and charges incurred by the pursuer in sending the chain and anchor to Greenock and sending them back again to Liverpool, as well as the price of the telegraphic message, amounting in all to £8 3s.

In answer to this action, the company referred to the condition contained in their printed forms for receiving messages, which are as follows:—

"In order to provide against mistakes, and more effectually insure delivery, every message of consequence ought to be repeated, by being sent back from the station at which it is to be received, to the station from which it is originally sent. Half the usual price for transmission will be charged in addition for repeating the message. The company will not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of, unrepeated messages from whatever cause arising; nor will the company be responsible for mistakes or delays in the transmission of, nor for the non-delivery of, a repeated message, to any extent above £5, unless it is insured at the rate of £1 per cent."

They pled that the condition that they will not be responsible for mistakes in the transmission of unrepeated messages from whatever cause arising, protected them from liability under this action. They referred to the Act 16 and 17 Vic. c. 203, s. 66, which provided "that the use of any electric "telegraph erected or formed under the provisions of this "Act, for the purpose of receiving and sending messages, "shall be, subject to the prior rights or uses thereof for the "service of her Majesty, and for the purposes of the company, "and subject also to such reasonable regulations as may be

"from time to time made or entered into by the company, be "opened for the sending and receiving of messages by all per- "sons alike, without favour or preference;" and also to the case of *Macandrew* v. *Electric Telegraph Company, English Jurist*, new series, vol. I. p. 1703, where the Court held that whether regarded as a "regulation" made under the statute, or as a limitation of their liability at common law as carriers of messages, this was a reasonable condition.

The pursuer replied, that the condition cannot be taken without some restriction, and that it does not protect the company or discharge them from liability under all circumstances. For instance, it would not protect them from the consequences of a wilful act on their part, or that of their servants, nor would it protect them from the consequences of gross and excessive carelessness. And this is the view that was taken of the condition by the judges in the case of *Macandrew;* for though they did not require expressly to decide the point, they intimated an opinion in the words of the rubric, "that this "condition would not protect the company from liability for "mistakes arising from gross negligence." This is further confirmed by the decision in the case of *Phillips* v. *Clark*, in Common Pleas, *Jurist*, vol. III. p. 467. There the defendant had received goods to be carried in his ship, under a bill of lading in which it was stipulated that he was not to be responsible for leakage or breakage, but it was held that this stipulation did not exempt him from liability from loss arising from leakage or breakage occasioned by the gross negligence of himself and his servants.

The Sheriff-Substitute, after hearing parties fully, held that, looking both to the subject of the message, and the amount of damage sued for, the message was not one of consequence, and was to be dealt with on the footing of an ordinary message, but that there had been such gross carelessness in the transmission, as to render the defenders liable in the damages sought. In giving judgment he said:—The question that arises in this case is one more of fact than of law, and is this, was there in the transmission of the message such gross carelessness on the part of the defenders as to deprive them of the protection of the regulation? It was stated in evidence by Mr Briggs, the agent of the other company, that the rule in his company was to transmit the message letter by letter, without any latitude or variation of any kind from the message as given in, and both witnesses concurred in saying that the per centage of errors in the transmission of messages was very low, and complete accuracy could in the general case be attained. I assume, then, that absolute and literal accuracy may be attained, and ought to be the rule, in sending telegraphic messages; and let us then trace the progress of the message from Greenock to the next station at Glasgow, from thence to Carlisle, and then to Liverpool. When the message reached Glasgow the "a" in Millar, the sender's name, had been changed for "e," and the "d" at the end of Woods, the party to whom the message was to be sent, was dropped. In other respects the message was correct. At the next station —Carlisle—the two serious errors appeared, the substitution of "three quarters" for "and quarter," and "eighteen" for "fifteen;" and at the Liverpool station the word "reply" was omitted. Several minor inaccuracies were also pointed out, but they do not appear to be such as can fairly be founded on. It appears that the symbols used to represent 15 and 18 are to some extent similar, and might be liable to be mistaken; and if this mistake had stood alone in the message, I think it is one of the class from which the company's regulations would have protected them. In M'Andrew's case the mistake was similar in character. The message was addressed by the consignee to the owner of the ship loaded with oranges, and was "Foam, proceed direct to Hull." The message delivered was, "proceed direct to Southampton;" but it appeared that in the defendant's mode of telegraphing the letters in the names of these two ports were represented by a certain number of short horizontal strokes of different lengths, which might be mistaken one for the other. But the substitution of "three" for "and" could not, it appeared, possibly have proceeded from misreading the instrument, but must have been the result of negligence. The omission of "Reply" also has not been explained on any plausible ground, and affords stronger evidence of carelessness than any other part of the message. Two safeguards against error have, it appears, from the omission of this word, been neglected either in the transmission of the message from Carlisle or in its receipt at Liverpool. The end of a message is denoted by two ticks of the needle to the left, and either the transmitting clerk must have finished the message without the word, or the receiving clerk must have cut it short without waiting for the signal that it was finished. But further, the number of words is transmitted along with each message, to afford a means of checking its correctness by counting them. The number of words that was telegraphed from Carlisle was nineteen, and the receiving clerk at Liverpool should have been warned that something was wrong when he found only eighteen words in the message as received by him. It is said that he counted "hundred-weight" as two instead of one word, and thus found nineteen words in the message. But this does not seem to be a satisfactory answer, as "hundred-weight" is indeed only one word, and would seem to have been written so by him in his transcript of the message. It is said, again, that the omission of "Reply" might have been caused by the disturbing force of atmospheric electricity holding up the needle, while that word was being telegraphed, and that the word might in this way have been passed over. But the witness who stated this, who was the agent of the defenders' company, stated it only as a theory, for he confessed that he had never known the case of a word having been omitted from a message from this cause. And the other witness, Mr Briggs, gave it as his decided opinion that though a message might be confused and unintelligible by the presence of atmospheric electricity, this could not have the effect of dropping one word out of a message, and that although it might render some part of a message unintelligible, the point of the needle would warn the receiving clerk that all was not right, and it would be his duty to signal back to the station from which it was sent that it was unintelligible, and the message would then be repeated. Whatever might be the result in law, there had been only one of these mistakes in this message. I think it is impossible that so many inaccuracies and errors could have occurred in it without there having been such gross carelessness in the transmission as will render the defenders liable in the damages sought, which are the direct consequences of the errors committed.

Act. R. & S. Neill. *Alt.* W. M'Clure.

3d November, 1858.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Smith.)

William Moreland v. James Clark and James M'Kinlay.

Theft—Sale—Restitution—Warranty.—*Held, that the owner of a mare, which had been stolen from him, was entitled to recover its value from a* bona fide *purchaser who,* ante litem, *sold it with a Warranty of soundness, the animal having been returned* pendente lite, *under the Warranty, and afterwards resold.*

The pursuer, who is a merchant in Belfast, on 16th April last, brought to Glasgow, for sale, a grey mare, which, on the following day, he exhibited in Rutherglen market, and lodged in the stables of Mrs Boyd. Upon the 18th April he caused the mare to be removed to the stables of the defender, Clark, and, as alleged, committed it to his custody. Shortly thereafter, and on the same day, it appeared that a person of the name of Stitt, who had led the animal from Boyd's to Clark's stables, obtained possession of it, without the authority of the pursuer, sold it, and absconded with the price.

In these circumstances, the present action was brought for restitution of the mare, or payment of its value—(1.) as against Clark, on the ground that he had wrongously parted with it while in his custody; and (2.) as against M'Kinlay, on the ground that it was stolen property in his possession.

In defence it was pleaded—

For Clark—That the mare had never been committed to his custody.

For M'Kinlay—(1.) That he had purchased the mare from a person who was ostensibly the owner; and (2.) That on 20th April, before the institution of this action, he had sold her.

Proof having been led upon the issues raised by these defences, it appeared that, soon after the sale by M'Kinlay had been made, the pursuer called upon him, making inquiry as to the mare, when he was told that "she was not far away"—that although sold, the sale had been under warranty of soundness—that it had been returned as unsound, and resold.

The pursuer then pleaded that, as regarded the defender, M'Kinlay, the question should be decided as if no sale had been made, in respect—

(1.) The alleged sale had been annulled, in consequence of the failure of a condition which was essential.

(2.) That the delivery of the mare to the party purchasing from him, was virtually a delivery on trial; and,

(3.) That he was in *mala fide* in reselling *pendente lite*.

Mr Sheriff Smith, after hearing parties, pronounced the following judgment, which, on appeal, has been *simpliciter* confirmed by Sir A. Alison:—

Having resumed consideration of this process, with the proof led, and having heard parties' procurators thereon; In fact, Finds that the pursuer was owner of a grey mare which he brought from Ireland on 16th April last, and placed in Mrs Boyd's stables, M'Pherson Street, Glasgow, with the view to sell her at the Horse Market, which was to be held at Glasgow on the following day: Finds that the mare was taken to the Horse Market on the following day by the pursuer, assisted by a person named William Stitt, but the pursuer failed to sell her, and she was taken back to Mrs Boyd's stables: Finds that next day, Friday, 18th April, Stitt, at pursuer's request, took the mare to the stables of the defender, James Clark, but he has failed to prove that this defender received her into his custody; and this defender has proved that he desired Stitt to take her away, which he did, and brought her back to Mrs Boyd's stables, where she remained till 22d April, when she was again taken away by Stitt and sold to defender, M'Kinlay, for between £23 and £24, without any authority from the pursuer, and without accounting to the pursuer for the price: Finds that the mare was thus stolen from the pursuer by Stitt: Finds that the defender, M'Kinlay, sold this mare after he had bought her from Stitt before this action was raised, and before he knew that she had been stolen from pursuer, to Hugh Bartholomew, engineer in Glasgow, with warranty that she was sound, under which warranty she was returned as unsound, after this action was raised, and after this defender knew she was claimed by pursuer; and this defender afterwards sold the mare in a lot to Mr James Walker: Finds that as the mare is not now in the custody or under the control of either of the defenders, they cannot deliver her to the pursuer; and the pursuer has not proved that her value was greater than £24, when stolen by Stitt: In law, Finds that the defender, Clark, never having received the mare into his custody, he is not liable either to return her to pursuer, or pay her value: Finds that the mare having been stolen, the pursuer was entitled to recover her from any one in whose possession she was afterwards found; and that the defender, M'Kinlay, was in *mala fide* in parting with her to Walker, after this action was raised, and he knew that the pursuer claimed her: Therefore assoilzies the defender, James Clark: Decerns against the defender, James M'Kinlay, for the sum of £24: Finds the pursuer liable to the defender, James Clark, in the expenses incurred by him: Finds the defender, James M'Kinlay, liable to the pursuer in the expenses incurred by him: Allows accounts to be given in, and remits the same to the auditor of Court to tax and report, and decerns.

Act. T. G. WRIGHT. *Alt.* JOHN BOYD.

6TH NOVEMBER, 1858.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

JAMES MORRIS v. M'NAB AND M'RORIE.

Reference to Oath—Remit—Sheriff Court Act 16 & 17 Vict., sec. 10.—*Held, that after a Remit made of consent of parties to a person of skill, and a Report following thereon in regard to the matters in dispute, a Reference to Oath was incompetent.*

In this action, James Morris sued Samuel M'Nab and David M'Rorie (1.) for an alleged balance of the contract price of work, executed under the following estimate by the pursuer:—"I hereby agree to make the new cut and embankment for to "keep the water into the new cut, and to protect the west "end of the small park all in a sufficient and workmanlike "manner for the sum of £28;" (2.) for a sum for alleged extra work.

The defences were—

(1.) That the work had not been finished in terms of the contract.

(2.) That no extra work had been performed.

Of consent of both parties a remit was made to a Civil Engineer, to report on these defences, and his report was to the effect that they were well founded. The pursuer then proposed a reference of these points to the oaths of the defenders. To this the defenders objected, and pleaded—(1.) That under the terms of the Sheriff Court Act 16 & 17 Vict., sec. 10th, a reference to oath was incompetent after the remit of consent. (2.) Independently of the remit of consent and of the terms of the Sheriff Court Act, the proposed reference was incompetent at common law, in respect that it was not of proper matters of fact within the knowledge of the defenders, but of questions of skill. The Sheriff-Substitute (Mr Barclay) thereupon pronounced the following judgment:—

Having heard parties' procurators, and made avisnndum with the process: Finds that in the present state of the process there is not such issue of disputed facts as to warrant the proposed reference by the pursuer to the oaths of the defenders, and therefore refuses to sustain the same, and in respect that no objections have been stated to the report of the Inspector, approves thereof, and in terms of the same, Finds that the work has not been finished in a sufficient and workmanlike manner, and so as to keep the water into the new cut in terms of the contractors' estimate, and that no extra work has been done; therefore finds that the pursuer cannot at present recover from the defenders the sum sued for, or any part thereof; with these findings, orders the cause to the roll of motions that parties may state what order they crave.

NOTE.—The question is not altogether, as argued by the pursuer's procurator, *the time* of the reference, but its *matter*. It is quite true that a reference to oath may be made any time before extract, and even after a verdict of a jury, which is analogous to a judgment of court on matter of fact. But all references to oath must be of pure matter of fact within the knowledge of the party. In the present case the matter at issue is one of mixed fact and science. It is whether certain work has been done according to contract, and whether certain other work is within that contract, or to be considered additional. This question was properly left to the opinion of a scientific person, and his award, both under the Sheriff Court Act and the antecedent practice, must be binding on the parties; and the opinion of the two defenders, necessarily unskilled in such subjects, is not to be obtained on oath so as to override the opinion and award of the party selected to determine that matter. Suppose the case of a farm, where the question was whether the management was according to good husbandry, and where the parties had selected a skilled agriculturist to decide, would it be competent to set aside his award by a reference to the oath of one of the parties, it may be a Cockney shopkeeper in total ignorance of the very rudiments of agricultural science? Had the report of Mr Ritchie

recognised extra work, and thereon the question had been, had such been authorised, there might have been room for a partial reference of such matter of fact. But as the case at present stands, there is no possible opening for a reference to oath.

The pursuer having appealed against the interlocutor, the Sheriff-Depute (Mr E. S. Gordon) adhered, adding the following Note:—

If the proposed reference to the oath of the defenders had been made before the remit of consent to Mr Ritchie, the Sheriff is not prepared to say that the matter of the reference is such as to prevent the reference being sustained. But a remit was made of consent to Mr Ritchie to report on the first two grounds of defence; and a report by a person of skill was a proper mode of ascertaining whether these grounds of defence were well founded in point of fact. Mr Ritchie has made his report, which is to the effect that they are well founded. By the 10th section of 16th & 17th Vict., it is provided that "it shall be competent to the Sheriff to remit to persons of "skill, or other persons, to report on any matter of fact; and "where such remit shall be made of consent of both parties, "the Sheriff shall hold the report to be *final* and *conclusive* "with respect to the matter of such remit." The Courts had previously held that such a report excluded all claim for additional proof or further investigation, upon the ground that such a report is the result of a judicial agreement implying that the parties should abide by the determination of the reporter. The words of the Act are peculiarly strong, it being declared that such reports "shall be binding and conclusive "with respect to such matter of fact." The Sheriff thinks that these words, as well as the view that the report is the result of an agreement to be bound by the opinion of the reporter, exclude the right of the unsuccessful party to refer to the oath of his opponent the points which have been the subject of a report under a remit of consent. Further, the Court has, in some cases, a discretion to admit or refuse a reference to oath, and the present appears to be a case in which such discretion might be properly exercised to the effect of refusing to sustain the reference. The case is not one in which it is probable that the pursuer could expect to take any benefit from the reference to oath, even if it was sustained.

Act. THOMAS SOUTAR, Crieff. *Alt.* R. H. MONCRIEFF, Perth.

10TH NOVEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

WILLIAM M'HAFFIE, Sen., *v.* GODFREY PATTISON & Co.

Bill of Exchange—Interdict—Delivery—Jurisdiction.—*In an application for delivery of a Bill of Exchange for £550, and for Interdict against the holders indorsing or transferring the same—Held, that without an allegation of violence or fraud on the part of the holders, the application substantially resolved itself into a Suspension or Reduction, and as such, was incompetent in the Sheriff Court.*

THIS was a summary action brought by William M'Haffie, senior, merchant in Glasgow, and residing in Liverpool, as attorney and commissioner for William M'Haffie, junior, merchant, sometime in Glasgow, now in Bombay, the sole partner of the concern carrying on business under the names of M'Haffie Brothers, merchants, Glasgow, and William M'Haffie & Co., merchants in Bombay, against Godfrey Pattison & Co., merchants in Glasgow. The petitioner averred, that sometime prior to 24th October, 1857, the said William M'Haffie, junior, and Michael Jamieson M'Haffie, his brother, carried on business as merchants in Glasgow, under the firm of "M'Haffie Brothers," of which firm the said Michael Jamieson M'Haffie ceased to be a partner on the said date: That on 1st October, 1857, while William M'Haffie, junior, was abroad. Michael Jamieson M'Haffie granted to the respondents a bill or promissory note for £550, payable twelve months after date, which was signed by Michael Jamieson M'Haffie with the company name of "M'Haffie Brothers:" That said bill or promissory note was granted without the knowledge or consent of William M'Haffie, junior, and without any value or consideration having been received therefor by the said firm of M'Haffie Brothers or William M'Haffie, junior, and only as a collateral security for a bill or promissory note for £805 10s granted to the respondents by the late firm of Michael M'Haffie & Co., of which Michael Jamieson M'Haffie was the sole partner, or for some other purpose unknown to the said William M'Haffie, junior. They therefore craved the Sheriff to decern the respondents to deliver the bill for £550 to the petitioners, and in the meantime to grant interdict against the respondents indorsing, delivering, or transferring the same to any other party.

The respondents in defence pleaded—(1.) No title to sue. (2.) The respondents' title to the promissory note could not be questioned or tried under this action. (3.) The promissory note was not in the possession or under the control of the respondents when the petition was presented. (4.) They were *bona fide* holders of the note, and the contrary could only be proved by their writ or oath. (5.) Generally, the whole other averments in the petition were not admitted in so far as inconsistent with their defences—in particular, it was not known or admitted that William M'Haffie, junior, was ignorant of the granting of the note; if not aware of it at its date, he became aware of it in the ordinary course of business, and made no objection to it.

The Record having been closed upon the petition and minute of defence, the Sheriff-Substitute (Mr Bell) pronounced the following judgment:—

"Repels the first preliminary defence in respect of the production No. 5/1. But in respect it is not averred in the petition that the granter of the bill or promissory note in question, as the acting partner, in this country, of the firm of M'Haffie Brothers, was not entitled to grant bills in name of said firm; and in respect the present summary application is not founded on any allegation of violence or fraud on the part of the defenders, finds that it substantially resolves itself into an equivalent for a suspension or reduction of the said promissory note, which is incompetent in this Court, and cannot be reached by means of a summary petition concluding for interdict and delivery. Therefore, and in conformity with the decision of the Court of Session in the case of *A. & W. Thom* (June 8, 1848), sustains the preliminary defence, that the respondents' title to said bill or note cannot be tried or questioned in the present shape, and dismisses the action. Finds the petitioners liable in expenses," etc.

The petitioners having appealed against this judgment,

Sir ARCHIBALD ALISON, after hearing parties' procurators, adhered to the Sheriff-Substitute's interlocutor for the reasons therein stated, as also those in the following note:—

"NOTE.—The case of *Thom*, referred to by the Sheriff-Substitute, which went by advocation to the Court of Session from this Court, clearly establishes the principle that it is incompetent in the inferior Court to institute a suspension of a bill under colour of an action for delivery or restitution of the bill from the holder. It may be that the Supreme Court would entertain a different opinion in a case where *fraud* is distinctly alleged on the part of the receiver as well as the granter of the instrument. But it is needless here to go into the law on that point, because fraud is not averred against the defenders, the holders of the bill sought to be got back. All that is said is, that the bill was granted by the partner of a former firm, now a partner of the pursuer's firm, for a debt of that former firm, with which the pursuer's firm had no connection. This may have been a wrongful or even a fraudulent act on the part of the party who did this; but there is no allegation that the defenders were cognisant of the wrong. And the mere fact that the bill was for a debt of the former firm, though signed by the new firm, affords no evidence whatever that

they were cognisant of any fraudulent or improper act, for it is no uncommon thing for a firm to adhibit their signature to a bill for a debt of another party, as a matter of kindness or accommodation."

Act. JOHN NAISMITH. *Alt.* JOHN KIDSTON.

17TH NOVEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

ANDREW BURNS & MANDATORY *v.* JOHN WALKER, *et e Contra.*

Agent or Broker—Disbursements—Bill of Exchange—Compensation.—*The master of a vessel in a foreign port, having drawn on the owner in favour of the agent or broker, for the value of Disbursements made on account of the vessel, which draft was indorsed by the broker for value, the indorsees having become bankrupt while debtors to the owner, and the draft having been protested by the trustee on their estate for non-acceptance and non-payment, and returned to and taken up by the broker.—Held the owner was not entitled to plead Compensation against a claim by the broker for Disbursements on account of the vessel, notwithstanding that the indorsees were debtors of the owner; and that the owner on ranking on the indorsees' estate, had deducted the sum in the draft from his claim before ranking.*

THE party Burns, who is a merchant in Melbourne, instituted an action in the Sheriff Court at Glasgow, concluding for decree against Walker, a commission agent in Glasgow, for the sum of £187 7s 8d, due to him in respect—(1.) The schooner "Boindie" of Glasgow, of which Walker was owner, had been sent by him to Geelong in Australia in 1854, consigned to Burns for sale. (2.) That the pursuer had made disbursements on account, and bestowed time and labour on the business of said vessel, after her arrival in Australia. (3.) That the master of said vessel had drawn in his favour on the owner, Walker, for several sums, and that these drafts had been dishonoured. And (4.) That after deducting the sum realised by the sale of said schooner, from the amount of advances, charges, and expense of drafts with exchange and re-exchange, the amount sued for remained due.

In defence, Walker pleaded—(1.) That the whole disbursements, &c., debited in the account sued for, had not been made. (2.) Compensation or payment to the extent of £140. (3.) That the party Burns had sold the vessel, and the proceeds exceeded his whole claims.

Walker immediately thereafter raised an action against Burns for the price of the vessel, under deduction of the disbursements, &c., which he might be able to instruct. The cases were conjoined.

The questions before the Court were two—(1.) Whether the charges made by Burns were correct. And (2.) Whether Walker's plea of compensation was well founded.

In support of his second plea, Walker stated:—That on account of the disbursements, &c., made by Burns, the master of the schooner had drawn a bill on him in Burns' favour for £200; that Burns indorsed that bill to John and Walter Scott of Glasgow for value; that before the bill came to Scotland, Messrs Scott had become bankrupt, and the same had thereby been vested in the trustee on their estates; that the bill had been presented to him, and protested for non-acceptance; that he was a creditor of Messrs Scott to the extent of £163, and had, in ranking on their estates, given them credit for £140 of said draft, which he then presumed to be the full amount of the debt due by him to Burns; that Messrs Scott had made an offer of composition, which being accepted, they were discharged, and paid him a composition on his claim as ranked; and that all this had been duly intimated to Burns.

Burns answered to this plea—That the bill, if it had been paid to the indorsees, would have gone to his credit with them on account; but that the same had been returned to him in due course, unaccepted, and that he therefore had no claim against them for a dishonoured and unpaid draft.

A proof was allowed to both parties, and a commission granted to examine witnesses in Australia. The commission was reported, and thereafter a proof was led by the party Walker in this country. The Sheriff-Substitute (Mr Smith) thereafter gave judgment as follows:—

In fact, Finds that when the party Walker employed the party Burns to sell the schooner "Boindie," he also instructed him to discharge the debts of said vessel: Finds that the party Burns has instructed that he disbursed the sums of money charged in the debit side of the accounts current appended to the Summons, subsequent to September, 1854, for discharging the debts of said vessel: Finds that on 6th September, 1854, when the party Walker was indebted to the party Burns the sum of £194 15s 2d for money advanced on account of the "Boindie," the master of said vessel drew a bill of exchange on the party Walker in favour of the party Burns, who endorsed the same to Messrs John and Walter Scott, ship agents in Glasgow, that when this bill of exchange arrived in Glasgow, Messrs Scott had become bankrupt, and the bill became vested in the trustee on their sequestrated estate, who presented it for acceptance to the party Walker, who refused to accept, and it was protested against him for non-acceptance, and afterwards, when it fell due, for non-payment; and this bill was afterwards returned to Australia to the party Burns, who credited the estate of Messrs Scott with the amount: Finds that the party Walker was a creditor of the Messrs Scott's at the time of their sequestration, and in ranking on their estate he gave credit to them for the sum of £140, in respect of the said bill of exchange: Finds that the master of the "Boindie" drew two other bills of exchange for £50, dated respectively 29th November, 1854, and 17th February, 1855, upon the party Walker, in favour of the party Burns, for disbursements made by the latter on account of the "Boindie," both which bills of exchange the party Walker refused to accept, and they were sent back to the party Burns in Australia dishonoured and protested: Finds that the party Burns has proved that he was entitled to charge the commission charged on the debit side of the account-current appended to the Summons: Finds that the party Burns sold the schooner "Boindie," and has credited the party Walker on the credit side of said account with the nett proceeds thereof: In law, Finds that as the schooner "Boindie" was given in charge to the party Burns by the party Walker, with special instructions to sell her and discharge her debts, Burns was in the position of broker and agent for Walker; and the rule of law applicable to parties making advances for a ship in a foreign port on the master's draft do not apply: Finds that the party Walker being indebted to Burns at the time the bills of exchange—referred to in the findings in point of fact—were presented to him for acceptance and payment, was bound to have accepted and paid them, is liable in the re-exchange charged against him: Finds that the fact of the party Walker having credited Messrs Scott with £140 in respect of the bill of exchange of date 6th September, does not entitle him to plead that the party Burns has been paid and compensated to that extent, the bill of exchange having been sent back dishonoured to Burns, when Walker was bound to have accepted it: Therefore, in the action Burns against Walker, repels the defences, and decerns in terms of the conclusions of the Summons; and in the action Walker against Burns, sustains the defences, and assoilzies the defender: Finds the party Walker liable in the expenses of this conjoined process: Allows an account to be given in, and remits the same to the auditor to tax and report, and decerns.

Pending an appeal, Walker's estates were sequestrated; and the trustee having refused to become a party to the action, the appeal was dismissed.

Act. T. G. WRIGHT. *Alt* J. CLARK.

Digest of English Cases.

3D MARCH, 1858.

COURT OF APPEAL IN CHANCERY.

In re THE HULL AND LONDON LIFE AND FIRE INSURANCE COMPANY, *ex parte* GIBSON, HUDSON, & KEMP.

Joint Stock Company—Winding Up—Contributory.

MESSRS GIBSON, HUDSON, & KEMP, the appellants, alleged that they had become shareholders, signed the deed of settlement, and acted as directors of the Company in question, induced by and on the faith of statements made by the solicitor and one of the promoters of the company, that two gentlemen named Cammell and Horncastle would become shareholders. This representation was untrue in point of fact, but not fraudulently made. On discovering the truth, they did not take any steps for their relief, but attempted to dispose of their shares. *Held* (1) that the company was not bound by the misrepresentations of the solicitor and promoter; and (2) that the appellants were in any view not entitled to the relief sought in respect they continued to act as owners of the shares, after they discovered that the representations in question were untrue.

5TH & 6TH MAY, 1858.

ROLLS COURT.

HOGGARD *v.* M'KENZIE.

Bankruptcy—Lien—Agent or Manager.

HOGGARD, the plaintiff, was employed by the firm of D. & J. M'Donald & Co. of Glasgow, as the manager of their London business. In consideration of his accepting bills for their accommodation, it was arranged that he should have a lien over the whole goods consigned to him, and over all the bills, notes, and cash, which passed through his hands. The warehouse in which the goods were kept was rented by M'Donald & Co., of which he had the management when they failed in October, 1857. Acceptances were outstanding to the amount of £14,000, for which he was liable, and large quantities of goods were in the warehouse, of which he had the keys. *Held*, that the warehouse being the warehouse of M'Donald & Co., whose manager he was, the goods were in their possession and at their order and disposition, and that the plaintiff had no lien over them.

28TH MAY, 1858.

COURT OF QUEEN'S BENCH.

PEARSON & AMOR *v.* DAWSON.

Sale of Goods—Constructive Delivery—Vendor—Warehouseman.

ASKEW purchased a lot of hogsheads of sugar in bond from the defendant. He obtained samples, and his name was entered as purchaser in the defendant's book, kept for the purchase. He subsequently resold twenty hogsheads of the sugar to the plaintiffs, who granted a bill for the price and obtained a delivery order, which they handed to the defendant, who placed it on his file and entered in his book the names of the plaintiffs, opposite the hogsheads which they had purchased. At the same time the plaintiffs gave a delivery order of their own for two of the hogsheads, which the defendant recognised by delivering the goods, the plaintiffs paying the duty. The warehouse was a bonded warehouse, double locked, of which one key was kept by the defendant, the other by the Custom House Officer. Askew having become insolvent without paying for the goods, the defendant claimed a lien for the price payable to him. *Held*, that having accepted of, and recognised the delivery order of Askew, though the goods remained in his custody, he had no possession to entitle him to a lien.

22D MAY, 1858.

COURT OF ADMIRALTY.

THE GALATEA.

Salvage.

THE master of the steam-tug Challenge contracted to tow the brig Galatea, from Gravesend to the North Fortwall. The brig was so seriously damaged by a violent storm while being towed out, that she could not continue her voyage. A claim for salvage was made by the master, owners and crew of the tug. *Held*, that the owner of a towing vessel engages to do all that is necessary to facilitate the safe transit of the vessel, which has engaged to tow from the place of departure, to the place where the towage is to cease, and he takes his chance of ordinary bad weather; but if the voyage be totally interrupted by the act of God, subsequent services for the safety of the ship will be reckoned, not as towage, but as salvage.

12th JUNE, 1858.

COURT OF QUEEN'S BENCH.

GARTON *v.* THE GREAT WESTERN RAILWAY COMPANY.

8 & 9 Vict. c. 20, s. 138.

SERVICE of a notice on a Railway Company must be at the *principal office* where the secretary and staff are located.

22D JUNE AND 5TH JULY, 1858.

COURT OF COMMON PLEAS.

HURMER *v.* CORNELIUS.

A PERSON who hires himself in the character of a skilled labourer may be dismissed by his employer on discovering his incompetency, although there be no express understanding or warranty of competency.

COURT OF EXCHEQUER.

THE time of the commencement of the sitting of a Court falls to be regulated, not by Greenwich time, but by the mean time at the place where the Court is held.

31ST MAY, 1858.

COURT OF COMMON PLEAS.

HUTCHINSON & MOOR *v.* GOVAN AND OTHERS.

THE plaintiffs shipped a quantity of salt cake on board a general ship, desiring that it should be stowed in bulk. Salt cake is a substance which has, and was known to the plaintiffs to have, corrosive qualities, but they gave no notice of this to the person in charge of the ship, because, as they said, it was an article well known in commerce, and the shipowners ought to have known its properties. It was stowed in contact with and among casks containing salt provisions, and so corroded, rotted, and destroyed the hoops and casks, that the brine and salt liquor in the casks ran out and destroyed the salt cake. *Held*, that the shipowner being ignorant of the character of the article, was not responsible for the shipper's loss.

17TH NOVEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF STEELE.)

ANDREW USHER & Co. *v.* GEORGE RUTHERFORD.

Discharge—Decree—Small Debt Act—*Held that a Decree of the Sheriff Small Debt Court does not, under the Act 1 Vict., cap. 41, sec. 2, operate as a discharge or forfeiture of every other debt then due by the defender to the pursuer, but only of debts ejusdem generis.*

IN this action the pursuers sue for payment of £17 17s. 3d., being the balance of an account for goods sold and delivered by them to the defender, between 20th August, 1857, and 20th January, 1858.

The defender, besides denying generally the pursuers' claim, states in defence that the pursuers summoned him to the Small Debt Court, at Glasgow, on 14th June, 1858, for payment of fourteen shillings and fourpence, alleged to be due by him to them; that they obtained decree and recovered payment of that sum and expenses; and he maintains that under the Small Debt Act, 1 Vict., cap. 41, sec. 2, this decree operates as a discharge of the debt sued for.

It appears that during the currency of the account sued for, the pursuers sent to the defender a quantity of brandy, which for some reason he did not retain, but returned to the pursuers. The pursuers alleged that the defender had not returned the whole quantity, and the action in the Small Debt Court at their instance against him was for the value of the deficiency.

The Record having been closed, the parties were fully heard on the defender's plea by the Sheriff-Substitute, who pronounced the following judgment:—

Having heard parties' procurators in terms of the foregoing appointment: Finds, that the present action has been brought concluding for payment of the sum of £17 17s. 3d., as the balance of an account for goods, "Sold, furnished, and "delivered by the pursuers to the defender as per account," which account shows that the furnishings were made as upon three distinct dates, and comprehending *three different articles:* Finds, that after the last date in said account, the pursuers did raise in the Sheriff's Small Debt Court, against the defender, an action for payment of 14s. 4d., in which action the pursuers, after certain procedure, obtained decree, and the contents were paid by the defender to the pursuers upon 25th August last: Finds, that the said Small Debt action was *not* raised for payment of goods sold and delivered; but expressly for the value and amount in money of the difference between a certain quantity of goods, which originally had been furnished by the pursuers to the defender, and the quantity of the same goods, which the defender had afterwards returned to the pursuers, usually called a "short return:" Finds, that although there is no doubt that the price of the goods now sued for, and the value of the said short return, may all have been exigible by the pursuers from the defender *before* the said action was raised in the Small Debt Court, yet there is not only no natural connection whatever between the said claims, but they severally arise out of a totally different species of contract—the one being that of *sale* and the other that of *recompense* or *restitution*—and each being distinct and separate, both in time and in amount: Finds, that the certification in the Small Debt Statute, as to the pursuer forfeiting such portion of his debt as may not be included within the amount thereby allowed to be sued for, which enactment is of a highly penal nature, does indeed use the words in apparently general terms—"any debt or demand"—but that these general terms are immediately and intrinsically connected with, and must be read with reference to, the directly preceding words, "any remaining portion of:" Finds, therefore, in point of law, that upon a sound construction of the said statute, a pursuer cannot be held, when seeking the benefit of the statute, and, therefore modifying his demand to the statutory amount, in order to recover *one* debt of a *particular* character, or otherwise special, that may be due to him, to have surrendered and forfeited *every other* debt or demand, no matter of what different character, that may *also* be due to him at the same time by the same party: Finds, that the adoption of this construction of the statute leads to no substantial or practical injustice, and sufficiently protects the interest of debtors in any just debt; while an opposite construction would be unjust to creditors, and might lead to their harassing debtors with the expense of procedure in the ordinary Courts in all cases, instead of the cheaper procedure in the Small Debt Courts: Therefore repels the defence that the present action is barred by the terms of the statute 1 Vic., cap. 41. sect. 2, reserving all question of expenses, and in respect of the general denial, otherwise of the pursuers' claim, allows them a proof in support thereof, and to the defender a conjunct probation; grants diligence against witnesses and havers, and commission to either of the depute Clerks of Court to take the examinations of havers, and receive and certify exhibits, reserving all objections, and report within six days, and appoints the case to be enrolled next Court day to fix a diet of proof.

NOTE.—The policy of the enactment of the statute doubtless was to prevent the multiplication of law-suits under it. Say, for instance, that a creditor held a bill of £20, he is not to be allowed to divide that bill into four different portions of £5 each, and fulminate four several small debt actions against the debtor, upon all of which diligence might be separately done. But it could never be meant that if there were *different* transactions having no natural connection, the demand of what was due under the one should forfeit all right to what might be due under the other. Take the case which might easily occur, and may have often occurred in practice. A man takes a house from another. After getting possession, the tenant buys a horse from his landlord upon credit. Shortly afterwards he takes a fancy to one of his landlord's cows. The landlord will not sell, but lends the animal for a short period. By and by the tenant allows the horse or the cow to trespass upon the landlord's fields; or he himself commits some damage to the property in the tenant's own possession. Supposing, as it is very likely, that this gives rise to some ill feeling, and the parties may have a meeting, which ends in a quarrel, and an assault by the tenant upon the landlord, giving ground for a claim of damages. Rather than take the trouble of proceeding with *sequestration*, the landlord, under the provocation he received, hurries to the Small Debt Court, and takes out a summons, and obtains decree for the rent. Assuming the rent had been £15, he can only sue for £12, and there the statute will come into play, and cut off the "remaining portion," being £3. But supposing him then to sue for £10 or £20 as the *price* of his *horse*, either in the Small Debt or the ordinary Court, and also to present a summary application for *re-delivery* of his cow, the value of which might be £21, and to raise an action of damages for the trespass and injury, and another for the assault, asking in each £50 or £100, is it at all reasonable, or in accordance with common sense, that the tenant, because of the decree for the *rent of the house* under the contract of *location*, should shake himself clear of his undoubted liability for the "*horse*," under the contract of "*sale*"—for the "*cow*," under the contract of "*commodate*," and for the "*damages*," under the obligation of "*recompense*" and "*delict?*" And yet, according to the contention of the defender here, all these were *debts and demands due at the time*, and entering into what is termed the "State of accounts" between the parties, and, therefore, it is said, falling under the sweeping words in the statute, "ANY debt or demand." It is thought that such a construction of the statute at once answers itself.

But it may be added, that the grammatical as well as legal construction of the words of the statute are equally opposed to the gloss now put upon them. It is fixed legal and grammatical rule, that *general* words must be taken as restricted to, and limited by the *particular* words with which they are connected as antecedent or relative. Now the words of the *second* member of the sentence certainly are "any debt or demand;" and if they had stood alone might be conceived as of universal application. But the *first* member of the sentence has the words "*remaining portion of*," as noticed in the interlocutor. In grammar, it cannot be said, that the forfeiture applies to a *remainder* which was *no portion* of the *original*. In law, the *portion* forfeited must be out of an "*any*," of which a portion remained capable of forfeiture.

On appeal, the Sheriff adhered *simpliciter*.

Act. JAMES GALBRAITH. *Alt.* J. M. TAYLOR.

17TH NOVEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

BUCHANAN'S TRUSTEES v. WILLIAM YORK AND OTHERS.

Bankruptcy—Double Ranking—Cautioner—Relief.—*A and B were cautioners for C. C became bankrupt, and A and B were called upon, under decree, to pay the debt. A, who had also become bankrupt, and been discharged on a composition of 10s in the pound, after his discharge paid one-fourth of the debt. B paid three-fourths, and claimed A's composition on one-fourth, being the excess paid by him over his proportion of one-half—Held that this would be a double ranking in respect of the same debt, and therefore incompetent.*

IN 1846, John Buchanan (the pursuers' author) and William York, the principal defender, became cautioners to the extent of £1000 for John M'Callum, as trustee in the sequestration of James Carmichael. M'Callum's estates were sequestrated in 1854, and in 1855 he resigned the trusteeship, and was judicially superseded by Henry Leck, who was appointed trustee on Carmichael's estates in his room. Mr Leck found a large balance due by M'Callum to the estate, uncovered to the extent of £2381 16s 3d, and under the bond of caution obtained a decree against the pursuers and the defender, William York, jointly and severally, for £1000. In March, 1855, York's estates were sequestrated, and in July or August of the same year, he was discharged and reinvested, on a composition of ten shillings in the pound, on all debts due by him at the date of the sequestration, payable by two equal instalments, for payment of which James York and Cullen, who were also defenders in this action, were respectively securities. The decree at Leck's instance was dated in December, 1855, so that there was no ranking for the £1000, or any part of it, on William York's estates. The pursuers, however, on 7th March, 1856, paid Leck £750 of the sum in the decree with interest, and the defender, William York, on the 11th of the same month paid £250. The present action concluded for payment from York and his cautioners, of a composition of ten shillings in the pound, on the sum of £250, being the excess which the pursuers had paid over their half as co-cautioners for the debt of £1000 due to Leck.

It was pleaded for the defenders—

(1.) That York having already paid what was equal to his composition on his one-half of the debt, to admit the pursuers' claim would be to allow a double ranking.

(2.) That the payment by the pursuers of £750, previous to the defenders' payment of £250, discharged the debt, as regarded the defenders, to the extent of three-fourths, and that, therefore, York had already paid more than he was legally liable for.—*Bell's Comm., vol. I.*, p. 354; *Farquharson, 15th May*, 1832, 10 *S.*, 526; *Burton on Bankruptcy*, p. 32.

Proof having been led, the Sheriff-Substitute (Mr Bell) pronounced the following judgment:—

Finds that the creditor in the bond of caution for £1000 for the party John M'Callum mentioned in process, having received from the pursuers £750, and from the co-obligant, the defender, William York, £250, said creditor has been paid in full; and the question in this process is, whether the pursuers are, in the circumstances, entitled to relief from the said William York, and the cautioners for his composition, the other defenders, in respect of said pursuers having paid £250 more than their share of the £1000 bond: Finds that William York was sequestrated in March, 1855, and was discharged in August thereafter, on a composition of 10s per pound on all debts due by him, his obligation under said bond being one of these: Finds that it was after York's discharge that the pursuers paid to the creditor in said bond £750, and that York paid £250: Finds that the position of the pursuers would have been the same whether they had paid the whole £1000 and then ranked on York's estate, or whether they only paid £750, and York relieved them to the extent of the remaining £250, seeing that where "the creditor goes first against the "solvent cautioner and compels him to pay the whole debt, "such solvent cautioner is entitled to be ranked upon the "estate of the insolvent cautioner for one-half only of what he "pays" (*Bell's Comm., vol. I., p.* 354): Finds that by York's payment of £250 to the creditor, being his dividend of 10s per pound on £500, the pursuers have obtained the whole relief they were entitled to from York, and to sustain their right to a second dividend of 10s per pound on the surplus £250 paid by them, would be to give a double ranking for the same debt, which is incompetent: Finds that it does not alter the case that York might have refused to pay to the creditor in the bond more than a dividend of 10s upon the £250, seeing that if he had done so, the creditor could then have come upon the pursuers for the remaining £125, who could have ranked against York only for a similar dividend, and no more, which would have left them £250 out of pocket: Therefore sustains the defences, and assoilzies the defenders: Finds the pursuers liable in expenses, etc.

The pursuers appealed, and pleaded—

(1.) The cautioner's right of relief exists separately, and independently of that of the creditor, was not derived from or through him, and could not be affected by his acts; and although the same debt formed the subject-matter of both the creditor and the cautioner's claims, these claims depended on distinct rights, equally valid if once called into existence.

(2.) The relief is *pro rata*, that is, the cautioner paying is entitled to re-payment of what exceeds his share; and while bankruptcy has the effect of changing the rate of payment, it does not and cannot affect the rights of parties.

(3.) To sustain the defence would be to affirm the proposition, that payment by composition is equivalent to payment of the principal sum represented by the composition, but this was already negatived by the Court. (*Cranston* v. *M'Dowal, Ross's L. C. Common Law, vol. III.*, p. 118.)

(4.) Had the creditor chosen to rank upon the defender for the whole amount of the debt, which he was at liberty to do, (*Bell's Comm., vol. I*, p. 354,) he would have drawn £500, but in such a case, were the defence sustained, the legitimate conclusion would be that the defender could then claim repetition from the pursuers of £250, a result negatived by the decision in Cranston *ut supra*. But to sustain the pursuers' claim, the defender would in all have only to pay £375 instead of £500, leaving a loss on the pursuer of £125, which is an equitable division of the deficiency; and in all cases, to recognise the cautioners' right of relief as a valid claim for composition on the excess, would be a safer and more intelligible principle, than simply to leave the adjustment of the loss to the favour or caprice of the creditor.

(5.) It has been decided in England that a claim like the present is good, in respect the cautioner alone can cut off his right of relief (and here they had paid under *compulsitor*), and all parties transacting for discharge or composition, are aware that the right of relief exists and must be satisfied, and must be held to negotiate subject to the burden of meeting that relief. (*Lord Eldon in Gifford*, 6 *Vesey*, p. 805.)

Sir Archibald Alison adhered to the Sheriff-Substitute's judgment, adding the following note:—

This is a very nice question, and it has been very ably argued on both sides before the Sheriff, and has been the subject of a very distinct interlocutor by the Sheriff-Substitute, and although the Sheriff has listened with pleasure to the arguments which have been adduced for and against the judgment pronounced, it appears to him that the same result

which has been arrived at by the Sheriff Substitute, may be come to by a shorter consideration and process of reasoning.

The pursuers and defenders here were cautioners on a debt for £1000, for which they were both responsible *singuli in solidum* to the original creditor, with a relief of one-half of the amount *inter se*, in the event of one of them being required to pay more than his own share. York, one of the cautioners —the defender in the present suit—became bankrupt, and could only pay 10s a pound on the amount of his debt. It appears that after the sequestration of his estates, and after he had obtained his discharge under a composition contract for 10s in the £1, payments were made by both of the cautioners to the creditor in the bond—the pursuers having paid £750 of the debt, and the defender York, £250, which payments extinguished the debt due to the original creditor in the bond. Then, how does the question of relief stand between the two sureties—the parties to this action? As the defender York's estate was sequestrated and he obtained his discharge on a composition of 10s in the £1, his estate could not be called upon to pay more than £250, being the composition on £500 as his half of the cautionary obligation in a question *inter socios*. It happens to have been under this impression that the payment of £250 was made by York, which was a voluntary payment after he had obtained his discharge made upon the footing of its being the fair amount of the bankrupt share of the debt. This payment the interlocutor under review has sustained as a discharge in full to York, for all that can be recovered under his original obligation, or from those liable for his composition, upon the ground that to sustain any farther claim upon York's estate, would be virtually to let in another ranking upon the estate for the same debt, which is incompetent. The Sheriff is not prepared to say that it is, properly speaking, a *double ranking*, as the payment by York was voluntarily made after the sequestration was at an end and wound up. But the main ground on which the Sheriff proceeds, is that, holding the debt against York's estate to be £500, in a question between the cautioners the payment of £250 was a discharge of that debt in full under the composition contract of 10s in the £1, and therefore that the pursuers *have already got*, after their co-cautioner's bankruptcy and discharge, all that they could demand from him. It is true that in this way the pursuers will have paid £750, and the defender York only £250 of the original debt; but that is no more than the unavoidable result of the co-cautioners being bound jointly and severally to the creditor on the bond, and one of them becoming bankrupt and paying only 10s in the £1. If he had become bankrupt and his estates paid *nothing*, the pursuers would have been compelled to pay the whole £1000 without any relief, and when the bankrupt estate was able to pay £250 or a composition of 10s on his half of the original debt, the pursuers have got all the relief which they are entitled to in the circumstances. If the pursuers' present demand for £125, now insisted on, were sustained, it would virtually be a second ranking to that amount of the same debt, on the bankrupt estate, to the effect of enabling the pursuers *to draw* on the whole 15s a pound on their debt, while the other creditors had compounded for 10s a pound.

Act. R. Stewart. *Alt.* R. Ross.

18TH NOVEMBER, 1858.

SHERIFF COURT, PERTHSHIRE.

(MR SHERIFF BARCLAY.)

JAMES BROWN *v.* MITCHELL & CARMICHAEL.

Decree—Interdict—Jurisdiction—Discharge.—*Held, that the Sheriff Court cannot competently entertain an application for interdict against enforcing a Sheriff Court Decree for expenses, on the ground that the Debtors had been sequestrated, and had obtained a discharge on a composition after the account of expenses had been remitted to the Auditor for taxation, but before decreet was pronounced.*

THIS was an application for interdict against enforcing payment of a decreet obtained in this Court, under the following circumstances:—On 29th July last, the respondents, Mitchell & Carmichael, charged the petitioner on a decreet, obtained at their instance against him, for the expenses of process amounting to £13. The petitioner avers, in the application, that he was sequestrated on the 19th March, 1858; on 2d April, offered a composition of 5s per pound; on 29th April, the creditors unanimously accepted the offer; and the petitioner was discharged in May, of all debts due by him at the date of his sequestration. The action in which the decreet was obtained was pending, and the petitioner was found liable in expenses, and remit made to the auditor, all before the date of sequestration; and he contended the chargers were therefore only entitled to the composition on the amount of expenses. The chargers answered, admitting the petitioner's averments, the debt in question was not in existence at the date of sequestration, and not even before the date of the discharge (decreet not having been pronounced till after); therefore, the discharge could not apply to this debt, and the petitioner's own acts kept the chargers from ranking. On these statements, the record was closed. After hearing parties, and advising, the Sheriff-Substitute pronounced the following interlocutor:—

Having heard parties' procurators, and made avizandum with the process: Finds that the present action is of the nature of a suspension or interdict of execution under a final and extracted decreet of this Court, which decreet is sought to be recalled or restricted: Finds such action incompetent in this Court. Dismisses the same; finds the defenders entitled to expenses; remits the account thereof to the auditor, to tax; and decerns.

NOTE.—The Sheriff-Substitute felt and expressed his doubts of the competency when he subscribed the original warrant of service. He was surprised that the preliminary objection was not taken at the first calling. It was urged, however, at the debate; and it is the duty of the Court to notice it, though it had not been stated. The Substitute has every inclination to sustain the jurisdiction, if he could see that it was not against principle and authority. It is no doubt true, that the petitioner does not seek to open up the decree on the merits, but on a fact that formed no part of the closed record, or the issue under the same; and it is quite competent for the Sheriff to interdict the execution of his decreet, when it is sought under the same to attach the property of third parties. But here the same party, against whom the decreet was obtained, asks the Court to recall or limit the extent of its decreet. The principle is, that, so soon as the Judge has given decreet, his functions therein are ended, and he can neither recall, modify, nor explain his decree. In this case he has decerned for a certain sum; the petitioner desires the same Judge to modify the amount to one-fourth thereof. The petitioner's sequestration and discharge were both obtained within the currency of the process between the parties resulting in the decreet for expenses. It might have been competent, before decreet, or perhaps extract, to have stated the fact of the discharge as *res novitor*, and thereon raised the question of the effect of that discharge, and restricting liability for expenses. If so, the petitioner is barred under the doctrine of "competent and omitted." There is little authority on the point of jurisdiction. But the case 4th and 5th December, 1829 (Eddington and Sons), is very instructive. There the remedy sought was, not to recall or restrict the decree, but, in point of fact, to work it out; nevertheless, the Supreme Court held that the Sheriff had no further power of jurisdiction in the matter. With submission, however, the decision in Eddingtons' case has always appeared to the Sheriff to push the principle too far; and in practice it has not been closely followed, as such supplementary applications are not unfrequently absolutely necessary to the ends of justice. Suppose that a petition is presented to a Sheriff to stay execution on his decreet, because payment or satisfaction had been made. However expedient to entertain such application, it is believed that such mode of remedy would be incompetent, except in the Supreme Court. That, however, is a much stronger case for interference than the present. On the merits, the Substitute may venture to state, that his opinion

is against the pursuer. The debt was not constituted either at the date of sequestration or before the discharge, so that the defenders, whilst sought to be placed under the fetters of the sequestration, had no corresponding privileges in voting or opposing the discharge. The authorities are certainly discordant; and the leading case, 10th March, 1855 (Macpherson), went on a specialty. But there is also a specialty in this case—that the discharge was obtained before the decree for expenses, and the opportunity missed of raising the question in the depending process.

The petitioners appealed, and craved the opinion of the Sheriff (Mr E. S. Gordon), who, after advising, dismissed the appeal, and affirmed the Sheriff-Substitute's judgment, adding the following note:—

NOTE.—Under the Act 16 and 17 Vic. c. 80, sect. 2, a defender may get himself reponed against a decree in absence, whether extracted or not, at any time before implement has followed thereon, by lodging a reponing note. But the present application is substantially a suspension of a decree *in foro*, pronounced by the Sheriff. It is clear that Sheriffs have no power to entertain suspensions of any decreets, except of those which proceed on bills, or obligations registered in the books of the Sheriff Court, or of Council and Session cases, in which there has been a judgment of the Court only *ficticne juris;* and this was a power given for the first time by the nineteenth section of 1 and 2 Vic. chap. 119. The application is therefore incompetent. If the petitioner thought he had good grounds for refusing to pay more than the composition of five shillings per pound on the amount of expenses, he should have objected to decreet being pronounced for a larger amount. But he allowed that opportunity to pass.

Act. J. DALLAS. *Alt.* T. SOUTAR.

29TH NOVEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

ANDREW M'EWAN (Young's Trustee) *v.* JAMES STEWART.

Bankruptcy—Cautionary Obligation—Locus Pœnitentiæ—Improbative Writ—Mercantile Amendment Act.—*Held, that a party who agrees to become cautioner for, and signs an improbative offer of a composition in a sequestration, may resile before signing the bond of caution; and that there is locus pœnitentiæ, until the offer of composition is finally approved of by the Lord Ordinary or the Sheriff.*

THE Estates of John Young, deceased, were sequestrated, and the petitioner was appointed Trustee thereon. Mrs Young, the widow and executrix of the Bankrupt, made offer of a composition of 12s 6d per pound to the creditors on the estates, and offered Robert Young, James Young, and the respondent as cautioners: This offer, which was neither holograph nor tested, was subscribed by the proposed cautioners and addressed to the petitioner. Thereafter, the creditors having entertained the offer, the respondent was required to sign the usual cautionary bond, when he refused to do so. In these circumstances, the petitioner, with concurrence of the creditors, presented this application, craving that the respondent should be decerned to subscribe and execute the bond of caution (which was produced), in terms of the offer.

The respondent in defence pleaded:

(1.) That while he had signed the offer referred to, he did so on the express understanding and condition acceded to by the proposed co-sureties, that they should consign in bank before subscription of the bond of caution a sum of £250, which was to remain until the composition should be duly paid, which condition was suggested by, and known to the trustee: That the co-sureties had not made the consignation agreed upon, and that, therefore, the defender was entitled to withdraw his offer of caution:

(2.) That, irrespective of any understanding with his co-sureties of the nature referred to, the defender was entitled at any time before subscription of the bond to withdraw his offer of suretyship.

The record having been closed on this defence, Mr Bell pronounced the following judgment:—

Finds, first, That under the Mercantile Law Amendment Act, sect. 6, all cautionary obligations must be in writing, "otherwise the same shall have no effect:" Finds, that where an obligation can be constituted only by writing, an undertaking to enter into such obligation must also be in writing, and that writing must be probative (Barron, Jan. 23, 1794, Mor., p. 8463): Finds, that the offer of composition, No. 5/1, founded on in the petition as warranting the conclusion against the defender to execute the bond of caution, No. 5/4, is neither tested nor holograph, and is therefore not probative: Finds, second, That even if the said offer could be held equivalent to a verbal undertaking to execute a bond of caution, or as evidence of such undertaking, the defender had still *locus pœnitentiæ*, because where a party agrees verbally, or by an imperfect missive, with a view to a subsequent written contract, the obligation is held to be suspended till the writing has been executed, unless *rei interventus* has intervened, which is not averred to have been the case here—(Bell's Comm., vol. 1st, pp. 327–8, and Dickson on Evidence, sects. 598 and 603): Finds, third, and more particularly as the question at issue is affected by the Bankruptcy Statute, that it seems to be correctly stated by Professor Bell, Comm., vol. 2d, p. 460, that "the offer of composition by the bankrupt may be withdrawn *rebus integris;* and by the Act it would appear, that *res sunt integræ* till the composition is finally approved of, the trustee being enjoined to proceed in the meanwhile without any regard to the offer:" Finds, that if this is the law as regards the bankrupt, it must, *a fortiori*, be law as regards his cautioners, the more especially as where, in the case of the present defender, the agreement to become cautioner is only inchoate, no bond of caution having been signed: Therefore, and under reference to the annexed note, sustains the defences, and dismisses the action; but, in the whole circumstances, finds no expenses due, and decerns.

NOTE.—The question raised in this action is not without nicety, and there is no reported decision precisely in point. If the offer founded on as constituting an obligation against the defender be invalid, because improbative, there is of course no case; and even independent of the provisions of the Bankrupt Act, and although the offer were to be held entitled to some faith in judgment, it would seem at common law, considering that it refers to an obligation which could only be finally constituted by writing, that there was still *locus pœnitentiæ*. This view is strengthened by the fact, that the cautionary bond in question is one to be lodged in a sequestration, and therefore to be dealt with as falling under the provisions of the bankruptcy statute. It is admitted on all hands, that bankrupts and their cautioners may, on cause shown, withdraw from an offer of composition, even after the lodging of the bond, provided judicial authority has not been interponed. But it would rather seem that they are equally entitled to withdraw without cause being shown, especially if the withdrawal be intimated before the bond of caution has been executed. Where an engagement is of that character, that it is not valid till reduced to writing, there is *locus pœnitentiæ* till the final purpose to undertake it be declared in writing. "The privilege of resiling," says Professor Bell, "is not destroyed where the irrevocable obligation has not been legally declared." (See also Chaplin, Feb. 5th, 1842.) In bankruptcy, it has been held that an offer of composition does not, as in an ordinary mercantile transaction, become a binding contract by the simple acceptance of the creditors. In the case of Brown, June 17th, 1846, the Lord Justice Clerk, in speaking of the offer of composition which had been made by the bankrupts, said, "I think that proposal—for such alone it was, an offer or proposal by the bankrupt—entirely fell, and that by his own conduct. The resolution of the creditors is not in itself a substantive act, which takes effect

and can be acted on by itself; it is merely an assent to an offer or proposal by the bankrupt. He must go on to make that proposal complete in due time. He did not do so. He drew back and refused, and the resolution therefore flew off, being one only of adoption of his proposal, if duly completed by him." In the case of Ironside, March 26th, 1841, (4th B. M. & D., p. 629,) both the bankrupts and their cautioners were held entitled to withdraw at the eleventh hour, after a bond of caution duly executed had been lodged, and the trustee had reported thereon. No doubt a change of circumstances had taken place since the date of making the offer, but the judgment of the Sheriff-Substitute of Perthshire, which was subsequently confirmed simpliciter, both by the Sheriff Depute and the Lord Ordinary, whose decision was acquiesced in, was not rested on any change of circumstances, being in the following terms:—"Finds, that the bankrupts have withdrawn their offer of composition previous to the same, and the acceptance thereof being approved by the Court, in terms of the bankrupt statute; and finds that the cautioners for the composition have in like manner withdrawn their sureties, or object to continue as such: Finds it, therefore, unnecessary to decide on the other grounds of objection urged by the cautioners, and refuses to approve of the offer of composition and acceptance in respect of such retraction thereof." The power of resiling from an imperfect obligation may no doubt be barred either by homologation or *rei interventus*, but neither the one nor the other is or could be averred in the present instance. In no case, indeed, can *rei interventus* properly follow upon the acceptance of an offer of composition, until it has been approved of by the Lord Ordinary or Sheriff, seeing that it is expressly enacted by sec. 142 of the Bankrupt Act—"That notwithstanding such offer of composition and proceeding consequent thereon, the sequestration shall continue, and the trustee shall proceed in the execution of his duty, as if no such offer had been made, until the deliverance of the Lord Ordinary or the Sheriff be pronounced." This enactment has clearly a strong tendency to keep open the *locus pœnitentiæ*, until it be seen whether, in the words of section 145, the offer of composition "became ineffectual." The case here, as already remarked, is favourable to the defender, seeing that he withdraws before signing the bond of caution; and that it is instructed by his production No. 6 that he has not done so capriciously, but in consequence of one of his co-cautioners having failed to make, as he had promised, a consignation in bank as a supplementary security; although this failure, being a matter only between the cautioners themselves, would not have liberated the defender, if otherwise fully bound to the pursuers.

The pursuer appealed, but Sir Archibald Alison adhered to the interlocutor of the Sheriff-Substitute, adding the following note:—

NOTE.—This is an important case under the Bankrupt Law; the more especially as it is the first of the kind that has occurred under the recent Bankrupt Statute, which has materially changed the mode to be followed in making offers by a bankrupt of a composition, and naming the cautioners for it, and establishes various rules and particulars to be followed out, which were not required under the former Bankrupt Acts. In adhering to the interlocutor under review, the Sheriff is mainly influenced by the authority of Professor Bell, who expressly says, that a proposed cautioner for a composition may resile from his offer to become security, provided *res sunt integræ*, and that matters are to be held entire until a bond has been actually signed, and the offer has been approved by the Lord Ordinary or the Sheriff. It is true that Mr Bell's authority and all the other cases relate to offers of composition under the former Bankrupt Act; but there does not appear to be any material difference between that Act and the present, so far as the present question is concerned. It is true that by the present Act any subsequent offer of composition, after a first offer shall have fallen or become ineffectual, must be assented to in writing by 9-10ths of the creditors ranked, and must state the amount of composition and the terms of payment, and be subscribed by the cautioner proposed, before it can be entertained, which was not required under the former Act. But the annexation of these requisites to the offer of composition, does not, in the Sheriff's opinion, alter the principle on which Mr Bell's opinion is founded, which is, that the offer to become security may be resiled from by the cautioner at any time before the bond of caution is actually signed. The reason of this appears to be, that till that is actually done and the matter closed, so far as the cautioner is concerned, his obligation to subscribe the bond is subject to a power of resiling, which, again, is grounded on the contract not being clothed with a finally obligatory character on both sides, till the bond is signed and the offer finally approved of by the Lord Ordinary or the Sheriff.

The Sheriff, however, entirely concurs with the Sheriff-Substitute, in thinking that the defender has no claim for expenses, as the reason assigned, though good, perhaps, for never offering to become cautioner at all, did not justify him in resiling after the offer to become cautioner had been actually signed by him, and lodged with the trustee.

Act. T. G. WRIGHT. *Alt.* R. ROSS.

30TH NOVEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF STEELE.)

ROBERT STEWART & SON *v.* GAVIN BARR AND WM. PEEBLES.

Company—Liquidator—Obligation.—*Held, that a person who is appointed to wind up the affairs of a dissolved Company, is entitled to recognise, and to grant an acknowledgment or obligation to pay a claim arising out of transactions, settled before the dissolution of the Company, and that his obligation is binding on the partners.*

IN November, 1854, Fyffe, Barr & Co., of Melbourne, shipped to South America a quantity of goods which the pursuers had, through Peebles, Fyffe & Company of Glasgow, consigned to them for sale in Australia. On this re-shipment, Fyffe, Barr & Company charged a commission in the account sales, which they rendered to the pursuers. The pursuers objected to this item, but they accepted, and, at maturity, paid a bill for the full balance on the account sales, on the understanding that the charge for commission should be afterwards arranged.

Before any adjustment of the pursuers' claim for repetition of the commission had been made, the firms of Fyffe, Barr & Co., and Peebles, Fyffe & Co., were dissolved, and the defenders, who were the partners of these firms, appointed the defender Barr to wind up the company's affairs. Barr, in doing so, recognised the pursuers' claim, and granted to them the following obligation:—

"Messrs Robert Stewart & Son.

"Dear Sirs,—I agree on behalf of my late firm to deduct "the return commission charged on your goods by Fyffe, Barr "& Co., amounting to seventeen pounds. (Signed) Gavin "Barr, in liquidation of Peebles, Fyffe & Co.—17th April, "1856."

The pursuers, founding on this obligation, now sue the two partners of the dissolved companies, for repayment of the overcharged commission.

Barr states in defence, a denial of resting owing and liability, with an explanation, that as liquidator for the dissolved firms, he had discovered that these firms seemed indebted in a sum of money, which was claimed by the pursuers, and that he, as liquidator, with concurrence of the other defender, had, to avoid litigation, granted an acknowledgment; that he was in advance for the dissolved firms, and as Mr Peebles now repudiated the obligation, the defender was not in safety to pay the whole or part of the sum sued for.

The defence for the other defender, Peebles, is a denial of liability, on the ground that the transactions out of which the claim arose, had been completely settled during the subsistence of the company, and that it was *ultra vires* of the defender Barr, to grant the obligation founded on.

The Sheriff-Substitute, Mr Steele, after hearing parties, pronounced the following judgment:—

Having heard parties' procurators in terms of the foregoing

appointment: Finds, in point of fact, That the pursuer had business transactions with the defenders' firm, and with their foreign house, with whom they are identified during the subsistence of said firm: That the documents produced instruct that a claim arose by the pursuers out of the said transactions, against the parties during the subsistence of the said firm, and that such claim was then put forth, and if not adjusted, at all events maintained: That, upon the dissolution of the said firm, the parties composing the same, being the present defenders, united in appointing Mr Barr, one of their own number, to wind up the affairs of the firm, and for that purpose conferred upon him by the minute of agreement No. 8/1 powers of management in terms almost unlimited: That the said defender, in the exercise of said powers, recognised and admitted the justice of the pursuers' said claim, and accordingly granted, in his capacity as managing partner for winding up the concern, the obligation No. 2 in favour of the pursuers for the amount of the said claim, being the sum now libelled on; and upon these findings in point of fact, Finds, in point of law, that the recognition of a claim against the Company, and the granting of a proper document or acknowledgment therefor, were acts within the competency of a partner of this Company, even although the Company were dissolved, and such partner had no general power of administration or management, and, that more especially, such acts are within the consistency of a partner, who held special and discretionary power of administration and management, (*Vide Buchanan, Watson & Co.*, v. *Adams*, 20*th January*, 1853; *W. Shaw*, 762,) such as those conferred on the defender Barr, so as to make the same binding upon all his constituents, the other partners of the firm, as well as on himself: Therefore repels the defences, find the defenders liable in the principal sum and interest libelled on: Finds them liable also in expenses, allows an account thereof to be lodged, and remits to the auditor to tax and report, and decerns.

On appeal, the Sheriff Principal adhered, pronouncing the following interlocutor:—

Having heard parties' procurators, under the defenders' appeal upon the interlocutor appealed against, and whole process, adheres to the interlocutor complained of for the reasons stated by the Sheriff-Substitute, as also those contained in the following note, with this addition, that all questions of relief between defenders *inter se*, are reserved entire, and dismisses the appeal.

NOTE.—The present case was very ably and anxiously debated by Mr Forbes on behalf of the defender Peebles, and he strongly contended that it appeared from documents in process, or at all events, that he was prepared to prove, that so far from there being any balance due to the pursuer by the firm when the Company was dissolved, the balance lay the other way, and that it was *ultra vires* of Barr, after the dissolution of the Company, to rear up a debt against the firm, however effectually he might do so against himself as an individual. But to this it appears to be a sufficient answer, that by the minute of agreement No. 8/1, both the partners conferred unlimited powers on the defender Barr, to liquidate and wind up the affairs of the concern. He began to do so, accordingly, and in the exercise of his duties as liquidator, and with a view to adjusting of the account between the pursuer and the defenders' firm, he granted the obligation No. 2 libelled on in the action as liquidator expressly on account of the firm. There seems to be no doubt that the granting of such an obligation was within the power of a liquidator, both at common law and under the recent decision by the Supreme Court referred to by the Sheriff-Substitute. Every Company unquestionably subsists even after dissolution, to the effect of winding up its affairs and paying off its debts. And if the Company subsists to that effect, it may, unquestionably, convey its powers of so doing to a liquidator, especially if, as in the present case, he is expressly invested with all the powers which the Company itself would have had in the matter. It is quite a different question, which is not *hujus loci*, whether the defender Barr did right in granting the obligation libelled on in the Company's name. Suffice it to say, he had power to do so, and if he has done wrong in granting the obligation, the defender Peebles will have a claim of relief against him, which in this interlocutor is expressly reserved.

Act. R. CARSWELL. *Alt.* D. FORBES. J. L. LANG.

30TH NOVEMBER, 1858.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

COMPETITION FOR TRUSTEESHIP.

A. F. REID *v.* W. L. YOUNG.

Trusteeship — Competition Voucher—Affidavit.—*Held* (1), *That an extract-decree in absence, and a particular state or account, were sufficient vouchers for arrears of rent, and that production of the lease was not necessary;* (2), *Creditor allowed by amendment to value a security stated, but not valued in his original affidavit.*

THIS was a competition for the trusteeship on the sequestrated estate of Messrs James and John Duff, farmers at Hillhead. The issue depended on two large claims on opposite sides—one by Lord Strathallan, the landlord of the farm; the other by the Central Bank, on a bond for a cash credit in name of the mother of the bankrupts; and the points in law will be found noticed in the annexed notes.

"The Sheriff-Substitute having heard parties' procurators on the mutual notes of objections, and again on the draft notes issued by him, with amended affidavits and additional vouchers, and made avizandum with the whole proceedings, he adopts the following notes as his final decision, and the grounds thereof.

The difficulty which in this and in similar cases the Sheriff-Substitute feels, is, how far under the 50th, 51st, and 58th sections of the recent Bankrupt Statute he can allow amendments of affidavits on which votes were given, and additional vouchers to be produced. He expressed himself fully on this subject in his notes in Ford's sequestration, which will be found in the second volume of the *Dundee Law Chronicle*, page 160. He remains of opinion that all mere technical objections should be disregarded, and the fullest opportunity afforded to real creditors to rectify their oaths and claims, and to support the same by evidence, unless, in the words of the 51st section, "the failure to comply with the provisions of the Act shall appear to have been made for some improper or fraudulent purpose, or where injury can be qualified by the other creditors or any of them, in respect thereof."

I. Objections for Archibald Burns and others.

Against the vote of Lord Strathallan.

The affidavit is objected to as not instructed by any voucher of debt. There was no lease or voucher produced, but a very particular state of rents is annexed and subscribed, as relative to the affidavit; perhaps in these circumstances no farther production was necessary. The production of the lease could only establish the amount of *annual rent*, but not the amount of arrears actually due. The agent for Lord Strathallan at the first hearing produced a printed tack, but which not being stamped, could not be received as evidence; but he farther produced an extract decree of this Court, obtained in absence against the bankrupts on the 15th October last, and which the Substitute allowed to be received, although perhaps not actually necessary to support the affidavit.

No doubt the affidavit refers to a tack, and none such was produced; and now that it is produced, being unstamped, it forms no voucher of debt; but its place is amply supplied by a decree against the bankrupt tenants.

Mr Reid objected that the lease was only subscribed by James Duff, one of the bankrupts, but the answer is that the deed cannot be looked to, any more on the one side than on the other until stamped. But, although it were otherwise, the lease is in name of the joint-tenants, who, on the face of the sequestration proceedings, are in the possession of Hillhead, the subject let.

Mr Reid farther objected to the decree of constitution as obtained in absence, and within sixty days of the bankruptcy. The answers are, the decree in absence is good, until opened up, and that here there is no question of preference. A decree of constitution may be obtained against a bankrupt, even after sequestration. (*20th May*, 1813, *Clark v. Ross;* *14th May*, 1835, *Walker.*)

2. Vote of Robert M'Farlane. The vitiation in the bill is rectified by the date being repeated at length in the body thereof. The objector offered to prove that, at the date of the affidavit, the deponent was not the creditor therein, but that the same was held by the bank in which it was discounted, and which evidence the Sheriff-Substitute allowed, but ultimately this vote was withdrawn.

II. Objections for Mr W. L. Young.

1. Vote for David Duff, Pitlochry. The affidavit is for money said to be lent on 26th May, 1855, and which can only be proved by writing or oath, and for which no voucher is produced, nor referred to as in existence, and consequently the vote is rejected.

2. The vote of John Rodger. The marginal addition, which is of importance, was allowed to be signed. The words deleted were immaterial, but the deletion might be initialed by the Justice, or the words declared as scored. The security of Robert Duff was allowed to be valued by a separate affidavit, and all which having been done, the vote is now admitted for the amended amount.

NOTE. — The Sheriff-Substitute entertained some doubt, whether, after the vote was given for a specific sum, it was proper to allow a valuation of a security omitted. The valuation of securities is an essential to an affidavit, and, therefore, ought to be complied with before the vote is given; nevertheless, the effect of such amendment can only be to decrease the sum on which the vote is given, certainly never to increase it, and so appears advantageous rather than prejudicial to the general body of creditors. He is encouraged in this view by observing, from the first number of the *Scottish Law Journal*, that Sheriff Bell of Glasgow, (who has perhaps in this department more experience than the whole Sheriff-Substitutes in Scotland,) has allowed an amended affidavit, *stating* and valuing securities for the first time. That is a much stronger case than this, for there the security was not even stated, whereas it is here stated but not valued. *See 7th Dec.*, 1842, *M'Ewan;* *11th March*, 1847, *Dyce;* *17th Dec.*, 1853, *Gibson;* *15th Feb.*, 1858, *Hay.*

3. Vote for the Central Bank of Scotland. The voucher of debt is only by James Duff, one of the bankrupts, and, therefore, does not vouch a debt against the bankrupt estate; accordingly the affidavit is not made against the bankrupt estate, but against the individual, and there is no such individual sequestration. It might have been competent to have made an affidavit, stating the fact that the bill was for the behoof of the joint tenantcy of Hillhead. Any affidavit to that effect now tendered would not be an amendment, but an original claim and affidavit which cannot possibly be admitted, and therefore the vote is rejected.

4. Vote of the Central Bank on bond. The affidavit appears, when taken in connection with the bond produced, open to serious objections. The bond does not specify that the money was to be, nor the affidavit state that in point of fact, it was advanced to the bankrupts, or applied to their joint farm of Hillhead. According to the bond, Jean Duff, the mother, is the primary debtor, and the bankrupts and others are her cautioners. In that state of fact, the other obligants required to be valued. If the affidavit had specifically set forth the fact of the bankrupts being primary debtors, and especially, if any written evidence was produced as to that being the true state of the fact, the vote might have been admitted. The state annexed is quite sufficient, as the clause founded on in the bond is designed for another purpose. The policy of insurance should have been valued at a sum, however nominal, to enable the trustee or the creditors to demand an assignation of it, and under the whole circumstances, the Sheriff-Substitute was at first inclined to hold, that an amended affidavit with vouchers, might be allowed to sustain the vote against the bankrupts, as principal debtors bound in relief to the other parties in the bond.

Having indicated these views, Mr Reid, at the second hearing, produced an amended affidavit, setting forth that the money received under the bond for a cash credit, was advanced to enable the bankrupts to stock the farm of Hillhead; Although, unquestionably, this has been conscientiously sworn, and is very likely to be the true fact, yet all the evidence produced goes the other way, and so would not bind the other parties to the bond. The letters produced show that the farm was intended to be taken by the mother, and worked by her two sons, and that the bond was taken for her behoof; consequently, all the drafts on the bank produced are subscribed by the mother, although indorsed by one or other of the sons. What alone could have supported this vote would have been a back letter by the bankrupts, setting forth that they were the sole parties to be benefited by the bond, and were primary debtors therein; of course the bank may be entitled to rank for the full amount of their claim, but it is impossible, under any construction of the statute, that they can vote on the estate of the bankrupt as primary debtors when *ex facie* of the evidence they were merely sureties, and therefore this vote is rejected.

5. Vote of John M'Robbie. The vote is objected to as being an account not due by the bankrupts, and which was offered to be proved by the creditor's books, and which the objectors were allowed to recover, but no proof being offered to contradict the affidavit at the second diet for hearing, this vote was admitted.

6. Vote of James Smitton. The vote is objectionable, as the claim is made and vouched against James Duff individually, and therefore cannot be sustained.

7. Vote of Archibald Ballantyne. The objector offered to prove that, at the date of the affidavit, the claimant was not creditor in the bill, and which he was allowed to establish. The bankrupts being both parties to the bill, the one drawer and the other acceptor, it appears to form a good document of debt, though the affidavit might have been made more explanatory. The abatement of interest ought to have been made in the oath, but it has been properly made in the voting. Ultimately Mr Reid withdrew this vote.

Upon the scrutiny, it therefore appears that the majority of valid votes is in favour of Mr William Laurence Young, whom the Sheriff-Substitute therefore finds duly elected as trustee on the sequestrated estates of James Duff and John Duff, farmers, Hillhead, in the parish of Blackford; but, in respect that no voucher was lodged at the meeting in support of Lord Strathallan's vote, and which has been sustained, chiefly because of the extract-decreet subsequently produced, and this vote having carried the election, he finds no expenses due between the competitors.

1ST DECEMBER, 1858.

SHERIFF COURT, KILMARNOCK.

(MR SHERIFF ANDERSON.)

LANG v. HALL.

Presumption of Payment—Proof—Writ or Oath.—*A party raised an action against the executrix of his deceased brother, for constitution and payment of a claim for premiums of insurance alleged to have been advanced on deceased's account—Held, that the pursuer could only instruct his claim by the*

writ or oath of the defender, the presumption being that these premiums were paid by the deceased.

THIS was an action of constitution and payment at the instance of James Lang, against Mrs Janet Lang or Hall, executrix of the deceased John Lang. The summons concluded for the sum of £70 10s. 3½d., being an alleged balance of sums paid by him, consisting of premiums of insurance on deceased's property. These payments the pursuer alleged were made by him on account of the deceased. In support of his claim, he produced insurance receipts extending over a period of twenty-eight years, the first being dated 11th November, 1828, and the last 15th May, 1855. These receipts were in the ordinary form, and bore simply that the premium and duty therein mentioned were "received from John Lang," (the party deceased.)

The defender denied that the sums sued for were advanced by the pursuer for, or on account of, the deceased John Lang; but, on the contrary, as the receipts themselves showed, averred that these payments were made by the deceased himself, at the time when they fell due, out of his own proper funds; and pleaded that the pursuer could instruct his claim only by the writ or oath of the defender.

The Record was made up by condescendence and defences, and upon being closed, the Sheriff, after hearing parties, issued the following judgment, which has been acquiesced in:—

Finds (1.) That the present action is at the instance of the pursuer James Lang, against his sister Mrs Janet Lang or Hall, as executrix-dative of their late brother John Lang, and concludes for constitution and payment of certain sums with interest, being almost exclusively premiums of insurance against fire over property belonging to the said John Lang deceased, and which the pursuer avers he disbursed from his own proper funds, on his late brother's behalf: Finds (2.) That the receipts produced show these payments were made, not by the pursuer James Lang, but by the deceased John Lang himself: Finds (3.) That it is incompetent to prove, by parole testimony, that the money was paid by the pursuer James Lang, with his own funds as he alleges: Finds, (4.) That the only competent mode of redarguing the evidence of the receipts in process, is by the writ or oath of the defender or her author: Finds that the proof *scripto* has failed: Therefore, appoints the pursuer, within ten days, to lodge a minute stating whether he wishes a reference to the defender's oath.

NOTE.—The claim now advanced by the pursuer against his own sister, as representing their deceased brother, except curling-stone handles, 5/6, with 6/ of interest, consists of annual payments of fire insurance, and interest thereon, from 1828 to 1855 inclusive, and which the pursuer avers, as managing his brother's insurance matters, he made on his behalf. The pursuer has produced the receipts from the insurance office, (of which latterly he himself was agent,) to show that this was the case. Now, in the first place, it is plain, though these receipts had been taken in the pursuer's own name, instead of his brother's, the presumption must have been, that the payments were made with John Lang's funds, he being the proper debtor, but the receipts bear that it was John Lang, and not the pursuer, who actually paid the money. In such a case as this, the mere circumstance of holding the documents is not thought to be material, and, besides, the parties greatly differ as to how they came into the pursuer's possession. The defender avers that the pursuer obtained them in a most improper and surreptitious manner, but the Sheriff-Substitute thinks it quite unnecessary to make any inquiry as to this.

The pursuer comes into Court founding on these documents, and nothing else, and he asks to be allowed to prove by parole that they are untrue. He does not pretend to say he had any general management of his brother's affairs, but only that he paid these insurance premiums. Though a banker and a man of business, he has not produced a book or letter of any description, to show that his brother and he ever had a single pecuniary transaction.

It is certainly a most extraordinary and improbable circumstance, that for so long a period he should have made those annual payments, and never presented any account during his brother's life, and that it is only now heard of for the first time, after that brother is in his grave.

Act. D. R. ANDREWS. *Alt.* J. TORRANCE.

10TH DECEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF STEELE.)

A. v. B.

Breach of Promise of Marriage — Solatium — Quantum of Damage—*Circumstances in which the Court allowed the sum of £250, in name of Solatium and Damage for Breach of Promise of Marriage.*

A., a spinster, 45 years of age, supporting herself by needlework, received with favour the attentions and subsequently the promise of marriage of B., a widower 50 years of age, and an elder of the church, and who possessed a clear assessable income of £150 per annum or thereby. B., having after a time refused to fulfil his promise of marriage, the present action was brought against him by A., concluding for payment of the sum of £500 as solatium and damages.

In the course of proof it appeared, that the defender's offer of marriage, and the pursuer's acceptance thereof, were communicated to the relations of parties on both sides, and that for a year they were regarded as engaged—that in the meantime, and in consequence of her engagement to the defender, the pursuer had refused a second offer of marriage made to her by a respectable man, having an income of £200 per annum; that the defender had withdrawn from his engagement without any reasonable or ostensible cause; that after the defender had ceased to visit the pursuer, she had a severe illness, "occasioned by over-action of the heart upon the vessels, which could or might be caused by mental excitement," and that she had since been in delicate health.

The Sheriff-Substitute, (Mr Steele,) in giving judgment, "Finds the pursuer entitled to the sum of £300, which would be equal to an annuity of £15 to £18."

The defender appealed, and Sir A. Alison, after hearing parties' procurators, modified the damages found due to the sum of £250.

Act. W. BURNS. *Alt.* R. ROSS.

17TH DECEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

JOHN GRAHAM (M'Haffie's Trustee) v. ROSS, Jun., & Co.

Bankruptcy—Reduction—Statute 1696, c. 5—Delivery Warrant—Fraus dans causam contractui.—*A party bought goods to be delivered during the following month; when delivery was made to the Calenderers of the buyers, the latter were in insolvent circumstances, and on the first business day after delivery, they agreed to cancel the contract, granting to the sellers, at the same time, an order on the Calenderers for re-delivery—Held, in an action of Reduction, under the Act* 1696, *c.* 5, *of the Delivery Warrant, at the instance of the Trustee on the buyer's Estates, that although the contract was not void or voidable on the ground of fraus dans causam contractui, the buyers were entitled to reject the goods, and the Delivery Warrant was not struck at by the Act* 1696, *c.* 5.

THE defenders sold to the firm of Michael M'Haffie & Co., on 30th September, 1857, 2000 pieces jacconets, to be delivered in the month of October following. On 10th October (Saturday) they made delivery, on account of the buyers, at

the calender of James Taylor & Son, of 250 pieces of the goods; but on 12th October (Monday), M'Haffie & Co. wrote to defenders asking them to cancel the contract, and enclosing an order on Taylor & Son for delivery of the 250 pieces sent in to them on Saturday. The defenders agreed to cancel the sale, and took back the goods from the calenderers. The estates of M'Haffie & Co. were thereafter, on 24th October, sequestrated, and the pursuer was appointed trustee thereon.

The pursuer, with consent of the commissioners on M'Haffie & Co.'s estates, brought this action of Reduction, to set aside the re-delivery of the 250 pieces jacconets to the defenders, and pleaded—

(1.) That the order on Taylor & Son, and delivery of the jacconets in virtue thereof, were given in extinction or security of a prior debt, viz., the unpaid price of the jacconets, within sixty days of bankruptcy, and at a time when M'Haffie & Co. were insolvent, thereby giving the defenders an illegal preference over the bankrupts' other creditors.

(2.) That the said order was null and reducible under the Statute 1696, c. 5, as extended by the "Bankruptcy (Scotland) Act, 1856."

The defenders pleaded—

(1.) No delivery to M'Haffie & Co.

(2.) Even if delivery had been made, M'Haffie & Co. being utterly insolvent and unable to pay the price, were entitled and bound to reject and return the goods.

(3.) The bankrupts having acted fairly and honestly in *tempestive* rejecting the goods, for which they were unable to pay, and the defenders having acted in *bona fide* in taking back those goods, they were entitled to absolvitor.

The pursuers replied—

(1.) Delivery of the goods was legally made by the transmission to the calender of Taylor & Son, who acted for M'Haffie & Co.

(2.) The *bona fides* of the defenders was not the test whereby the point at issue was to be determined. The defenders having got re-delivery of the goods within a few days of M'Haffie & Co.'s bankruptcy, were bound to restore them or pay their value.

The Record having been closed, and proof *pro ut de jure* allowed and led, the Sheriff-Substitute (Mr Bell), after hearing parties' procurators, pronounced the following judgment:—

Finds, that on the 30th September, 1857, the defenders sold to the late firm of Michael M'Haffie & Co., for delivery in the course of the month of October following, 2000 single or 1000 double pieces of jacconets: Finds, that the first and only delivery under said sale is stated by the defenders to have been made on Saturday the 10th of October following, and this statement is admitted to be correct by the pursuer, although the receive note is dated 9th October: Finds, that the delivery which took place on the 10th of October was a delivery to James Taylor & Son, on account of M'Haffie & Co., of 250 pieces of jacconets: Finds, that on the first business day after the delivery, viz., on Monday the 12th, M'Haffie & Co. wrote to the defenders a letter, which is as follows:—"Dear Sirs,—As we find that we shall only require the 1000 pieces 50 yards jacconets, we shall feel obliged by your cancelling the order, and shall put something in your way on some future occasion. We enclose order on Messrs James Taylor & Son for delivery of the 250 pieces sent in on Saturday the 10th inst.;" and the order was enclosed accordingly: Finds, that the defenders, on receiving said letter, agreed to cancel the sale, and took back, of the same date, the 250 pieces from the calenderers: Finds it not proved that Michael M'Haffie & Co. were insolvent, and knew themselves to be so on the 30th of September, when they made the purchase: And finds it mutually admitted that their circumstances were desperate, and known to them to be so on Monday the 12th of October; and their former clerk, the witness James Grainger, has deponed that he "cannot recollect whether M'Haffie's circumstances became worse between the 9th and 12th of October, 1857:" Finds, in point of law, that it is not proved that M'Haffie & Co. knew that they were insolvent at the time of making the purchase, the said purchase was not void or voidable on the ground of *fraus dans causam contractui:* But finds, that as the said Michael M'Haffie & Co. knew themselves to be utterly insolvent at the date of the first delivery under the sale, it would have been their duty, had the delivery been tendered to them, to refuse the same, or at least to receive the goods only *custodiæ causa:* Finds, that although it is not denied that the goods were delivered to the calenderers on account of M'Haffie & Co., it is not proved that they were aware of their having been so delivered on the 10th October, and the witness Thomas Taylor Brown, manager to Taylor & Son, has deponed they "had no special orders from M'Haffie & Co. regarding the jacconets;" whilst it is not denied by the pursuer that the first and only act of M'Haffie & Co. regarding them was to write the letter above quoted, on the first business day after the day of delivery, requesting that the transaction might be cancelled, and enclosing a delivery order in favour of the defenders, which was immediately accepted and put in force: Finds, that as the said letter does not openly avow that M'Haffie & Co. have elected to reject the goods in respect of their then known insolvency, but merely asks for a cancelling of the transaction, this was substantially doing the same thing under a different form, and must be presumed to have been prompted by what they then knew of their affairs: Finds, that in these circumstances, the delivery to the calenderers did not operate as a bar to M'Haffie & Co. returning the goods, and their doing so was not a deed struck at by the Act 1696, cap. 5, seeing that it was not in the proper sense a voluntary deed, but a deed rendered necessary in common honesty by their supervening insolvency: Therefore, and under reference to the annexed note, sustains the defences, and assoilzies the defenders from the conclusions of the action, with expenses.

NOTE.—It is distinctly laid down by Professor Bell, in conformity with decisions which he quotes in support of the doctrine, that both the English and Scotch law concur in holding "that it is the part of an honest man when he finds himself unable, as buyer, to pay the price, but is not yet a bankrupt, to reject goods proffered to him for delivery by a carrier or other person to whom they have constructively been delivered for him." (*Comm.* vol. i., p. 32.) Professor Bell adds, "Goods may be rejected even after they have been taken into custody of a clerk or warehouseman, acting without express authority from the buyer." (*Idem*, page 235.) President Blair went even farther than this in the case of *Steins*, *16th November*, 1810, where he said "That if a bankrupt was to take delivery of goods which he had bought as a solvent man, this would be a fraud which would entitle the seller to redress." In the case of *Brown*, *Dec.* 21, 1816, (*Hume's Reports*, page 709,) which is extremely in point here—An insolvent purchaser was held entitled to re-deliver nine cattle which had been delivered into his farm seven days previously, and taken charge of by his servants, though without any special instructions from him. As remarked by Professor More in his notes on Stair, p. xc., the leaning of our decisions seems even to support the dictum of President Blair, that to take delivery after insolvency or bankruptcy is such a fraud as entitles the vendor to reclaim his goods. In the present case, although there may have been constructive delivery for a short period, the bankrupts M'Haffie & Co. had never availed themselves of it to exercise any act of proprietorship; and knowing, as they did, that they were irretrievably insolvent at the time, they did no more than what fair dealing prompted and law required, in sending the goods back to the defenders. It is a mistake to suppose that the statute 1696, cap. 5, strikes at such an act as this as an undue preference.

The pursuer appealed, but Sir A. Alison confirmed Mr Bell's decision, adding the following note to his interlocutor:—

NOTE.—The Sheriff concurs in the opinion of the Sheriff-Substitute, that there are not sufficient grounds here to set aside the transaction complained of by the pursuer, and therefore that the defence should be sustained against the reduction; but the grounds of that opinion are not identical with those which seem to be pointed at in the careful and distinct interlocutor and note of the Sheriff-Substitute. The grounds on which the Sheriff proceeds are these:—1st, That it is the duty of a purchaser, who has not yet received what in law is held

equivalent to actual delivery of goods purchased, to reject them, and annul the bargain, if he feels that he will be unable to pay the price from impending bankruptcy. 2ndly, That also it is his duty so to act and his privilege to do so, if actual delivery has not passed in his favour; yet, if this has not actually taken place, and the goods have been not merely constructively but really delivered to him, they have thereby become part of his stock, and pass to his trustee on bankruptcy without any power of repudiating or cancelling a transaction thus complete in all its parts. 3rdly, That the sole question, in the present case, thus comes to be, whether the delivery of the jacconets in question to Taylor & Son, the calenderers, which took place on the 9th or 10th October, 1857, is to be regarded as actual and real delivery, as between the vendor and vendee, or constructive delivery only, and such as left the vendor vested with a right to stop the goods, as still *in transitu*. For it is understood that the right of stoppage *in transitu*, on the part of the vendor, is commensurate with the duty to reject, in the event of bankruptcy, on the part of the vendee, and that actual and real delivery will be a bar to either being exercised. Now, the facts here are, that in the original order there was no place of delivery specified on the part of the vendees. But it appears from the receive note in process, dated 9th October, that the jacconets were sent by the sellers to Taylor & Son, the calenderers, "on account of" M'Haffie & Co., the purchasers, and that the goods were in the hands of the calenderers when the vendees requested the bargain should be cancelled on the 15th October, on the ground that they did not require the goods. It is proved, however, that Taylor & Son are general calenderers, and there is no evidence in process that they had any special instructions from M'Haffie & Co., the purchasers, in regard to the receipt of the goods. In these circumstances, the Sheriff conceives that it is impossible to hold that delivery to the general calenderers was actual and real delivery for behoof of the vendees, as in a question between the vendor and the vendee. Delivery to a calenderer, though on account of a particular purchaser, appears to be much *in pari casu*, in point of principle, with delivery to a general carrier of goods addressed to the vendee; and neither can be regarded as capable of barring the right to stop *in transitu* on the one point, and the duty to reject the goods on insolvency on the other. The material circumstance is, that in neither case have the goods arrived at their final place of destination, neither the carrier's cart nor the calenderer's workshop being their final place of deposit; and it has been held, that even when goods were at the vendee's door on the carrier's cart, or even actually taken into his warehouse by a clerk, without the vendee's knowledge or special direction from him, the delivery was not actual, and the right of stoppage *in transitu* was not barred. 4th, In addition to this, and *separatim*, the power and duty of rejection or cancelling the bargain appears to have been exercised *tempestive* by M'Haffie & Co., the purchasers in the present case. The receive note by the sellers to the calenderers was dated 9th October, and on the 12th, with a Sunday intervening, M'Haffie & Co., the purchasers, being hopelessly insolvent, wrote to the sellers wishing the bargain cancelled. This is within the *triduum* of bankruptcy, so much the object of inquiry in the Roman law, and within the reasonable period which our own law allows to the bankrupt to reject goods, not as yet finally delivered, of which he feels that he is unable to pay the price.

Act. JOHN BOYD. *Alt.* J. MORRISON.

17TH DECEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

GRAHAM (M'Haffie's Trustee) *v.* DENHOLM & OTHERS.

Bankruptcy—Stat. 1696, c. 5—Bankruptcy Acts, 1856 and 1857—Sheriff Court Jurisdiction—Relevancy—Agent's Power—Cash Payment—Collusion—*A. and B. sold goods to C. through D. as agent. When the price became due, D. called for payment, and was employed by C. to sell other goods previously on the same day delivered to D. for the purpose, and directed to apply the price in payment* pro tanto *of the debt to A. and B., who knew nothing of the second sale. D. accordingly carried out these instructions. C. became bankrupt, and was sequestrated within sixty days. In a reduction at the instance of the trustee—Held* (1), *That the action was competent in the Sheriff Court;* (2), *That reduction of the delivery of the goods was not barred by the subsequent sale;* (3), *That in law the agent D. did not, as agent in the first sale, act for or represent A. and B. in the delivery and second sale;* (4), *That the payment to A. and B. made by C. through D. was a cash payment in ordinary course, and equivalent to being made by C. himself; and* (5), *To reduce such a transaction, it was necessary to aver and prove collusion on the part of A. and B.*

THE defender, Mr Denholm (whose business is that of a commission agent), sold to Messrs. Michael M'Haffie & Co., on 11th and 16th September, 1857, on account and risk of the defenders, Messrs John Robertson & Co., 750 pieces jacconets and on 17th September, on account and risk of the defender, Mr Wm. Sommerville, 250 pieces jacconets, the fact of Denholm's agency in the transactions being disclosed at the time. The prices amounted *in cumulo* to £492 10s, payable in cash on 9th October following, with five per cent. off. On 9th October, Denholm called for payment, when he found M'Haffie from home, but saw him on the 12th, and was solicited to allow the settlement to lie over for a few days, which he refused to do, on the ground that his constituents expected payment next cash-day, viz., on the 13th. M'Haffie then said that he had 500 pieces of jacconets at the calenderer's—instructed Mr Denholm to sell them for prompt cash, and gave him a delivery order for the goods. Denholm, on the 12th, obtained and reported to M'Haffie an offer of 9s per piece for the jacconets, and having received fresh instructions, on the same day sold them to Messrs H. P. Ree & Co., and rendered account sales to M'Haffie & Co. On the morning of the 13th he applied, at M'Haffie's request, to Robertson & Co. to take a bill, which they declined, by a letter afterwards despatched. On the 13th, Denholm delivered the goods to Ree & Co., and having received instructions from M'Haffie to get payment from Ree & Co. and make payments to the other defenders to account of their sales, and to say to them that the balances would be paid by the end of the month,—settled with Ree & Co. for the price, which was £209 16s 6d, after deducting charges. The matter was then adjusted between M'Haffie & Co. and Denholm, by the former giving a receipt for said sum, and by the latter granting a receipt for £209, and paying the balance, 16s 6d, to M'Haffie & Co.'s cashier. M'Haffie personally examined the various statements and accounts, and directed the entries to be made in his books. Mr Denholm, on the same day, paid Robertson & Co. £140, and Mr Sommerville £69 to account of their claims, and received receipts from these parties respectively.

These details of the transaction between M'Haffie & Co., Mr Denholm, and Ree & Co., and M'Haffie's directions for the payments to the other defenders, were stated in the pleadings for the defender Denholm. The case, in point of fact, as presented by the other defenders, was that they had sold goods, and in due course had received payments to account, in the usual way, in *bona fide*, and without any knowledge whatever of the sources whence the money came.

M'Haffie & Co.'s estates were sequestrated on 24th October, and the present action was raised by the Trustee to reduce the delivery of the 500 pieces of jacconets to Denholm, and to recover the price or value of these goods.

The summons called for production of "all pretended in-"voices, accounts, states, letters, dispositions, or other pre-"tended conveyances, whereby the said Michael M'Haffie "& Co., or Michael Jamieson M'Haffie, transferred and "made over to the defender, William Denholm, either for "himself, or as agent for, or as representing the defenders,

"the said William Sommerville, and John Robertson & Co., or "one or other of them, 500 pieces of jacconets, the property "of the said Michael M'Haffie & Co.;" and concluded for reduction of "the said delivery note or order, or other "writings, together with the said conveyance, transference, "or delivery itself, whether the same be vouched and in- "structed as aforesaid, or whether the same was merely "verbal, with all that has followed or may follow thereupon." The libel was laid on the statute 1696, cap. 5, as extended by various sections of "The Bankruptcy (Scotland) Act, 1856," and the Bankruptcy Act of 1857; and on the medium that the transaction sought to be reduced was a collusive device on the part of the bankrupt and the defenders, to secure a preference to the latter, and that the sale to Ree & Co. was effected by Mr Denholm, "without consultation with, or "special directions from the bankrupt for his, the said William "Denholm's, own benefit, or that of his said constituents, or one or other of them collusively, and by way of disguising "the true nature of the transaction, which was simply a de- "livery of goods, in security for a payment *pro tanto* of a prior "debt."

Preliminary pleas were stated for the defenders, Denholm and Sommerville, to the effect that the action was not competent in the Sheriff Court, and was not relevantly laid. For Mr Sommerville it was contended that, under the Act 1696, c. 5, a declarator of bankruptcy by the Court of Session must precede the conclusions of reduction; and for him, in conjunction with the other defender, that the agency of Mr Denholm, as libelled by the pursuer, if "special" (*Bell's Com., Shaw's Ed.*, p. 176), and confined to the mere sale to M'Haffie & Co., which was the only kind of agency mentioned, could not imply power to represent the defenders in any collusive scheme, such as that alleged, but if "general" (*Ib.*, p. 175), or purposely conferred to conduct such a scheme, it was not sufficiently averred. A separate plea was stated for Robertson & Co., that the reductive conclusions, confined as they were to the mere delivery, were barred by the subsequent concluded sale and transaction between Ree & Co., Denholm and the bankrupt. These pleas were repelled by Mr Sheriff Bell, and his judgment was adhered to by Sir Archibald Alison, on appeal.

The grounds of his Lordship's judgment on the question of competency were these: Finds that it is enacted by sec. 10 of the Bankruptcy Scotland Act, that "deeds made void by this Act, and all alienations of property by a party insolvent, or notour bankrupt, which are voidable by statute or at common law, may be set aside either by way of action or exception, and a decree setting aside the deed by exception shall have the like effect as to the party objecting to the deed, as if such decree were given in any action at his instance:" Finds that by sec. 9 of the subsequent statute, 20 and 21 Vict., c. 19, it is enacted, "that the 10th section of the first hereinbefore recited Act (namely, the Bankruptcy Scotland Act), shall be taken to apply to actions and exceptions as well in the ordinary Courts of the Sheriff as in the Court of Session:" Finds that the only meaning attachable to this latter enactment is, that all deeds and alienations of property which it was competent previously to set aside either by action or exception in the Court of Session, may now be competently set aside by action or exception in the Sheriff Court.

Proof was subsequently led by the pursuer of the value and purchase by M'Haffie & Co. of the 500 pieces of jacconets in question; and the books of the whole defenders were recovered and exhibited under diligence, but were found to contain only entries in the usual and customary form. The defenders renounced probation.

At the debate, it was pleaded for the pursuer—(1.) That Denholm, in the transaction in question, had power in law to represent, and did represent the other defenders, and consequently they were direct parties to the scheme for the delivery and sale of the goods and division of the price (*Bell's Com., Shaw's Ed.*, p. 202); and (2.) that the admissions and statements of the defenders on record, inferred collusion on their part, and were relevant to support the action.

For the defender, Denholm, it was pleaded that he was a mere agent in the whole transactions, had no interest whatever therein, received no benefit whatever therefrom, except the ordinary commission, and had duly accounted to and been duly discharged by all the parties.

For the defenders, Sommerville, and Robertson & Co.—

1. The admissions or statements on record of the defender, Denholm, cannot be used as evidence against the other defenders.

2. The pursuers' case is laid upon collusion, but no attempt has been made to prove collusion, and the action therefore falls; or otherwise, it must rest, as regards each defender, on his statements. These do not infer the conclusions of the summons, but amount only to the circumstance of a cash payment made in the ordinary course, and received in perfect *bona fide*, and without knowledge on the defenders' part, either of the bankrupts' insolvency, or of the source whence the money came.

3. An agent has in law no power to represent his principal beyond the sphere of his employment (*Bell's Com., Shaw's Ed.*, pp. 179, 180), and here the agent was employed only to sell and settle by receipt of cash.

4. Preferences are of two kinds only; either spontaneous or collusive, and these are equally reducible, the circumstances always being relevant. If the transactions here challenged be a spontaneous preference, then by the time the fruits of it reached the defender, it was a payment in cash, made and received, (so far as they were concerned,) in the ordinary course of business; and such a payment does not fall under the Act 1696, c. 5. (*Forbes v. Brebner, 26th January*, 1751, *M.*, 1128; *Bean v. Strachan, 1st August*, 1760, *M.*, 907; *Spier v. Dunlop, 30th May*, 1827.) If it is alleged to be collusive, then no evidence of collusion has been adduced; but in a circuitous transaction of the nature alleged, no case can possibly arise except on collusion, (*Bell's Com., Shaw's Ed.*, p. 1126), and accordingly collusion has here been averred, although not proven.

4. It is settled that the interposition of a third party having no interest in the alleged preference, and being no party to the alleged scheme or device, renders the transaction unchallengeable; (*Ramsay v. Scale's Representatives, June* 11, 1829, 7 *S.* 749), and here the action has been held to apply to the sale to Ree & Co., and not to the delivery to Denholm merely.

His Lordship (Mr Sheriff Bell) pronounced the following interlocutor, assoilzieing the defenders, which has been acquiesced in:—

Having heard parties' procurators, and resumed consideration of the proof, productions, and whole process: Finds, that the defender, Denholm, who carries on the business of a commission agent in Glasgow, sold, and delivered, avowedly in that capacity, a quantity of jacconets, in September, 1857, to the bankrupts Michael M'Haffie & Co., of which firm the bankrupt Michael Jamieson M'Haffie was the sole partner: Finds, that the said sales, as vouched by the letters Nos. 8/1, and 8/3, and the invoices Nos. 8/2, 8/4, and 8/5, were to the extent of 750 pieces jacconets, on account and risk of the defenders Robertson & Co., and to the extent of 250 pieces on account and risk of the other defender Sommerville; and this fact was expressly disclosed to M'Haffie & Co. by the said letter No. 8/3: Finds, that the *cumulo* price of said jacconets was £492 10s, which price was payable on the first cash day in October, or, at least, not later than Friday the 9th October: Finds, that, on said day, Denholm called for payment accordingly, but was informed that M'Haffie was from home, and had left no instructions as to payment: Finds, that Denholm called again on 12th October and saw Mr M'Haffie, who said he had been disappointed of a remittance he had expected; but, on being informed that Denholm's constituents counted on getting immediate payment, he stated that he had 500 pieces of jacconets lying at the calenderer's, which he instructed Denholm to sell for him at prompt cash, and with that view handed to him the delivery order No. 30/3 on Messrs James Taylor & Sons, calenderers, with whom the goods lay: Finds, that of the same date Denholm, as commission agent for M'Haffie & Co., effected a cash sale of the said jacconets to H. P. Ree & Co., for £225, conform to account sales No. 8/6, rendered by Denholm to M'Haffie & Co., in which he charges his usual commission: Finds, that before authorising the application of said money in payment *pro tanto* of the accounts due to the other defenders, M'Haffie instructed Denholm to ascertain whether the defenders, Robertson & Co., would take a bill instead of cash, but they, on being applied to, peremptorily refused to do so, as

is instructed by their copy letter to Denholm, of date 13th October, in No. 35: Finds, that on being informed of this, M'Haffie then authorised Denholm to pay out of the said price £140 to account of the defenders, Robertson & Co., and £69 to account to the defender Sommerville, which sums were paid to them accordingly, on the said 13th of October, conform to their receipts Nos. 11/12 and 11/13, and at the same time M'Haffie gave to Denholm, as his discharge, the receipt No. 11/14, which is in these words—"Glasgow, 13th October, 1857.—Received from Wm. Denholm, Esq., the sum of £209 16s 6d sterling, as per account sales, less discount and commission:" Finds, that there is no evidence that the defenders, Robertson & Co. and Sommerville, knew at the time they received said payments to account that they were made out of the proceeds of any sale of goods effected the same day, and both said defenders have averred that they received no explanation whatever of the source from which said payments came, and that they were made to them in the ordinary course of business, they having given no authority to Denholm to transact for them in any other way: Finds also, that there is no evidence that the sale to H. P. Ree & Co. was other than a *bona fide* transaction and for a fair market price: Finds, that Michael M'Haffie & Co. were carrying on their business as usual on the said 13th October, and there is no evidence that any of the defenders were then aware that they were insolvent or on the eve of bankruptcy: But finds, that on the 24th October thereafter, their estates were sequestrated, and they were thus rendered notour bankrupts: Finds, that in the present action of reduction, in which the trustee on Michael M'Haffie & Co.'s sequestrated estates is the pursuer, it is maintained in point of law, that the granting of the delivery order on James Taylor and Sons for the said 500 pieces jacconets to the defender Denholm for behoof of his constituents, within sixty days of bankruptcy, was equivalent to the granting of an illegal preference over the bankrupt's other creditors, and that the said deed, and all that followed thereon, is null, and reducible under the statute 1696, c. 5: But finds, in the first place, that, for aught that has been made to appear, the bankrupt sold said jacconets on the 12th October, in the ordinary course of business, and that the delivery order was handed to Denholm, not as a transfer of the goods to him, or for behoof of his constituents, but merely in his capacity of commission agent, to carry through a sale which M'Haffie & Co. had instructed, and for their behoof, they reserving to themselves entire control over the free proceeds, and there was no illegality in, or element to warrant reduction of such *bona fide* sale, made in the ordinary course of business, though by a party on the eve of bankruptcy: Finds, in the second place, that it is settled law that a payment in cash to a creditor who does not receive it collusively or fraudulently, even though made by an insolvent debtor, (the insolvency not being known to the creditor, and the payment being made in the ordinary course of business), is not reducible under the Act 1696: Finds, in the third place, that in carrying through the sale of the said 500 pieces jacconets, and in afterwards making a payment to account to the other defenders, the defender Denholm was the mere hand of M'Haffie & Co., and received personally no benefit by said actings, except his commission as an agent; and, on the other hand, the defenders, Robertson & Co. and Sommerville, did not know, and were not bound to inquire, where the cash which they were entitled to demand payment of came from, and although they had known that it came from the proceeds of the said sale of jacconets, this would not have rendered the payments invalid, they being cash payments to them by their debtors, and it being the ordinary practice of merchants to sell goods on hand to enable them to pay off debts owing by them: Therefore, sustains the defences stated on the merits for all the defenders, and assoilzies them from the conclusions of the action: Finds the pursuer liable to each of the defenders in expenses, etc.

Act. JOHN BOYD. *Alt.* For Denholm—JAMES HAMILTON; For Sommerville—W. B. FAULDS; For Robertson & Co.—R. STEWART.

17TH DECEMBER, 1858.

SHERIFF SMALL DEBT COURT, LINLITHGOW.

(MR SHERIFF HOME.)

DOBIE v. ANDERSON.

Road—Turnpike Act—Clause—Construction—Clergymen.—*Held, that Dissenting, as well as Established Church clergymen, have a right of exemption from payment of Toll Dues, within the Parish of their ministrations, when on ministerial duty.*

THE Rev. Mr Dobie, of the United Presbyterian Church, Linlithgow, had occasion to pass through the Magdalen Toll-bar, in the parish of Linlithgow, on the 23d August last, in a gig, and again on the 18th October, on horseback, on ministerial duty within said parish; he claimed exemption from payment of the usual dues. Anderson, the tacksman of the toll, refused, and insisted upon payment. Mr Dobie thereupon paid under protest, and brought the present action for repetition of the sums paid, in order to have the question of liability tried.

The pursuer pleaded that he was exempted from payment of the dues under the "General Turnpike Act, 1 and 2 Wm. IV., c. 43," the 37th section of which enacts, that "no toll shall be demanded for any horse, etc., from any clergyman, going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish."

Answered for the defender—The statute founded on contains no exemption in favour of the pursuer, or the minister of any body of Dissenters; there was no ambiguity in the terms of the clause founded on; the clergymen exempted from payment of the toll, were those of the Established Church alone, as was clearly indicated by the introduction into the clause of the words *parishioner*, *parochial*, and *parish*.

The pursuer replied—

(1.) That the interpretation of the statute, so far as concerned the rights of the exactors of dues, must be strict, while as regards the payers, and claims of exemption from payment, it must be liberal.—(*Barclay on Highways, pp.* 198–216).

(2.) That, keeping this rule in view in the construction of the clause founded on, the words "any clergyman" must be held to signify clergymen of all denominations.

(3.) That the introduction into the clause of the words "parishioner," "parochial," and "parish," did not directly or by implication limit the right of exemption to the clergymen of the Established Church. The word "parish," although sometimes used to point out a certain district, from its derivation and according to the best lexicographers, meant nothing more than the particular charge of a priest—a church. If this construction of the word, then, were sound, every minister duly ordained had a *parish*, his ministerial were his *parochial* duties, and the members of his church were his *parishioners*.

(4.) The section of the statute founded on gave exemption from payment of these dues to persons going to or returning from their usual places of worship, of whatever religious denomination; the intention of the legislature, in making such a provision, clearly being to give the community every facility in obtaining the benefits of the Divine ordinances. It could scarcely be contended, therefore, that while the legislature offered facilities to the community in waiting upon the public instructions of their pastors, they intended to throw any barrier in the way of their receiving gospel ministrations in private, which would be the case if the defender's argument was sound.

The SHERIFF-SUBSTITUTE, in giving judgment, said that although the clause of the statute founded on might have been differently expressed, he could have no doubt that the inten-

tion of the legislature was to extend the exemption to Dissenting as well as Established Church clergymen. He therefore decerned against the defender for repayment of the dues, with expenses.

Act. JAMES WATSON. *Alt.* JOHN HARDY.

18TH DECEMBER, 1858.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

M'LELLAND AND OTHERS v. M'COWAN (M'Cue's Trustee) AND OTHERS.

Expenses—Sheriff Court Act, 16 and 17 Vict., cap. 80—Small Debt Act, 1 Vict., cap. 41—Clause—Construction.—*In an Ordinary Sheriff Court action, parties lodged a minute consenting to a summary trial under the provisions of the 23d section of the Sheriff Court Act.—Held, that the expenses in the action, subsequent to the date of the minute, were not to be taxed according to the scale of the Small Debt Act, but according to the scale of fees applicable to the Ordinary Court.*

THE pursuers presented a petition to the Sheriff of the County of Lanark to interdict the defenders, John Tiernan and Son, from delivering to the defender, M'Cue, a quantity of meal placed in their store by him, and which the pursuers represented he had obtained from them upon a fraudulent representation. M'Cue lodged defences which were insisted in, upon his bankruptcy, by M'Cowan the trustee upon his sequestrated estate.

After the record was closed, a joint minute was lodged for the parties, consenting that the case should be tried in the summary way provided by the 23d section of the Sheriff Court Act, 16 and 17 Vict., cap. 80. To this minute the authority of the Court was interponed, and the case was disposed of, judgment being pronounced in favour of the pursuers, and finding the defenders liable in expenses, of which an account was allowed to be given in, and remitted to the auditor to tax and report.

The account laid before the auditor, in terms of this remit, was charged according to the highest scale in the table of fees for actions depending in the Ordinary Court, and was sustained by him; but to his report the defenders objected, in so far as the account, subsequent to the date of the joint minute, had not been taxed in terms of the table of fees subjoined to, and appointed by, the Small Debt Act, 1 Vict., chap. 41. To these objections answers were lodged by the pursuers, and upon the point being advised by the Sheriff, he pronounced the following judgment, which was not subject to review:—

Having considered the auditor's report on the pursuers' account of expenses, with the objections thereto (No. 17), and answers (No. 18): Finds, that it was not intended by the 23d section of the Sheriff Court Act that, after parties lodged a minute consenting to a case being tried in a summary way, the expenses from the date of said minute should be taxed according to the scale appointed by the Sheriff Small Debt Act, the case not being a Small Debt Court case, and procurators of Court being entitled, under the said section, to appear and plead in the cause as previously: Therefore repels the objections, and approves of the report, etc.

Act. D. TURNER. *Alt.* R. M'CULLOCH.

22D DECEMBER, 1858.

SHERIFF COURT, KILMARNOCK.

(MR SHERIFF ANDERSON.)

BRYCE PRINGLE v. WILLIAM FIFE & OTHERS.

Sheriff Court Act—Officer's Execution—Citation.—*On a Petition for Interdict, the Sheriff pronounced a deliverance appointing service and ordaining the defenders to lodge a notice of appearance. In executing this Warrant, the Officer employed the forms of citation and execution in use prior to the Act of* 1853, *requiring the respondents to lodge answers within four days.—Held, that the citation and execution were irregular and invalid, and that it is imperative to employ the form of execution provided by the Act.*

ON a petition for Interdict presented to the Sheriff Court of Ayrshire, the usual deliverance was pronounced upon the petition, appointing service thereof upon the respondents, and ordaining "them to lodge a note of compearance in the Sheriff Clerk's Office, Kilmarnock, within four days each from the date of such service with certification."

The execution returned by the officer bore that he had lawfully "intimated the said petition, together with the said deliverance, to each of the said William Fife, John Clifford, and James Murdoch, respondents, by serving each of them with a copy thereof, consisting of three pages, and required them to conform to said deliverance, by lodging answers to said petition in the hands of the Clerk of the Sheriff Court of Ayrshire at Kilmarnock, within four days after the date of my service-copy, being the date of this execution."

The defenders pleaded in defence—

(1.) The citation was disconform to its warrant—the citation being to conform "to said deliverance, *by lodging answers* "*to* said petition," whereas, the warrant required the defenders to lodge a *note of compearance.*

(2.) The officer's execution, besides being subject to the above objection, was informal and inept, because not in the form introduced by section 9 of the Sheriff Court Act.

The Sheriff-Substitute repelled both of these pleas, adding the following note to his Interlocutor:—

"The warrant is accurately worded in the service copies of the petition; and in point of fact, a note of compearance was lodged for each defender within four days. Under the recent statute, a much shorter form of execution would have been enough; and seeing the one in question bears that the officer served each defender 'with a copy of the petition, together with said deliverance, and required them to conform to said deliverance,' the execution is not bad, because the officer goes on unnecessarily to narrate how the defender is to conform to the deliverance, and employs the word 'Answers,' instead of 'Note of Compearance.' It may be held as mere surplusage, the warrant itself being accurately copied."

The defenders appealed to the Sheriff-Depute (Christison) and pleaded in support of the first defence, that to hold the lodging of a note of appearance as obviating the objection, was to hold that there could be no such thing as an objection to a citation at all; that, as compliance with the citation would have placed the defenders in a wrong and injurious position, the citation was bad, because "the forms of law might not at the very threshold be made a trap, and at an officer's caprice be either right or wrong, so much so that defenders must judge, upon their own responsibility, either to disregard a citation, or by regarding it, suffer." In support of the objection to the form of the execution, they urged that section 9 of the Sheriff Court Act was imperative, not merely permissive, in its enactment.

The Sheriff, after Answers, gave effect to these pleas, and pronounced an Interlocutor, in which he "recals the Interlocutor appealed from; sustains the first preliminary plea in the defences, and finds the execution of the citation to be irregular and invalid; therefore dismisses the action, and finds expenses due to the defenders;" and to which he appended the following Note:—

The above Interlocutor has been pronounced with much hesitation and doubt; but in the end, the Sheriff has come to the opiuion that the officer's execution is invalid.

Two questions are to be disposed of—1st, Does the 9th section of 17 and 18 Vict., cap. 80, abrogate the old form of execution? 2d, If not, does the officer's inaccurate requisition for answers make it bad? Upon the first and general question, the following objections to the execution occur:—(1) The intention and policy of the statute are clear to *substitute* a short attestation of service of copy of the summons or petition, with the warrant, in place of a prolix and clumsy composition of the officer. If the words, therefore, of the 9th section admit of this construction, effect ought to be given to this obvious intention. Now, these words are positive and imperative, that the form in Schedule F *shall be* the form. (2) The phraseology in the first section, enacting new forms of summonses, is the same as in the 9th section, and both admit of the same construction, which, in the case of summonses, is clearly to abolish the old form, with which all the subsequent procedure, in regard to notice of appearance, calling on parties to adjust a minute, and only failing that, allowing a condescendence and defences, are inconsistent, just as in the new form of execution, the order to lodge a notice of appearance is inconsistent with a call for answers, as in the pursuer's execution. (3) If the 9th section had stopt at the words "that Act," leaving out, "which form shall be equally valid and effectual in all respects as the longer form at present in use," there could be no doubt of the abolition of the old form. But does this paragraph do more than declare that the substituted form shall be as good and extensive in its operation as the former; and does not the direction, that executions "*shall be*" in the new form, mean, shall be so in future, when also no doubt can exist, especially as full effect can be given to the declaration, of the validity of the short form by interpreting this to mean that it shall have the same effect as the longer form in regard to diligence, interruption of prescription, etc.? (4) It is favourable to this view, that the change from the long form to a simple and the briefest possible attestation of service, is so great and complete. (5) Also, that the Act passed on 15th August, 1853, was not to come into operation till 1st November: This makes it easy to read the 9th section as enacting, that the new form shall be the only form after 1st November, 1853; and *then*, of equal force with the previous form in use up to that date. (6) It is a material objection to the continuous existence of both forms of execution, that it is impossible to observe the old form in the execution of *Petitions*, without borrowing from the new the order for a notice of appearance. (7) Section 7th contains a form of petition; but omits the declaration that it shall be as effectual as that at present in use: It is clear that the regulation as to summonses and petitions is the same, and then the phraseology in section 1st is the same as in section 9th. (8) The 9th section, *inter alia*, enacts, that all executions "shall be written at the end of the summons or petition itself; and where necessary on continuous sheets, but not on a separate paper." If this prohibition were disregarded, could it be maintained that an execution on a separate sheet of paper was valid as formerly? Clearly not; and it is equally clear that if the 9th section is adopted in part as abrogating the old form, it must be held as abrogating the form altogether. In order to show the difficult position which the pursuer has to maintain, let him consider what could have been done had the defender lodged answers; or whether, if they had made no appearance, decree in absence could have been safely taken. On these grounds, the execution is held to be invalid. If the statute abrogates the old mode of execution, then the form in Schedule F becomes a statutory formality; and no equivalents can be admitted to be sufficient.

"The particular execution in the present case is liable to the further objection that it is inaccurate, even as an execution in the old form, by calling for answers instead of a notice of appearance."

Act. R. M. Beveridge, Cumnock. *Alt.* C. B. Rowan, Ayr.

27th December, 1858.

SHERIFF SMALL DEBT COURT, GLASGOW.

(Mr Sheriff Strathern.)

James M'Nab *v.* Glasgow & South Western Railway.

Contract — Construction — Railway Company.—*A Railway Company issued season tickets, on the express conditions that, in the event of there being no accommodation in the class of carriage, the holder should take an inferior class without being allowed any deduction; and further, that the tickets should be subject to any alteration or discontinuance of train. —Held, that these conditions did not entitle the Company to discontinue altogether a particular class of carriage, for which they had issued season tickets.*

The pursuer purchased from the Railway Company a second class season ticket from Johnstone to Glasgow. The conditions on which season tickets are issued are as follows:—

"In the event of there not being accommodation in the class of carriage of any train, the holder must take any inferior carriage in which there is accommodation, without being entitled to any allowance or deduction.

"These tickets are only available for the ordinary trains of the company, and not for any special train. They are issued, subject to any alteration or discontinuance of trains as may from time to time take place; and the holder is also subject to the company's bye-laws in every respect as an ordinary passenger, and to any alteration in such bye-laws and regulations as may be made from time to time."

At the date when the ticket was issued, the afternoon train from Glasgow, by which the pursuer usually travelled, consisted of carriages of first, second, and third class; but the Railway Company after some time discontinued the second class carriages. The pursuer therefore raised this action for damages. The defenders maintained that under the contract between the parties, the pursuer was bound to take a third class carriage; and further, that they were entitled at any time to discontinue a particular class of carriages, and that their doing so was merely an "alteration or discontinuance of trains," in terms of the conditions we have quoted.

The Sheriff, after hearing parties, repelled these defences, and held that the discontinuance of the second class was not such an alteration as the Railway Company were entitled to make, under their agreement with the pursuer; that it did not fall under either of the conditions of the contract; and he therefore decerned for the difference between the price of a second and first class season ticket.

Act. John Naismith. *Alt.* J. B. Dill.

29th December, 1858.

SHERIFF SMALL DEBT COURT, GLASGOW.

(Mr Sheriff Bell.)

Melvin Brothers *v.* The Edinburgh and Glasgow Railway Company.

Carrier — Railway Company — Contract.—*A Railway Company received goods to be conveyed "per Railway and Steam" to a place beyond their line of Railway, and at the end of their line handed over the goods to a Steamboat Company to be forwarded to their destination.—Held, that*

the Railway Company, the receiving carriers, were liable for the safe transit of the goods until they reached the Consignee.

THE pursuers, who are warehousemen in Glasgow, put into the defenders' hands, a truss of goods to be forwarded to a party in Helmsdale, Sutherlandshire. The address upon the truss was that of the consignee, with the additional words "per Rail and Steam;" when the truss reached its destination, some of the goods were awanting, while the remainder were so injured that the consignee considered them unsaleable, and returned them to the pursuers. The present action was therefore brought against the defenders for the value of the goods short delivered, and for the damage done to those delivered and returned.

The defenders admitted having received the truss in good condition, but pleaded—

(1.) That being carriers between Edinburgh and Glasgow only, and having safely conveyed the truss along their line of railway, and at Granton made delivery in good condition to a Steamboat Company, they were not liable in the sums libelled.

(2.) That being instructed by the address to deliver the truss to the Steamboat Company, the defenders in carrying out these instructions assume the position of agents for the pursuers, so that the contract between the pursuers and the Steamboat Company could be enforced against the latter direct.

The pursuers answered—

(1.) The contract to carry the truss from Glasgow to Helmsdale, was made with the defenders alone; they accepted the truss without objection, and were liable for its safe transit until it reached the consignee.

(2.) Where a Railway Company receives goods to be conveyed to a place beyond the terminus of their line, and at that terminus hands over the goods to another public carrier, to be conveyed to their destination, the second carrier acts merely as the agent of the contracting carrier; the latter, as principal, being alone answerable to the owner of the goods.

The Sheriff, after consideration of these pleas, in giving judgment said—that if the word "steam" had not been upon the address, he would have had no hesitation in holding the defenders responsible for the safe delivery of the goods to the consignee, but the instructions of the pursuers, that for a part of the journey the goods were to be conveyed by water, raised a difficulty. He felt the force of the defenders' argument, "that they had pointed out to them by the pursuers a specified mode of transit, which they were bound to follow, that they could not have done otherwise than hand the goods to a Steamboat Company; and in doing so, they were acting simply as authorised by the pursuers, and as their agents." But he thought the pursuers' argument must prevail. There was no privity of contract between the pursuers and the Steamboat Company; there were more than one line of packets by which the defenders could have forwarded the truss, it being optional to them to select whichever they chose: he must hold that they were the contracting parties with the Steamboat Company, and responsible to the pursuers for the manner in which that company implemented the contract. He did not see how the pursuers could go directly against the Steamboat Company, with whom they had no dealings whatever, while there could be no doubt of the right of the defenders to do so, if they could show that the goods were damaged while in the Steamboat Company's possession. He held the defenders liable for such damages as the pursuers could instruct.

Act. GALBRAITH. *Alt.* KIRKWOOD.

19TH JANUARY, 1859.

SHERIFF COURT, GREENOCK.

(MR SHERIFF TENNENT.)

BROWN v. MAGISTRATES AND TOWN COUNCIL OF PORT-GLASGOW, AND OTHERS.

Reparation—Road—Burgh—Summons—Relevancy.—*In an action of damages, against the Magistrates of a Burgh, for injuries sustained through the falling of timber improperly piled in a street of the Burgh, in contravention of the Police Regulations issued by the Magistrates.—Held, that the summons was irrelevant, in respect that it did not set forth that the street, where the accident took place, was under the control and management of the Magistrates of the Burgh.*

THIS was an action against the Magistrates of Port-Glasgow and certain other parties, concluding for damages in consequence of injuries received by two children from the fall of a quantity of timber, alleged to have been improperly piled up on the streets of the Burgh.

The summons set forth, in so far as regarded the Magistrates of Port-Glasgow: That by the 14th article of the Regulations and Bye-laws for the Police and Town of Port-Glasgow, it was enacted, "That no stones or other materials for building, or otherwise, should be laid down on any street or lane, except in such part as was previously fixed by the Magistrates or by those appointed by them, and a proper barricade, etc., should be erected betwixt the material and the street, by and at the expense of the proprietor, mason, or other person appointed by them;" that, by the 19th article of these regulations, it was enacted that no obstructions of any kind on the roads, streets, quays, etc., or other places within the bounds and limits of the town, should be allowed; that the said Magistrates and Council did expressly permit or tacitly suffer the other defenders, in contravention of said regulations, to lay down and pile up on the public streets of Port-Glasgow, and particularly upon Fore Street thereof, and at a spot indicated, a quantity of deals, in an insecure manner, and without any barricade, and generally permitted or suffered the said parties to pile up the said deals in a reckless and careless manner so as to be dangerous, whereby the pursuers were injured.

The Magistrates of Port-Glasgow pleaded in defence that no relevant statements had been made in the summons inferring damages against them.

The Sheriff-Substitute sustained this plea, and dismissed the action, in so far as regarded the Magistrates of Port-Glasgow, with expenses, adding the following Note:—

The case that is stated against the Magistrates of Port-Glasgow is this, that they had permitted or suffered a breach of their Police Regulations upon the streets of the Burgh. But it is not said that the place where the accident occurred is situated within their jurisdiction, or that they are the parties who are vested with the control and charge of it, so as to be liable for the consequences of an accident such as that on which the action is founded. All that is said to connect the Magistrates with the locality is that it was one of the streets of the Burgh. But this it would appear is not of itself sufficient. It does not follow that the Magistrates necessarily possess the entire control over the streets of a Burgh. In some smaller Burghs, the main streets are under the charge of the Road Trustees; and the quays and harbours of others are under the direction of Harbour Trustees, as in the present case, where the averment of the defenders is, that in point of fact the locality in question is not one of the streets of Port-Glasgow, but a part of the quays, which are under the charge and direction of a different body—the Harbour Trust. It therefore does not seem to be enough to say that the occurrence took place upon one of the streets of Port-Glasgow to infer liability against the defenders as Magistrates.

In the case of *Dargie* v. *The Magistrates of Forfar*, (March 10, 1855, Sess. Cases, *vol. XVII. p.* 730), which was a case very similar to the present, the pursuer set forth that the Town of Forfar was a Royal Burgh, and the Magistrates were the conservators, and had the sole management, control, and superintendence of the public streets; that they had derived considerable revenue from letting the sweepings, and expended annual sums upon the cleaning, lighting, and repairing of the said streets; that it was their duty to preserve them unobstructed and safe for passage, as well as sufficiently lighted, and that the inhabitants of the Burgh and the pursuer relied on their performing these duties. These specific averments form a remarkable contrast to those which have been made in this action.

The Sheriff (Macfarlane), on appeal, in substance adhered to the Substitute's Interlocutor, adding the following Note:—

NOTE.—The Sheriff has no difficulty in substantially adhering to the Interlocutor submitted to review.

No intelligible case has been laid against the Magistrates and Council of Port-Glasgow. It is obvious, indeed, that the pursuer has endangered his case as against all of the defenders, by his anxiety to make so many different parties liable to him, in place of merely directing his action against the individual (if any) who was the actual delinquent.

Act. MACDONALD. *Alt.* MACCALLUM, NEILL, M. L. INGLIS.

19TH JANUARY, 1859.

SHERIFF SMALL DEBT COURT, GREENOCK.

(MR SHERIFF TENNENT.)

JOHN MALCOLM, INSPECTOR OF POOR, GREENOCK, *v.* ARCHD. MACCALLUM, INSPECTOR OF POOR, PORT-GLASGOW.

Poor—Settlement—Poor Law Amendment Act, Section 76.—*A ship carpenter lived for a number of years in a parish, but was absent from it, during the course of his residence, in the exercise of his trade, on one occasion for four and a-half months, on a foreign voyage, and on another occasion for three years and four months, on a voyage to the East Indies, and on service in the Royal Navy. During his absence some clothes and tools had been left by him in his mother's house, in the parish in which he had been residing.—Held, that the 76th section of the statute requires actual and continuous residence to constitute a settlement—that he could not be held as constructively resident in the parish during the occasions when he was abroad, and that the periods of these absences could not, therefore, be taken into account in reckoning the length of his residence in the parish.*

THIS was an action brought by the Inspector of Poor of Greenock, against the Inspector of Port-Glasgow, for aliment paid by the former to the widow and children of Andrew M'Kinnon, with the view of having it determined, whether Port-Glasgow, as the parish of M'Kinnon's birth, or Greenock, as the parish of his subsequent residence, was liable for their support.

The facts as admitted by both parties were:—Andrew M'Kinnon, the husband of the pauper, was born in the parish of Port-Glasgow, about the year 1820, and resided there with his parents from his birth, till the year 1839. For two years he served with a shipbuilder in that place as an apprentice carpenter—although not under an indenture—and having on 5th April, 1839, received from him permission to seek employment elsewhere, he, upon the following day, left Port-Glasgow for Greenock, and never returned to reside in the former place. On the same day, the 6th April, he entered into the service of Mr William Johnston, Greenock, as an apprentice carpenter. At Whitsunday, 1839, his mother—his father being dead—also removed to Greenock, where she occupied a house in Tobago Street, and her son resided with her. He continued to reside in Greenock till the 25th March, 1840, when, with his master's permission, he made a voyage to Canada as carpenter of a ship. He returned upon the 10th August of that year, and resumed his employment and residence in Greenock, after an absence of about four and a-half months. His clothes and tools remained in his mother's house during his absence. He continued to work with Johnston from his return till 13th July, 1841, when he was discharged upon the business ceasing to be carried on. Shortly afterwards he sailed on a voyage to Calcutta as carpenter, and while there he joined H.M.S. Ship "Nimrod," in which he served also in the capacity of a carpenter, till he was discharged on 22d November, 1844. Some tools, it appeared, were left by him at his mother's during this absence. On his return to Greenock, he again entered into service as apprentice carpenter with John Barnhill and Co. On 31st December, 1844, he married. For a few months he and his wife lived with his mother, and then moved to a house of his own in Cowgate. He lived in that house down to Whitsunday, 1847, when he went with his family to Dumbarton, where he lived till February, 1850, when he returned to Greenock with his wife and family, and lived there till his death in August, 1853, when his widow became chargeable to the parish.

The Sheriff, in giving judgment, said that the question that arises here is—Whether Andrew M'Kinnon acquired by residence in Greenock a settlement there, or whether Port-Glasgow, the parish of his birth, is liable for the support of his widow and children.

Whatever view is taken of the case, it is clear that residence for five years is required to give M'Kinnon a settlement in Greenock, because, even although it were to be held that he had acquired a settlement by residence for three years before August, 1845, the date of the passing of the Poor Law Amendment Act, he had not become a proper object of parochial relief, and did not therefore fall within the exception in the 76th Section.

It appears, from these admitted facts, that M'Kinnon never at any one time completed five years of actual residence in Greenock. On the contrary, from April, 1839, when he first came there, down till Whitsunday, 1847, when an admitted break in the residence took place by his removal to Dumbarton, the whole time of his actual residence in Greenock was only about four years five months, which was broken by two absences, the first of about four and a-half months, and the second of about three years and four months. But it is maintained, on behalf of Port-Glasgow, that while abroad, M'Kinnon was exercising his trade of a ship carpenter, that he had a house in Greenock where his effects were left, and that constructively he must be held as having been resident there; and it was also pleaded, on the authority of an opinion expressed in the case of *Hay* v. *Croll, etc.*, (5th February, 1858,) that the time during which he served in the Navy was to be reckoned a part of the residence requisite for his acquiring a settlement in Greenock. The opinion expressed in that case, which was to the effect that a soldier's residental settlement is not lost by absence with his regiment, referred not to the acquisition of a settlement, but to a different matter provided for in another part of the 76th section, the loss of a settlement which had been previously acquired. Nor was it the case that M'Kinnon had a house in Greenock during his absence. He was in the habit, when at home, of living with his mother, and when he was abroad he left his tools, and perhaps a few clothes there; but he did not possess any house that could be called his when he was abroad.

What the statute requires, to make a residential settlement, is continuous and actual residence for five years. What might be sufficient to give a party a legal domicile, will not be enough to give him a residential settlement, which can only be acquired by actual residence within the parish. This is the view of the meaning of the statute which has been taken in recent cases.

In *Hutcheson* v. *Fraser* (11th Feb., 1858), the Lord Justice-Clerk observed, in deciding the case—"As to the attempt to introduce the rules as to the retention of an original or acquired domicile *animo revertendi*, I say nothing, for it seems impossible to impute the pauper's hope to return to her former service, as a matter of legal effect, in the question of fact whether there was a continuous residence for five years; and I am glad that a case has occurred which calls on the Court to declare that the main matter to regard is continuous residence in point of fact, and that on such loose notions as have been here pleaded, the important declaration of the statute cannot be overcome or eilded."

The recent case of the *Infirmary of Aberdeen* v. *Watt and another*, decided on 15th Dec., 1858, bears a very close resemblance to the present case. It was held in that case that the occasional residence of a seaman in the seaport town to which his ship belonged, and to which she generally returned on the completion of her voyage, was not residence in the meaning of the 76th section of the statute—and it was also held that constructive residence was not sufficient under the terms of the Act. It was observed by one of the Judges—"I am quite prepared to decide that constructive residence is not sufficient, and that five years' actual residence—continuous, though it may not have been constant—are required by the 76th section of the statute."

The Lord Justice-Clerk observed—"The first thing that is quite obvious on the face of the 76th clause is, that residence is the foundation of a settlement; that is, personal presence; the tenancy or occupancy of a house has nothing to do with it. The tenancy of a house may assist to determine the quality of residence, but personal presence is what is required, and such circumstances are immaterial where there is no actual residence. As little has the question of domicile to do with it—residence and domicile are totally distinct things. Residence is one of the elements that may go to the constitution of domicile, but it alone is all we have to deal with in a question of settlement. Again, it is plain that nothing of the nature of constructive residence will meet the requirements of the Act. What is necessary is actual residence for a full period of five years, and these must be continuous years. It will not do to combine various periods of residence, so as to make up a residence of five years. The residence must be for five years continuously. That does not mean that absence for a day, a week, or a month, will interrupt the continuity of a residence, and put an end to the acquisition of a settlement, because the law must proceed on the ordinary conditions of human affairs, and the common case is that a man is occasionally called from home for one reason or another, and it is the rarest possible thing to find a person who has been in the same parish without any absence for five years. But such incidental (I do not say accidental) absences are not to be taken into account as breaking the continuity of residence. This does not interfere with the principle that there must be five years' actual residence."

It is therefore very plain, that the time requisite to complete M'Kinnon's industrial residence in Greenock cannot be supplemented by the two long periods of constructive residence, when he was actually abroad; and that as he had not acquired any other settlement, Port-Glasgow, as the parish of his birth, must be liable for the support of his wife and children.

Act. KING. *Alt.* MACCALLUM.

25TH JANUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

STEWART v. THE CALEDONIAN RAILWAY COMPANY.

Expenses—Appeal—Competency—Auditor's Report—Revival of Action—Sheriff Court Act.—*Where an action falls by the lapse of three months, without any step having been taken therein—Held that the Interlocutor reviving the same on cause shown, must embody the reasons for revival—That an appeal against an Interlocutor approving of an Auditor's Report and decerning for the expenses as taxed, without objections lodged thereagainst, in terms of the Act of Sederunt, is competent to the effect of bringing up therewith appeals against prior Interlocutors.*

A FINAL judgment in favour of the defenders, and awarding them expenses, was pronounced, in this action, on 6th April last. Before the remit to the auditor to tax the expenses, etc., had been carried out, the action fell asleep. The Sheriff-Substitute, on the motion of the defenders, and no appearance or objection being made for the pursuer, on 28th July, pronounced an Interlocutor reviving the action. Against this Interlocutor, the pursuer, on 29th July, lodged an appeal, which was subsequently dismissed as being then incompetent. Thereafter, the defenders' account of expenses having been audited, the Sheriff-Substitute, on 18th August, pronounced an Interlocutor approving of the auditor's report, and decerning in usual form. The pursuer appealed against this Interlocutor, as also that of 28th July, formerly appealed against.

The defenders pleaded that the appeals were incompetent, in respect—

(1.) No objections to the auditor's report, which the last Interlocutor merely approved of, had been lodged in terms of the Act of Sederunt.

(2.) The pursuer being thus barred from entering upon the question of expenses, there was nothing in the Interlocutor to appeal.

Answered for the pursuer—

The Interlocutor last appealed against contains a decerniture for expenses, and is therefore subject to review, and that therewith the prior Interlocutors may be brought up.

The Sheriff-Depute, (Sir A. Alison,) thereupon pronounced the following Interlocutor:—

Finds, that although the pursuer is not entitled to object to the Interlocutor approving of the auditor's report, seeing no objections were lodged to that report, as required by the Act of Sederunt, if the same was meant to be objected to, yet the appeal against that Interlocutor is competent, seeing that it contains a decerniture for expenses, to the effect of enabling the pursuer to bring under review the prior Interlocutor reviving the action, which it was not competent to appeal against by itself, without an Interlocutor which could be appealed against under the statute; and in respect the pursuer has now appealed against not only the Interlocutor, decerning for the expenses, but also the prior one reviving the action, which it is competent under the statute to do: Finds, that the appeal is competent to the effect of bringing under review at this stage the Interlocutor reviving the action, and repels the objection to the competency of such appeal, and appoints parties to be further heard on the merits of the appeal upon the Interlocutor reviving the action.

Parties having been heard on the merits of the appeal, Sir A. Alison pronounced the following Interlocutor:—

Having resumed consideration of this process, and again heard parties' procurators at great length upon the merits of the appeal against the Interlocutor of 28th July last, reviving the action; in respect the pursuer did not appear and object to the motion for reviving the action on 28th July last, which, in consequence of his non-appearance, appears to have been granted by the Sheriff-Substitute as a matter of course, in respect in consequence thereof, the case appears to have proceeded before the Sheriff-Substitute in proper form, and the defenders' account of expenses was afterwards taxed and decerned for, in respect the pursuer only interrupted the course of procedure by his appeal lodged on 29th July, which was discussed on 11th August, 1858, and found to be then incompetent, as not falling within the cases specified in the Sheriff Court Act. And in respect, although the present appeal is competently directed against the Interlocutor of 18th August, decerning for the defenders' expenses, as well as the previous Interlocutor of 28th July, reviving the action, yet on considering that appeal, and the merits of that Interlocutor, the Court cannot overlook the consequences which have resulted from the pursuer permitting the motion to have the action revived pass in absence, whereby the defenders have now been deprived of the possibility of reviving the action at all if that first revival is not sustained. Finds that the pursuer is now barred, *personali exceptione*, from objecting to the said revival. Therefore dismisses the appeal, and adheres to the Interlocutor complained of.

NOTE.—In affirming this Interlocutor, the Sheriff has no intention of sanctioning a practice which is said to be creeping into the Court, of making the revival of actions, after three months have elapsed without any step having taken place, a mere matter of form, and in that way eluding the whole intention of the Act of Parliament as to Sheriff Court processes. On the contrary, so far from that, he is clearly of opinion that both that provision in the Sheriff Court Act, as well as the other, as to the falling of actions absolutely after the expiry of six months, should be maintained *in viridi observantia*, and never allowed to slip through as a matter of course, even when no opposition is offered. The enactment of the statute is quite express, that the action is to be revived, even on expiry of the first three months, *only on cause shown*, and under that enactment he holds it to be clear not only that the cause should be shewn to the Sheriff-Substitute before a motion for the revival is granted, but that the Interlocutor should bear what that cause is, and what has been sustained as sufficient cause by the Court. It is thus alone that the agents can be adequately impressed with the necessity, whether the motion is to be opposed or not, of coming prepared to show cause to the Sheriff-Substitute why the action should be revived, and that the Court of Appeal and the Court of Session can be put in a position to judge whether the reason assigned was sufficient to warrant revival of the action.

Act. BURNS. *Alt.* A. YOUNG.

26TH JANUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF STEELE.)

JAMES SHAW SILLARS *v.* RALPH SILLARS.

Minority.—*A party advanced a sum of money to a minor to enable him to speculate in railway shares. The speculations were unprofitable, and the minor handed to the lender the proceeds of the shares.—Held, that the lender was not entitled to recover from the minor the difference between the advance and the sum the shares realised.*

THE pursuer in his own right, and in right to the debts found to be due to the concern of Sillars, Oxley & Co., sue for payment of £90, being cash lent by that firm to the defender, on 21st October, 1845, under deduction of £37 10s, paid to account on 11th November, 1845.

The defence was—(1.) that at the date of the alleged loan, the defender was a minor and a clerk in the office of Sillars, Oxley & Co., and that the advance was not for necessaries or *in rem versam* of the defender.

The defender admitted—(2.) That £90 was handed to him by the firm of Sillars, Oxley & Co., for the purpose of speculating, as they desired, or advised him to do, in the purchase of railway shares, and was so applied by him; and the whole proceeds of the shares when sold, being the £37 10s credited by the pursuer, were handed to him or his said firm. But this admission was made under the qualification that Sillars, Oxley & Co. had subsequently agreed to waive and discharge all claim against the defender, and that accordingly, no claim had been made against him for upwards of twelve years.

There being no written evidence of the loan, the question was referred to the oath of the defender, who deponed that he had received the money from Sillars, Oxley & Co., and applied it, as they had requested, in the purchase of railway stock; that the proceeds of the sale of the stock were handed to the pursuer's firm; that the pursuer and his partners had agreed to write off the debt, and that it had actually been written off in the company's books.

The books of Sillars, Oxley & Co., which were produced, contained an entry of the advance to the pursuer, but there was an erasure on the line, in which, had the debt been written off, the discharge would have appeared.

The parties having been heard, the Sheriff-Substitute pronounced the following judgment:—

Having heard parties' procurators, in terms of the foregoing appointment: Finds, that at the date of the transactions libelled on, now upwards of thirteen years ago, the defender was under age, and serving as a clerk in the office of the pursuer's firm, the principal partner of which was the pursuer Sillars,; the defender's uncle: Finds, in point of fact, that the lad seems to have had no means of his own beyond his small salary, and the pursuer, instead of taking care of his relative and dependant, to whom he was in a manner in *loco parentis*, and preventing him from foolish or imprudent speculations, entrusted him, apparently voluntarily, with the sum of £90, for the express purpose of gambling in speculations in shares in scrip, at the very time of the mania on that subject in 1845: Finds, that it does not appear whether the defender was to be himself the real party in these transactions, or whether his name was to be used only as a "cat's paw" to cover the pursuer, or extend his own operations; but finds that the defender, *de facto*, seems to have derived no benefit from these transactions, and to have paid over to the pursuers the whole monies realised in speculations, which, as might be expected, and certainly was deserved, ended in a loss. That the monies used for these purposes were not put to the debit of the defender originally in the pursuer's books, but the debit and credit respectively of a borrowing and lending account, and ultimately an entry was made, the nature of which, from the whole having been erased, cannot now be traced, but from which no transfer can be pointed out as occurring in any other part of the book, while the defender expressly states that his uncle told him he had long before written, or caused to write, the whole matter off, and the entry which now appears at the place where such balancing entry would naturally have occurred, is altogether written upon an erasure: Finds, that these transactions took place about thirteen years ago, and there is no evidence that any demand was made for payment till recently, before the institution of the present action. And upon that state of facts, finds, in point of law, that if the defender was truly a mere "hand" or "tool" of the pursuer, and used as a name, as was notoriously the case at that time, when other parties resorted to that kind of transaction, these can afford no ground of action against him now, especially in the peculiar situation in which he was placed as the dependant relative of his employers: Finds, on the other hand, that even if the transactions were intended to have been on the defender's own account, they were, from their very nature, of known lesion to the defender in his minority and lessage, especially when he was led into the same by the encouragement or through the means of one who ought to have been scrupulously careful to prevent a young lad engaging in such speculations while under his charge: Therefore sustains the defences, assoilzies the defender from the whole conclusions of the action, finds him entitled to expenses, allows an account to be lodged, and remits to the auditor to tax and report, and decerns.

NOTE.—The Sheriff-Substitute at first thought a difficult question of form might here arise owing to the limited terms of the minutes of reference, and the answers being apparently somewhat beyond these. The Sheriff-Substitute is now quite satisfied upon that head. He thinks the defender's answers are *inter et in cuti* to the matter referred, and that the justice of the case in all other respects is wholly with the defender.

On appeal, the Sheriff pronounced the following judgment, adhering:—

Having heard parties' procurators under the pursuer's appeal upon the Interlocutor appealed from, proof adduced, and whole process, in respect, although the oath of the defender proves, that, while yet a minor, and, as it appears, wanting five months of majority, he got the loan sued for, yet, there is no evidence of his being *lucratus* by the said loan, but rather the reverse; in respect the oath proves that the pursuer's claim, high as it was, was extinguished or departed from by the voluntary act of the pursuer in writing off the debt, which proof comes to be intrinsic; and in respect some years have since elapsed without any demand having been made for the sum now sued for, adheres to the Interlocutor complained of, and dismisses the appeal.

Act. J. CLARK. *Alt.* J. NAISMITH.

Digest of English Cases.

29TH JUNE, 1858.

VICE-CHANCELLOR WOOD'S COURT.

THE AUSTRALIAN AUXILIARY STEAM CLIPPER CO. *v.* MORMSBY.

A COMPANY was formed and registered under the Joint-Stock Companies Act, 1856, in order to purchase a number of vessels and to run them between England and Australia and elsewhere, or to let them out for hire, and generally to transact the business of shipowners. The 55th section of the registered articles of Association provided that "The business of the Company, "and the affairs thereof, shall be controlled, managed, and "regulated by the directors, who may do and exercise all such "powers, discretions, acts, deeds, and things which the Com- "pany might exercise and do, as are not by the Joint-Stock "Companies Act, 1856, or by these articles, or by these "articles declared to be exercisable by the Company in "general meeting; subject, nevertheless, to the regulations of "these articles, to the provisions of the Joint-Stock Companies "Act, 1856, and to such regulations (being not inconsistent "with the aforesaid regulations and provisions,) as may be "prescribed by the Company in general meeting; but no "regulations made by the Company in general meeting shall "invalidate any prior act of the directors which would have "been valid if such regulation had not been made."

The articles contained no clause empowering the directors to raise money. *Held*, that the directors had power to mortgage the vessels of the Company to raise money for the purposes of the Company.

27TH & 31ST MAY, & 9TH NOVEMBER, 1858.

COURT OF COMMON PLEAS.

BAXENDALE *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway—Undue preference to one customer over another.

THE Great Western Railway Company agreed to carry the goods of Sommerville at a lower rate from Bristol to London than they carried the goods of equal quality and quantity betwixt these two places for the plaintiffs and other customers, —while he agreed to undertake the risk of the carriage and to send goods to other places or other lines belonging to the said Company. *Held*, that the plaintiffs were, notwithstanding, entitled to an injunction against the Railway Company charging lower rates for Sommerville's goods than for theirs, and that in doing so the Railway Company were giving Sommerville an undue and illegal advantage over the plaintiffs and their other customers.

2D AND 26TH JUNE, 1858.

COURT OF APPEAL IN CHANCERY.

Ex parte JESSOP, *in re* THE LONDON AND COUNTY INSURANCE COMPANY.

LEVESON JESSOP was a shareholder and director and also a creditor of the Company. The affairs of the Company having become embarrassed, Mr Jessop insisted that they should be wound up, or that he should be allowed to retire by disposing of his shares. The directors adopted the latter alternative, and Mr Jessop, in consideration of his being relieved of all liability as a shareholder, not only gave up the debt due by the Company to him; but transferred his shares to a party named under an arrangement betwixt the directors, and a person who had agreed to re-construct and carry on the business. The attempt to continue the business failed, and the Company is being wound up under the statute. The Vice-Chancellor Kinderaley held, that Mr Jessop was liable as a contributory; but the Justices held (overruling the decision of the Vice-Chancellor), that the transference having been in all respects fair and open, Mr Jessop was entitled to be relieved.

15TH NOVEMBER, 1858.

VICE-CHANCELLOR KINDERSLEY'S COURT.

In re THE NORTHUMBERLAND & DURHAM BANKING COMPANY.

Joint-Stock Bank—Contributory.

MATTHEW ROBERT BIGGE became a shareholder in this Joint-Stock Bank, after, but not in consequence of certain fraudulent misrepresentations said to have been made by the directors. On the subsequent bankruptcy of the Company, held, that Mr Bigge was liable as a contributory.

10TH, 11TH, 12TH JUNE, AND 14TH AND 26TH JULY, 1858.

VICE-CHANCELLOR STEWART'S COURT.

M'DONALD *v.* RICHARDSON.
RICHARDSON *v.* MARTEN.

THE partner and executor of a deceased merchant continued the business, and improperly continued to use the funds, vessels, etc., in which the deceased was interested. *Held*, that he was bound to account for the profits.

5TH MAY, 1858.

EXCHEQUER CHAMBER.

JOHN WHEELTON AND OTHERS *v.* EDWARD B. HURDISTY AND OTHERS.

THE plaintiffs proposed to insure the life of Joddrell, in which they had an insurable interest. Joddrell himself and two referees stated that he had not had any disease tending to shorten life. The Company granted a policy which referred to the proposal as containing a statement that Joddrell had not had such disease. The statements of Joddrell and the referees on this point were untrue, but their falsehood was not known to the plaintiffs. *Held*, (1) that in making the misrepresentation, Joddrell and the referees did not act as the agents of the plaintiffs; and (2) that there being no warranty by the plaintiffs, or condition in the policy upon the subject, the plaintiffs were entitled to recover the sums for which the deceased's life was insured.

30TH NOVEMBER, 1858.

COURT OF COMMON PLEAS.

ATKINSON *appt.*, SELLERS *respt.*

Sunday Travelling—18 & 19 Vict., c. 118, serving with refreshments in a public-house at unlawful hours.

A PERSON travelling for pleasure is a traveller in the sense of the Act. Modern practice has made no distinction between travelling for pleasure and travelling for business.

Digest of English Cases.

2D NOVEMBER, 1858.

COURT OF QUEEN'S BENCH.

HOLLIDAY *v.* MORGAN.

Warranty of Horse—Unsoundness.

A HORSE warranted sound was congenitally short-sighted, which produced the vice of shying, thus rendering the animal less fit for present use. Held that this was a breach of the warranty, though the defect was congenital.

5TH JULY, 1858.

EXCHEQUER CHAMBER.

(*Error from the Court of Queen's Bench.*)

THOMPSON AND OTHERS *v.* HOPPER.

Policy of Insurance—Time Policy—Seaworthiness.

(1.) Unseaworthiness, *per se*, is no defence to an action upon a time policy.

(2.) It is a good defence to an action on such policy at the instance of the owners that they wilfully sent the vessel to sea in an unseaworthy state, whereby she was lost—but in such a case the underwriters must show that the unseaworthiness was the cause of the loss.

3D JUNE, 1858.

COURT OF QUEEN'S BENCH.

HIGGS *v.* GOODWIN.

Patent—Subject-Matter—Infringement.

THE plaintiff took out a patent for "treating chemically the "collected contents of sewers and drainage in cities, towns, "and villages, so that the same may be applicable to agricul- "tural and other useful purposes." The Board of Health for the town of Hitchen adopted and used a process similar to, or identical with that patented by the plaintiff, but not for commercial profit, but for merely sanitary purposes. Held, (1.) That the chemical process patented by the plaintiff was a good subject-matter for a patent; but, (2.) That the use of it by the defendants in the manner and for the purpose stated was not an infringement.

22D NOVEMBER, 1858.

COURT OF COMMON PLEAS.

OWEN *v.* WILKINSON.

Compensation—Joint and Several Promissory Note.

IT is competent to the holder to set off the contents of a joint promissory note against a debt due by the holder to one of the granters of the note.

13TH JANUARY, 1858.

ROLLS COURT.

DANBY *v.* DANBY.

Presumption of Death.

A GENTLEMAN of 20 years of age, left England for America in the year 1852, and wrote home immediately on reaching New York, announcing his arrival. He was in declining health when he left England. He never again wrote to his friends there, which, from his character and station in life, it is presumable he would have done, if living. Advertisements requesting information as to him, were inserted in the principal American newspapers, without effect. His father died in 1853, intestate. Held that there was *prima facie* evidence that he had predeceased his father.

16TH JUNE, 1858.

COURT OF QUEEN'S BENCH.

LUCAS & OTHERS *v.* BRISTOW.

Contract—Usage of Trade.

THE contract betwixt the parties was embodied in a broker's note in the following terms:—"Bought this day, for John Bristow, of Messrs Lucas Brothers & Co., of Bristol, fifty tons best palm oil, expected to arrive in Bristol from Africa, per Chalco, after the delivery of 100 tons previously sold, usual tare and draught—wet, dirty, and inferior oil, if any, at a fair allowance; and if any difference should arise, to be settled by arbitration. Payment by cash on delivery, less £2 10s per cent. discount, end of fourteen days from being ready for delivery in Bristol." The plaintiffs, on arrival of the vessel, tendered fifty tons of the oil, in implement, in eighty-seven casks—seventeen only of which contained best palm oil. It was proved that, by the custom of the port of Bristol, this was sufficient implement of such a contract. Held that evidence of such custom was admissible, and that the contract must be construed in accordance with the custom.

19TH JANUARY, 1858.

COURT OF QUEEN'S BENCH.

WILLIAM KITCHEN *v.* JOHN RITSON IRVING.

Merchant Shipping Act, 1854, Sec. 70.

IT is incompetent for a creditor of the mortgager of a ship to take and sell it for his debts to the prejudice of the mortgagee, although it was provided by the mortgage that the power of sale thereby conferred on the mortgagee should not be exercised till after a date considerably later than that at which the attempt to attach the vessel was made by the personal creditor.

12TH, 13TH, AND 15TH NOVEMBER, AND 3RD DECEMBER, 1858.

VICE CHANCELLOR WOOD'S COURT.

JONES *v.* PEPPERCORNE.

Broker—Deposit—Lien.

STRAHAN & Co., Bankers, London, deposited Dutch bonds with the defendants, who were brokers, to cover advances made at the time, the defendants having power to sell the bonds when the advance became payable. Held that the defendants had not only a special lien over the bonds for the specific advances made upon them, but a general lien over them for all advances made by them to Strahan & Co.

29TH NOVEMBER, 1858.

EXCHEQUER CHAMBER.

SHERIDAN *v.* THE PHŒNIX LIFE INSURANCE CO.

Life Policy—Annual Premium Payable Quarterly.

A POLICY of assurance provided *inter alia* that the premium should be payable by quarterly instalments, receipt of the first of which was acknowledged, that if the insured should die before the termination of twelve calendar months from the date thereof, or should live beyond such period, and the insured or his assigns should, on or before that period, or on or before the expiration of every succeeding twelve calendar months, provided that the insured was still living, pay the annual premium, then the company should be liable; and provided also, that if the insured should die before the whole of the quarterly payments should become payable for the year in which he should so die, it should be lawful to the directors to deduct and retain from the gross sum payable to the representatives of the insured, so much as would be sufficient to pay and satisfy the whole of the said premiums for that year. The insured died within twelve months from the date of the policy. The third quarterly instalment was past due and unpaid. Held, reversing the decision of the Court of Queen's Bench, that it was an annual insurance, though the annual premium was payable by quarterly instalments, and not an insurance from quarter to quarter, and that the defendants were consequently liable.

26TH JANUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

HANCE WALKER AND SONS (M'KAY'S ASSIGNEES) v. UBE.

Deed—Probative—Instrumentary Witness—Female—Title to Sue.—*In an action founded upon an assignation in which one of the Instrumentary Witnesses was a female—Held that the Deed was improbative and invalid, and so could not found a title to sue.*

A FEMALE of the name of M'Kay, a grocer and provision merchant in Glasgow, while a prisoner in the North Prison there, executed an assignation in favour of the pursuers, her incarcerating creditors, of various book debts, due to her by her customers, amounting, *in cumulo*, to £17 17s 3d. One of the instrumentary witnesses to the assignation was a female relation of the granter, who happened accidentally to be present when the deed was executed.

Among the debts assigned by this deed was one due to M'Kay by the defender, amounting to £2 7s 1d. For this sum the pursuers, as assignees of M'Kay, raised an action against the defender in the Small Debt Court, where they were met with the defence, that the assignation founded upon was not a valid title authorising the pursuers to sue the action, in respect (1) Each page of the deed was not signed by the granter, and (2) one of the instrumentary witnesses was a female. Owing to the importance of the latter question thus raised, the case was remitted to the ordinary Court Roll, in order that the point might be more maturely considered and disposed of than it could be in the Small Debt Court.

A Record having been made up and closed, the pursuers pleaded—

(1) Where a deed is written upon one sheet of paper, it is not necessary that the granter sign each page, (*Menzies*, page 98, and authorities there cited.)

(2) There is no statute, law, or decision of the Supreme Court in Scotland, finding that a female is not qualified to act as an instrumentary witness. A female was admitted as an instrumentary witness under the Civil Law, D. 28, Act 1, c. 20, sec. 6. And although some of our institutional writers have laid down the *dictum* that they are not admissible by the law of Scotland, no authority is cited in support of this doctrine. Besides, whatever might have been the view taken of the law upon the point, at a time when females were excluded from acting as witnesses in any case, civil or criminal, now that the law in this respect has been so far relaxed as to admit their testimony in a case involving the life of a subject, there can be no good reason why they should not be received as instrumentary witnesses. Later authorities consider them admissible, *Ross' Lectures*, p. 147, 148; *More's Stair*, vol. ii. p. 399; *Dickson on Evidence*, vol. i. p. 370, sec. 689; vol. ii. p. 887, sec. 1775; and authorities cited. In the case of *Sutton*, 24*th February*, 1816, *Murray's Reports*, vol. i. p. 9; an issue was adjusted, and a case permitted to go to trial upon the *assumption* that a female instrumentary witness was admissible. In England they were received, and why not in Scotland?

Answered for the defender—

(1) The Statute 1696, cap. 15, which stands unrepealed, requires each page of a deed to be signed by the granter.

(2) It is clearly laid down as the law of Scotland by Stair, B. 4, T. 43, p. 11; and Erskine, B. 4, T. 2, sec. 27, that a female is not admissible as an instrumentary witness, and the universal practice of all conveyancers has been in accordance with this view of the law. See *Tait on Evidence*, p. 84; *Bell's Dict. Digest*, p. 502 and 989; and *Menzies' Lectures*, p. 109. If this view is erroneous, it can only be obstructed by a decision of the Supreme Court.

Upon considering the pleas and arguments of parties and the authorities cited, the Sheriff-Substitute pronounced the following Interlocutor:—

Having heard parties' procurators, and resumed consideration of the whole process, Finds, that the pursuers sue as assignees of Jessie M'Kay, grocer, Anderston, and produce in support of their instance the assignation No. 5: Finds, that it is objected to the validity of said assignation, *first*, that it is signed by the granter and instrumentary witnesses only on the second page, the deed being contained on two pages: Finds, that it is settled by a long and uniform train of decisions that where a deed is contained entirely on one sheet of paper, which is the case here, it is not necessary, although it be written on successive pages, to sign more than the last page; therefore repels the said objection: Finds, that it is objected, *second*, that one of the instrumentary witnesses being a female, the deed has not been duly executed, and can receive no effect in judgment: Finds, under reference to the annexed Note, that this is a good objection, and that the deed is in consequence improbative and invalid; therefore sustains the defences and assoilzies the defender from the conclusions of the summons: Finds the pursuers liable in expenses, of which allows an account to be given in, and remits the same to the auditor to tax and report, and decerns.

NOTE.—The argument in favour of the view that a woman may now be competently taken as an instrumentary witness, rests mainly on the grounds, *first*, that the old Acts which contain, in general terms, a requirement of witnesses to the subscription of deeds, do not, *per expressum*, exclude females; *second*, that the legal incapacity which in former times was held to attach to women to give testimony in any matter, civil or criminal, has been gradually relaxed, and is now virtually abrogated, women being admitted in all causes, and before all tribunals, to give oral evidence equally with males; and *third*, that several of our more recent writers on Scotch law, including, in particular, Professor More in his valuable Notes on Stair, and Mr Dickson in his well-digested work on the Law of Evidence, have stated it as extremely doubtful that women are any longer to be held disqualified as instrumentary witnesses, and have, on the contrary, rather expressed an opinion that they are qualified. But, on the other hand, and against their qualification, we find, *first*, that all our older and most authoritative institutional writers, including Stair, Erskine, and Burnet, have laid it down unqualifiedly that women may not be instrumentary witnesses; *second*, that the reason for this exclusion, assigned by Mr Tait in his well-known Treatise, page 84, namely, "their inexperience in business, which renders them liable to deception," still continues in force, notwithstanding the relaxation of the rule which excluded them from giving *viva voce* testimony; *third*, that by the universal practice of conveyancers, women are not received as instrumentary witnesses; *fourth*, that there is no case on record where a deed so attested has been sustained, but, on the contrary, it was incidentally laid down in the case of *Dalrymple* (Hoggertson's Consistorial Reports, vol. ii.), in the opinions there given by Lords Eldin, Gillies, and Alloway, that a woman could not be an instrumentary witness; and although, in the case of *Sutton* in 1816, (1 Murray's Reports, page 10), an issue was sent to a jury to try whether the subscription of an instrumentary witness, who was a female, was her true and genuine subscription, it does not follow that the Court intended to sustain the deed if the finding was in the affirmative, but only that it was unnecessary to give any opinion upon the effect to be attached to the subscription as long as its genuineness was disputed; and *fifth*, that if an innovation is to be sanctioned on the immemorial practice of conveyancers, this should be done in the first instance upon the deliberate authority of the Supreme Court. This is the view of Professor Menzies, the latest, and one of the ablest authorities on the subject, who says, page 109—The relaxation of the rule attaching legal incapacity to women as witnesses, "has not been extended so as to admit them in the character of instrumentary witnesses. There is, indeed, no statutory exclusion, but there is no part of our practice more uniformly supported by usage. . . . It is to be kept in view that this is a question of great magnitude, and that the existing practice rests upon very grave considerations." He then refers to Mr

Tait's ratio for exclusion, and adds—"It would, therefore, be rash to infringe upon the established practice, before a different rule shall be authorised by a decision resulting from a deliberate and solemn trial of the question."

The pursuers appealed, but after hearing parties, the Sheriff (Sir Archibald Alison) adhered to the Sheriff-Substitute's judgment, adding the following Note:—

The point involved in this case raises a very important question, and well worthy of the consideration of the Supreme Court, when it shall be brought before it, because there can be no doubt that the strict rules of evidence in ancient times have been essentially abrogated and altered, both by statute and the practice of the Court in later times. But on this material point, upon the competency of a female being an instrumentary witness to a deed, Stair lays down the law in the most express terms in that way, and so does Bankton, and Erskine holds them excluded also, although he says they are rather excused than held incompetent. It is understood, also, to be the general rule in practice to exclude females from signing as witnesses. In these circumstances, it appears to be the duty of the Court to adhere to the law on the subject as laid down by our best authorities, and to leave it to the Supreme Court or the House of Lords to introduce a change in the law in this respect, if it shall be deemed expedient from the change of general ideas on the subject. If the question should occur, which it probably will do ere long, before either of these supreme tribunals, it will not escape observation, that there is a wide distinction in point of reason between the situation of a witness in an ordinary case, whether civil or criminal, where females are beyond all question admissible, and the case of calling females to be *instrumentary* witnesses. In the latter case the party has the choice of the witnesses. In the other he has not, but must take the chance of such parties as witnesses who happened to be present on the occasion, to speak to what they saw or heard. There are many reasons, therefore, that may be urged in favour of admitting females as witnesses in the one case which do not apply in the other, and unquestionably the reason assigned by some of our later authorities for excluding women from being instrumentary witnesses, viz., that of being for the most part unacquainted with business and easily accessible to domestic influence, they are more liable to be made the instruments of a conspiracy than those of the other sex.

Act. J. L. Lang. *Alt.* W. D. Hall.

26th January, 1859.

SHERIFF SMALL DEBT COURT, FALKIRK.

(Mr Sheriff Robertson.)

M'Farlane *v.* Gray.

Manse—Assessment—Heritor—Feuar.—*Held, that Feuars in a village are Parochial Heritors, and liable, as such, for the building of a manse for the Minister, and that the assessment falls to be levied according to the real rent of their holdings.*

The pursuer, as clerk and collector to the Heritors and proprietors of Heritages of the parish of Slamanan, sued the defender, a Feuar of 24 falls of ground in that parish, for the sum of £5 8s, being the amount of two *interim* assessments imposed for the expense of erecting a parochial manse.

The defender objected that he was not a Heritor in the proper sense of the term, and so not liable.

The judgment of the Sheriff, in which the pleas and arguments of parties are fully narrated, was as follows:—

This case has been very elaborately argued, and the whole facts and law fully elicited; and, as there is no substantial difference between the parties as to the facts, I have thought it right to dispose of it in this Court, without putting the parties to the expense of a record by a remit to the Ordinary Roll. As there are a number of parties in precisely the same circumstances as the defender, it appears to me that the best course to follow is to state fully and at length the grounds of my judgment, and the authorities on which it is rested, so as to enable the parties and their agents to judge whether they shall rest satisfied with it, or whether they will have the question tried on written pleadings, and with the advantage of an appeal to the Sheriff Depute, and to the Court of Session. This summons is brought at the instance of the Clerk and Collector of the Heritors and Proprietors of Heritages of the parish of Slamanan, against the defender, a Feuar in the said parish, for the amount of two *interim* assessments, amounting together to £5 8s, for the expense of erecting a parochial manse. The grounds of the pursuer's action, which were stated at considerable length, and illustrated by ample references to authorities, are summed up in these three propositions—1st, That the building of a manse is a burden on the Heritors of a parish; 2d, That the defender is one of the Heritors of the parish of Slamanan; and 3d, That the amount of the assessment is to be levied according to the real rent. The first of these propositions is not questioned by the defender, and the third was not argued; but while he admits that he is a Feuar in the said parish, under a feu disposition from Mr Waddell of Balquhatstone, and that he stands rated in the valuation roll of the county on an annual rental of £24, he pleads that he is not an Heritor in the proper sense of that term. His special grounds of defence may be stated as follows:—That the whole extent of his feu is only 24 falls of ground, for which he pays £1 1s per annum, under a feu disposition prohibiting sub-infeudation; that the feu duty is an outside or rack rent, for that quantity of ground; that so far as the ground is concerned, Mr Waddell, the superior, has substantially both the *dominium directum* and the *dominium utile;* that the defender's right in the soil is subject to forfeiture in the event of the rent or casualties being unpaid; that the church to which the manse is an appendage, or an accessory, has long ago been divided amongst the real Heritors or owners of the soil; that the whole area of the church has been so apportioned; that no portion of it has been assigned to, or belongs to the defender; and that he is truly a tenant at a high rent, and not a parochial Heritor in the sense of that term, as recognised by the law of Scotland. It was further averred and argued, that by the almost universal custom and practice of Scotland, the burden of erecting and keeping in repair churches and manses, rested with the owners of the soil alone, as distinguished from owners of house property; that none of our institutional writers recognised a Feuar in the defender's circumstances as an Heritor; and that to attempt to extend this burden to the proprietors of petty holdings, in villages on which poor cottages had been erected, on the pretence that these were heritages, and the owners Heritors, was alike contrary to the ancient law, and to the universal feeling and understanding of the country. And as to the custom and practice, reference was made to the course observed throughout the country generally, as well as specially in this district, and the church lately built in the parish of Polmont, and the manse in the parish of Falkirk, were given as instances; and it was averred, and not denied, that in both these parishes, there were numerous Feuars holding large and valuable interests, from whom no contribution nor assessment had been demanded. It was further argued that Slamanan was a parish specially circumstanced, that a large portion of its annual rental arose from minerals, and that on these no portion of this assessment had been laid, although that part of the parochial property was much more valuable than the village house property, the estimated rental of Feuars' houses and feus amounting only to £778 13s, and the mineral rental to £1088. Then, in reference to the legal argument maintained for the pursuer, as supported by the decided cases referred to in the books, it was said that the whole of these decisions were *anterior* to the recent Valuation Act, which had afforded totally new *data*, or at all events, *data* which had never previously been recognised or founded on, for fixing and ascertaining the real property of the country, and that whatever that Act might have done as a basis for general assessments, it could not alter the previously existing law, or confer the character of an Heritor in the ancient and proper legal sense of the term on a petty Feuar, or render him liable for an assessment which previously could not have been levied from one of his class. Such being the nature of the action and defence, I shall now proceed to state the views I entertain in regard to the legal questions which the case involves. By our more ancient statutes, the burden of providing and upholding manses and churches was laid on the

whole parishioners or inhabitants of a parish; *vide* St. 74, 1572, and St. 12th September, 1563, therein referred to. About one hundred years subsequent to this, by the statute 1663, cap. 21, "anent manses and glebes and poinding for minister's stipends," it "is statute and ordained, that where competent manses are not already built, the Heritors of the parish shall build competent manses to their ministers;" but that statute is silent as to who are to be considered Heritors, and it is very possible that, at the date of it, the only persons entitled to that character were those possessing old retours and paying by the valuation, according to which all assessments had been previously levied. I am not aware that in any of the statutes regarding parochial burdens there is any express definition or specification of the meaning of the term "Heritor." The word "Heritour," or "Heritor," is old Scotch for a proprietor or landholder in a parish (*vide* Dr Jamieson's Dictionary), imported probably mediately from the French "Heritier," and certainly, anciently at least, it does not appear to have been used in the sense of an owner of house property merely. We find a corresponding English word "Inheritor," employed occasionally in the sense of a landowner; and it is so used by Shakspeare, "The very conveyances of his lands will hardly lie in this box, and must the Inheritor himself have no more?" It is not, however, with its meaning in ancient or feudal times that we have now to deal, but with its present legal signification, as interpreted by our Courts; and it by no means follows that though the Act 1663, cap. 21, may be the first statutory provision imposing on the owners of real property the obligation of supporting churches and manses, that the term "Heritor" is to be construed now as it was two centuries ago, and certainly there appears to be no authority for now limiting that character to persons holding property separately valued in the cess books of the county: Indeed, it is remarked in a note of the Lord Ordinary, in the case of *Robertson* v. *Murdoch*, 23d February, 1830, "that such a limitation would be quite extravagant." On the other hand, to constitute an Heritor, something more is necessary than the mere possession of a heritable right; the holder of a heritable bond is not a heritor: there must be a direct right of ownership in the soil, not created, however, as a security or incumbrance, but existing as a direct right of property; but the possession of any portion of land in property, however small, appears to carry that character along with it—"*majus aut minus non variat speciem*," and although the small landowners have small pieces of land, they are as much heritors of it, as a person who has extended possessions is heritor of them. (*Lord Cringletie's note—Case of Robertson referred to supra.*) Accordingly, Mr Dunlop, in his parochial law, so lays it down, p. 260, sec. 178, when treating of the jurisdiction of the Heritors and Kirk Session. He says, "This Board or Court is composed of ministers, elders, and Heritors of each parish, all proprietors of lands *or houses* who are liable in payment of public burdens *being to be considered Heritors:*" and such certainly, whatever may have been the practice or custom of our older law, appears to have been the rule, according to recorded decisions, as far back at least as in the case of *Peterhead*, 24th June, 1802. *Connell's "Supplement," p. 23; Dunlop's "Parochial Law," p. 8; and Paton's "House of Lords Cases."* In that case, Lord Eldon gave effect to the principle that all owners of heritable subjects, whether lands or houses, are Heritors, and liable for public burdens in proportion to the actual rents of their holdings. This opinion of Lord Eldon was concurred in by Lord Thurlow, and is so instructive on this matter, and his reasons are so fully given, that I shall quote his words. His Lordship said—"There are here two questions—1st, Whether the Feuars, who are unquestionably Heritors, as well as those commonly described under that name, be liable in any degree, or whether the expense lies wholly on the landward heritors; and 2d, If the Feuars be liable, in what proportion they and the landward heritors ought to contribute?" And the conclusion at which he and Lord Thurlow arrived, after having considered the whole case "*with deep attention*," was, "that the expense of building or repairing a parochial church" (and the same principle applies equally to a manse), "was a parochial burden which ought to fall on the property of a parish, and should not be regulated by a reference to the population in different parts of the same parish. It was therefore proper that the appellants—the Feuars and proprietors of the houses in the burgh—should contribute to the expense of the church; and the rule laid down by the Court of Session was a just one, that they should pay according to the real rents of their houses. With regard to the country Heritors, the rule of the valued rent had no doubt been long in observance in building or repairing the churches of parishes purely landward; but there was no express law, nor train of decisions, establishing, in a parish of the present description, the rule of the real rent in regard to one part of the parish, and of the valued rent in another part; and the best and fairest rule was to take the actual or real rent of the whole property in the parish, and upon that to apportion the expense. The land upon which houses are built, in a town like this, has great value in reference to its extent. Therefore, it does appear to me that the true rule is, not that the Court should take one proportion of the expense from one species of Heritors, and another from another species, but that it is proper to lay the burden on the whole Heritors, including the Feuars of the town, according to their real rents." And the judgment accordingly "declared that such charge is a parochial duty, and that it ought to be defrayed by all the owners of lands and houses in proportion to their real rents." *Harlow and others* v. *Heritors of Peterhead; Paton's Appeal Cases, vol. IV.*, p. 356. Such was the decision of the House of Lords in the case of Peterhead. But the same principle was given effect to in a much older decision, that of *Scott* v. *the Heritors of St Cuthbert's*, 19th Jan., 1773, M. 10,577, where the competency of assessment on the real rent appears for the first time to have been authoritatively fixed. The same view, resting on the case of *Peterhead*, was adopted in the case of *Blackie and others*, 8th March, 1828. *Shaw and Dunlop, vol. VI.*, p. 748. There the Lord Ordinary (M'Kenzie) found that the expense of erecting a manse "ought to have been divided amongst the whole Heritors in proportion to the real value of their properties respectively," and to this part of his judgment the Court substantially adhered, while recalling, in other respects, the Interlocutor, in *hoc statu*, but remitting the case "to have all parties having interest called in the action." Again, the whole question was fully raised and decided in the case of *Boswell* v. *Hamilton*, 15th June, 1837. *XV. Shaw*, p. 1148. And this case demands special attention from the circumstance that both the questions—what constitutes a Heritor, and what is the proper basis for assessment—the valued or the real rent, were fully re-considered. Lord Gillies, while entertaining no doubt that a *Feuar* is a *Heritor*, still appears to have wished to take the valued and not the real rent as the basis of the assessment. His Lordship says: "Two questions have been raised here; 1st, whether a Feuar is in law an Heritor; and, 2d, supposing all Feuars to be Heritors, must the assessment be imposed according to the real rent? In regard to the first question, I have no doubt that the Feuars are Heritors; but it does not follow, as a necessary consequence, that the assessment must be on the real rent. Every land estate out of which these feus have been made, stands valued in the cess-books; and as the feus are each of them part of the lands so valued, it may be quite practicable to impose upon each feu its own proper share of the *cumulo* valuation of the estate. There is at least no necessity for taking the real rent of the Feuars. They may be assessed in proportion to the share of valued rent effeiring to their respective feus." Lord M'Kenzie also expressed his reluctance to depart from the older custom of assessing on the valued rent. He says: "If we concede that we may disregard a long-established custom, I do not know where we are to stop. Now, if it was the custom to assess on the valuation only, I think the departure from that rule will give rise to much trouble and confusion; and that innumerable consequences will flow from it which are not at present foreseen by those who insist on the adoption of this new rule." But the opinion of Lord Corehouse, finally concurred in by the other Judges, was quite unhesitating and decisive on both points—both that a Feuar is a Heritor, and that the real, and not the valued rent, was the criterion of assessment. His Lordship says: "I am sensible that there are very serious practical inconveniences which may result from applying the rule of the case of Peterhead to the present case. But if these Feuars are to be subjected to assessment, I hold that the Court are bound by that decision, and must adopt the rule of assessment which was fixed by it. Lord Eldon there enjoined that the assessment should be imposed according to the real rent, *though this was contrary to the general custom of Scotland;* he took the real rents of all Heritors, great and small alike, *in town and country*, and directed the assessment to be proportioned to that real rent." The Lord President

(Hope) also had doubts as to adopting the real, and not the valued rent; but he had none as to a Feuar being a Heritor. His Lordship observes: "It is quite clear that every Feuar is liable to assessment *in one shape or another*. It is not the extent of the ground, but the nature of the right which constitutes an Heritor; and whether a feu is worth £500 per annum to the Feuar, or only £5 per annum, the Feuar is equally an Heritor. And every Heritor must be assessed." The Court held the real rent to be the rule (the Lord President and Lord Gillies eventually concurring even on this matter), and unanimously held that a Feuar was a Heritor—"finding that the expenses of re-building the Church of Mauchline are to be defrayed by all the owners of land and houses in the parish according to their real rents." Since this decision in the case of Mauchline, I am not aware that the question has been tried in the Supreme Court. No doubt, in many cases since that date—and there are several within my own knowledge—manses and churches have been built exclusively at the cost of the larger Heritors, and without any assessment being levied on the Feuars; but this cannot alter the legal liability which has been authoritatively fixed, ever since the case of Peterhead. I have therefore no difficulty in arriving at the conclusion in this case, that the defender is a Heritor of the parish of Slamanan, and as such is liable to be assessed on the real rent of his property. That the recent Lands Valuation Act has passed since the case of Mauchline was decided, appears to me in no degree to affect his defence. The effect of that Act has been to ascertain and record the real value of the defender's property, but not to alter its legal liabilities; and supposing that no such Act had passed, and that the defender's property was not entered in any public valuation roll, its actual value, if disputed, would only have become a subject for proof, the delay and expense of which is no longer necessary. Then, as to the alleged specialities of the parish of Slamanan, and that the mineral rental has not been assessed—that is a matter which it is impossible to regard in this case. It may be very anomalous that while a mineral rent of nearly £1100 per annum is free of assessment, the rents of cottages and kailyards should be taxed; but (as was stated by their agent, Mr Gair) the pursuers, who are equally interested with the defender to make the basis of the assessment as wide as possible, in declining to attempt to extend this assessment to the proprietors of minerals, are acting under the opinion of eminent counsel, who have advised them not to raise that question, but to limit their assessment to those parties who are believed to be unquestionably, and beyond all legal doubt, liable; advice which is fully warranted by the last decision of the Supreme Court, where the point as to mineral property was tried. In that case (*Bell* against the *Earl of Wemyss*, 16th Feb., 1805, Fac. Coll), it was held "that the proprietor of a coal mine is not liable for any part of the expense of building a new parish church," and the same rule must hold in regard to a manse. No doubt two of the judges dissented from that opinion, and a different course has been adopted so far as regards poor's rates; but this recorded judgment as to the expense of erecting a church, however questionable in principle, remains still unaltered; the law is fixed by it while it stands; and the pursuers, in making a parochial assessment, must take the law as they find it.

In these circumstances, what I have to decide is, whether, where an assessment has been regularly made by the Parochial Board or Court entitled to make it, the defender has established any ground in fact or law entitling him to exemption therefrom? That he is a Feuar in Slamanan—that his property stands in the valuation roll rated at £24 per annum—that the manse has been built, and that the two assessments pursued for have been made to pay the cost of it, are all admitted facts; and the defence is rested exclusively on the grounds that the possession of a small feu does not constitute a Heritor, and that the assessment has been illegally made, because not extended to the owners of mineral property; but I am unable to concur in either of these positions, being satisfied that the defender is a Heritor, in the legal sense of that term, as interpreted by the decision of the Court of Session and the House of Lords; and that the pursuers, while the case of Wemyss remains unaltered, would not have been justified in extending the assessment to the owners of mineral property; and I have, therefore, no hesitation in decerning against the defender for the sum of £5 8s, his proportion of the assessment, with expenses.

Act. And. Storie & John Gair. *Alt.* Alex. Hedderwick.

26th January, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Bell.)

Robert M'Cormick *v.* John Graham.

Bankruptcy—Balancing of Accounts.—*Circumstances in which held that the creditor of a bankrupt was entitled to deduct the amount of a debt due to him by the bankrupt from a sum due by him to the bankrupt estate.*

Robert M'Cormick raised this action against John Graham, accountant, trustee on the sequestrated estates of Robert Cochran, concluding for repetition of a sum of £40, paid by the pursuer to the defender under the following circumstances: On 28th September, 1858, the pursuer, by missive, offered to purchase from Cochran, at the price of £340, certain goods and fittings conform to inventory. This offer was accepted by Cochran, and a payment of £1 10s made to account. Subsequent to this transaction, the goods sold being still in Cochran's possession, Cochran became bankrupt, and the defender was appointed trustee on his estate. At the date of the sequestration, Cochran was indebted to the pursuer in a sum of £40, for cash lent. In these circumstances, the pursuer demanded from the trustee delivery of the goods and others so sold to him by Cochran, and claimed the right to deduct from the price the sum of £40 due to him by the bankrupt. The trustee declined to accept the price under that deduction, but accepted the whole sum conform to price in the foresaid inventory, reserving to the pursuer to claim repetition of the sum of £40, by action or otherwise, if he should be so advised. The trustee, in settling with the pursuer, gave him credit for the sum of £1 10s paid to the bankrupt to account. The present proceedings were taken for recovery of the £40.

The trustee pled in defence, that there was no legal obligation on him to implement the transaction between the pursuer and the bankrupt by delivery of the goods, and no legal right in the pursuer in the circumstances stated to retain his claim of £40 out of the purchase price.

Sheriff Bell has pronounced the following judgment, which has been acquiesced in by both parties:—

Having heard parties' procurators, and reviewed the process, Finds, that after the bankruptcy of Robert Cochran, the pursuer was entitled to impute the debt of £40 owing to him by Cochran, in compensation, *pro tanto*, of the price payable by said pursuer for the stock and fittings purchased by him from Cochran, and he having paid to the defender the whole of said price, without retention of said £40, but under protest, and without prejudice to his right to claim restitution, is now entitled to decree accordingly. Therefore decerns against the defender in terms of the conclusions of the summons, the pursuer, *unico contextu*, with receiving payment, giving up to the defender the I O U for £40, being No. 4/5 of process: Finds the defender also liable in expenses, allows an account thereof to be given in, and remits to the auditor to tax and report, and decerns.

Act. J. Galbraith. *Alt.* G. Hamilton.

27th January, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Bell.)

Young *v.* M'Intosh's Creditors.

Bankruptcy—Appeal.—*Held, that the insertion of a Gazette notice of sequestration on the fifth day after the first deliverance, was irregular—that the meeting to elect a Trustee and Commissioners could not be held sooner than the seventh day after the insertion of such Gazette notice—that the failure to*

publish in the Gazette a notice of remit by the Lord Ordinary to the Sheriff of Lanarkshire, was fatal to the proceedings under such remit, and resolutions of creditors at such meeting recalled.

THE estate of Malcolm M'Intosh was sequestrated on 6th January, 1859, by the Lord Ordinary, the sequestration remitted to the Sheriff of Lanarkshire, and the creditors appointed to meet on 17th January, to elect a trustee and commissioners. The notice of sequestration was not published in the *Edinburgh Gazette* till the 11th January. No notice of the remit was ever published in the *Gazette*, and the meeting for the election of trustee was held on the 17th January. The creditors at the meeting resolved to proceed with the election. The appellant protested against the resolution, on the grounds stated in the Sheriff's Interlocutor. The meeting proceeded to the election of a trustee, and the proceedings having been reported to the Sheriff, this appeal was brought. The following is the judgment:—

Having heard parties' procurators on the note of appeal for David Young, accountant in Glasgow, a creditor claiming under the sequestration of Malcolm M'Intosh, merchant, Portree, in terms of the affidavit lodged by him, Finds, that the estates of the said Malcolm M'Intosh were sequestrated in the Court of Session on the 6th day of this month; but finds —first, that no notice of the remit by the Court of Session to this Court was inserted in the *Gazette*, in terms of the provisions of section 19th of the Bankrupt Statute; and second, that the requisite statutory notices of the meeting for the election of trustee were not given, in respect that the *Gazette* notice was not published till the 11th January, and that the meeting was then advertised to take place, and did take place, on the 17th January, which was less than six free days from the date of said *Gazette* notice, and contrary to the provisions of section 67 of the said Act: Finds, therefore, that the said meeting could not competently proceed to the election of trustee, sustains the appeal, and recalls the resolutions appealed against: Finds the respondents liable in expenses, allows an account thereof to be lodged, and remits the same to the auditor of Court to tax and report, and decerns.

Act. J. GALBRAITH. *Alt.* P. M'LEOD.

27TH JANUARY, 1859.

SHERIFF COURT, KINCARDINESHIRE.

(SHERIFFS ROBERTSON AND BELL.)

JAMES MOLLYSON *v.* ROBERT SIM'S EXECUTORS.

Decree of Constitution—Executors Nominate—Expenses.—*Held, that a Creditor was not entitled to a personal decree against Executors Nominate within six months from the death of the Testator, and that having craved such decree with expenses of process, the Executors who consented to a decree of Constitution being pronounced, were entitled to their expenses of process.*

MOLLYSON sued the defenders for payment of £85 3s 8d due to him by bills granted by the late Mr Sim, with interest and expenses. The defenders maintained that the action was premature, because raised within six months after Sim's death, but consented to decree of Constitution without expenses, on condition that it should not be put in execution till the expiry of said six months. They craved their expenses. The Sheriff-Substitute (Robertson), on 10th November, 1858, pronounced decree, *cognitionis causâ tantum*, against the defenders, and found them entitled to expenses, adding the following Note:—

The defenders in the discharge of their duty as Executors Nominate, were warranted in entering appearance to oppose a *personal* decree against them, and the claim for the expenses. Had the pursuer craved only a decree of Constitution and expenses, in the event of the defenders opposing that demand, he might have been entitled to expenses, had these been incurred by their unnecessary opposition. But the defenders have properly and successfully opposed the demand in the summons.

On appeal, the Sheriff (J. M. Bell) adhered.

Act. CAIRD. *Alt.* FALCONER.

27TH JANUARY, 1859.

SHERIFF SMALL DEBT COURT, STONEHAVEN.

(MR SHERIFF ROBERTSON.)

J. TAVENDALE, INSPECTOR OF POOR OF FETTERESSO PARISH, *against* WILLIAM BARNETT, INSPECTOR OF POOR OF NIGG PARISH.

Poor Law Act—Statutory Notice—Recovery of Advances.—*Terms of a letter which held sufficient intimation to the parish of birth that a party had become an object of parochial relief, and that said parish was bound to pay the money, to be advanced to the pauper by the parish where he resided.*

JAMES WOOD, a native of the parish of Nigg, residing in the parish of Fetteresso, received parochial aid from the former inspector of the latter parish, who on 3d March, 1854, wrote to the defender as follows: "I am told he has a birth settle-"ment in your parish. In the meantime he is an object of "relief. I have given him 5s. As early next week as pos-"sible, I shall call upon him and write you particulars. In "the meantime must hold your parish liable for all advances." Shortly thereafter, Wood having recovered his health, the defender was not at that time called on to pay the advances, but Wood having again fallen into bad health became an object of relief on 18th January, 1858, when he received parochial aid from the pursuer, who then intimated to the defender that the latter should be liable for the advances. It was proved that Fetteresso was not liable on the ground of residence, and the Sheriff-Substitute held that the letter of 3d March, 1854, coupled with the intimation in 1858, was sufficient notice under the Statute to make Nigg liable for the advances subsequent to said letter, and decerned accordingly.

Act. MONRO. *Alt.* CHRISTIAN.

28TH JANUARY, 1859.

SHERIFF COURT, KINCARDINESHIRE.

(SHERIFFS ROBERTSON AND BELL.)

WILLIAM MELVIN *v.* JOHN M'BAIN.

Process—Assignee—Expenses.—*Held,* (1) *that an assignee to a decree was entitled to raise a new action for the sum contained in the decree, provided he consented not to operate or use diligence upon the former decree.* (2) *That as the pursuer might have adopted the course provided by the 12th section of the Act, 1st and 2d Vict., cap. 114, he was not entitled to the expenses of process.*

THIS was an action by an assignee, for payment of £71 5s with interest, being the principal sum, interest and expenses, contained in a decree dated 21st March, 1849, by the Sheriff of Kincardineshire in an action at the instance of George Fyffe against the defender, which decree was assigned by Fyffe to the pursuer on 20th December, 1853, and intimated to the defender on 11th January, 1854. The defender pleaded

that it was incompetent to raise a second action for the same debt, and to obtain a second decree either at the instance of Fyffe or his assignee. The Sheriff-Substitute, before disposing of the case on the merits, appointed the pursuer to lodge a minute stating whether or not he consented, in the event of judgment being pronounced in his favour, not to operate or use diligence upon the former decree in favour of his cedent, adding the following Note:—

NOTE.—The only plea in law stated for the defender requiring observation is the 5th.

There seems to have been no good reason to have prevented the pursuer following the course provided by the 12th section of the Diligence Act, 1st and 2d Vict., cap. 114. But it does not follow that that course, though competent, was imperative. Indeed, by the 8th section of that Act, the former law and practice on the matter of diligence were open to him, if he should see fit to proceed in that way in place of the manner provided in the statute, under this condition, that the former fees are not exigible. The Sheriff-Substitute can discover no good reason to prevent the use of another summons, provided the defender is secured against the possibility of diligence being used on the two decrees, and against payment of the expenses of the second action. With that view the above Interlocutor has been pronounced, and it is proposed not only to embody in the decree to be pronounced in this case, a finding to the effect that it only shall be operative as a ground of diligence, but also to find the pursuer not entitled to expenses. Had the defender relied on his 5th plea exclusively, and not introduced into his defences statements not founded on fact, he might possibly have been found entitled to expenses, but from the nature of said plea, and the character of the defence, the Sheriff-Substitute intends to find neither party entitled to expenses.

The case of *Munro*, referred to by the pursuer at the debate, does not bear on the present case. But the case of *Keltie*, *15th December*, 1827, seems to recognise the competency of the present action. In that case it was held to be no objection to a creditor proceeding with summary diligence on a liquid ground of debt, that he had concluded for payment of the same debt in an ordinary action still in dependence. The case of *Nicolson*, *9th December*, 1837, although it does not bear so pointedly on the present case, may be referred to. In that case, after an action had been brought for payment of a debt by an assignee, a new action was raised against the same defender on the same *medio* by a new assignee, (the original assignee being dead), and the second assignation being granted with consent of an additional party, the plea of *lis alibi* was repelled, reserving to the defenders to get absolvitor in the original action. The case of *Denovan*, *1st February*, 1845, is not antagonistic to the case of Keltie, but proceeds on the peculiarity of the plea of prescription. In that case a note of suspension and liberation was passed on the ground of *lis alibi*, where the holder of a bill had raised within the years of prescription an action in the Sheriff Court against the acceptor for payment, and after that process had fallen asleep, had beyond the years of prescription extracted the protest, and charged and imprisoned the acceptor thereon.

The pursuer by a minute consented not to operate upon the former decree. On 1st December last, the Sheriff-Substitute decerned against the defender, in terms of the conclusions of the summons, under the condition that the former decree should not be used, nor any diligence on it, and found no expenses due to either party. On appeal, the Sheriff (J. M. Bell) adhered, stating that he concurred substantially in the views of the Sheriff-Substitute, who thereafter refused a motion by the pursuer to find the defender liable in the expenses subsequent to the date of the appeal.

Act. FALCONER. *Alt.* CHRISTIAN.

4TH FEBRUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

CHRISTOPHER SHORROCK and Mandatory *v.* JOHN BLACK & COMPANY.

Principal and Agent—Sale.—*Held, that the seller of goods is entitled, on the bankruptcy of an agent who has purchased from him, without disclosing his principal, to charge the principal, provided the term of payment be not elapsed nor the state of accounts between the agent and principal altered, and that the principal, by prematurely settling with the agent, cannot deprive the seller of his right.*

THE pursuer, Christopher Shorrock, who is a commission agent in Manchester, sued the defenders, John Black & Co., calico printers in Glasgow, for payment of the sum of £73 15s, being the price of 100 pieces of 36-inch calicoes. The defenders stated in their minute of defence that they never bought any goods from the pursuer, and never had any dealings with him. Thereafter the record was closed, and proof having been led, the Sheriff-Substitute pronounced the following Interlocutor:

Having resumed consideration of this process, with the proof and productions, and having heard parties' procurators, Finds, that in the month of September, 1857, the defenders employed Messrs John Black & Son, commission agents in Manchester, to purchase for them in Manchester 10,000 pieces 36-inch calico cloth, at the price of 14s 9d: Finds that, in consequence of said employment, John Black & Son went into the Manchester market, and purchased from the pursuers 2000 pieces at said price, to be delivered from time to time, and to be paid for in cash one month after delivery, and on 13th October, 1857, 100 pieces were delivered by the pursuers to John Black & Son, who immediately sent them to the defenders, who do not deny having received them: Finds that, when the pursuers sold said goods to John Black & Son, they knew that they were purchased by John Black & Son as agents for a third party, but John Black & Son did not inform them, nor did they then know that they were for the defenders, and the invoice of said goods was made out by the pursuers in name of John Black & Son, and the purchase entered in their books as made by said firm: Finds, that after said 100 pieces were delivered by the pursuers, but before the time of payment had arrived, John Black & Son became bankrupt, and the pursuer then applied to them, and learned that the goods were purchased for the defenders, to whom they immediately applied for their price: Finds, that prior to the time the defenders employed John Black & Son to purchase said goods in Manchester, they had accepted a bill for the accommodation of John Black & Son, who at the time of their bankruptcy were considerably in debt to the defenders, but no alteration had taken place in the state of the accounts between these two parties from the time of the sale of said goods till pursuers applied to defenders for their price: Finds, in law, that where a party sells goods to a broker, knowing that he, the broker, is an agent, but in ignorance of the principal for whom he acts, the vendor is entitled, as soon as he discovers the principal to elect, and to charge him in place of the agent, provided the term of payment has not elapsed, nor the state of accounts between the principal and agent been altered; and that the principal, by prematurely settling with his agent, cannot deprive the seller of this right of election: Finds, therefore, that the pursuers are entitled to recover the price of the said 100 pieces of calico cloth from the defenders, and decerns against the defenders in terms of the conclusions of the summons: Finds the pursuers entitled to expenses; allows an account to be given in, and remits to the auditor to tax and report, and decerns.

NOTE.—There is no doubt from the proof of the facts of this case. The pursuers sold the goods referred to in the summons to John Black & Son of Manchester, in ignorance that they were for the defenders, and without inquiring for whom they were purchased; they invoiced them to John Black and Son, and debited them in their books with their price; there is also no doubt that John Black & Son purchased them for defenders, to whom they sent them as soon as received from the pur-

suers, and that John Black & Son failed before the term of payment had arrived. Had they remained solvent, the pursuers would have looked solely to them for payment. The only question, therefore, in this process, is one of law; are the pursuers entitled, on John Black & Son's failure, to go to the defenders for payment? The Sheriff-Substitute thinks they are. In *Smith's Mercantile Law*, page 132, it is laid down on the authority of the cases of Paterson *v.* Gandasakin, 15 East, 62, and Thomson *v.* Davenport, Smith's Leading Cases, 212, "That where a broker purchases in his own name, without disclosing that he has any principal, the broker is, of course, the person to whom the trader gives credit; yet, if the seller afterwards discover the principal, he may elect to abandon the responsibility of the broker, and charge him, and so he may, if the broker, in making the purchase, stated himself to be an agent, but omitted to state the name of his principal, which is afterwards discovered, unless in either of these cases the seller have suffered the time for payment to elapse, and the principal to alter the state of his account with the broker in such a manner that he would be a loser if called on to pay the seller; but if the time for payment have not elapsed, the principal cannot, by prematurely settling with the agent, deprive the seller of his election." The same principles of law are stated in *Bell's Commentaries*, new edition, pages 201 and 202. It is true that the defenders in this case state that they did settle with their agents, John Black & Son; that prior to the purchase, they granted him their acceptance, and that they were greatly in defender's debt at the time of their bankruptcy; but it is not pretended that the state of their accounts was altered in any way between the purchase from the pursuers and the time the pursuers called upon them for payment, and, in accordance with the above authority, the pursuer's right of election cannot be taken away by any such premature settlement.

Against this judgment the defenders appealed, when the Sheriff pronounced the following Interlocutor, adhering:—

Having heard parties' procurators, under the defenders' appeal upon the Interlocutors appealed against, proof adduced, and whole process, adheres to the Interlocutor for the reasons stated by the Sheriff-Substitute, as also those in the following note, and dismisses the appeal.

NOTE.—It was admitted by the defenders at the debate before the Sheriff, that the law, as laid down in the Sheriff-Substitute's Interlocutor, is well founded, viz., that a vendor, who sells goods to an agent in his own name, but discovers afterwards that that agent was buying them, not on his own account, but for a principal, whose name is afterwards disclosed, is entitled, on the agent's bankruptcy, to recur on the discovered and acknowledged principal and real purchaser for their price. But it is said there was here money furnished to the agent by Black & Co. of Glasgow, the principals and real purchasers, and that the whole dealing of the pursuer was with Black & Son, the agents, who were accordingly debited with the price of the goods. There does not appear, however, to be either reason or authority for holding that this creates a specialty which releases the principals of their responsibility to the sellers, especially where, as in this case, the principals have in fact got the goods. An usage of trade is also now alleged at the eleventh hour by the defenders, though none such is averred on record. It does not, however, seem competent to plead any such local usage, in opposition to a fixed and well-known rule of law, least of all where it is not alleged before the record is closed. The application to the principal here for payment of the price, on the bankruptcy of the agent, was made within the period of credit of the goods, the price of which is sued for. And it is proved that the pursuers *knew* that Black & Sons, in making the purchase, *were buying as agents*, and always did so, though the names of the principals were not disclosed till after the bankruptcy of the agents. No *private* arrangement between the principal and agent as to the mode of settling their accounts *inter se*, can be effectual to deprive the vendor of his remedy and right to fall back upon the principal, when disclosed, if the demand on the principal is made *tempestive*.

Act. J. NAISMITH. *Alt.* A. MACGEORGE.

7TH FEBRUARY, 1859.

SHERIFF COURT, KINCARDINESHIRE.

(MR SHERIFF ROBERTSON.)

THE NORTHERN AGRICULTURAL COMPANY *v.* JOHN M'BAIN.

Sheriff Court Act—Revival of Action.—*Held, that the 15th section of the Statute does not apply to an unopposed process of poinding.*

AN execution of poinding was reported to the Sheriff Clerk, on 11th May, 1858, and on 10th November following, the poinders moved that the case should be revived. No appearance was made by the debtor. The Sheriff-Substitute refused the motion, without prejudice to the poinders taking all competent steps under their diligence of poinding, and added the following:—

NOTE.—The Sheriff-Substitute considers that the 15th section of the statute of 1853 does not apply to unopposed poindings which have been simply reported, without any warrant to roup having been granted. Poindings in that state cannot properly be considered as "causes," in the sense of said section. They are, more properly speaking, mere diligences or executorials for carrying into effect a final decree in a cause already out of Court. It may be that in the case of competing poindings, or of competing claims in a poinding, where a record may be requisite, reviving is necessary, and the Sheriff-Substitute reserves his opinion on such questions until they arise for decision.

Act. CHRISTIAN. *Alt.* ABSENT.

15TH FEBRUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

JOHN WYPER *v.* JOHN and WILLIAM HARVEY & Co., and ALEXANDER WYLIE (Risk's Trustee.)

Retention—Arrestment—Poinding—Mercantile Amendment Act—Clause—Construction.—*Where, under the provisions of Sec. 3 of the Mercantile Amendment Act, a seller of goods attaches them, while in his own possession, by arrestment or poinding, prior to the date of intimation of a re-sale of the goods to a subsequent purchaser.—Held that an arrestment or poinding so used is entitled only to the same limited operation and effect, in a competition, as any arrestment or poinding used by any other creditor of the original vendee; and therefore does not interfere with the right of the sub-vendee to demand delivery under the provisions of Sec. 2 of said Act.*

RISK bought from the defenders, Harvey & Co., in March, 1857, and subsequently paid, among others, six puncheons of whisky, which, remaining with them, were entered in their books as held for him. On the 26th March, 1857, Risk re-sold them to the pursuer Wyper, and was paid the price by him on 15th April following. The pursuer got delivery of one of the puncheons, but the rest still remained in Harvey & Co.'s possession. Risk absconded, considerably indebted to Harvey & Co. on other grounds, and his estates were sequestrated on 6th July, 1858. Immediately after the sequestration, Harvey & Co. raised an action against Risk for £1113 11s 6d of moneys collected on their account and not paid over, and used an arrestment in their own hands. Under this arrestment, Harvey & Co. claimed the right to retain the five puncheons; and the pursuer, who disputes that claim, raised the present action, concluding for delivery of the whisky as his absolute property, in virtue of the sale before-mentioned—which sale he averred in his

petition had been intimated to Harvey & Co., prior to the date of Risk's sequestration.

The Sheriff-Substitute, after proof had been led, having heard parties' procurators, pronounced the following judgment:—

Finds, that the bankrupt, John Risk, bought from the defenders, John and William Harvey & Co., in March, 1857, and subsequently paid certain puncheons of whisky, including the six puncheons referred to in the petition, as instructed by the productions, Nos. 10, 11, and 12: Finds that Risk did not get delivery of said six puncheons, but they were entered in the books of said defenders as held by them for him: Finds, that on the 21st March, 1857, Risk re-sold the said six puncheons to the pursuer, and was paid the price by him on 15th April thereafter, conform to discharged account, No. 4: Finds, that the whisky still remained in the possession of the said defenders, but the pursuer got delivery from them of one of the six puncheons in May, 1858: Finds, that the estates of the said John Risk were sequestrated on the 6th July, 1858, and the pursuer has failed to prove the averment remitted to probation by the Interlocutor of 15th October last, that prior to the date of the sequestration he (the pursuer) had intimated to the said defenders the sale to him by Risk of the said six puncheons, or at least of the five puncheons now in question: Finds, that on the 9th July, 1858, being the day after Risk's sequestration, the said defenders having raised an action against Risk for a balance of £1113 11s 6d of monies collected on their account, and not paid over, arrested on the dependence of said action in their own hands, conform to execution of arrestment No. 7/2—"All goods, gear, debts, sums of money, or any other effects whatever lying in their hands, custody, and keeping, pertaining, or in any manner of way belonging to the said John Risk," and on the 9th October, 1858, the said defenders made the following entry in their warehouse book, conform to excerpt No. 9, opposite the entry therein of the said five puncheons: "These five puncheons arrested in our hands, and to be retained by us as a small indemnification for the loss we have sustained by John Risk's absconding with funds amounting to £1204 4s 9d, belonging to us. We therefore transfer them to our own stock:" Finds, that the defender Wylie, as trustee in Risk's sequestration, makes no claim to the whisky, and the question raised in this action is whether, in the above circumstances, the pursuer, as subvendee of said five puncheons, is entitled to delivery of the same from the defenders, or whether they are entitled to retain the same as against the said balance due to them by Risk, as constituted by the Extract Registered Decree No. 7/3: Finds, that the answer to this question mainly depends upon the interpretation to be put on the first, second, and third sections of the Mercantile Law Amendment Act (Scotland): Finds, that prior to the passing of said Act, it was settled by a series of decisions, and particularly by the cases of *Melrose*, March 7, 1851, and *M'Naughton*, July 15, 1852, that where there had been no delivery of goods sold and paid for, and where the purchaser had subsequently re-sold and been paid, the original seller was nevertheless entitled, on the bankruptcy of the purchaser from him, to retain the goods as against a balance arising on subsequent transactions between him and said purchaser; and this in preference to the claim of the subvendee: Finds, that where there has been no sub-sale, there does not appear to be any provision in the said Mercantile Amendment Act which interferes with this right of retention in the seller; but Finds, that by section 2 of the Mercantile Law Amendment Act, it is expressly enacted that, where there has been a second sale, the original seller, if the price has been paid to him, and the conditions of the contract implemented, is not entitled to a right of retention as against the second purchaser: Finds that, although under the provisions of section 3 of said Act, any seller of goods may attach them while in his own hands or possession by arrestment or poinding at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, an arrestment or poinding so used is entitled only to the same limited operation and effect in a competition as any arrestment or poinding by a third party; that is, by any other creditor of the original purchaser, and therefore does not in any way interfere with the absolute right given to the sub-vendee by sec. 2 to demand delivery, and this *a fortiori* when the seller has not used arrestment till after the sequestration of the purchaser from him: Therefore, and under reference to the annexed note, finds that the defenders, J. & W. Harvey & Co., have no longer any right, at common law, to retain the five puncheons, for which they have been paid, against the pursuer, the second purchaser, who has also paid for them, and that the arrestment used by them on the 9th July, 1858, though used before the re-sale was intimated to them, was not effective to cut down the pursuer's right to obtain delivery of said puncheons: Repels the defences, and decerns against the said John and William Harvey & Co., in terms of the prayer of the petition: Finds them also liable in expenses, of which allows an account to be given in, and remits the same to the auditor to tax and report; and, as regards the defender, Wylie, in respect there are no substantive conclusions against him, he being only called for his interest, and no expenses asked against him, except in the event of his offering opposition, which he has not done, dismisses the petition.

NOTE.—The first section of the Mercantile Law Amendment Act provides that goods sold but not delivered shall no longer be attachable by creditors of the seller, "to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same." It does not necessarily follow from this enactment that the seller's right of retention for a general balance against a purchaser who becomes bankrupt, is cut off. On the contrary, if there be no re-sale by the purchaser, such right seems to continue. But by the second section of the Act, if there be a second purchaser or sub-vendee, this right of retention in the original seller is expressly taken away. The words are explicit—"Where a purchaser of goods who has not obtained delivery thereof shall, after the passing of this Act, sell the same, the purchaser from him, or any other subsequent purchaser, shall be entitled to demand that delivery of the said goods shall be made to him, and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery on payment of the price of such goods, or performance of the obligation of the contract of sale, *and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser*; provided always that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, *except as between him and such subsequent purchaser*, or any such right of retention arising from express contract with the original purchaser." It is thus clear that when a re-sale has taken place, and when the original seller has been paid the price charged by him, and had the other conditions of sale implemented, the right of a *bona fide* sub-vendee to demand delivery cannot be affected by any other transactions between the seller and first purchaser. The reservation of the seller's right of retention, "except as between him and such subsequent purchaser," is favourable to the view that the right continues as before, where there is no subsequent purchase; but no words could make it plainer than those used in this section, that the seller cannot, in any question with a subsequent purchaser, retain the goods for any separate debt or obligation due by the original purchaser. The only question remaining, therefore, is, whether the terms of the third section enable the original seller to place himself in a more favourable position as regards a sub-vendee, and to get out of his obligation to deliver to him. The words of the third section are—"Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party." Under this section, if an attachment be attempted by the seller *after* he has received intimation of a re-sale, such attachment is simply inept. If it be made before intimation, it is good to this limited extent, that the same effect will be allowed to it in a competition as an arrestment or poinding by a third party. Now, it seems clear that it would be a good answer to an arrestment or poinding by a third party, that is, by any other creditor of the original purchaser, that before it was used there had been a *bona fide* sale of the goods to a second purchaser, who had acquired,

under section 2 of the Act, the absolute right to demand delivery, a right which the said section declares shall not be defeated by the existence of any separate debt of the original purchaser, and therefore cannot be defeated by diligence done with a view to make the goods so re-sold available for payment of such debt. If the second sale could be shown to have been collusive or fictitious, the case would be different; but if a real transaction, the whole purport of the Act is to secure its validity, and in this respect to assimilate the law of Scotland with that of England. It was unquestionably a hardship, as our law formerly stood, that although the original seller had been paid his own price for the goods, and although the sub-vendee had paid the price at which they were charged to him, yet when he came to demand delivery he could be met by a plea on the part of the vendee that he was entitled to retain them against a separate debt, it might be consequently contracted of the first vendee. Our doctrine, that there was no *jus in re* until delivery had taken place, necessarily made this a good plea; but the provisions of the first and second sections of the Mercantile Law Amendment Act have altered this, and make the plea no longer available. But, further, it is not to be lost sight of that there is this specialty in the present case, that the arrestment founded on by J. & W. Harvey & Co. was not used till after the sequestration of the purchaser from them. No diligence used after sequestration can affect the rights of parties as they stood at the date of sequestration. The sequestration did not carry to Risk's trustee the right to demand delivery of goods which Risk had previously sold to the pursuer and been paid for. If that right was already out of the person of Risk, it could not be arrested by the Messrs Harvey in their own favour as against him. If it was not out of Risk's person, then it must have passed to his trustee, and an arrestment against Risk attached nothing after his sequestration.

The defenders, Harvey & Co., having appealed—

Sir Archibald Alison adhered to Sheriff Bell's Interlocutor in so far as the findings in point of fact were concerned, and in so far as it repels the defences, and decerned against the defenders, Harvey & Co., as craved, with expenses. The following is his Lordship's Note:—

The late Mercantile Law Amendment Act has made so great and fundamental a change on the law of Scotland in regard to the transfer of moveables, that all questions regarding it are both difficult of decision and of great importance in point of precedent. The difficulty in the present case arises from the seeming contradiction of the third section of the Act with the first two sections. The well-known object of the Act was to assimilate the law of Scotland with that of England in regard to to the transfer of moveable goods, and with that view to validate the re-sale of goods sold to a second purchaser, without their ever having been delivered to the first buyer. The first section of the Act declares, that "goods sold but not delivered *shall no longer be attachable by creditors of the seller*, to the effect of preventing the purchaser, or others in his right, from *enforcing delivery of the same;*" and by the second section it is declared, "that the seller, on intimation being made to him of such subsequent sale, *shall be bound to make such delivery on payment of the price of such goods, or performance of the obligations or conditions of such sale*, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser, provided always that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, *except as between him and such subsequent purchaser*, or any such right of retention arising from express contract with the original purchaser." If the matter had rested here there could have been no doubt whatever of the present question. The second purchaser's right is by the Act declared absolute, though the original purchaser had got no delivery, and indefeasible against any right of retention by the first purchaser or the diligence of his creditors. But then the difficulty of the case arises here: The third section of the Act declares that, "Any seller of goods may attach the same while in his own hands or possession by arrestment or poinding, *at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller*, and such arrestment or poinding shall have the same operation and effect *in a competition* or otherwise, as an arrestment or poinding by a third party." Passing by the anomaly here first introduced, of an arrestment or poinding of goods by a party in his own hands, which is a novelty in the law of Scotland, it certainly does look very much as if the Legislature intended to make the intimation of the re-sale to the original seller the *point of demarcation between the period* when the arrestment or poinding of the goods in the seller's own hands shall be deemed effectual, and when it shall not. It is expressly said that such arrestment or poinding shall, in a competition, have the same effect as an arrestment or poinding by a third party. This clearly shows that the Act contemplated a competition such as here arises. But supposing such a competition to have arisen, how is any preference awarded to such arrester or poinder founded on debts due by the original purchaser to be reconciled with the *absolute right* which, under the first and second sections of the Act, the second purchaser is declared to have acquired to the goods *irrespective of delivery, or any intimation whatever*. The Sheriff does not see how this difficulty is to be surmounted; and if he was driven to decide the matter just now, he fairly confesses he does not know how he would do so. His view of the case, however, is that there is a specialty here which is sufficient to decide the case in the pursuer's favour; and that is, that the arrestment founded on by Messrs J. & W. Harvey & Co., the defenders, was not used till *after* the date of the sequestration of the estates of Risk, the original purchaser of the whisky from them. But no diligence used after sequestration can affect the rights of parties as they stood at its date. The right to demand delivery had already been taken out of Risk's person, and transferred to the pursuer *before* the arrestment, and therefore the goods could not be arrested by the defenders, in their own hands, effectually, as against him. This consideration appears to the Sheriff sufficient to sustain the Interlocutor under review in the pursuer's favour, without deciding the other and more difficult question, which, he fairly confesses, appears to present a difficulty almost inextricable, as the different sections of the Act appear to be contradictory of each other.

Act. T. G. WRIGHT. *Alt.* ALLARDICE.

17th FEBRUARY, 1859.

SHERIFF SMALL DEBT COURT, AYR.

(MR SHERIFF ROBISON.)

WATSON *v.* OLIVER.

Turnpike Act—Exemption from Toll Dues—*Held, that the exemption of the 37th sect. of the general Turnpike Act applied to traffic between detached portions of land leased from the same landlord, although under different writings.*

THE pursuer, who is tacksman of the Kilwinning Bridge Toll Bar, and Check Bar thereto attached, sued the defender, Oliver, for toll-dues in respect of traffic passing through these bars between the defender's lands of Woodside and two fields detached therefrom, called Glebe Park and Corsehill Park. The facts, as stated at the hearing of the case, were as follows:—The Earl of Eglinton let the lands of Woodside to the defender on a nineteen years' lease, Corsehill Park being included therein. Glebe Park was not then out of lease; but, when this happened, it was let to the defender for a period corresponding to the unexpired term of his lease of the other lands. The toll-bar and check-bar are so situated that the traffic between the farm-steading of Woodside and the two parks above-named passes through them. The defence stated was, (1.) That the Corsehill Park being included in the lease of Woodside, and the Glebe Park being held from the same landlord, in virtue of a missive which referred to the obligations of that lease, under which the whole lands were wrought, while the term of ish from the whole lands was the same, they must be held to be all included in one lease. (2.) That all

lands included in the same lease, however far they may be separated, must be held to be the same farm, and that the exemption contained in the 4th clause of the 37th section of the Act thus applied to the traffic in question.

In answer, it was contended (1) that the Corsehill Park, although included in the lease, was not a portion of the farm of Woodside, being detached therefrom by intervening lands, and distant therefrom upwards of a mile. (2) That the Glebe Park, being held under separate missive, and being in like manner detached and distant from Woodside upwards of half a mile, formed no portion of that farm; and (3) that neither of the possessions being part of the farm of Woodside, the exemption founded on, which referred to traffic from one part of a farm to another part thereof, did not apply.

The Sheriff-Substitute decided that the lands were virtually held under the same lease; and, in accordance with a decision lately pronounced by him, after consultation with Sheriff Christison, must be considered as one farm. In these circumstances, the exemption founded on clearly applied. He therefore assoilzied the defender.

Act. WM. MACKORIE. *Alt.* J. DICKIE.

18TH FEBRUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

ALLAN CUTHBERTSON, Treasurer of the Glasgow Riding School Tontine Society, *v.* JOHN GORDON.

Tontine—Partnership—Society—Shareholder—Call—Liability.—*A Tontine Society having sold its property to meet debts, and thereafter made further calls upon the shareholders—Held that a shareholder, whose nominee had survived the sale of the Society's assets, but died before the call was made, is liable for a proportion of the loss incurred effeiring to such nominee's interest in the concern.*

THE Glasgow Riding School Tontine Society was instituted in 1838. The capital subscribed amounted to £2,325, being ninety-three shares of £25 each. The Society, before the beginning of the year 1847, had not only lost the whole of this capital, but had also incurred a large amount of debt. In May, 1850, the property belonging to the Society, including the building occupied as the Riding School, was sold, and the price paid over to the creditors of the Society; but there being still a deficiency, the committee of management issued a call-letter in January, 1852, for the sum of £8 per share, and in August, 1857, issued another call-letter for the sum of £9 per share.

The defender was a member of this Society, and held four shares upon the lives of three nominees. One of his nominees died in 1844, and another in 1848, and there was only one of them in life, (being the one upon whose life two shares were held,) when the call of £8 per share was made in 1852. The defender agreed to pay the call of £8 on these two shares, but as his nominees for the other shares were dead, he refused to pay the calls on them.

When the second call of £9 per share was made in August, 1857, the defender refused to pay the same, on the ground that his nominees were all dead previous to the same being made, his last surviving nominee having died in August, 1855. This action was accordingly brought by the Treasurer to the Society, concluding for the sum of £51, being the defender's proportion of loss on three shares; but was, in the condescendence, restricted to £29 18s 10d as the proportion of loss on two shares. The shares were held on the life of the nominee, who died in August, 1855; and the pursuer maintained that the interest of the defender in the Society did not cease till the term of Martinmas, by which time the whole losses had been incurred. The defender pled that the whole loss must be borne by those who had still an interest in the Society, when its amount was declared.

The Record having been closed on condescendence and answers, the Sheriff-Substitute pronounced the following Interlocutor:—

Having again heard parties' procurators, and reviewed the whole process: Finds that by the constitution and regulations of the Glasgow Riding School Tontine Society, of which regulations No. 18 is a printed copy, every subscriber for one or more shares was entitled to name a person not under the age of 70 years, upon whose life the interest of the subscriber for such share or shares was to depend; and by the third regulation, it is proved that, "During the life of each person so named, the subscriber, by whom the life has been nominated, shall be entitled to a portion of the free yearly income of the Society's property, corresponding to the share or shares held upon such person's life: declaring always that upon the death of any of the nominees, the interest of the subscriber depending upon such life shall be considered at an end from and after the 11th day of November preceding the death of such nominee:" Finds that the Society was instituted in 1838, but the undertaking turned out unprofitable, and the individual shareholders have, in consequence, been subjected to personal loss: Finds that in April, 1850, it was resolved that the heritable property, belonging the Society, should be brought to a sale, in conformity with the powers given by the constitution, and the said property was accordingly sold on the 1st May, 1850, at the price of £1,300: Finds that the sum thus realised was not sufficient to pay the debt due by the Society, there being, on the contrary, a balance due to the Western Bank, after crediting said sum, as at 28th May, 1851, of £461 19s 10d, as is instructed by the bank pass-book, No. 6/2: Finds that interest having run on this sum, the debt was increased at 28th May, 1858, to £623 13s 10d, to which falls to be added the further sum of £50, as the expenses of winding up, law charges, etc., making the Society's total debt £673 13s 10d: Finds that the defender was a shareholder in said Society to the extent of four shares; but his nominees for two of these shares died respectively in July, 1844, and August, 1848, whilst the nominee for the other two shares did not die till the 12th August, 1855, so that the defender's interest to the extent of said two shares, was not at an end till 11th November, 1854: Finds that, although the Society was in debt in July, 1844, and August, 1848, when the defender's other nominees died, the pursuer has, in article 23 of his condescendence, restricted the claim against the defender to the sum of £29 18s 10d, instead of the sum of £51 concluded for in the summons, the said restricted sum being the proportion of the said debt of £673 13s 11d, effeiring to the two shares held by the defender till August, 1855: Finds that it is maintained by the defender that, as he offered by his agent's letter of 6th October, 1852, No. 6/11, to a pay a call which had then been made of £8 upon the said two shares, and that his nominee for them died before any further call was intimated, he is not liable in payment of more than the sum of £16; but Finds that the shareholders having unanimously resolved to sell, and having actually sold the property of the Society in May, 1850, said Society was then virtually brought to a conclusion, and only existed thereafter to the effect of winding up its affairs and paying its debts: Finds that the call of £8 per share, which was not stated as a final call, having turned out inadequate, the shareholders, to whom a liability admittedly attached in May, 1850, remain liable for such increased call as may be necessary to liquidate the whole existing debt, the more especially considering that said debt is substantially the same now as it was then, with the addition of a certain amount of interest, which has occurred in consequence of the delay that has taken place. Therefore repels the defences, and in respect it is not denied that the restricted sum of £29 18s 10d is the sum that the defender is liable to contribute towards payment of the Society's debt, in respect of the said two shares held by him in May, 1850, and down till August, 1855, in the proportion that these two shares bear to the whole shares held by solvent shareholders; decerns against said defender for said restricted sum of £29 18s 10d: Finds the defender also liable in expenses, subject to some modification in respect of the re-

striction made *pendente lite* on the sum originally concluded for; allows an account of said expenses to be given in, and remits the same to the auditor to tax and report.

NOTE.—A remit to an accountant was suggested by the agent for the defender, but such a course, with the expense it would involve, seemed extremely inexpedient, considering that the sum really in dispute between the parties is now only £13 18s 9d, and that the productions in process leave no doubt as to the precise state of the Society's debt, and apparently as little that the contribution required from the defender as effeiring to the two shares last held by him is not under the restricted sum decerned for. In the view of the case which presents itself to the Sheriff-Substitute, the defender may consider himself favourably dealt with in being absolved from all claim in respect of his other two shares.

The defender appealed against this Interlocutor, and the Sheriff, on reviewing the case on reclaiming petition and answers, adhered to the decision of the Sheriff-Substitute, with the variation that the pursuer's expenses were modified to one-half of the taxed amount. The following is the Note appended to his Lordship's Interlocutor:—

The Sheriff has perused with pleasure, and given every attention in his power to the able argument for the defender in the petition drawn by Mr Graham; but he does not see any solid ground for differing from the Sheriff-Substitute's view of the case. A remit to an accountant would in any view be highly inexpedient, as the material elements for the accounting are sufficiently instructed by the admissions in process, and the question at issue between the parties is rather a point of law emerging upon ascertained facts than one of fact requiring additional investigation. The matter at issue between the parties is correctly stated by the defender in page 10 of his reclaiming petition, where it is said to be whether the defender, who is admitted to have been a shareholder in the Riding School Tontine, is liable for a share of the loss effeiring to his interest in the concern, while he remained a partner by his nominees or the survivor of them continuing in life, or whether he is only liable for such losses as were actually declared during the lifetime of these nominees. The Sheriff cannot doubt that the former view, which is the one contended for by the pursuers, is the correct legal view of this point. What constitutes the liability of a shareholder is, not the circumstance of calls having been made while he was a holder of the shares, but the fact of debts having been contracted during that period. The obligation to bear a proportional part of that debt, *inhaerit opibus* of the shareholder, and that equally whether the call was made before or after he had ceased to be a partner. From the date of his withdrawing from the concern, or his interest in it ceasing, he is liable for no farther losses, whether incurred only, or made the subject of specific calls. But such liabilities as were incurred before that date must be made good by him *pro rata*, whether they were demanded during his being a partner in the concern or not.

Expenses are modified, because the sum decerned for is little more than half of what was originally demanded, and very possibly, if that sum only had been at first asked, the litigation might have been entirely avoided.

Act. T. G. WRIGHT. *Alt.* A. L. GRAHAM.

18TH FEBRUARY, 1859.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

SEQUESTRATION OF THE ESTATES OF A.B.

Sequestration—Deed of Arrangement—Sist—Objections—Majority.—*Where two creditors whose respective claims amounted to upwards of £20 voted in favour of, and two creditors whose respective claims amounted to upwards of £20, voted against a resolution to wind up an Estate by a Deed of Arrangement.—Held,* (1) *That the resolution had not been carried by a majority in number as required by the Act;* (2) *That in the circumstances "it was not reasonable" to sist sequestration; and* (3) *That in order to entitle a creditor to object, a note of objections must be lodged within four days from the meeting.*

AT the meeting for the election of a trustee on the sequestrated estates of A. B., only four creditors attended, whose claims amounted to upwards of £20 each. On a resolution to wind up the estate by deed of arrangement, two of these voted for, and two against the proposal.

An application having been made to the Sheriff to sist the sequestration, the creditors who voted against the resolution, but who had not lodged a note of objection, proposed to object to the votes in support of it, and maintained—

(1) That in the present matter notes of objections were not required by the statute; and

(2) That the objectors were prevented from lodging their notes of objections, within five days from the meeting, by reason of the sequestration proceedings being kept up to the expiration of that term.

The Sheriff, in respect that no note of objections had been lodged as required by sec. 70 of the Act, refused to hear the same.

On the question whether the sequestration should be sisted, it was objected that the resolution to wind up by deed of arrangement had not been carried by a legal majority, and further, that in the circumstances the same was not reasonable.

The Sheriff, after hearing parties, found that there voted for the resolution to wind up under a deed of arrangement, two creditors, who each claim for debts of twenty pounds and upwards, and there voted against said resolution, two creditors claiming for debts of twenty pounds and upwards each; and that, therefore, the resolution was not carried by a majority in number entitled to vote, and to be counted in numbers; and further, that the resolution was not of the nature of winding up an estate under deed of arrangement; he therefore refused to sist the proceedings in the sequestration, and found that the meeting for the election of a Trustee had miscarried.

The Sheriff-Substitute added the following Note to his Interlocutor:—

NOTE.—Although the 60th section of the Sequestration Act provides for notes of objection only in cases of competition or objection, yet it is clear that objections to notes in any matter can be received in no other way. There may be a hardship in a party stating objections, who has not access to the sequestration proceedings, which ought, by the same section, "to be *forthwith* reported to the Sheriff," and the vouchers transmitted to the Sheriff Clerk; nevertheless, there is no power in the Court to prorogate the term for lodging objections, and in practice no difficulty has been experienced in framing notes of objections, on the inspection of the vouchers seen at the meeting.

It is obvious, that neither party had observed that, under the 101st section of the statute, no creditor whose claim is less than twenty pounds can be reckoned in *number*. In this way the qualified creditors were equally divided, and the resolution was not carried by a majority in number.

It is quite apparent that a deed of arrangement does not apply to the matter resolved on. The bankrupt simply makes an offer of composition, and which must be dealt with according to the relative section of the Act. He had no right to qualify that offer by introducing a condition for a deed of arrangement. But in point of fact, there is no arrangement as "*to winding up the estate.*" A deed of arrangement is a recent introduction into Scotland from the English Bankrupt Law. It has reference to winding up large estates which may be embarrassed and yet not insolvent, and where full payment may be ultimately expected, but which desirable result might be defeated by placing the estate into the hands of a judicial trustee, subject to all the fetters of the sequestration process. Such was the recent highly honourable case of the Messrs Dennistouns in Glasgow. It may be that a composition may form *part* of a deed of arrangement, but in all such cases the winding up of the estate, under some other control

than a judicial trustee, is the object. In the present case the bankrupt has not been long in business; his whole assets, according to his statement, are £66 10s, and his debts £618 17s 7d. It is not easy to perceive where is the estate to be wound up, or what benefit the creditors can possibly reap by such arrangement.

If the present scheme were to be approved of, there would be no necessity for any offer of composition being carried through under the statute. The provisions of the statute are anxiously particular, and cautious as to composition discharges. The offer, as here, may be made at the meeting for electing a trustee, but then it can only be *entertained* by a majority of the creditors, and a second meeting must be convened after the bankrupt has been publicly and judicially examined. Of this adjourned meeting not only must there be Gazette notice, but individual notices to all the creditors claiming on the estate, or mentioned in the bankrupt's state of affairs. After the offer has received the sanction of the second meeting, and security has been found, the whole proceedings must be judicially approved of after any creditor has an opportunity of being heard. Only after the bankrupt's oath or declaration, can he obtain his discharge upon the composition. During all this time the estate is under the management of the trustee and commissioners, subject to all the safeguards of the statute. Contrast this with the perfunctory mode in which the present composition discharge is sought to be carried through, upon a vote by two creditors, one, and by far the greatest of whom, is the bankrupt's mother. The sequestration is sought to be sisted for two months, during which, whilst the bankrupt, it is supposed, is to have the benefit of personal protection, the estate is to be allowed to manage itself, whilst the hands of the creditors are tied up from all measures for their own protection. Such a procedure could never have been contemplated by any legislative body, pretending to do equal justice between a bankrupt and his creditors.

The agent for the objectors pled that, the resolution of the meeting was inoperative because it had not been resolved, under the 35th section of the statute, to apply to the Sheriff for a sist. There is some weight in this objection, but the case is decided upon more weighty grounds. It is clear under the 36th section that the Sheriff has full power to consider whether the application for the sist is "*reasonable.*" He is not required to wait until the deed of arrangement is presented for approval under the 38th section, by which time the estate proposed to be wound up may be irrecoverably lost.

18TH FEBRUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF STRATHERN.)

PETER BEATTIE *v.* WILLIAM ALEXANDER AND OTHERS.

Interdict—Poinding—Inspector of Poor—Liability.—*Held, that although, under the Poor Law Act, the Inspector of Poor is to sue and be sued for Parochial Debts, a decree against an Inspector, as such, cannot be enforced against his personal property.*

THIS was an application for interdict at the instance of Beattie, who is Inspector of Poor for the Parish of Barony, but who designs himself in the petition as "Peter Beattie, residing at Rosebank Terrace, Glasgow." In his petition he states, that on 2d August last, Adam Dickson, Sheriff Officer, on the instructions of the respondent, executed a poinding of several effects belonging to the petitioner, and situated in his private dwelling-house; that this poinding proceeded upon a decree from the Sheriff Court Books of Lanarkshire, bearing the petitioner "Peter Beattie, Inspector of Poor for the Parish of Barony," to have been found liable to the respondent, Alexander, in the sum of £6 16s 8½d. That the decree referred to, was obtained in a Small Debt action of forthcoming at the instance of the respondent, against Robert Brown, Inspector of the Poor at Kirkintilloch, as common debtor, and the petitioner (Beattie) as Inspector of Poor of the Barony, arrestee: that at the date of the arrestments on which the decree proceeded, the petitioner, *as an individual*, had no funds or effects in his hands belonging to Brown, and that the petitioner's personal property is not attachable for parochial debts.

To this petition the respondents stated in defence, that the decree against the defender, although in the character of Inspector, entitled them to poind his personal property for payment; that they had no other mode of enforcing the decree, and that if the petitioner paid the amount, the Parish was bound under the Act to reimburse him. And further, that this application for interdict was an attempt to review or recall a small debt decree, and was therefore incompetent.

The facts as stated in the petition having been admitted, the Sheriff-Substitute heard parties, and thereafter pronounced the following judgment:—

The Sheriff-Substitute having resumed consideration of this process, under the remit to him contained in the interlocutor of 14th December last: Finds in terms of that interlocutor, that the defender admits that the decree of forthcoming at his instance against the pursuer, (the arrestee called in action) was obtained against the pursuer in his character of Inspector of the Poor of the Barony Parish of Glasgow, and not *privato nomine:* Finds, in point of law, that although by force of statute, an inspector of poor is the officer in whose name actions must be prosecuted, and defended for the parish which he represents, he is neither answerable in his own person nor in his personal goods for the result of the actions in which for the parish he may be involved: Finds, that on this principle, the poinding of the pursuer's effects under the said decree is inept, and further procedure against said effects ought to be interdicted: Therefore repels the defences, and grants interdict as craved: Finds the defender liable to the pursuer in expenses, etc.

NOTE.—The decree under which the proceedings challenged have been taken, has not been produced, but being admitted to be a decree obtained in the Small Debt Court, its terms are assumed to be in the statutory form, and *ex facie* to contain personal pains in case of non-payment against the present pursuer, the defender in that decree. But the form of the decree will not change the admitted nature of the debt, nor create personal liability where the defender has been called as a public officer (and in the action so designed), simply in his representative character. Indeed, the Poor Law Act expressly enacts, that when summoned, he shall be bound to appear, "and answer on behalf of the parochial board," (sec. 59.) An inspector of the poor is the servant of the board—he is trustee for the administration of the funds in relieving the poor who may be entrusted to him, but as inspector, he neither imposes nor levies the assessment, nor is he custodier of the funds of the board. Like trustees, and other representative officers, acting in the discharge of their duties, he incurs no personal liability whatever; and it would be a dangerous, and perhaps ruinous consequence to such officers, if any different principle were suffered to prevail. An inspector of the poor is unquestionably answerable, both in person and goods, for many things occurring in the discharge of the duties of his office; for example, for neglect of duty he may be punished criminally, or *for excess of duty he may personally have to answer in damages*, but only in such cases arising from *culpa*, and beyond the limits of his office. Expenses have been awarded, because the principle of exemption from personal liability, is one too certainly fixed, and sufficiently known to have led the defender into an error in distinguishing between the personal furniture of the pursuer, as inspector, and *the funds or effects of the parochial board represented by him.*

On appeal, the Sheriff (Sir A. Alison) adhered, adding the following Note:—

The point raised under the present action, though relating to a sum of trifling pecuniary amount, is of great importance as a matter of precedent. The question is not whether this Court, under the present application, can review the decree which was pronounced in the Small Debt Court against the pursuer as Inspector of the Poor; but whether, holding that decree to be good and unchallengeable, the defender is entitled

to poind the pursuer's *private* property to enforce payment of the contents of the decree, when that debt is admitted to be one not due by the pursuer *privato nomine*, but *qua* Inspector of the Poor.

In dealing with this question it must be recollected that although by the 57th section of the Poor Law Act, it is declared that the Inspector of the Poor is to institute and be the proper defender in all actions at the instance of or against the Parish of which he is Inspector, yet the Parochial Board is declared to have the entire direction and control over such actions. This being so, and it being admitted that the decree here passed against the present pursuer in his official character as Inspector, to permit his *private effects* to be poinded and seized for the debts of the Parochial Board, would be the same anomaly as to allow the effects of B to be poinded for a debt of A. The decree must be made effectual by a poinding of the effects of the Parochial Board if they have anything to poind, or by an arrestment of their funds in bank or elsewhere, followed by a forthcoming. It is true, if they have no poindable effects, and no funds in bank, which is often the case, the debt may for a time be irrecoverable from the Board, but that is no more than the case in many other instances where public officers, such as Commissioners of Supply, or the like, are defenders in actions on account of funds under their control, and the only effect of the decree is to authorise arrestment or poinding of the public funds or effects under their management. The case of *trustees* who are *personally* liable till the trust funds under their management are exhausted, even under decrees against them *qua* trustees, is very different from that of a public officer, such as an Inspector of Poor of a Pariah, for trustees are vested *sub modo* with the trust funds; but the case is widely different with the Inspector of Poor, who is not even formally entrusted with the parochial funds, but is merely declared by the statute to be the officer who is to sue and be sued, in all actions connected with the parish which he represents.

Act. ROBERT M'LUCKIE. *Alt.* WM. SPEIRS.

24TH FEBRUARY, 1859.

SHERIFF COURT, DUMFRIES.

(MR SHERIFF TROTTER)

JOHN BELL *v.* JAMES JOHNSTONE.

Master and Servant—Disobedience and Insubordination.—*Held, that certain expressions made use of by a Servant, when complaining to his Master of the nature and insufficiency of his diet, did not amount to disobedience, so as to justify the Master in summarily dismissing the Servant.*

IN this action, the pursuer, a shepherd, sued his master the defender, for £30 in name of damages, for having dismissed him (the pursuer) from his situation on the 24th of August last, on insufficient grounds, he having been engaged for twelve months, from Whitsunday, 1858, to Whitsunday, 1859; or otherwise, for payment of £16 of wages, £10 of board wages, and £2 5s as the value of two sheep stipulated as part of the pursuer's wages.

The allegations on the part of the pursuer were;—that on the day condescended upon, he and other servants were engaged in mowing the defender's hay crop, and had supplied to them each, as dinner, the third of a quartern loaf and a quart bottle of milk; that being dissatisfied with such diet, the pursuer remonstrated with the defender, and asked to have butcher meat in its place; that the defender refused to comply with this request, and dismissed the pursuer on the spot, declining to pay him his wages; and that his health had been seriously impaired by the diet referred to, as certified by his medical attendant.

In answer—the defender denied that he had dismissed the pursuer from his service, but that, on the contrary, he had desired him to return to his work; that, even supposing he had adopted such a measure, he was fully justified by the pursuer's disobedience and insolence. The defender adduced evidence to prove that the diet objected to by the pursuer was sufficient both in quantity and quality, and was usual in the district at that season of the year.

Proofs having been led, and parties' procurators heard, the Sheriff-Substitute sustained the plea of justification, and assoilzied the defender with expenses.

His Lordship's Interlocutor and Note are as follows:—

Having heard parties' procurators on the proofs, and resumed consideration thereof, and whole process: Finds that on the 24th August last, a dispute arose betwixt pursuer and defender, as to the bread-and-milk diet allowed by defender to pursuer during hay harvest; and this dispute was commenced by pursuer holding up a roll before his master, and asking him, "if he thought it fit for any man to work on:" Finds that this question, with the act which accompanied it, was, if not directly insubordinate, at all events quite inconsistent with that deference and respect which every servant owes, and is on all occasions bound to show to his master, and which the master is entitled to demand from the servant: Finds that defender remonstrated with the pursuer, and told him that the diet objected to was the same as other people got and gave; to which pursuer replied, that "whatever other people were getting, he would not take such diet:" Finds that the pursuer demanded from defender that butcher-meat should be added to the diet, and that defender expressly refused to make such addition, and told the pursuer that he might go where he could get better diet, as he was tired of him, to which pursuer replied, that he was tired of him (defender) too, and that he would go, and take his dinner with him: Finds that the diet in question is the diet of the district, and that it was the same diet which was provided to pursuer during the previous year, and to which he made no objection when he renewed his engagement for the current year: Finds that pursuer was not entitled, especially in the way he did, to object to such diet, and that he was not justified in refusing to take the same: Finds that defender was justified in dismissing pursuer from his service, unless he complied with the rules of the house, and took, without objection, the diet provided for him, the same being, as in the present case, wholesome and sufficient diet, and that pursuer did so refuse to comply with the rules of the house; sustains the defences; assoilzies the defender from the conclusions of the action: Finds the pursuer liable in expenses; appoints an account to be given in, etc.

NOTE.—The history of the present case comes out with sufficient clearness in the evidence. The pursuer, James Johnstone, Janet Little, and Lilly Waugh, combined among themselves to refuse the bread-and-milk diet, and demand an addition of butcher-meat. This, at the very outset, was an act of insubordination on the part of these servants, in which the pursuer took the lead, and acted as spokesman. In pursuance of their plan, when their master came into the kitchen, pursuer held up before him a loaf or roll of bread, and asked, "if that was fit for any man to work on," or "fit for a man who was mowing all day." The act and the words were both unjustifiable from a servant to his master, and the pursuer, in using them, was guilty, if not of insolence, at all events, of disrespect to his master. The defender firmly declined to make any alteration of the diet, assuring his servants that it was the usual diet of the district, to which pursuer replied, that "whatever other people were getting, he would not take such diet." The pursuer, in thus refusing to take the diet, when his master assured him he should have no other, was guilty of an act of disobedience, quite unjustifiable in a servant towards his master.

It thus appears that the events of the 24th August last, which resulted in the pursuer leaving the defender's service, commenced in insubordination, were followed up with at least disrespect, and ended in disobedience. The defender on oath expressly denies that he turned pursuer away, while pursuer alleges that he did, and most certainly if he did, he was justified in the circumstances in doing so. Had the diet complained of been either unwholesome or insufficient, the pursuer would have been entitled respectfully to remonstrate with his master on the subject, and if, on such remonstrance, diet both wholesome and sufficient were not furnished to him, he would

further have been entitled to give up his place, and sue his master for wages and board wages. But, in the present case, the diet was both wholesome and sufficient; it was the diet given by other farmers in the district, and above all, it was the same diet which pursuer himself had received the previous year, and of which he had made no complaint. Had he wished for a change of diet, pursuer should have stipulated for it, when he renewed his engagement at Whitsunday, 1858, and not have demanded it in the unbecoming way he did on the 24th of August.

In the whole circumstances, the Sheriff-Substitute has no difficulty in sustaining the defence with expenses.

The pursuer having reclaimed, the Sheriff-Depute (Napier), recalled the Interlocutor, and found that the circumstances proved were insufficient to warrant the defender in dismissing the pursuer from his situation without payment of his wages; and that there was no act or expression of disobedience to support the plea of justification.

His Lordship's Interlocutor and Note, both fully disclosing the nature and details of the case, are as follows:—

Having resumed consideration of this case, with the defender's answer to the pursuer's reclaiming petition; proofs for both parties, and whole process, recalls the interlocutor (3d December, 1858), appealed against: Finds, in point of fact, that the pursuer was hired by the defender as his farm-servant in the capacity of a shepherd, and also to assist at hay and harvest; which service he entered at Whitsunday, 1857, and was re-engaged by the defender in said service from Whitsunday last, 1858, until Whitsunday next, 1859: Finds, that upon the 24th of August last, 1858, the pursuer, along with some other of the defender's farm-servants, being at their dinner in the defender's kitchen, which dinner consisted of bread and milk, complained to the defender that the bread was not sufficient diet for the pursuer to work upon: Finds, that in making this complaint, the pursuer lifted the bread, but that he did not, either by word or deed, act violently or impertinently towards his master, the defender: Finds that the defender did not order the pursuer to his work, but on the contrary, that he took hold of pursuer by his arm, or his shoulder, or some part of his person, and told him that he might go where he could get better diet, and ordered him to quit the place, as he, the defender, was tired of him, or words to that effect: Finds that the pursuer did not refuse to return to his work, and committed no act of disobedience to his master: Finds that the pursuer, on being told by the defender to quit the premises, demanded his wages before departing, which the defender refused to pay him: Finds, in point of law, that under these circumstances, the defender did, without due cause, dismiss the pursuer from his service between terms, and has not proved any justification; and that for such dismissal, the pursuer is entitled to be indemnified by the payment to him of his full wages and board wages; that is to say, his full wages up to the term to which he was hired, and board wages from the date of his said dismissal, up to the said term; and with these findings, in fact and law, remits the case to the Sheriff-Substitute to determine the amount of the said wages and board wages, and to proceed further in the cause as shall seem just.

NOTE.—The question before the Sheriff is whether the pursuer was *dismissed*, and dismissed justly, for disobedience or impertinence? The defender himself, in his own evidence, does not found any such defence, and so far from saying that he had dismissed the pursuer, either for disobedience or improper demeanour or language, he denies that he dismissed him at all. He says that he told the pursuer to go to his work. Now, in this part of his statement upon oath, the defender is totally unsupported. Moreover, he is directly contradicted, not only by the pursuer in his evidence, but by three independent witnesses, who all corroborate the pursuer in his statement that he was *dismissed*. 1. James Johnstone's evidence on that point is, that "the defender then said pursuer was to go from about his house as he was tired of him. Bell (pursuer) then said he was tired too, and he would go and take his dinner with him; and defender *took him by the shoulders and ordered him from about his house*. Bell was *very civil* to defender, and gave him no bad language." "Bell asked him for his wages, but defender would not give them." 2. The witness, Jane Little, says, "defender said Bell might go where he could get better diet, for he was tired of him. Bell said he was as tired of him. Defender *took hold of him, pushed him against me*, and told him *to go from his house*, as he had been too long there; as they went out at the door, pursuer asked his wages, and defender refused them." "Bell was *quite civil*." 3. The witness, Lilly Waugh, says, "Bell was *quite civil*. Defender told him to go where he could *better himself*, as he was tired of him. He *took Bell by the shoulders*, and told him *to go from about his house*, as he had been too long there. Bell asked his wages, and defender refused his wages."

The defender in his answer to the pursuer's reclaiming petition, says,—"It is granted that a servant has a right to *complain*, but denied that he has a right to *attack*, and that in a very unbecoming, disrespectful, and insolent manner." Now, for this pleading, not only is there not a shadow of excuse in the whole proof, but it is directly in the face of the facts proved, and receives no support whatever from the defender's own testimony. There was a *complaint*, but there was no *attack*, and every witness says that the pursuer was *quite civil*.

The Sheriff-Substitute has founded the case against the pursuer upon grounds diametrically opposed to the defender's own oath. He seems to reject the defender's positive statement that he did *not* dismiss the pursuer, and finds that if he did dismiss him, he was justified in so doing. He further finds that "this dispute was commenced by the pursuer holding up a roll before his master, and asking him if he thought it fit for any man to work on: Finds that this question, with the act that accompanied it, was, if not directly *insubordinate*, at all events quite inconsistent with that deference and respect which every servant owes, and is on all occasions bound to show to his master, and which the master is entitled to demand from the servant," and accordingly, the Sheriff-Substitute further "finds the defender was *justified in dismissing* pursuer from his service, unless he complied with the rules of the house, and took, *without objection*, the diet provided for him, the same being, as in the present case, wholesome and sufficient diet."

It is very far, indeed, from the Sheriff's intention, to afford any countenance whatever to disobedience on the part of a servant, or to sanction insolent or disrespectful demeanour from a servant to his master. When any such case is before him, the Sheriff will have no hesitation in applying the law, that such servant may be dismissed on the spot, without receiving one penny of his wages. But that masters should be kind to their servants, is a precept no less sacred than that servants should obey their masters. To refuse to take a certain diet, may or may not be *unreasonable*, but it is not capable, *per se*, of being construed either into insubordination, disobedience, or insolence, in a question between a farm-servant and his master. To refuse to *work* may be disobedience in a servant, but to refuse to *eat* is nothing of the kind, whatever else it may be. As for lifting up, or holding up the roll, upon which the whole stress of the Sheriff-Substitute's judgment seems to be laid, the Sheriff cannot view that as impertinence on the part of the servant, more especially as all the witnesses say he was *quite civil*. A hungry farm-servant, just returned from his labour in the fields, is not expected to state such a grievance in the phrase, or with the grace of a Sir Charles Grandison, nor is a farmer, even in his own kitchen, the Great Mogul. The Sheriff-Substitute seems to have got rid of the strong preponderance of evidence in favour of the pursuer, by treating it as a "combination" of all these farm-servants against their master. But this is not what the law understands as a combination against a master. It was merely the combination in *complaints* occasioned by a sympathy in starving — a combination of hungry mouths against bread and milk for dinner, and too little of that. There was no combination *not to work*.

But whether the complaint was reasonable, or would have justified the pursuer in quitting his service, is not the question before the Sheriff. The defender did not desert his service, he was turned off for *complaining*, according to the judgment under appeal—the complaint itself being the disobedience said to justify the dismissal. With this view of the case, the Sheriff cannot agree. But he is by no means satisfied, that the food in question did not afford *a just ground of complaint*, and he is confirmed in this by the evidence of the witnesses who say, "since Bell (the pursuer) left the house, we have got *broth and meat* to dinner," and the defender himself, on being

re-examined, admits, "rather than have more words about it, I consented that the other parties should get meat diet, or broth diet, *after pursuer went away*." That is to say, that the hungry combination was successful through the remonstrance of the pursuer, who alone was dismissed with his cruse to the wilderness.

Act. J. A. SMYTH. *Alt.* T. H. M'GOWAN.

25TH FEBRUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

MICHAEL MUNDAY *v.* DAVID LAW.

Master and Servant—Liability—Injury.—*Circumstances in which a Master held liable in damages for injury sustained by a Servant, on the ground that a platform provided by the former was too narrow, and otherwise dangerous and insecure.*

THIS was an action at the instance of Michael Munday, a labourer in the employment of the defender for injuries sustained by the pursuer while in defender's employment on 3d May last (1858), in consequence of the insufficiency and want of the necessary and proper number of suitable planks, on a scaffolding used for constructing a building in the West-End Park of Glasgow—whereby the pursuer fell and was seriously injured—concluding for £300 damages. The defence, on the merits, was a denial of the grounds of action, and of the defender's liability to the pursuer in damages, for any alleged injury sustained by him.

A proof having been allowed and led, the Sheriff-Substitute pronounced the following Interlocutor:—

Having heard parties' procurators, and resumed consideration of the proof and whole process: Finds, that on the 3d May, 1858, the pursuer, while in the defender's employment as a labourer on a building then in course of erection in the West-End Park, Glasgow, fell from a platform or scaffolding on the third storey of said building, to which he was carrying lime for the use of the masons employed on said platform: Finds that the flooring was not laid on any of the stories, and the ascent to the said platform was by means of a sloping gangway: Finds that the pursuer at the time of the accident had a hodful of lime on his shoulder, and had reached the platform, and was going along it, when he fell off by the side which was unfenced, down through the open joistings to the ground, a depth of 34 or 36 feet, whereby he was much bruised, and otherwise injured, and lay four weeks in the Infirmary, and was not able to resume work till the latter end of July, and then only to a limited extent: Finds, that according to the evidence of the defender's foreman, Peter Stewart, which appears, in this respect, correct, the platform consisted of five planks laid alongside of each other, each plank being 11 inches broad, so that the entire breadth was four feet seven inches, which breadth extended from the outer wall of the building inwards, to the space left vacant for the flooring: Finds, that according to the pursuer's own statement, the outside plank not being nailed or fastened down to the tresses on which it rested, canted when he stepped on it, and he was in this way thrown off: Finds that the evidence is contradictory as to whether the said plank was nailed or not, the pursuer and the witness, John Kerr, deponing that it was not, whilst the defender's foreman and the witness, Thomas Graham, depone that it was; and on the other hand, the defender's witness, James M'Kenna, whose particular duty it was to attend to the scaffolding, states that he does not know whether the planks were nailed or not: Finds it, however, distinctly proved, that there was a considerable quantity of loose stones, chippings, shivers, and lime on the platform, as also a tub for holding lime, which was 18 inches broad, and that the available portion of the platform was considerably narrowed by the occupation of the one side of it, by the masons employed in building: Finds, that according to the testimony of the witnesses, Arthur Molloy and Edward Kelly, both of whom have had experience in the construction of such platforms or scaffolds, the platform in question was unsafe, both because it was too narrow, and because it was covered with small stones and rubbish; and the witness, Molloy, in particular has deponed that he said to his neighbour Kelly, "that the platform was an awful place for a man to carry stuff to," and that "it was not the breadth of a regular scaffold:" Finds, that when a labourer undertakes a piece of work to which, in its own nature, a certain risk attaches, he has no recourse against his employer if an accident happens to him, provided his employer has done everything in his power to make the risk as small as the character of the work will admit; but if the employer neglects to do this, and thereby exposes the labourer to greater danger than necessary, liability does attach if the labourer sustains personal injury—(see *Baird*, 8th Feb., 1854, and *M'Aulay*, 9th Dec., 1846): Finds, in the whole circumstances of this case, as established by the proof, that a certain amount of blame attaches to the defender in not securing the greater safety of the said platform by a better construction, a greater breadth, and more attention to keep it free of rubbish and other obstructions, in which case it is less likely that the pursuer would have been thrown from it, or missed his footing upon it: Therefore repels the defences, and decerns against the defender for the sum of thirty-five pounds as a reasonable compensation to the pursuer, *tota re perspecta*, for the injuries sustained by him: Finds the defender also liable in expenses, of which allows an account to be given in, and remits the same to the auditor to tax and report.

Both parties appealed to the Sheriff (Sir A. Alison,) who adhered, adding the following note to his judgment:—

NOTE.—This case has been very anxiously and ably debated on both sides, and there was much room for argument, as the evidence, as is frequently the case in such matters, is contradictory; but upon the whole, the Sheriff cannot doubt that the Sheriff-Substitute has arrived at the right conclusion on the matters. The grounds on which the Sheriff has affirmed the judgment are these:—In the first place, there is no evidence here of any incapacity, negligence, or recklessness, on the part of the pursuer, which might have assisted in producing the catastrophe which happened. There is no room, therefore, for the application of the rule recently introduced into the Scotch Law, from the English, in regard to no damages being due, where the negligence of the party who suffered has materially contributed to the unfortunate result. In the second place, it is proved that the platform from which the pursuer fell consisted of five planks only, whereas the proper number should have been six or seven. In the third place, the scaffold, such as it was, was encumbered with rubbish, stones, and a mortar-tub, which necessarily narrowed the space, over which the pursuer had to pass in carrying his load for the masons. In the fourth place, it distinctly appears from the evidence, that the accident happened from the plank on which the pursuer had put his foot, canting as it is called, or tilting to the side, whereby the pursuer lost his footing and fell: and that is the way the pursuer himself says the accident happened. It could not have been tilted in this way, had it been nailed to the other planks, and what appears to the Sheriff to demonstrate decisively that it had *not* been so nailed is the fact, which is clearly proved, that the plank fell down along with the pursuer. This could never have happened, if it had been nailed to the other planks as it should have been. It is true, the defender has adduced some evidence, tending to show that the plank which fell had been nailed, but independently of the fact of its falling, which seems to negative that plea, it appears to be disproved by the following considerations—1st, The witness, M'Kenna, who put up the scaffold, and whose duty it is to see that it is in right order, won't swear that the plank which fell was nailed. All that he says, is, that he is not sure, and that he thinks that it was secured in the ordinary way, which was to have the outside planks nailed. 2d, The defender's witnesses, who are called to prove that the scaffold was nailed, do not in any instance say that they know that this was the case in regard to the plank which fell. All that they say, is, that the scaffold was secured in the usual way, which was by nailing the outside plank, and that they did not observe anything particular in regard to the plank that fell. But such vague testimony as

to the general practice of putting up scaffolds can never outweigh the inference deducible from the fact, that in point of fact, the plank on which the pursuer put his foot *did* fall with him, and that the workman who put up the scaffold, and whose special business it was to survey it daily, declines to swear that the plank which fell was nailed to the rest of the scaffold.

Act. R. R. AULD. *Alt.* P. S. HONEYMAN.

25TH FEBRUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

H. & J. EWING & COMPANY v. DAVID GOW.

Contract—Service—Locus Pœnitentiæ.—*Held that a draft agreement to serve for two years, and a letter transmitting the same to the master for approval, do not, unless accepted in writing, or followed by entering on the service, constitute a valid contract to serve even for one year.*

THE summons in this case concludes that the defender should be ordained to enter into the pursuers' service, in the capacity of clerk and canvasser for orders, and serve them for two years, from 1st November last, at the yearly salary of £80, with 10 per cent. on the net profits of their business. The pursuers found upon two letters addressed by the defender to their manager, Mr Clark, as containing the defender's engagement, and which engagement they allege was accepted by or on behalf of the employers, not only verbally, but by letter from Mr Clark to the defender, dated 4th October, 1858.

It appeared, however, on producing the defender's letters, that the one was a draft offer unsigned, containing the terms on which he was willing to engage, and the other a note to the pursuers accompanying it for approval.

The defender admitted that he entered into a verbal arrangement with the pursuers, to serve them for two years, but never entered their service, and averred that it was understood as part of the arrangement that the agreement was to be reduced to writing, and that in point of fact, this had never been done. He was obliged to resile from it in consequence of his present employer refusing to liberate him from his engagement.

The Record having been closed on summons and defences, the Sheriff-Substitute, after hearing parties, pronounced the following Interlocutor:—

Having considered the closed and whole process, and having heard parties' procurators thereon: Finds, that the contract of service libelled on is alleged to be for two years, from the first November last: Finds, that the documents in process, which are admitted to have been all the writings that passed between the parties, with regard to such alleged contract of service, do not prove that there were any concluded agreement between the defender and pursuers: Finds, that the defender never entered into the service of the pursuers: Finds in law, that a contract of service for two years can only be constituted by writing, and that a verbal contract for such a length of time is not good, even for one year, unless the servant has entered into the service of the master: Therefore sustains the defences, assoilzies the defender: Finds the pursuers liable in expenses, allows an account, etc.

NOTE.—The two letters from the defender to Mr Clark the pursuers' manager, of date 16th September, when read together, merely amount to an offer of service on the defender's part. There is no written acceptance of this offer by the pursuers, and the subsequent correspondence of the parties tends to show that this offer was departed from, and some verbal agreement entered into between the parties in place thereof.

On appeal, the Sheriff (Sir A. Alison) adhered, adding the following Note:—

If the defender's offer, or rather admission of engagement of 16th September, 1858, had been signed or acted upon by his entering upon the proposed service, his engagement would have been complete. But the pursuers' letter of 4th October, refers to a verbal engagement, not the written offer of 16th Sept., and it was the *former* or the *verbal* one, which was accepted, not the written one. Apart from the verbal arrangement, there is no acceptance of the written offer, either in the letter of 4th Oct., or *rebus ipsis et factis*. The offer of 16th Sept. is not even mentioned in the letter of 4th October, but, on the contrary, a verbal arrangement is referred to as agreed to, fixing a different day for commencing the service. And it is notorious that an engagement for more than a year can be proved only by writing, even when insisted in only for a year. The offer of 16th Sept. is alluded to in the letter of Nov. 1st, complaining of the defender's breach of engagement, but not in that of 4th October, founded on as the conclusion of a bargain.

Act. WM. BURNS. *Alt.* JOHN CLARK.

28TH FEBRUARY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

ALEXANDER BANNATYNE v. GIBSON & CLARK.

Consignment—Compensation—Submission—Del credere Commission.—*A party having consigned certain quantities of wheat for sale on his own account, against which cash advances were made by consignees—Held, in an action at the instance of the consigner for a full account of the consignees' intromissions, and on which a balance was admittedly due by them, that they were not entitled to set off a sum due to them by the consigner, arising out of separate transactions of the same nature, such sum not being a liquid debt.*

ALEXANDER BANNATYNE, pursuer, consigned certain quantities of wheat and flour, in September and October, 1853, to Messrs Gibson & Clark, for sale on his own account, against which cash advances were made by defenders. The account sales produced in process showed a balance in favour of the pursuer of £135 4s 2d. This balance the defenders admitted, but refused to pay on the following grounds:—

(1) On 28th February, 1854, pursuer purchased by sample a large quantity of Danish wheat from defenders. This, when lying at the railway station, and before delivery, he discovered to be disconform to sample, and immediately resiled from the bargain, refusing either to take delivery or pay the price. To settle the dispute thus arising, parties entered into a submission, in which an award was pronounced by the arbiters, finding the pursuer liable to the defenders in the full price of the wheat, £1920 with interest. Pursuer refused to pay this sum, and an action was raised in the Court of Session to compel payment. During its dependence, and under the Lord Ordinary's warrant, the wheat was sold for £1792 3s, payment of which defenders received. This action was dismissed on the ground that the Interlocutor of the arbiters was unstamped and improbative. Nevertheless the defenders maintained that the submission was still subsisting.

(2) That they were entitled to set off the difference between the nett proceeds of the sale, and the price at which pursuer bought the wheat, against the balance in the latter's favour.

(3) That the action should be sisted until the final issue of the submission.

No averment was made by defenders on record that the wheat had been sold by them as factors under a *del credere* commission.

The Sheriff Depute held it important to the plea of compensation that such should be inserted, and accordingly opened the closed record for that purpose, allowing defenders a proof on said averment, and pursuer a conjunct probation.

Proof was led, and thereafter, and on hearing parties', the Sheriff-Substitute pronounced the following judgment:—

Having resumed consideration of this process, with the proof and productions, and having heard parties' procurators thereon: Finds, that the defenders sold the various quantities of wheat and flour mentioned in the account sales, No. 7 of process, on account of the pursuer, to whom they had previously made cash advances; and that after deducting said cash advances and commission at the rate of 4 per cent., which commission the defenders were entitled to charge, as on 5th Aug., 1854, a balance was due by the defenders to pursuer on said account sales, of £135 4s 2d: Finds, that on 28th February, 1854, the defenders, as factors and agents for Messrs Robert Hutcheson & Co. of Kirkaldy, under a *del credere* commission sold to the pursuer 80 quarters of new and 400 quarters of old Danish wheat at the price of 40s per quarter, but the pursuer refused to take delivery or pay the price of said wheat, on the alleged ground that the same had been sold by sample, and that the bulk was not of equal quality with the sample: Finds, that the pursuer and defenders, by minute of reference of date 17th April, 1854, entered into a submission of their disputes as to this Danish wheat, to Messrs Wm. Taylor and John Robert Lamb, both grain merchants in Glasgow, which minute of submission has no limitation in point of time as to its endurance, and the defenders plead that said submission is still in subsistence: Finds, in law, that as the defenders sold to the pursuer the 80 quarters new and 400 quarters old Danish wheat, as agents for another party under a *del credere* commission, they would have been entitled to set off and compensate any claim which they had under this transaction against the sum of £135 4s 2d, due by them to the pursuer on the account sales No. 7 of process, provided said claim was established and liquidated; but as they themselves plead that said claim is still a matter under submission, they are not entitled to refuse or delay to pay the pursuer his admitted balance till the result of said submission: Therefore decerns against the defenders for the sum of £134 4s 2d, with interest at the rate of 5 per cent. per annum, from the 4th August, 1854, in terms of the conclusions, reserving to the defenders to constitute their counter claim against the pursuer, either under the submission or otherwise: Finds the defender liable in expenses, subject to modification in respect of the pursuer's denying the defenders' averment as to the holding a *del credere* commission from their constituents in the sale of the Danish wheat, modifies the same to two-thirds of their taxed amount; allows an account to be given in, and remits the same to the auditor to tax and report, and decerns.

Both parties having appealed against the judgment and been heard, the Sheriff Depute (Alison) gave judgment, adhering, in the following terms:—

Having heard parties' procurators under their mutual appeals upon the Interlocutor appealed from, and whole process, for the reasons stated by the Sheriff-Substitute, adheres to the Interlocutor complained of, and dismisses the appeals for both parties.

NOTE.—It is not disputed by the defenders that the balance claimed by the pursuer in this action, and now decerned for, would have been due if it had stood alone. But a counter claim is rested on by them, founded on a quantity of wheat sold by them, on commission, to the pursuer, alleged by him to be inferior to the sample, which was made the subject of a submission, or reference, between the parties, and which is alleged to be still subsisting, though no regular decree or award has been pronounced in it. It appears from the admission of parties, that the minute constituting the submission was dated 17th January, 1854, and that on the 18th July, 1854, an award was pronounced by the arbitors, which was informal and unstamped, and as such, was shortly after set aside by the Court of Session. This being so, the plea founded on the alleged pending submission, appears to be sufficiently met and obviated by the case of *Potter* v. *Ivare, Ilington & Co.*, 15th July, 1858, in which it was found that when a decree arbitral had been pronounced in a submission, though informal and set aside on that ground, the submission had thereby come to an end, and no ulterior proceedings could be taken by the arbiters without special powers conferred upon them in a new deed of submission, which is not alleged to have been entered into here. But, independent of this, it seems impossible to allow the defenders more time to liquidate their counter claim in the submission, in order to make it a defence against the claim in this action, seeing that they have had the submission on hand *for five years*, and have confessedly done nothing in it to liquidate their alleged claim, and in addition to that, they were allowed a proof of their claim in this action, but did nothing in it beyond producing the abortive submission and award. In these circumstances it is evident that the demand founded on by the pursuer of a liquid and admitted claim, cannot be met by one not only illiquid and denied, but which has not been liquidated *post tantum temporis;* and all the defenders are entitled to, is to have their alleged counter claim reserved after decree has been passed on the present, which has been done in the Interlocutor pronounced. The modification of expenses seems to be proper, as the pursuer has denied the *del credere* commission, which has been clearly proved.

Act. JOHN CLARK. *Alt.* GEORGE BLACK.

15TH MARCH, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

WYLIE AND LOCHHEAD v. WILLIAM MARTIN.

Husband and Wife—Separation—Aliment—Liability of husband for furnishings made to wife—Inhibition.—*A wife living in separation from her husband, and receiving suitable aliment, but against whom Inhibition had not been used, purchased furnishings conducive to her comfort in her husband's name. In an action for the price of the furnishings, Held that the husband was liable.*

THE pursuers, who are general upholstery furnishers, sued the defender for £30 17s 6d, the amount of an account for furnishings made to him.

The defence was a denial of resting owing, it being explained that no such goods were sold or furnished to the defender. They might have been given to the defender's wife, who had deserted his house and had been living apart from him prior to the date of the account sued for. That the defender had allowed his wife to remove a portion of his household furniture and effects, and had regularly paid her an aliment of 8s per week, which in the circumstances of the parties was ample. Further, that the articles, the price of which was sued for, were not required by the defender or his wife, and were unsuitable to their circumstances.

The record having been closed upon the summons and minute of defence, proofs were allowed.

From the evidence led it appeared that the furnishings, (which consisted of the ordinary fittings of a bed-room,) the price of which was sued for, were purchased by the defender's wife, a person upwards of 70 years of age, who was accompanied at the time by a married daughter: that the goods were ordered to be sent to the house of the daughter, where the old woman then resided; the account was ordered to be sent to the defender's place of business. No mention was made at the time of the fact of the separation of the defender and his wife. They had lived separate since September, 1857, since which time the defender had regularly paid his wife an aliment of 8s per week. The defender, who is 69 years of age, has a salary of £100 a-year: he further has a sum of £200 invested in the Clyde Trust.

The Sheriff-Substitute having heard parties' procurators on the record, proof, and productions, pronounced the following judgment:

Finds, that on 26th September, 1857, the defender and his wife separated by mutual consent, and they have lived separate since; the defender allowing his wife an aliment of 8s per week, which he has regularly paid her: Finds, that in the months of August and September, 1858, the defender's wife purchased from the pursuers the articles of furniture specified in the account appended to the summons; and that said articles are necessaries: Finds, that the defender had not used inhibition against his wife, and he has not proved that the pursuers knew that she was living separate from him when they furnished her with said articles of furniture: Finds, in law, that in these circumstances the defender is liable to the pursuers; therefore decerns against the defender in terms of the conclusions of the summons: Finds the defender liable in expenses, etc.

NOTE.—Had the defender used inhibition against his wife, or had he given notice to the pursuers not to furnish her with the goods, or even had the pursuers known that she was living separate from him, he would not have been liable even for necessaries furnished to her, having allowed her a suitable aliment, which has been regularly paid.

The defender appealed, but the Sheriff (Sir A. Alison) adhered to the judgment of the Sheriff-Substitute, adding the following Note:—

This is a very nice case, and the Sheriff has had some doubts about it, but upon the whole, after mature consideration, he has come to be of opinion that the Interlocutor under review is well founded. The material circumstances are as observed by the Sheriff-Substitute—1st, That the defender, although separated from his wife, had not used inhibition against her; 2d, There is no evidence to show that the pursuers knew that he was separated from her, when the goods were ordered by her; 3d, That the address given by her to the pursuers when the goods were ordered, viz., at her daughter, Mrs M'Kelvie's, who was along with her mother at the time of ordering the goods, was not such as to excite reasonable grounds of suspicion, it being no unusual thing for a father and mother to live with their daughter; and 4th, The furnishings sued for being of the value of £30 18s 1d, do not appear to be unsuitable or extravagant for a person in the defender's rank of life, who is admitted to have £100 a-year of salary, and to have saved £200 during a long and laborious life, and when his wife was in receipt of 8s a-week of aliment from him. There is no doubt that the obligation of the husband, although separated from his wife, extends to providing her with reasonable *furniture*, as well as food and clothing, and the hardship on the defender is not so great in reality as it at first appears, as the furniture bought, and the price of which is now decerned for, is, of course, *his* property.

Act. T. G. WRIGHT. *Alt.* J. KIDSTON.

17TH MARCH, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

APPEAL—JAMES RENNIE & Co.'s SEQUESTRATION.

Objection—Mandate—Partner.—*Held, that a mandate to a firm to vote, at meetings under a sequestration, entitles any partner of the firm to vote.*

AT a meeting of the creditors on James Rennie & Co.'s sequestrated estate, Robert MacLuckie, Writer, Glasgow, appeared as mandatory for John Sewell & Co. of London, and voted under the following mandate:—

LONDON, 11*th Feb.*, 1859.

GENTLEMEN,

We hereby authorise you to attend, vote, and act at all meetings under the sequestration of James Rennie & Co., Wholesale English and Foreign Fancy Warehousemen, No. 66 Miller Street, Glasgow, with the same powers as belong to

Your most obedient Servants,
(Signed) JOHN SEWELL & Co.

Messrs Lamond & M'Luckie, Writers, Glasgow.

On an appeal against a resolution adopted at the meeting, the vote of Mr MacLuckie was objected to on the ground that the mandate did not entitle him to vote. The Sheriff-Substitute, after hearing parties, repelled the objection and sustained the vote.

The following is the Sheriff's deliverance:—

Having considered the minutes lodged in terms of the preceding appointment, and heard parties' procurators thereon, Finds it admitted by the parties Simon Prince & Co., that unless their objections to the vote of Robert MacLuckie, writer, as mandatory for John Sewell & Co., claiming for £382 5s 3d, be sustained, there is not the statutory majority in favour of the resolution, that the offer of composition made by the bankrupt should be accepted, and that their appeal will fall to be dismissed: Finds, that the objection to said vote resolves into this, that the mandate granted by the creditors, John Sewell & Co., did not authorise the vote of the said Robert MacLuckie as their mandatory: Finds, that the said mandate, which is prefixed to the said affidavit, is as follows, *(ut supra)*: Finds, that in the general case a mandate to a company must be understood to be a mandate to any of the partners acting as the representative of the company: Finds, more particularly, and especially in the present case, that as under the Bankrupt Act, any of the partners of John Sewell & Co. might have attended the meeting and voted, and as the mandate gives to Lamond & MacLuckie the same powers as belong to John Sewell & Co., this must be held as equivalent to authorising any of the partners of Lamond & MacLuckie to attend and vote; therefore repels the objections and dismisses the appeal: Finds the appellants liable in expenses, etc.

Act. JAMES GALBRAITH. *Alt.* ROBERT M'LUCKIE

Digest of English Cases.

19TH JANUARY, 1859.

COURT OF QUEEN'S BENCH.

SENIOR *v.* WARD.

Compensation—Injury by a Fellow-Workman—Negligence of Deceased.

AN action at the instance of the administratrix of a deceased miner, to recover compensation from the owner of a mine, for negligence by which the deceased was killed. Defence sustained, in respect, (1) that the deceased was guilty of negligence which contributed to his own death; and (2) that, in any case the negligence alleged was not the negligence of the owner himself, but of the deceased's fellow-workmen, for which, as in a question with him or his representatives, the owner of the mine was not responsible. Reference made to the Scotch case of *The Bartonshill Coal Company* against *Reid*, 3 *MacQueen*, p. 206.

29TH MARCH, 5TH JULY, & 25TH NOVEMBER, 1858.

COURT OF COMMON PLEAS.

BOTTLE ENVELOPE COMPANY *v.* SEYMOUR.

Patent—Subject-Matter.

THE application of a well-known tool to work previously untried materials, or to produce new forms, is not the proper subject-matter of a patent.

13TH & 14TH DECEMBER, 1858, & 4TH FEBRUARY, 1859.

COURT OF DIVORCE & MATRIMONIAL CAUSES.

KEATS *v.* KEATS & MONTEZUMA.

Condonation of Adultery by the Husband.

CONDONATION implies more than mere forgiveness. "There can be no condonation which is not followed by conjugal cohabitation."

6TH DECEMBER, 1858.

ROLLS COURT.

SCOTT *v.* COLBURN.

Public Company—Powers of Directors.

BY the constitution of a public company, the directors were empowered to grant mortgages, but forbidden to grant bills of exchange. The directors, in the proper exercise of their office, contracted a debt to the plaintiff which they paid in part in cash, and granted bills for the balance. The due payment of the sums contained in the bills was secured by a mortgage. *Held*, that though the bills were bad, the mortgage was good.

21ST JANUARY, 1859.

COURT OF EXCHEQUER.

THE METROPOLITAN SALOON OMNIBUS COMPANY *v.* HAWKINS.

Action for Libel and Slander—Joint-Stock Company.

THE defendants pleaded justification or *veritas convicii* in an action for libel and slander, imputing to the company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs. *Held*, that an inspection of the plaintiffs' books ought not, at least in general, to be allowed in such a case.

23RD & 24TH NOVEMBER, 6TH, 7TH, 8TH, 9TH, & 10TH DECEMBER, 1858, & 22D JANUARY, 1859.

COURT OF CHANCERY.

THE ROYAL BRITISH BANK—*ex parte* NICOL.

IN this case, the same questions were raised as in the recent Scotch case of Inglis *v.* the Liquidators of the Western Bank, 4th Jan., 1859. The decision of the court was similar to that of Lord Kinloch in that case.

We subjoin a list of the authorities referred to in the course of the argument, which may be useful to some of our readers:—

In re The Deposit and General Life Insurance Co. *ex parte* Ayre (4 Jur. N.S. 596); Dodgson's case (3 De G. & S. 85); Holt's case (22 Beav. 53); Bell's case (Id. 35); Bernard's case (5 De G. & S. 283); The National Exchange Co. of Glasgow *v.* Drew (2 Macq. 103); The Deposit and General Life Insurance Company *v.* Ayscough (6 El. & Bl. 761; 2 Jur. N.S. 812); Henderson *v.* The Royal British Bank (7 El. & Bl. 356); Powis *v.* Harding (1 C.B. N.S. 533); Clarke *v.* Dickson (4 Jur. N.S. 832); *In re* The Royal British Bank—Brockwell's case (29 Law Times, 375); The Hull & London Fire & Life Insurance Company *ex parte* Gibson, Hudson, & Kemp (2 De. G. & J. 275; 4 Jur. N.S. 1005); Charter's case (1 De. G. & S. 581); Straffon's Executor's case (1 De. G. Mac. & G. 576-592); Keene's Executor's case (3 De. G. Mac. & G. 272;) Bennett's case (5 De. G. Mac. & G. 284); Mayhew's case (Id. 837); Bargate *v.* Shortridge (5 H. L. C. 297); Walton's case *ex parte* The Royal British Bank (5 Weekly Rep. 637); 7 & 8 Vict. c., 113, s. 4; Ranger *v.* The Great Western Railway Co. (5 H. L. C. 72–80); Burnes *v.* Pennell (2 H. L. C. 497); *In re* The Liverpool Borough Bank (4 Jur. N.S. 1068); *In re* The Athenæum Life Assurance Society (4 Kay & J. 305; 4 Jur. N.S. 1137); Stainbank *v.* Fernley (9 Sim. 556); Parbury's case (3 De. G. & S. 43); Wilde *v.* Gibson (1 H. L. C. 605); Pilmore *v.* Hood (5 Bing. N.C. 97); Duranty's case (4 Jur. N.S. 1068); Cornefoot *v.* Fowke (6 M. & W. 358); and Daubeny *v.* Cockburn (1 Mer. 643).

11TH & 28TH JANUARY, 1859.

VICE-CHANCELLOR WOOD'S COURT.

Ex parte JOHN SHEFFIELD, *in re* THE ATHENÆUM INSURANCE SOCIETY.

IN this case, a similar question was raised, and a similar judgment given.

11TH NOVEMBER, 1858.

ROLLS COURT.

JONES *v.* THE CONSOLIDATED INVESTMENT AND INSURANCE COMPANY.

Policy of Insurance—Assignment.

E. W. effected in 1850, a policy of Insurance on his own life, with the defendants, one of the conditions of which was, "that the policy of a person insuring his own life, will become void if he dies by his own hand, or by the hand of justice, or in consequence of a duel; but in case of death, not *felo de se*, the board of directors may pay to the executors of the insured, a sum not exceeding the value of the policy, on the day previous to the death; but should such policy have been assigned to other parties for a valuable consideration, six calendar months before the death of the insured, then it is to remain in force to the extent of the beneficial interest therein, of the parties to whom it shall have been so assigned." In 1854, the policy was assigned to the plaintiff, "as security in case of death, or otherwise for any notes of hand or bills of exchange you may have cashed for me." W. died by his own hand in 1857, and was at that time indebted to the plaintiff for large sums advanced by him to or for W. within two months of his death. *Held*, that as the policy had remained in the plaintiff's hands, it was a valid security for these new debts, and that no fresh assignment by W. to him was necessary, and judgment for the plaintiff accordingly.

9TH NOVEMBER, 1859.

QUEEN'S BENCH.

SAUL *v.* JONES.

Bill of Exchange—Presentment.

To charge the indorser of a Bill of Exchange, accepted payable at a bank, the Bill must be presented at the bank where it is made payable. It is not sufficient to present it at the acceptor's house, even though it can be shown that there were no funds of the acceptor in the bank to meet it.

10TH MAY, 1858.

EXCHEQUER CHAMBER.

TUFF *v.* WARMAN.

Ship—Collision.

IN cases of collision, where the disaster has happened solely through the culpable negligence of the defendant, the plaintiff is entitled to recover; but not so if he has himself contributed so far to its occurrence, that it would not have happened but for his own negligence or improper conduct.

24TH JANUARY, 1859.

COURT OF EXCHEQUER.

THE METROPOLITAN SALOON OMNIBUS COMPANY (LIMITED) *v.* HAWKINS.

Joint-Stock Limited Liability Company—Libel.

A JOINT-STOCK COMPANY, incorporated under the Act 19 & 20 Vict. cap. 47, may maintain an action for libel, and that against one of its own shareholders.

6TH FEBRUARY AND 5TH JULY, 1858.

COURT OF COMMON PLEAS.

SHENDON *v.* THE NEW QUAY COMPANY.

Common Carrier—Property in Goods.

THOUGH a common carrier received goods for the purpose of conveyance from a party who has them in his possession, he is not barred from pleading that he had given them up to their real owner upon his demand, and if he can show that he delivered them to their real owner, the actual consignor has no claim against him.

Digest of English Cases.

19TH & 21ST MARCH, 1859.

VICE-CHANCELLOR KINDERSLEY'S COURT.

In re THE NATIONAL PATENT STEAM FUEL COMPANY *ex parte* BURTON.

Winding up—Contributory—Forfeiture of Shares.

MR BURTON applied for a hundred shares of this Company at its formation, which were allotted to him. He paid the deposit money, but never signed the contract of co-partnery of the Company. He got scrip certificates, but never attended any meetings of the Company, nor was entered on the register of Shareholders. There was no power to forfeit original shares in the contract. The Directors, after notice, declared Mr Burton's shares forfeited, and a general meeting also declared them forfeited, and the shares were re-issued. *Held*, notwithstanding, that Mr Burton was liable as a contributory in respect of these shares.

25TH NOVEMBER, 1858.

COURT OF QUEEN'S BENCH.

MARLOW *v.* HARRISON.

Auction—Bidding by Owner—Auctioneer's Liability.

A HORSE was advertised to be sold without reserve, but notwithstanding the owner attended and was the highest bidder. The plaintiff was next, but the auctioneer knocked down the horse to the owner. *Held*, that the auctioneer was not liable in damages to the plaintiff.

29TH NOVEMBER, 1858.

COURT OF COMMON PLEAS.

BOTTOMLEY *v.* NUTTALL.

Partnership—Foreign—Principal and Agent.

ONE of the partners of a foreign Company, who was resident in England, bought goods on their behalf, which were sent out to them, and accepted a bill for the price in his own name. The seller knew all along that he was dealing with the firm. *Held*, that on the bankruptcy of the English partner, the seller was entitled to hold the foreign firm responsible.

15TH JUNE, 1858.

COURT OF QUEEN'S BENCH.

DALZELL *v.* TRYER AND OTHERS.

Reparation.

THE plaintiff contracted with a person named Herrington, who was lessee of a steam-ferry near Liverpool, to be carried to and fro when required. On a certain day, Herrington hired a steamer, with the crew, from the defendants, and while being conveyed in that steamer, the plaintiff was injured through the negligence of the crew. *Held*, that the crew remained the servants of the defendants, who were responsible to the plaintiff for their acts and negligence.

25TH NOVEMBER, 1858.

QUEEN'S BENCH.

CRUKSON *v.* STONES.

Master and Servant—Temporary Disability of Servant through Sickness.

THE plaintiff entered into a contract with the defendants to serve them for ten years. He entered on his employment, but after some time, was disabled by sickness for thirteen weeks. Upon his recovery, he re-entered on his duty, under the original contract. *Held*, that the defendants were not entitled to make any deduction from his wages, in respect of his absence for thirteen weeks.

14TH FEBRUARY, 1859.

VICE-CHANCELLOR KINDERSLEY'S COURT.

LORD *v.* COLVIN.

Domicile.

"THAT place is properly the domicile of a person in which he is voluntarily fixed, the habitation of himself and of his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless, and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home."

Circumstances in which it was held that the domicile of a Scotchman who had resided six years in Paris was still Scotch.

1ST JUNE, 1858.

COURT OF QUEEN'S BENCH.

ELIZABETH PENROSE *v.* JOHN MARTIN.

Joint Stock Company's Act, 1856.

THE defendant, as Secretary of the Saltash Waterman's Steam Packet Company—Limited, (duly registered under the Act,) accepted a bill, as he was authorised to do, on their behalf, drawn upon them by the plaintiff. He omitted, however, in his acceptance the word "Limited," so that the company were not bound. *Held*, that the defendant was himself bound, and personally responsible in terms of the 31st section of the Act.

17TH MARCH, 1859.

SHERIFF SMALL DEBT COURT, AYR.

(MR SHERIFF ROBISON.)

TOSH OR URIE AND OTHERS *v.* COCHRANE'S EXECUTORS.

Settlement—Legacy—Vesting.—*A husband and wife, by mutual settlement, bequeathed to parties therein named, certain legacies. The deed, while it contained a joint and several power of revocation to the testators, provided that the husband should not have power to alter the legacies.—Held, in an action at the instance of the representatives of one of the legatees, who had survived the female but predeceased the male testator, that the legacy vested on the legatee's survivance of one of the testators.*

THE pursuers, as the representatives of the late Janet Urie, Pennyglen, Maybole, raised an action in the Small Debt Court against the defenders, claiming a legacy of £10, which was bequeathed by the late David Cochrane and spouse, to the said deceased Janet Urie, by settlement dated 5th January, 1853, and recorded 14th August, 1855. The legatee survived the wife, Mrs Cochrane, who died in 1855, but predeceased the husband, David Cochrane, who died in 1858.

The Sheriff-Substitute, having taken the case to *avizandum*, decerned against the defenders with expenses. The learned Sheriff's judgment, in which the facts of the case are very clearly brought out, being as follows:—

This legacy was the bequest of two individuals, husband and wife; and the legatee survived the wife, and predeceased the husband. The legacy was one of six, each amounting to £10, made by these parties in a mutual disposition and settlement of their whole property, (of which all the heritage appeared to belong to the wife,) which directed the legacies "to be paid within six months after the death of the longest liver, with the legal interest of the said sums from the said term of payment till paid, all which sums we hereby leave and bequeath to the said parties respectively." While a joint and several power of revocation was reserved by the testators, it was expressly provided that the husband (and male testator) should not have any power to alter the foresaid several legacies of £10 each.

The legacy thus constituted was thought to be a present gift, although postponed in regard to the term of payment, and to have become irrevocable by the predecease of the female testator alone, and independently of the clause excluding the husband's power to alter any of the legacies, and to have vested by the same event.

It has been decided that, in the case of a legacy bequeathed by a husband, and made payable after the decease of the longest liver of him and his wife, it vests if the legatee survive the testator, although predeceasing his widow. See *Wallace* v. *Wallace*, 28th January, 1807; *Stirling* v. *Baird's Trustees*, 12th November, 1851. It may be thought that neither of these cases is parallel to the present, in respect that in each of them the actual testator was survived by the legatee, whereas here, the legatee predeceased one of the two joint testators. But the very case has been decided, that where two testators jointly make a legacy, the legacy vests by the legatee's survivance of one of them. See *Nicholson*, Dec. 16th, 1806.

Act. W. MURRAY, Maybole. *Alt.* SMITH & GILMOUR, Irvine.

17TH MARCH, 1859.

SHERIFF COURT, AYR.

(MR SHERIFF ROBISON.)

BRUNTON *v.* BONE.

Loan—Proof—I.O.U.—Restriction to £100 Scots.—*Held that an I.O.U. for £10, neither holograph nor addressed, but the signature to which was admitted, was a sufficient voucher for a debt of £100 Scots.*

MRS BRUNTON, executrix-dative of her husband, found in his repositories an I.O.U., granted by the defender, Mr Adam Bone, for which, and another small account, she raised an action before the Sheriff Court of Ayr. The document, written upon the back of an envelope, was in the following terms:—

"Ardrossan, 25th July, 1855.

"I owe you ten pounds sterling. July 25, 1855.

"ADAM BONE."

It was not addressed to any person; but the pursuer alleged that on the date of the I.O.U., her husband had *lent* to the defender the sum of £10, therein mentioned.

In his defences, the defender denies having received such a sum, and pleaded that the "I.O.U.," not being addressed to any one, *nor holograph* of the defender, was of no force or effect; and that the loan sued for could only be proved by his writ or oath.

The pursuer answered that the I.O.U. was not a deed requiring the solemnities of deeds of importance; but was valid and effectual, although not holograph or attested by witnesses; and that, "at all events, the document in question is effectual, and warrants decree to the extent of £100 Scots."

By minutes, subsequently ordered by the Sheriff-Substitute, and given in by the parties, the pursuer stated that the whole document, except the subscription, was in the handwriting of her deceased husband; that, at his death, she found the paper in his shop desk; that the defender admitted that the subscription was *his*, but alleged that on the date of the I.O.U., he saw the deceased, and asked him for payment of an account, "when the deceased said he would give him £10 towards the account, till they would make a settlement. The deceased took him into a room of his house, shutting the door, when the defender received from him the £10 accordingly; and, at the deceased's request, the defender signed what the deceased represented, and what he, the defender, believed was a receipt or acknowledgment for the sum paid to him."

The defender, while denying the loan, claimed a counter account for furnishings, which he alleged the deceased owed him. That account the pursuer denied.

After debate, the Sheriff-Substitute, without adverting to the plea that the I.O.U. was, at least, effectual to the extent of £8 6s 8d, upon the pursuer restricting the claim on it to that sum, pronounced an Interlocutor, in which he "Finds that there is no valid writing in process under the hand of the defender to instruct the loan of £10; but allows the pursuer to refer the resting owing thereof to the defender's oath, if so advised."

Against this Interlocutor, the pursuer appealed to the Sheriff-Depute, (Christison), and in a reclaiming petition, pleaded—

(1) That the I.O.U., *per se*, proved the loan—that being confessedly subscribed and delivered by the defender, it was effectual without being holograph or tested, because it was not a deed, but a mere acknowledgment of debt; and that the principle to reconcile the apparently conflicting decisions, was the presence in the document of an *obligation* to pay, not merely of an *acknowledgment* of debt. Douglas v. Elliot, 7th January, 1757, F.C.; Henderson *v.* Murray, 5th December, 1765, F.C.; Stephenson *v.* Pirie, 1st February, 1832. (2) That the I.O.U., with the defender's admission of the receipt of the money, proved the loan—that the qualification to the defender's admission of the receipt of the money might be redargued, and that the I.O.U. itself did so, and proved that the object of the payment was "to *constitute*, and not, as alleged, to extinguish a debt." (3) That, at all events, the I.O.U. was effectual, and warranted decree for £100 Scots, and, if her other pleas failed, she restricted her claim upon it accordingly; that the Statutes did not apply to deeds under the value of

£100 Scots, and that it was competent to restrict the I.O.U. to that extent and effect. Reference was made to Erskine, 3, 2, 10. and 3, 9, 7. Dickson on Evidence, p. 397, sec. 750. Gordon v. Murray, 21st June, 1765; Ferguson v. Macpherson, 30th June, 1758, etc.

The defender answered, (1) the I.O.U. was ineffectual to any extent whatever: that, "not only did it bear, or in the words of the Statute, 1579, cap. 80, make no faith, but it was absolutely null and void, and being *ab initio* absolutely null, it could not be held good or obligatory to any extent whatever." (2) The Act, 1540, cap. 117, provided that no "obligation, bond, *or other writing*," should bear faith without the subscription of the party before witnesses. By 1579, cap. 80, all obligations, etc., and all writs importing heritable title, or other bonds and obligations of great importance, were to be subscribed by party and witnesses: by 1593, cap. 179, all writings were to contain the name, etc., of the writer: and by 1681, cap. 5, all deeds are declared *null*, unless they contain the names, etc., of the writer and witnesses. (3) The Statutes attach the sanction of *nullity* to the omission of the solemnities which they impose; that, as the document was "not conform to the Statutes, like the documents mentioned in some of the cases to which the pursuer refers, but was entirely destitute of the whole statutory requirements, it was not covered by the Statute 1540, cap 117, which was held applicable to several cases referred to by the pursuer." Jack v. Jack, 1672; 2 Brown's Sup., 665; Erskine, 3, 2, 10; Menzies' Lectures, p. 121.

The Sheriff pronounced an Interlocutor, in which he found, under the libel as restricted, that the I.O.U. "is proof of a debt of £8 6s 8d sterling, due by the defender to the pursuer;" adding the following note:—

There is no doubt of the correctness of the Interlocutor under review, in all its findings. The writ No. 4 is not probative of a loan of £10 sterling, either in itself or coupled with the admission of the subscription, qualified as that admission is, which (whatever may be the law in regard to qualified oaths under a reference) must be taken as a whole. The Sheriff has felt difficulty in sustaining the claim as restricted to £8 6s 8d, but he has come to the conclusion that it is proved. It would have been a more difficult step to have allowed a parole proof of a loan, the authorities being nearly balanced upon its competency. On the one side, *Erskine*, B 4, 2, 20; *Dickson*, p. 322 and 592 and 611, etc.; and the *Hammermen of Glasgow*, 5th March, 1668, M. 2247 and 12,408, are in favour of the competency of such a proof; while the opposite opinion is favoured by *Stair*, B. 4, 43, 4; *Baron Hume Decs.*, p. 500; and *Tait*, p. 307. The case, however, of a writ improbative in transactions of importance, when founded upon only in proof of a loan of £8 6s 8d, and when the subscription is not disputed, is different from that of parole evidence. If, in regard to small sums, there is an exemption from the prescribed formalities of deeds, an acknowledgment, if subscribed, becomes undistinguishable from a note or bill, or mercantile writing in the matter of proof. Now it is beyond dispute that, the statutory formalities of deeds are confined to writs of importance. The Act 1579 C. 80, is expressly so limited, and *Erskine* says, B 3, 2, 10 and 12, that all the others are equally limited in practice; see also *Menzies*, p. 136. Such being the case, the document No. 4, not denied to be subscribed by the defender, bears the same faith as a subscription to any other writ not holograph, which is sustained in rustic and mercantile transactions, or the like. It will not do for the defender to plead that the admission of his *signature* must be received with its qualifications, for the plea presents itself in a widely different question from that above referred to. If debts of or under £100 Scots are privileged in regard to proof, the subscription to an acknowledgment must be challenged or at least denied, otherwise it and the document will be held to be genuine. The want of the address is not an objection to the writ No. 4. The Act 1696, c. 25, against blank bonds, like other statutes does not apply in practice to writs of small importance, any more than to bills, notes, etc. In England this defect in an I.O.U. is not held to be material, and *Menzies*, p. 94, says, that the address is not material in Scotland. There are two obstacles to be got over before sustaining the document in question. One, that the I.O.U. in England is not proof of a loan, as is popularly believed, but only of a "stated account." See *Sergt. Byles on Bills*, p. 23, and various decisions. It does not seem admissible, however, to introduce this limitation into Scotland, where writs of small importance must be either held to be probative generally or not at all. The other point, as to which great difficulty has been felt, arises from the document libelled on having been granted for a sum above £8 6s 8d, and restricted to that sum. It is thought that there is a great deal of principle against giving effect to a deed for a small sum which was originally framed for a greater, and for maintaining that the importance of a deed is to be judged of as at its date and as a whole, and not as restricted when the creditor can do no better. The Sheriff, however, is unable to resist the authorities for the opposite view, of *Erskine* B. 3, 2, 10, B. 3, 9, 7, and of the decided cases.

Subsequently after a proof, which the defender was allowed of his counter account of £11 15s 6d claimed by him, it was held that he had proved it so as to compensate the claim on the I.O.U., and the defender was accordingly assoilzied with expenses.

Act. C. R. Rowan, Ayr. *Alt.* R. Goudie, Jun., Ayr.

17th March, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Bell.)

John M'Aulay v. Charles Tennant & Co.

Reparation—Damages—Solatium—Assythment.—*A boy of six years of age having been killed through falling into a pit or reservoir, used for cooling hot or boiling tar, upon the premises of manufacturing chemists, the father of the child brought an action to recover solatium and damages from the owners of the pit, on the ground that the pit, and field in which it was situated, although in a populous district and adjoining the high road, were unfenced and unguarded.—Held, that the premises being the private property of the defenders, the boy was a trespasser, and that no liability attached to the defenders. Farther, that the pursuer was not* in titulo *to raise the question whether the injury might have been prevented had there been a fence around the cooling pit.*

The pursuer, some time a labourer in the employment of the defenders, and residing in the vinicity of St Rollox Works —of which the defenders are the proprietors, and in the occupancy as manufacturing chemists—brought this action against them concluding for the sum of £200 in name of solatium and damages for the loss of his son, John M'Aulay, Junior, upon the grounds, and under the circumstances following, as set forth in the pursuer's libel:—

"On or about the 27th day of August, 1858, the defenders were, and it is believed still are the proprietors, and occupants, or possessors of a field lying near to their works at St Rollox, and on the west side of, and immediately adjoining the public road from Glasgow to Springburn, and between St Rollox Works and the main line of the Caledonian Railway, known by the name of the Bullock Park, and which field at the foresaid date contained several large and deep pits, made and used by the defenders as receptacles for hot or boiling tar or other substances of that description, and temperature used by them in their manufacture; the said field or space of ground and pits were at said date *open to the public, unfenced, and unguarded*, and in a populous district adjoining the public road, and peculiarly dangerous to the lieges; and on or about the said 27th day of August last, the pursuer's son, the said John M'Aulay, Junior, a boy of about six years of

age, who resided in the immediate neighbourhood, fell or stumbled into one of the said pits, and was so severely burnt or scalded that he died in consequence thereof, shortly thereafter; and his death was occasioned by the *gross and culpable negligence, fault and omission of the defenders or those acting under them, and for whom they are responsible, in not having the piece of ground and pits therein fenced and guarded, and the necessary precautions taken for the safety of the public.*"

The defence minuted for the defenders was an admission that on or about the date mentioned, the pursuer's son was injured in a tar cooler belonging to the defender, and that he died in consequence; but a denial that the cooler was of the description, or situated as averred in the libel, or that the occurrence happened either from *want of fencing* or *culpa* of any kind on the part of the defenders or those for whom they are responsible: it was explained, on the contrary, that the ground referred to was part of defenders' business premises, that the ground itself, and also the cooler *were fenced;* and that the injury to pursuer's son arose from his having improperly entered the enclosure, and having, of his own accord, recklessly gone upon, and exposed himself to injury from the tar.

The Record having been closed on these statements for the parties, the Sheriff-Substitute allowed them a proof *pro ut de jure* of their respective averments, and personally inspected the scene of the accident. The import of the proof, and personal inspection are given fully in the Sheriff-Substitute's judgment which follows, and which has been adhered to *simpliciter* by the Sheriff Depute, (Sir A. Alison.)

Finds, that the defenders, in the course of the operations carried on by them in their works at St Rollox, have occasion to run hot or boiling tar out of the boilers into a cooling pit: Finds, that the said cooling pit is near the centre of that portion of the works known by the name of the Bullock Park, and is about 40 feet long, by 16 feet broad: Finds, that the whole of the Bullock Park is used and occupied exclusively by the defenders in their own business, and is enclosed by walls or other fences, the proper entry to it being by a gateway in the wall, on the east side, by which it is shut out from the adjoining public road: Finds, that it is bounded on the north partly by a wall and outhouses at the back of a row of buildings called Jones' Land, and partly by a wooden fence or paling, which encloses a washing green to the west of Jones' Land for the use of the tenants there, all as delineated on the plan No. 11: Finds, that without any permission being given by the defenders, a gap was made in said paling at the point marked A in said plan, through which some of the defenders' workmen who lived in Jones' Land, as well as some men employed at the Caledonian railway works, which lie to the north-west of the Bullock Park, were in the habit of passing as a short cut to other parts of the defenders' works, or to the high road from Glasgow to Springburn; but there was no path or beaten track across the Bullock Park, from said gap to the said cooling pit, which is one hundred feet farther south than the gap: Finds, that although it is proved that the gap existed, and had been used for a good many months before the accident in question, it is also proved that the parties who so used said gap were trespassing, and that the defenders' tenants in Jones' Land were repeatedly warned by the factor against either themselves, or their children, going through the paling: Finds it farther proved that it was part of the prescribed duty of two of the defenders' workmen to watch the said cooling pit, and adjacent ground, and to keep children and other persons unconnected with the works away from it, and that they in point of fact frequently turned children out of the park who had strayed into it: Finds, more particularly, that on the afternoon of the 27th day of August, 1858, the pursuer's son, John M'Aulay, with other children, was turned away from the vicinity of the cooling pit, and out of the park, by the gateway, by the defenders' workman Thomas Barr: Finds, that notwithstanding this, the said John M'Aulay, who was only six years of age, and whose parents then resided in Jones' Land, went on a later part of the same day through the gap in the said paling with other boys, and straggled down towards the said cooling pit: Finds it proved that, "the inducement children had to come to it was to walk on the tar when it was in a certain state in which it sunk with them, and to take tar away to make balls:" Finds, that although the cooling pit was unfenced, it was only about 14 inches deep, and was not dangerous to any person who did not wilfully go into it: Finds it proved that, on the afternoon in question, a boy, John Docherty, having gone into the tar got his foot burned: Finds, that the witness Archibald Colquhoun deponed that Docherty "came back and told the other boys this; that John M'Aulay and the others made a fool of him, and that John said he would go to the cooler, as he was not afraid, and would walk on the tar:" Finds, that John M'Aulay went accordingly, and having gone in among the tar, lost his footing and fell among it, whereby he was so much burned, that although he was observed and taken out and carried home immediately, he died the following morning: Finds, that his mother Catherine M'Neill or M'Aulay, has deponed that she was aware that children went through the gap in the paling, and that she often made reflections about it, and that she often cautioned her said son not to go near the cooling pit: Finds, in point of law, upon these facts, that the deceased John M'Aulay having met with his death through his own act when trespassing within the defenders' grounds, where he had no right to be, no liability attaches to the defenders, and the pursuer, as the natural guardian of his child, having allowed it so to stray, is not *in titulo* to raise the question, whether the injury might or might not have been sustained had there been a fence round the cooling pit, the rule of law being that a party who, by a voluntary act, unauthorised and unnecessary and amounting to a trespass, exposes himself to danger and is injured, has no recourse against the proprietor of the premises where the injury is sustained, the more especially if such premises are at the time in their common and ordinary condition: therefore, and under reference to the authorities cited in the annexed Note, sustains the defences and assoilzies the defenders: Finds the pursuer liable in expenses, etc., and decerns.

NOTE.—The cases mainly founded on by the pursuer were those of *Black*, Morr. p. 13,905; *Chapman*, Feb. 25th, 1853; *March*, Feb. 17th, 1832; and *Hislop and Others*, 14th March, 1842. In all these cases proprietors of lands, on which there happened to be mouths of coal-pits or other openings, were held culpably negligent in not seeing that they were properly fenced, so as to prevent any of the lieges falling into them. But there was also in each of these cases this important specialty, that the aperture was close beside a public or other road "not shut out from public use," and that the injuries were sustained by persons lawfully travelling along these roads. In the present case no such element occurs. The cooling pit is in the centre of private works walled off from the nearest high road, and intended to be approached only by skilled and steady workmen. The pursuer's son was not in the defenders' employment, and had no right to be near the pit. The cases therefore which rule the present are the more recent ones of *Davidson*, 5th July, 1855; *Lumsden*, 1st Feb., 1856; *Balfour*, 5th Dec., 1857. In *Davidson*, a young child having strayed on a railway fell into an adjoining watercourse and was drowned, and it was held that although the watercourse was not fenced, no liability attached to the proprietors or tenants, because the child ought not to have been allowed to stray, and because there would have been no danger to persons taking care of themselves. The Lord President, after pointing out that the watercourse was not in a situation open to the public, said: "In regard to any danger that might happen to children, the danger was obvious and palpable to parents and others whose duty it was to take care of them, and the danger was well known to the parents of the child. In that state of matters this child is allowed to wander upon, and across the railway, and alongside of the lade, where it had no business to be, without any precaution taken to keep it from danger. That being the case, I do not see any ground for liability." In *Lumsden's* case, a boy nine years old carried gunpowder to his father, a miner, in works where the boy was not employed; in passing along he laid hold of a winding chain and was killed by being drawn into the machinery, which it was alleged was not sufficiently protected; but it was held that his father had no claim for damages, the boy having been in a place where he had no lawful occasion to be, and the death being caused by his own reckless act. The Lord Ordinary, (Ardmillan,) whose judgment was unanimously affirmed, says in his Note: "The danger of a boy being killed by the

winding chain of machinery at a coal-pit where the boy had no business there, where the place was not public, or situated so near a public road as to be hazardous, where there was no danger except to the rash and reckless, and where the boy himself rashly and needlessly laid hold of the chain by which he was killed, does not appear to be a casualty against which the defenders were bound to provide, or for which they were responsible." . . . "In no case that the Lord Ordinary is aware of has action been sustained, where there was not only merely a trespass in going to the place, and recklessness on the part of the injured party in exposing himself to danger, but a voluntary act, unauthorised and unnecessary, leading directly to the result." This is precisely in point here, seeing that John M'Aulay not only trespassed when he went to the cooling pit, but by his voluntary act of going to walk or wade in the tar, exposed himself to the danger of falling into it, the result which actually happened. In *Balfour's* case, where battens were stored in piles on an unfenced piece of ground adjoining a roadway along a canal harbour long used for that purpose, and open to the public, and where some of the battens fell and killed a boy ten years of age, who was between two of the piles, and who had no business on the premises, it was held that the owner of the battens who rented the ground in which they were stored, was not liable in damages to the father of the boy. Here, the locality was much more open to the public than that on which the defenders' cooling pit is situated, but the fact was held insufficient. The Lord Justice Clerk said—"That boys will frequent such a place in numbers, and often, as appears here, to the annoyance of people carrying on traffic, is to be expected. But boys have no business there, they come for idleness and amusement; the place is for business, and for business connected with the canal." Lord Cowan particularly adverted to the difference between *Balfour's* case and that of *Hislop's*, and the other cases above quoted, founded on by the pursuer. The present case seems even stronger than any of the others, analogous as they are, in which the principle of non-liability was affirmed.

Act. BUCHANAN. *Alt.* BURNS.

17TH MARCH, 1859.

SHERIFF COURT, KILMARNOCK.

(MR SHERIFF ANDERSON.)

GEORGE DYKES *v.* WILLIAM HILL.

Sale—Warranty.—*The seller of a horse having given a warranty of soundness, the horse being at the time unsound, circumstances in which it was held that the purchaser had no action on the warranty.*

THE pursuer bought a draught horse from the defender, who is a horse dealer, at Kilbirnie Fair, on 27th May, 1857, paid the price, and got delivery in the market. Shortly, or almost immediately, after the purchase, symptoms of disease manifested themselves, followed by an acute attack of *strangles*, of which the horse died on the 19th day of June following. The present action was brought for re-payment of the sum of £44, the price paid for the horse, and also for payment of the following sums:—"Item, of the sum of five pounds eight shillings, being the loss and damage sustained by the pursuer by and through the want of the said horse's work, from the date of purchase till the date of death, being three weeks, at the rate of one pound sixteen shillings per week: Item, of the sum of two pounds five shillings sterling, being the expense of feeding, medicine, and attendance, for said horse during the said period of three weeks: Item, of the sum of four pounds four shillings, being the charges incurred, and paid by the pursuer, to veterinary surgeons for advice and attendance on said horse during said period."

The defender pleaded:—(1.) No warrandice. (2.) No liability, in respect of maltreatment of the horse.

The record having been closed and proof led, the Sheriff-Substitute, after hearing parties' procurators, pronounced judgment as follows:—

Finds it proved—First, That the pursuer, George Dykes, purchased a horse for forty-four pounds sterling, from the defender, William Hill, at Kilbirnie fair, about mid-day, on the 27th of May, 1857, and paid the price, less five shillings returned in name of lucks'penny. Finds second, That the defender expressly warranted the said horse as whole and sound in every respect. Finds third, That the pursuer and his friends suspected something was wrong with the horse, from his appearing dull and hanging his head while standing, and drew the defender's attention to the circumstance before the bargain was concluded, who accounted for the animal's appearance, by stating that he had shortly before given it a hard drive. Finds fourth, That the witness, William Smillie, took delivery of the horse within an hour, or an hour and a half after the purchase, and while leading him to the railway station observed that he had a difficulty in stooping his head to the ground. Finds fifth, That on reaching the station, the horse was offered oats and water, both of which he refused. Finds sixth, That the animal was then put into a horse box, and conveyed by rail to Ayr, where he arrived at four o'clock, and reached the pursuer's farm the same evening, about five or six o'clock, when he again refused food, or at least seemed unable to swallow properly, and was observed to cough. Finds seventh, That the horse was moderately worked in the plough next day, when he was observed to lift at the flanks, to cough and stale frequently, and the urine to be tinged with blood. Finds eighth, That the horse was again put to the same work for the greater part of the 29th of May, when he exhibited exactly the same symptoms as on the previous day, and still refused both food and water. Finds ninth, That the horse was placed under regular medical treatment on the evening of the 29th of May, and continued so till he died, on the 19th of June following. Finds tenth, That the horse was unsound when the pursuer purchased him from the defender, and was then labouring under the disease of which he afterwards died: Therefore decerns against the defender in terms of the conclusions of the summons; allows the pursuer to give in an account of his expenses, and remits the same when lodged to the auditor to tax and report.

NOTE.—It rarely happens that so conclusive evidence of verbal warrandice can be produced as has been done in the present case. Here no fewer than four respectable witnesses speak in the most distinct manner to what passed at the purchase, and which, notwithstanding the defender's own denial, cannot leave the shadow of a doubt on any reasonable mind, that the horse was expressly warranted sound and correct in every respect. The question then is, the state in which the animal was when sold, whether sound or not. As might be expected, the evidence on this point is contradictory, but it is thought the great preponderance is in the pursuer's favour. All the witnesses are agreed that strangles was the cause of death, and they are also remarkably unanimous in stating the symptoms of that disease, and the order in which these symptoms appear—dulness, loss of appetite, sore throat, difficulty of swallowing, cough, lifting at the flanks, etc., etc. The main discrepancy in the medical testimony is the rapidity of the disease, and the period of time within which all these symptoms may arise. The defender's theory is, that the horse was sound and in perfect health and spirits when he sold him, or even if it then showed some of the premonitory symptoms of strangles, that its death was caused *solely* by the improper conduct of the pursuer in working the horse on the 28th and 29th of May; and he has led evidence to show that no disease to which the animal is subject yields so readily to treatment as strangles—in fact, that nothing but the most culpable stupidity could lead to a fatal result; that every horse, without exception, takes strangles, and that not one in a thousand dies. Assuming all this to be true, though the Sheriff-Substitute confesses much of it is new to him, the answer is, that the pursuer purchased a horse to work—he was not to suppose it had strangles. The defender himself accounted for the only symptoms he had noticed, dulness, lightness of belly, and staring coat. It is by no means an unusual thing (especially for a cart horse) to refuse food, when first put into a new stable. The pursuer is a miller, and not a veterinary surgeon, and even Mr Fulton, the experienced veterinary practitioner, who attended the horse, did not at first suspect strangles, believing it to be only a bad cold. In these circumstances, the Sheriff-Substitute cannot hold that

any serious blame, any *culpa lata*, attached to the pursuer for working the horse as he did on the 28th and 29th of May; neither does he think it proved that the animal's death was caused, or even materially accelerated, by the light and easy work to which he was put. The main question is, whether or not the horse was sound when sold. Various of the pursuer's witnesses speak to the animal's appearance; his coat staring, belly drawn up or clinked, hanging his head, and dulness, to which last Kirkwood drew the defender's special attention before the bargain was struck. The horse stood for an hour or an hour and a half among the defender's other horses, after he was bought, and before being removed to the railway station. It was a fine dry summer day, and there is really nothing in the attempt to show that the disease might have been contracted by exposure to the weather. Then in leading him to the railway station, the witness Smillie noticed he had a difficulty in stooping his head, and suspected something was wrong with his throat. When Smillie reached the station, and almost immediately after delivery was taken, the horse refused both oats and water, and never regained his appetite. Here, then, is a second symptom of strangles; and when the horse gets to the pursuer's farm the same afternoon, the other symptoms of coughing, difficulty of swallowing, etc., etc., all manifest themselves. The glands afterwards swell, the disease progresses, abscesses form, and ultimately the horse dies. The Sheriff-Substitute, therefore, thinks the great weight of the medical evidence shows that the disease had commenced before the horse was sold, or delivery taken, and that it is impossible to contend the animal was then sound, that disease afterwards supervened, and that all these symptoms developed themselves with such extraordinary rapidity.

The defender having appealed against this judgment, the Sheriff (Christison) recalled the same, and gave judgment as follows:—

The Sheriff having considered the closed record, process and whole proof, and heard the procurators for the parties, recalls the interlocutor appealed from, and finds first, that the horse sold by the defender to the pursuer on 27th May, 1857, was sold under an express warranty of soundness. Second, that the horse was unsound at the time of the sale, though the disease was not then developed, so as to be apparent. Third, that in two or three hours after the sale, the horse was offered corn and water at Kilbirnie station, which he refused, and was observed to have a stiffness in his neck—that he also refused to take food or water at night—and that this inability to take any nourishment whatever continued through the whole of the 28th and 29th of May, till about two o'clock of the 29th. Fourth, that, as stated in the pursuer's condescendence, other unmistakeable symptoms of disease manifested themselves, so early as the morning of the 28th of May. Fifth, that in this state of illness and inanition, the horse was worked in the plough for ten hours, with an interval for dinner, on the 28th of May, and the next day, for at least six hours, till he was unyoked, on the representation of a witness, who observed his distressed condition. Sixth, that the working of the horse was without the knowledge and sanction of the defender, who received no notice till he got a letter of the 30th May. Finds that the working of the horse in his state of disease and weakness, from want of food, was injudicious and improper, and calculated materially to aggravate his complaints, and to increase the risk of his death, which followed, and that the pursuer has lost his claim against the defender, under the warrandice: Therefore, assoilzies the defender from the whole conclusions of the action; finds him entitled to expenses, subject to modification, and appoints an account to be lodged and taxed, and decerns.

NOTE.—The express warrandice is clearly proved, and the denial of it on the record is a bad feature in the defender's case. The unsoundness is considered to be established. There can be little doubt that the refusal of food and water, and inability to stoop at Kilbirnie, were symptoms of the disease which was quite developed next morning. These early symptoms occurring within, at the most, three hours of the sale, make it more probable, that the seeds of the disease in a latent form existed before the sale than that they were of later origin. But on the other hand, the Sheriff considers the subsequent maltreatment of the horse to have been great, and inexcusable No doubt Mr Dick says, that he does not consider that the work to which the horse was subjected was such as to release the seller from the warranty, but in this he is contradicted by other witnesses of equal respectability and experience, and whose evidence is far more reconcileable with common sense. And even Mr Dick owns, that the treatment was injudicious, and had a tendency to aggravate the disease. It is not easy to conceive, where this is admitted, how the witness can have a measure for the degrees of aggravation, so as to pronounce that the injudicious working may not have been the cause of death. And this is more especially the case, when it is considered that the strangles, which seems to have been the disease, of which the horse died, is ordinarily, as described by all the witnesses, a mild disease, and so little dangerous that Mr Cockburn, who has treated several hundred horses for it, has never lost one. And farther, that it is a disease, for which not medicine, or active treatment, but care, repose, and nursing are the remedies. In Mayhew's edition of Blane, after saying that the disease is not dangerous, this treatment is recommended:—"Treat gently, nurse rather than physic, and on no account take blood." The entire strength "is required to throw off the disease, and the animal can ill afford to part with the smallest part of its vital energy; give no physic, neither purgative, sedative, nor febrifuge. Let the animal take *gentle* exercise, but not such as to distress him, daily." In regard to a disease of this mild character, and to be treated in such a manner, where death ensues after maltreatment, it is a reasonable presumption, that it is the treatment, and not the disease, which is the cause of death, at all events there can be no doubt that it materially enhances the danger. The Sheriff, therefore, where the veterinary witnesses differ, thinks himself entitled to exercise his own judgment, and indeed he confesses, that if even they had agreed in saying, that the work to which the horse was put, after so long inability to take any food or even water, was not hurtful, he would have found it difficult to acquiesce in an opinion so adverse to reason. He cannot receive the apology for the pursuer, that he was ignorant of the diseases and treatment of horses. A certain degree of intelligence is requisite in all dealings, and any ordinary person ought to have known, that to work a horse in illness and in starvation was wrong. Modified expenses only are found due to the defender, because he has very improperly denied his warrandice, and a great deal of the proof relates to that point, and to the question of unsoundness.

Act. JAMES MEIKLE. *Alt.* JOHN TORRANCE.

23D MARCH, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

GEORGE MURRAY & Co. *v.* JOHN TIERNAN & SON.

Sale—Warranty—Mercantile Amendment Act—Summons—Relevancy.—*A flesher bought from a salesman, in the Cattle Market, a fat cow, which, on being killed, was found bruised and damaged, and to some extent unfit for retail trade—Held in an action, for loss and damage thence arising, at the instance of the purchaser against the seller, that there being no express warranty of soundness, and no special purpose to which the cow was to be applied being specified at the time of sale, the seller was not liable. Averments in a summons sufficient to warrant proof of the facts averred.*

THE pursuers, fleshers in Glasgow, sued the defenders, cattle salesmen there, for loss and damages arising on the sale by retail of a fat cow purchased from them, in the Cattle Market, Glasgow, by the pursuers, on or about the 20th November, 1857; the said cow having been damaged by the defenders prior to the sale, or at least when in their possession or under their control, and thereby rendered unfit for the purpose for which it was purchased—which purpose the defenders knew was sale by retail.

The action was, in the first instance, brought in the Small Debt Court, and concluded for the sum of £5; but upon the defenders pleading in the action, of consent, it was remitted to the Ordinary Roll.

The defenders pleaded—

(1.) A denial that the defenders were owing the pursuers the sum sued for, or any sum whatever.

(2.) The defenders were cattle salesmen, and sell cattle in the Glasgow Market. It was very likely that the pursuers, on or about the date mentioned, purchased a cow from them. If they did so, the defenders expressly deny that the animal was damaged, or injured in any way by them, or that they knew it was damaged at the date of sale.

(3.) The animal, if purchased as averred, was purchased as it stood, with all faults. No warranty was asked or given. The defenders deny that they knew the purpose for which the cow was bought. By notice, put up in their office in the market, and advertisements, the defenders intimated that they are not liable for damage done to cattle by bruising. The other statements in the summons were denied so far as inconsistent with the above.

(4.) Under the 5th section of the Mercantile Law Amendment Act, the averments of the pursuers were insufficient to support the libel, and the same was irrelevant.

The Sheriff-Substitute having heard parties' procurators upon the relevancy of the action, sustained the same, and allowed both parties proofs, adding to his Interlocutor the following note:—

NOTE.—The pursuer does not aver that the defender expressly warranted the cow referred to in the summons, but he says that it was expressly sold for a specific and particular purpose, for which it turned out to be unfit. By the Statute 19th and 20th Victoria, chap. 60—the Mercantile Law Amendment Act—it is provided that "where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser; unless (1) the seller shall have given express warranty of the quality or sufficiency of such goods; or (2) unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose." If the pursuer, therefore, can prove that the cow was expressly sold for a purpose for which it was unfit, he will be entitled to recover, unless the defenders prove their averment that they intimated that they are not liable for damage done to cattle by bruising. Both parties, therefore, are allowed a proof of their averments before answer.

The defenders appealed this judgment; but the Sheriff, Sir A. Alison, adhered, referring to the views stated in the following note:—

The proof allowed is before answer only, and, of course, under reservation of the whole pleas of parties. All the length the Sheriff deems it necessary to go at present, is that he does not think this is a case in which he can at once, and without further investigation, shut out a proof. The recent Mercantile Law Amendment Act has made, in many respects, a very great change in the Mercantile Law of Scotland, whether for the better or not, remains yet to be seen. In regard to this particular case, however, and others of a similar description, the change made is not so great as in some other cases; because there is a saving clause, upon which the pursuer founds, reserving action on account of latent defects where there has been either an express warranty of the quality or an implicit warranty from the goods having been sold for either a specific and declared, or understood purpose. The pursuer alleges that the cow bought here was purchased in a *fat* cattle market, understood to be for animals to be immediately cut up; but that the beef proved to be very inferior, in consequence of bruises received by the animal on the voyage from Ireland. In such a case, under a certain state of the facts, an action of damages may still be competent under the late Statute, and in other circumstances it might not, and it is to clear up the case bearing on these facts, that the Sheriff has adhered to the Interlocutor, allowing a proof before answer.

The defenders' plea, founded at common law, on alleged *mora* on the pursuers' part in intimating the defect, is not yet disposed of, and will be disposed of by the Court before final decision.

Proof having been led, the import of which appears from the findings in the following Interlocutor, the Sheriff-Substitute, after hearing parties' procurators, pronounced judgment as follows:—

In fact, finds, that on the 24th Nov., 1857, the pursuer purchased two cows from the defender, in the Glasgow Cattle Market, at the price of £20, which he afterwards slaughtered for the purpose of selling the meat by retail: Finds, that when the defenders sold said cows, they did not warrant them, nor were they expressly sold for any specified or particular purpose: Finds, that prior to the sale of these cows, the defenders had put up a written notice on their sale box in the market, intimating that they would not hold themselves accountable for bruises or damage that may have been sustained by any cattle they sell, and that buyers must in future purchase them at their own risk; and that the pursuer knew of said notice: Finds, that when the pursuer had slaughtered and skinned these cows, it was discovered that one of them had been seriously bruised, in consequence of which the meat was considerably deteriorated in quality, and part of it was unsaleable as butcher meat, but it is proved that the defenders were not aware that the cow was in any way bruised or injured at the time of the sale: In law finds, that by the statute 19 and 20 Vic. cap 60, entitled the Mercantile Law Amendment Act, it is enacted that "where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless (1) the seller shall have given an express warranty of the quality or sufficiency of such goods; or, (2) unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose:" Finds, farther and *separatim*, that the defenders having intimated, and the pursuers being aware of this intimation, that they would not hold themselves accountable for any bruises or damage that might be sustained by cattle which they sold, the pursuer would not have been entitled to damage even prior to the passing of the above-recited statute; therefore sustains the defences, assoilzies the defender: Finds the pursuer liable in expenses, etc.

The defender again appealed, but the Sheriff adhered to the Sheriff-Substitute's judgment, adding to his Interlocutor the following Note:—

This case is one of importance in point of precedent, as all cases are which relate to the recent Mercantile Law Amendment Act, but the Sheriff cannot doubt that the Sheriff-Substitute has rightly adjudicated upon the point at issue. The view that he takes of the case is this:—The recent Mercantile Law Amendment Act has altered the presumption of law in cases where there is a dispute about articles sold coming up to the implied warranty. The rule of the old Scotch law was, that a full price implied a sound article, and therefore if the article proved to be inferior, the purchaser was entitled to be freed from the bargain. But the presumption has been changed by the statute, which declares that the purchaser is in all cases to be presumed as having taken the article *tantum et tale* as it stands, unless there was either an express warranty given to the purchaser, or it has been proved to have been sold for a special purpose specified at the time, and for which it afterwards proved to be unfit. Observe it is not said *implied* at the time. It is not alleged here, far less proved, that the cows sold were intended for retail sale after being slaughtered, as they were sold in the *fat* cattle market, and proved totally unfit for use after being cut up. That would have been a good plea under the old common law of Scotland, but it is not so under the present statute, which expressly requires a special purpose expressed at the time of sale. The Sheriff is aware that it is proved that the defenders had put up a notice on their stall, that they would not be responsible for bruises or latent defects in animals sold by them, but he attaches no weight to that, as knowledge of that placard is not brought home to the pursuer in the present instance.

Act. T. C. YOUNG. *Alt.* J. GEBBIE.

26TH MARCH, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

WILLIAM BLACK'S SEQUESTRATION.

Bankruptcy—Competition for Trusteeship—Affidavit—Mandate—Conjunct and confident—Diligence.—*Held, in a competition for the office of Trustee on a Bankrupt Estate* (1), *That the claim of a party conjunct and confident with the Bankrupt was not sufficiently vouched by the production of promissory notes;* (2), *That a diligence could not be granted to support the vote given on such a claim;* (3), *That it is not necessary in an affidavit by a partner of a descriptive firm, as such partner, to name the other partners; and* (4), *That a mandate subscribed by one partner of such a firm is sufficient to entitle a mandatory to vote.*

AT the meeting for the election of a trustee on the sequestrated estates of William Black, wholesale provision merchant in Glasgow, creditors whose claims amounted to £1,200 19s 1d voted for Mr Guild, and creditors whose claims amounted to £1,647 14s 3d voted for Mr Johnston, showing an apparent majority in favour of Mr Johnston. Objections were stated to several of the votes for both parties; but the only objections insisted on were those to the vote of James Collins Black for Mr Johnston, and those to the vote on the claim by the Roxburgh Street Sugar Refining Co. for Mr Guild. The note to the Sheriff-Substitute's Interlocutor states the objections and the grounds on which they were disposed of:—

Having considered the notes of objections for David Ramsay Guild, accountant in Glasgow, and William Johnston, accountant there, competitors for the office of trustee on the sequestrated estate of William Black, wholesale provision merchant, East Howard Street, Glasgow; and having heard parties' procurators *viva voce* thereon: In terms of the provisions of the Bankrupt Act, finds and declares, for the reasons stated in the annexed Note, the said David Ramsay Guild to have been duly elected trustee on said sequestrated estate: Finds the unsuccessful competitor, William Johnston, liable in the expenses of the competition; allows an account thereof to be given in, and remits the same to the auditor to tax and report, and decerns.

NOTE.—At the meeting for the election of Trustee, the votes for Mr Guild amounted in value to the sum of £1200 19s 1d, those for Mr Johnston, to the sum of £1647 14s 3d, giving the latter an apparent majority of £446 15s 2d. The first vote given for Mr Johnston objected to by Mr Guild, is that of James Collins Black, claiming for £613 8s 2d. The Sheriff-Substitute is of opinion that this vote cannot be sustained. Mr Black the claimant is the brother of the bankrupt, and his claim is founded on three promissory notes granted in favour of the claimant, one for £100, another for £69 7s 9d, both dated in December, 1858, the third for £200, dated on 7th January, 1859, and a bill of exchange for £250, drawn by the claimant upon, and accepted by the bankrupt, 1st March, 1859, and payable four months after date. The affidavit merely swears to the debt as vouched by said notes and bill; but contains no statement of the circumstances under which they were granted, or of the manner in which the debt arose. The three promissory notes have never been discounted, but remained in the claimant's possession since they were granted. In these circumstances, the Sheriff-Substitute considers that the same principles apply as those given effect to in the Court of Session, in the case of Jno. Anderson *v.* J. W. Guild, 13th June, 1852. At the discussion, a diligence was craved by Johnston to recover other documents to instruct Mr Black's claims; but the Sheriff-Substitute considers that such an application is incompetent, as the Statute requires that the creditor shall produce with his claim such vouchers and other documents as are sufficient to prove his debt. Mr Black's claim being rejected, and struck off from the votes for Mr Johnston, Mr Guild would have a majority in value of £166 13s. The only objection given to the votes for Mr Guild, which was insisted in at the scrutiny, was that of Mr David Richardson, as one of the partners of the Roxburgh Street Refining Co., claiming for £216 14s 2d the objections being that the creditors, the Roxburgh Street Refining Co., is a descriptive firm, and that the names of the partners of that firm are not given as required by law, and that the mandate is subscribed by said firm. The Sheriff-Substitute, however, is of opinion that the objections are untenable, and that the vote should be sustained. The recent Bankruptcy (Scotland) Act, 1858, provides, sec. 25, "that when a creditor is a corporation, an oath of verity, made as aforesaid by the secretary, manager, cashier, clerk, or other principal officer of such corporation, shall be sufficient, although the person making the same be not a member of such corporation; or, in case of other companies, an oath by a partner shall be sufficient;" and in the interpretation clause, sec. 4, it is enacted that the word shall include bodies corporate, politic, or collegiate, and partnerships. A company carrying on business under a descriptive firm is clearly a partnership, and section 63 provides that the mandatory of any person entitled to vote as creditor may vote in the absence of such creditors. The mandate in this instance is signed by Mr Richardson, who is a partner of the Roxburgh Street Refining Co., and clearly entitled to vote as such. This vote, therefore, being sustained, and Mr Johnston not having insisted on his objections to the other votes, Mr Guild is left in a majority in value of £166 13s.

For MR JOHNSTONE—JAS. MURDOCH.
For MR GUILD—T. G. WRIGHT.

31ST MARCH, 1859.

COMMISSARY COURT, PAISLEY.

(MR SHERIFF GLASGOW.)

CANDLISH'S EXECUTRY.

Intestate Succession Act, 18 Vic. cap. 23—Competition for Executorship.—*In a competition for the office of executor, between a sister uterine and a cousin german of the deceased, Held, that the cousin german was entitled to the office.*

MARGARET CANDLISH, Paisley, died intestate on 3d Jan. last. She left no brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but she was survived by a sister uterine, and the descendants of a deceased brother uterine, and of a deceased sister uterine, who by the Intestate Succession Act, 18 Vic. cap. 23, sec. 5, have right to one-half of her moveable estate. Miss Candlish was further survived by three cousins german on the paternal side, who, prior to the passing of the said Act, would have been entitled to the whole of the personal estate, but are now entitled only to the one-half thereof.

Mrs Webster of Manchester, the surviving sister uterine, applied to the Commissary to be decerned executrix-dative qua sister uterine, pleaded that she was entitled to the office in respect of her interest in the estate, in virtue of the said Act, and as being the only surviving sister, though uterine, she was the nearest relative, and therefore the next of kin of the deceased.

Mr James Orr of Liverpool, one of the cousins of the deceased, with consent of the other two cousins, opposed Mrs Webster's application, and claimed the office of executor for himself, as next of kin; he contended that though the statute gave the half of the personal estate to brothers and sisters uterine, it did not confer upon them the *status* of next of kin, a *status* which, prior to the passing of the Act, they did not enjoy, and that as under no circumstances could such relations get the whole succession, it was obviously the intention of the Legislature that they should not be regarded as the next of kin.

The Commissary Depute, after appointing condescendence and defences to be given in, pronounced the following judgment, which has been acquiesced in:—

Having heard parties, finds that the petitioner Orr is entitled

to the office of executor in preference to the competing petitioner, and decerns; but in the circumstances of the case, finds no expenses due.

NOTE.—Although the Act gives half of the succession to the brother and sister uterine, it does not give them the status of next of kin. They were never so esteemed before the passing of the Act 18 Vict. cap. 23. They cannot now succeed to more than a half of the moveables, even though there is no relation on the father's side at all.

There are sections giving a preference of a half to the father, and a third to the mother, over brothers and sisters, but the brothers and sisters would be entitled to be decerned executors-dative in preference to their parent.

This being the first case of the kind which has come before this Court, the Commissary-Depute has given no expenses.

Act. For WEBSTER—HECTOR & BROWNLIE, Pollokshaws.
Alt. For ORR—DAVID CAMPBELL, Paisley.

2D APRIL, 1859.

SHERIFF COURT, PERTHSHIRE.

(MR SHERIFF BARCLAY.)

FERGUSON'S SEQUESTRATION.

Bankruptcy — Sequestration — Affidavit — Amendment—Expenses.—*Held that the Court may allow a creditor to amend his affidavit for the purpose of rectifying any technical or clerical blunder, and that it is not necessary that the amendment should be made on the original affidavit—Opinion that expenses should be allowed to objectors in an appeal where the opposite party has secured a majority by amending their affidavits.*

IN this competition for the office of trustee on Ferguson's estate, the trustee, who was in an apparent minority, objected to four votes. On a motion by the other party, for leave to amend the affidavits, the objector contended against any amendment being allowed in this competition, and if rectified, that the Statute required the rectification to be upon the original affidavit.

In two of the affidavits, the amendments proposed were mere technical or clerical corrections; in the third, the amendment consisted in the valuation of a security, omitted in the original affidavit.

The Sheriff, after hearing parties, allowed the amendments to be made, and repelled the objections. The note to his Lordship's Interlocutor describes the proposed amendments, and states fully the grounds on which they were allowed. It is as follows:—

The opinion of the Sheriff-Substitute is, that the utmost latitude should be given to the admission of the votes of all *bona fide* creditors represented at the meeting, and that the only anxiety of the Court should be to exclude persons who do not fall under that character, from improperly exercising the right of creditors. He is disposed to allow the greatest extent and opportunity of rectifying all merely *clerical* and *technical* mistakes in an affidavit, which, in the former state of the law, were the source of much unsatisfactory and expensive litigation, to the great prejudice of the bankrupt estate. The only limit which the Sheriff-Substitute is disposed to recognise under the fifty-third section of the "Bankruptcy (Scotland) Act, 1856," is that provided by the Act itself, namely, "When the failure to comply with the provisions of this Act shall appear to have been made for some improper or fraudulent purposes, or where injury can be qualified by the other creditors, or any of them in respect thereof." Of course, it cannot be allowed that any new creditor, who was not represented at the meeting, should afterwards come forward on any new claim added to a vote or value recorded. With regard to the observation, that the rectification must be upon the *first* affidavit, this may be where it is a new correction of a clerical error; but where it is to supply the omission of a substantial fact, it must obviously form the subject of a supplementary or explanatory affidavit. Applying these general principles to the particular votes in question:—

First, Vote of the Clydesdale Banking Company.

It was by no means very clear (seeing that the creditors voted upon an obligation *directly* in their favour,) that they were bound to value the bankrupt's shares in the Edinburgh and Glasgow Bank, which came into their possession, not *directly* from the bankrupt, but indirectly, by an arrangement with said other bank. The creditors, however, have wisely met the objection, by putting a value upon the shares, which enables the creditors to obtain their benefit, if they choose to avail themselves of the power conferred upon them by the Statute. The correction is, therefore, for the benefit of the creditors, as not only reducing the vote, but also giving them what may perhaps be a privilege.

Second, Vote of James White.

The affidavit and account was not so far objectionable, as there was a want of evidence to fix the claim upon the bankrupt; and which, not having been supplied, the vote has been rejected.

Third, The Vote of David Logan, Shirres, and Company.

The objections to the first affidavit were purely technical, and have been rectified by the new affidavit; but it was wrong in them to add an additional claim, which, of course, has been disallowed.

Fourth, The vote of James Boak and Company. The objection here was merely technical, and has been rectified.

It is clear under the circumstances that the trustee elect cannot get expenses against the objectors, and the Sheriff-Substitute is not a little moved by the argument of their solicitor that he should have *his* expenses. It is certainly unusual to award expenses to the party who, in the end, has been unsuccessful, but under the old law, as the affidavits would not admit of correction, and as in point of fact it was only by correction that the trustee elect is placed in a majority, there does exist strong reasons for allowing expenses to the objectors. A contrary practice will have the effect of introducing excessive slovenliness, where there should exist scrupulous accuracy. The Sheriff-Substitute therefore indicates his intention that in future, on the occurrence of a similar case, he will award costs to objectors, who would have been in a majority on the scrutiny, had their objections been sustained, (as they would,) as the affidavits originally stood, but who only lost their position by subsequent amendments of these affidavits.

Act. *Alt.*

6TH APRIL, 1859.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

MARY MORRISON *v.* JOHN FAICHNEY.

Interdict—Reputed Ownership—Possession.—*A party who had purchased effects at a public judicial sale, and kept them for a number of years in the house of a brother, with whom she resided—Held entitled to vindicate them against her brother's creditors.*

THE defender was elected and confirmed trustee on the sequestrated estate of John Morrison, the pursuer's brother, and caused an inventory to be taken of certain articles of household furniture, and a cow, alleging that these effects were the property of the bankrupt, and vested in him, the defender, as trustee. The pursuer presented a petition for interim interdict, setting forth that she was owner of the articles of furniture, and also of the cow, and praying that the defender might be prohibited from interfering with, or selling the same. Thereafter, the defender, who was landlord of the subjects in which the effects were situated, applied for sequestration of the same effects for a year's rent, said to be due at Whitsunday, 1858. Another petition for interdict, at the pursuer's instance, was presented, disputing the extent of the hypotheo,

on the ground that the subjects were possessed as from Martinmas to Martinmas, and that the hypothec for one half year was accordingly lost. The defence in this second action was that the subjects were possessed from Whitsunday to Whitsunday.

The actions having been conjoined, and proofs allowed, it appeared that the articles of furniture did not originally belong to the pursuer's brother, the bankrupt; and they had been purchased by the pursuer at a public judicial sale, in 1840. That the pursuer, who lived in family with her brother, the bankrupt, from the time the furniture was purchased, had a cow, before the one in dispute was bought, and that the latter was purchased at Larbert market for the pursuer, by her brother, the bankrupt, in 1854, and afterwards paid for by her, and that she had always sold the produce of both cows.

Parties having been heard, the Sheriff-Substitute pronounced the following judgment:—

Finds, that the pursuer has proved ownership, by purchase and possession of the furniture and effects brought from Miltonbog to Sunnybrae, so far as claimed by her, reserving to particularise any articles so as sufficiently to extricate the case: but Finds that she has failed to prove her property in articles subsequently brought to Sunnybrae: Finds that she has proved her ownership and possession of the cow claimed by her: Finds that the pursuer does not claim exemption of her property from the defender's right of hypothec as landlord of the premises in which the same were situated; but only disputes the extent of his said right: Finds, with reference to the extent of the defender's right of hypothec, that the possession was taken of the premises soon after a term of Whitsunday, and, that although no rent was exacted for the period of possession up to Martinmas following, in the absence of express stipulation or practice, the tenure must be held to commence and endure from Whitsunday to Whitsunday, that also being the more common term of entry: therefore, Finds that the pursuer is entitled to vindicate her property from the defender's claim as trustee, and continues the interdict to that effect, but recalls the interdict so far as regards the defender's hypothec. But declaring that the defender is bound first to seek recovery of his rent and consequent expenses, from the subjects of hypothec not herein vindicated to the pursuer as her property: Finds the pursuer entitled to expenses, subject to modification, etc.

NOTE.—The pursuer's procurator argued that the late Mercantile Amendment Act was applicable to this case. But in the first place, that Act has no retrospective power; in the next place, that statute leaves the law of Scotland as to reputed ownership, and as to a sale without possession, precisely as before, but only limits the claims of the creditors of the vendor and vendee in the peculiar instance of the price being paid without delivery, so as in that case to assimilate the laws of England and Scotland. That possession presumes property in the possessor, has always been the law of Scotland. But like all other ordinary presumptions, must yield to proof of facts. In the present case the pursuer establishes her purchase by the strongest of all evidence, namely, a judicial public sale. This, too, was many years ago, and long before her brother's insolvency, or the defender's title to interfere. It must also be noticed that the effects so purchased were not then the property of her now bankrupt brother, John, but of her father, on whose death she would have succeeded to a portion thereof as inheritance. There is evidence that at the time she had money wherewith to make the purchase, and there is no proof that she did so with money belonging to John or any other person. The interdict at her instance against the sale which proved abortive, but not from failure of proof, rather strengthens her claim, seeing that she claimed property even at that time against her father's creditors. There is not sufficient evidence of the subsequent purchase of articles, and which easily might have been supplied by the evidence of the sellers in Perth. The evidence of property in the cow is not altogether so strong as that of the furniture bought at a public sale; but taken as a whole it is sufficient in the absence of contrary evidence of ownership in John. The pursuer has been in possession of the furniture and cow ever since they came to Sunnybrae, just as much and more than either of her brothers, and especially John, who appears often to have been from home. The mere circumstance of one of the brothers being held as the *direct* tenant, is not sufficient to vest in him, and his creditors, the right of property of everything within the premises. The defender's procurator founded on a variety of cases, but chiefly on that of *Anderson* v. *Buchanan*, 25th December, 1848. There can be no doubt that the authorities cited go to sustain the right of creditors to attach subjects in possession of their debtor, where a clear right of property is not proved to exist in another. To exclude such right of property, though latent, would be to deprive a person once unfortunate in the world, from ever having a furnished house by the help of his friends, who, in such cases, depending upon the security of the law are inclined to purchase their relative's furniture, and give it to him in loan. The case of Anderson cannot stand high in authority where such eminent judges as Lords Moncrieff and Ivory were in the minority. Besides, in that case, the sale was a private one, and the purchaser was never in possession, but resided at a distance from the house where the furniture was situated. On the pursuer's side, there are two cases which cannot be so easily got over, as may be the case of Anderson. These are the well-considered cases, 19th Nov., 1836, *Jeffrey*, and 8th January, 1840, *M'Dougall*. The first branch of the case of Jeffrey was decided by the present Sheriff-Substitute, when acting at Stirling twenty-five years ago. A sister succeeded in obtaining a decree from him against her brother for delivery of furniture, and subsequently that furniture was found not even to fall under the landlord's right of hypothec, because it had been wrongfully withheld from her, although in ignorance of the landlord. A stronger authority for the right of property, overcoming the presumption away from possession, cannot be supposed. The case of M'Dougall is also a strong authority, seeing that the sale in that case was private, and not a public judicial roup, as in the present instance.

Against this Interlocutor the defender appealed, and, in support of his appeal, lodged a reclaiming petition, which the Sheriff (Mr E S. Gordon) appointed the pursuer to answer. On advising the petition and answers, he pronounced the following Interlocutor, affirming:—

The Sheriff having considered the appeal with the reclaiming petition in support thereof, and the answers for the pursuer, dismisses said appeal, and affirms the Interlocutor appealed from, and decerns.

NOTE.—The evidence establishes that the pursuer was the purchaser and owner of the articles of furniture, etc., referred to in the Sheriff-Substitute's Interlocutor and Note. The case differs in many material circumstances from that of Anderson v. Buchanan, 22d December, 1848, which is founded upon by the defender. In that case the furniture originally belonged to Gordon, the bankrupt. The trustee on his sequestrated estate had never taken delivery of it; but allowed it to remain in the possession of the bankrupt. Anderson, a friend of the bankrupt, purchased it from the trustee, but he never obtained delivery; and he also allowed it to remain in the possession of the bankrupt, the original owner. There was a difference of opinion on the Bench; but without attaching too much weight to that circumstance, it must be kept in view that the Court proceeded on the absence of proof, (probation having been renounced,) upon certain presumptions, and their decision had reference to the special circumstances of that case. The facts that the bankrupt was the original owner, and was allowed to continue in possession of the furniture, were mainly relied on by the majority of the Court. This is brought out very clearly in the remarks of Lord Wood, in the recent case of Brown or M'Dougall v. M'Arthur, 8th of July, 1858. His Lordship, in reference to Anderson's case, says, "In that case, although no doubt its circumstances gave room for many observations upon the legal effect of disputed ownership, the judgment was not placed upon that ground. Apart from that, it was held that the Bankrupt Act did not so vest the property and the moveables belonging to the bankrupt, in a purchase from the trustee, as to exclude the subsequent diligence of the creditors, without his completing his right in the usual way required by the law of Scotland to transfer the property or moveables; and that the purchaser not having done so, but having allowed the goods sold to remain in the possession of the bankrupt, he had never acquired the *jus in re*, and that, therefore, the owner was not divested of his original right as owner, and the goods were open to the

diligence of the poinding creditor." His Lordship adds, "that this was clearly the ground of judgment of the majority of the Court." Brown or M'Dougall's case was also one in which the original owner was allowed to remain in possession of the effects, which had been sold about a year before, and no delivery of them was made to the purchaser. The Court founded their judgment upon these facts. But in the present case, John Morrison, the bankrupt, never was the owner of the furniture, etc.; the pursuer, who purchased them, took delivery and retained possession of them, although, no doubt, she lived in the house and premises for which John paid rent. In these circumstances, it is considered the cases of Anderson and Brown, or M'Arthur, cannot rule the present case.

Act. A. G. Reid, Auchterarder. *Alt.* W. G. Young, Auchterarder.

6th April, 1859.

SHERIFF COURT, AIRDRIE.

(Mr Sheriff Logie.)

James M'Ilroy *v.* Mansfield Grieve.

Master and Servant—Reparation—Collaborateur.—*A person employed in a coal pit as a drawer, sustained bodily injuries from the falling of the roof of the road, over which he had occasion to pass, and which it was, by the regulations of the colliery, the employer's duty to maintain—Held, in an action for reparation, that, notwithstanding his having appointed a sufficient staff of men to superintend the roads, the defender was liable.*

The pursuer, a drawer in a pit belonging to defender, at Palace Craig, near Coatdyke, while following his usual avocation, on 4th March, 1858, sustained severe bodily injury, in consequence of a portion of the roof of the drawing road—along which it was his duty to pass—falling upon him. He brought this action against the defender, concluding for solatium and damages for the injuries sustained, he having been thereby confined to bed, or otherwise rendered unfit for work, for several weeks.

The defender pleaded no liability—in respect that the road on which the pursuer had sustained injury was, in common with the other roads in the pit, under the charge of an experienced overman and roadsman—and referred in support of his defence to the principles of law enunciated in the Bartonshill Coal Company's cases, decided in the House of Lords, on 17th June, 1858.

The pursuer answered that, as by the printed rules of the colliery, which formed the basis of the contract between the parties, the maintenance of the formed roads devolved on the employer, the overman and roadsman were mere representatives of the defender, and not *collaborateurs* in the sense adopted in the Bartonshill cases.

The Sheriff-Substitute, after proof had been led, and parties' procurators heard thereon, pronounced the following judgment:—

Finds it admitted that the pursuer was a drawer in the service of the defender, at his pit at Palace Craig near Coatdyke: Finds, that on 4th March, 1858, he received severe personal injuries, in consequence of a portion of the roof of one of the drawing roads in said pit having fallen upon him, whereby his spine and loins and left knee were bruised or otherwise injured: Finds, that in consequence of the injuries so received, the pursuer was confined to bed, or otherwise rendered unfit for work for several weeks: Finds, that the pursuer was proceeding along a regularly formed road, in said pit, with his hutch and in the execution of his duty as a drawer, when said accident occurred: Finds, that by the printed rules of the colliery produced by the defender, and a copy of which is said to be given to each worker as the basis of the contract between the parties, it is stated that the maintenance of the formed roads shall devolve on the employer, that is, on the defender in this action: Finds, that the road in question was not in a safe condition on the morning and at the time when the pursuer met with the accident: Therefore finds, in point of law, that the pursuer has set forth relevant grounds of action against the defender: Finds, that the defender is liable in damages to the pursuer, and as a solatium for the severe personal injuries so sustained by him: Finds, that twelve pounds sterling is a reasonable sum, as the damage sustained by and in solatium to him for said injuries: Finds the defender liable to the pursuer in said sum of twelve pounds sterling, with interest thereof from the date of citation to this action till paid: Finds the defender liable in expenses, allows an account thereof to be given in, and remits the same when lodged to the Depute Clerk of Court as auditor, to tax and report, and decerns.

Note.—This is an action brought by a drawer in a colliery against the owner of the pit, for severe personal injury done to him by a fall in the roof of the drawing road along which it was his duty to draw coals. It has been attempted to meet this action by a defence that the owner of the pit is not liable, he having appointed an efficient staff, consisting of an experienced overman and roadsman, and that, as the roads were under their charge, the principles of law applied by the House of Peers, in the case of Reid and M'Guire *v.* Bartonshill Coal Company, are applicable to this case. Unless the Sheriff-Substitute has mistaken, not only the principles of the law enunciated in these very important cases, but also the facts of the present case, the Bartonshill cases, instead of being an authority for, are against the defender.

The Bartonshill cases establish the law, that when an injury has been done to one workman by the negligent act of another—the workmen being engaged in one common operation or work—the master is not liable for such injury. But an important exception was made where either there has been negligence on the part of the master, or where proper precautions have not been taken by him to have proper machinery and proper servants employed. The Lord Chancellor Cranworth, in giving judgment on the Bartonshill cases, gave a summary of various cases, which he held had been rightly decided on former occasions. In particular, he referred to the cases of *Paterson* v. *Wallace* (1 *Macqueen* 748), where a workman had been killed by the fall of a large stone while in a mine. In this case the Court of Session had allowed an issue to try whether the death had been occasioned by the unsafe state of the roof, and the negligence of the owners in having so left it when the workmen were sent to work there—and strong evidence had been offered to show that, though the roof was in a dangerous state, its condition was known to Paterson, who was killed, so that his death was the consequence of his own rashness, and not of the owner's neglect. The judge who presided on the jury trial was of that opinion, and directed the jury that the pursuer could not recover, and so withdrew the case from the jury. Exceptions were taken to this direction, but the Court of Session sustained it. On appeal, the House of Lords considered the exception well founded, and allowed a new trial—a course of which Lord Cranworth expressed his entire approval, the question being, as his Lordship remarked, not as to an injury occasioned by the unskilfulness of a fellow-workman, but whether the injury had been occasioned by his own rashness or *by the roof* not having been properly secured by the owners.

His Lordship referred also to the case of *Bryden* v. *Stewart*, 2 *Macqueen*, 30, where the miners had complained to the underground agent of the state of the pit, and, he having refused redress, they refused to work, and desired to be drawn up. One of the men in the course of the ascent having been killed, and an action having been brought against the owners, the House of Lords, reversing the decision of the Court of Session, held that the men had a right to leave their employment, and that their employers were bound to take all reasonable measures for having the shaft in a proper condition, so that the men might be brought up safely, and directed the verdict to be entered for the plaintiff.

The distinction pointed by Lord Cranworth between the two cases and the Bartonshill cases is, that they turned not on the question whether the employers were responsible for injuries occasioned by the carelessness of a fellow-workman, but on the principle that when a master employs his servant in a work of danger he is bound to exercise due care, in order to have his tackle and machinery in a safe and proper condition, so as to protect him against unnecessary risks.

His Lordship also remarked that the master is liable when

the accident occurs from a defective system; and the present Lord Chancellor, Chelmsford, expressed his entire concurrence in the whole of Lord Cranworth's opinion.

Applying the principles of law deducible from the above cases, the Sheriff-Substitute is of opinion that there are certain risks against which the workman is entitled to hold himself protected by the vigilance of the master, viz.: against unsafe roads, and shafts, and defective tackle and machinery.

In the present case it so happens that the general rule of law is confirmed by the agreement of parties, for by the rules of the pit, sec. 34, the workmen are directed, if, in travelling along any formed *road*, or other part of the works, "the maintenance of which, under these regulations, shall devolve on the employer," they meet or see any fall from the roofs, or observe any dangerous place, they are immediately to report it to the underground manager or roadsman. A copy of these regulations is said to be delivered to each worker on accepting work, so that they prove the obligation undertaken by the employer, to maintain the formed roads in a good and safe state, and that such obligation is not devolved upon a fellow-workman.

The plea, *damnum fatale*, is not set forth in the defences to this action, although at the bar an alternative plea was set up, that it being the roadsman's duty to attend to the state and safety of the roads and roof, he is not responsible for the roadsman's neglect, nor for any omission on the part of the overman, they being both fellow-workmen of the pursuer.

This alternative plea, it appears to the Sheriff-Substitute, cannot avail the defender, and in proceeding to state the grounds on which he has arrived at this conclusion, it is due to the parties to state, that it has been satisfactorily established that Frew the overman, and Vernal the roadsman, appear to be both steady and experienced men, and competent for the duties that were devolved on them.

Mr Frew the overman or manager, a witness for the defender, states that the roof was of "blaise," some parts of it hard and good, and other parts of it more broken, and that a day or two previous to the accident there had been a fall from the roof in the same drawing road—in consequence of which he sent a man named Sprott to go along and secure the roof in the whole line of that road. The roof of the road, therefore, was not in a good and safe state at the time, but required great watchfulness and attention on the part of those having charge of it. Vernal the roadsman, it has already been remarked, was admittedly a steady and experienced roadsman, but it is brought out on cross-examination of Sprott, that Vernal had been absent from the pit for three days before the pursuer was injured, owing to his wife's illness, and was not in the pit when the fall took place a day or two before, when Sprott was sent to secure it. In these circumstances the proof by the defender that Vernal was an experienced roadsman is of no avail, and had he been in the pit attending to his duty the probability is that the accident would not have happened. But when leave of absence is given Vernal to absent himself, what happens? Does Mr Frew, the overman, supply the want and superintend the roads to see that they are safe? Not only does he not do so, but he sends a man, Sprott, as to whose qualifications for the task no one speaks, described by Frew as an "ordinary pickman," and that only after he hears there had been a fall, to examine the roads, "with instructions to try where he (Sprott) thought it necessary." For aught that appears on the record, that is the only examination made during the three days of Vernal's absence, although by the rules of the pit, sec. 16, the roadsmen are required "at the *close* of the colliers' shift, and daily, to make careful inspection of the whole drawing roads," etc.

It appears from the evidence that Vernal the roadsman had returned to his work on the morning of the accident; but the defender has not called him as a witness, nor is there any evidence either as to his opinion of the state of the roof, or whether he had examined it at all prior to the *accident*. Frew, however, in his evidence states that on the morning in question, one of the workmen reported to him that the roof was "working" or moving at a place farther in towards the coal face, than that at which the accident afterwards happened—that he took a pick and sounded that part of the roof pointed out to him, and as part of it sounded loose and hollow, he sent for props to support it—that after this he came close to, but just inside the part of the roof which afterwards fell; and when there a collier remarked to him "that stoop is working," on which he "at first made light of the remark, but still thought it prudent to examine the stoop;" and when doing so, heard a cracking noise proceeding from the stoop, as if it was yielding to the mass overhead, and he "stepped back." Now if Mr Frew had not made light of the collier's remark when first made to him, but had instantly examined the stoop—and if when he heard the cracking noise he had stepped forward towards the quarter from which he knew the props were coming that he had himself sent for, instead of going back, this accident would have been prevented.

The Sheriff-Substitute has therefore formed a very clear opinion, that on the grounds above set forth, the defender is liable in damages to the pursuer, which he has assessed at twelve pounds—in respect of the number of weeks during which he was entirely idle, and of his being only able for lighter work, and to earn a smaller wage when he began to work. To come to this decision, it is unnecessary in this case to decide whether Mr Frew is to be regarded as a *collaborateur* or not, although, had it been so, the Sheriff-Substitute would have held that, as the manager of the pit above and below ground, his acts in that capacity become the acts of the owner of the pit.

It is rather remarkable in these rules, sec. 21, that while the foremen are required to descend the pit *before* the colliers' shift begins, to examine the drawing roads for fire-damp, etc., it is only at the close of the shift that the roadsmen are required to make their inspection, although an equal reason appears in the one case as in the other, to have it ascertained that the roads are in a state of safety before the workmen begin their labour.

Both parties having appealed, the Sheriff (Sir A. Alison) adhered, adding the following Note to his Interlocutor:—

The Sheriff has perused with much pleasure the distinct and able Interlocutor and Note by the Sheriff-Substitute in this important case, and he has also heard the case very ably debated both by Mr Aiton and Mr Rose. Though he adheres to the Interlocutor, however, it is not without considerable difficulty. Not from any doubt that the Interlocutor under review is strictly in conformity both with the old Scotch law on the subject and the obvious justice of the case, but because there is some little difficulty reconciling it with some of the expressions used and *dicta* therein by the Lord Chancellor in deciding the recent noted Bartonshill Coal Company's cases. The Chancellor there expressly laid it down, in concurrence with the other appeal Peers, not only that no workman had a claim against his employer for damages on account of injuries sustained through the fault of a fellow-workman, but that those persons were to be regarded as fellow-workmen, not only who were engaged in the same species of work, *but who were employed in the same workshop, manufactory, or mine*, and Lord Cranworth even used the strong expression, as appears from the report, that the persons engaged in hoisting up the miners to the surface, if not *collaborateurs* with them in the actual cutting out of the mineral from the rock, were still *collaborateurs*, as they were all engaged in the same general employment of cutting the coal from the rock which lay in the mine, and bringing it to the surface for sale. If this part of the noble Lord's speech is to be taken in its literal meaning without exception, and there is nothing inaccurate in the report, it would have the effect of cutting off all claims whatever, at the instance of a workman in any manufactory or local mine against his employer, even for the very grossest case of negligence on the part of another workman or person employed, whereby one has been injured or killed; because, in all such cases, the whole workmen employed are engaged in the common work of completing a manufacture or raising minerals to the surface. Such a doctrine, if received without limitation, would be equivalent to a total denial of relief from the master in all cases for injuries sustained in manufactories or coal mines, how gross soever the fault of the party by whom they were directly occasioned, because it need hardly be said that in not one case out of a hundred in which the workman does the mischief, can he make good any part of the damage thereby occasioned. But that such a state of matters is not only contrary to the obvious justice of the case, but to the understanding of English lawyers and judges of their own law, is obvious from the consideration, not only that in that very case the Lord Chancellor said that the master was clearly bound to have the tackling and *machinery at the pit in proper order*, and consequently that he was responsible in damages

if they were not in good condition; but also from his observing that the two Scotch cases referred to in the Sheriff-Substitute's Note, were rightly decided, in one of which a master was found liable in damages sustained by a workman from a *stone falling from the roof of a coal mine*, which is a case that very much resembles the present; and another in which the master was found liable in damages for injuries sustained by the workmen in consequence of the breaking of the tackling, by which the workmen were hoisted to the top of the pit, who had struck work under circumstances in which the Court justified them in insisting on going to the top. In neither of these cases could judgment have passed against the master if he incurred no responsibility whatever from the fault of a workman in his employment, because the damage in both cases arose from negligence on the part of a *collaborateur*, and would have been prevented if they had been sufficiently attentive and experienced. Without attempting to say where the line is to be drawn between liability and *non*-liability on the master's part, and respectfully waiting till the Court of last resort shall point out where the line lies, it appears to the Sheriff that the responsibility of the defender is established in the present case by the following considerations:—

In the first place, by sec. 34 of the rules and regulations of the mine, a copy of which is proved to have been delivered to every miner when he entered the employment, and another being put up at a conspicuous part of the pit, it is expressly provided that the roof of the subterraneous roads are to be upheld by the *master*, and that the workmen are to be bound to give notice of anything they see dangerous in the roofs, and not to pass through any dangerous place until the danger is obviated. 2d, It is proved here that there *was* danger in the roof, and that it was observed *before* the stones fell which hurt the pursuer, and the manager had given directions to have it propped up where the creaking had been heard, which was about forty paces from where it ultimately fell; but notwithstanding this, the requisite props were not put up, and the pursuer had been sent forward with his truck by the road surveyor, who was a short way behind him, before the props had been put up, or the danger obviated. 3d, The pursuer was not a collier or miner who had anything to do with the putting up of props or the cutting of coal, but a *roadsman*—that is a person employed to assist in dragging, with a horse, the trucks from one part of the mine to another, and therefore had nothing to do either with the propping of the roof or the cutting of the coal in a safe manner. Both at common law and under the express contract of parties in this case, he was entitled to rely on the roof being upheld by the master in a safe state. 4th, Although the surveyor and underground manager are proved to have been skilful and attentive persons, yet one of them had been absent for three days on leave, in consequence of his wife's illness, and no person was substituted in his stead. 5th, No negligence or recklessness of any kind is proved against the pursuer as having occasioned the catastrophe which followed.

As to the *quantum* of damages the Sheriff-Substitute appears to have struck a fair *medium* between the extremes of the evidence, in which it appears somewhat exaggerated in this, as in similar cases, on the opposite sides, and to have awarded a fair compensation to the pursuer for the injuries he sustained.

Act. A. Y. Rose, Airdrie. *Alt.* J. Aiton, Airdrie.

18th April, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Bell.)

William Ormiston & Co.'s Sequestration.

Sequestration—Competition—Affidavit—Executor—Vitiation—Conjunct and Confident—Mandatory.—*In a competition for a trusteeship in a sequestration—Held,* (1) *where a party claims in the character of an executor, he must produce his title to the office.* (2) *That an affidavit vitiated by an alteration of the date and sum,* ex post facto, *is bad.* (3) *The claims of a brother-in-law and father-in-law of the bankrupt, vouched by the bankrupt's bill only, cannot be sustained.* (4) *A mandate by a principal's known agent, who has omitted an oath to a debt due to the principal, is good.*

In this competition for trusteeship, James Smith, accountant in Glasgow, had votes amounting in value to £2160 15s 9½d, James Thomson, junior, had votes in his favour to the amount of £1816 13s. Notes of objections were lodged against the votes for both parties. Upon a scrutiny, the Sheriff-Substitute pronounced the following Interlocutor, in the note appended to which the nature of the objections and findings in law thereon are fully stated:—

Having heard parties' procurators on the notes of objections for James Smith, accountant in Glasgow, and James Thomson, junior, accountant there, competitors for the office of trustee on the sequestrated estates of William Ormiston & Co., general merchants and importers of foreign goods, Glasgow, and of William Ormiston, the sole partner of that company, as such partner, and as an individual: Finds and declares, for the reasons stated in the annexed note, the said James Smith to have been duly elected trustee on said sequestrated estates: Finds the unsuccessful competitor, Thomson, liable in the expenses of the competition. Allows an account thereof to be given in, and remits the same to the auditor to tax, and report, and decerns.

Note.—At the meeting for the election the votes for Mr Smith amounted in value to the sum of £2160 15s 9½d, those for Mr Thomson to the sum of £1816 13s, giving the former an apparent majority of £344 2s 9½d. At the scrutiny upon the notes of objections, the following votes in favour of Mr Smith were held bad, (1,) the vote of C. F. W. Rust, on behalf of F. E. D. Hast of Sweden, for the sum of £140 11s 3d, in respect that the said sum is brought out in the account, annexed to the affidavit, as a balance still due upon cash advances, one item of which is for £500, and no voucher is produced to support said item; (2,) to the vote of T. D. Marshall for £16 8s 8d, in respect that although the voter claims as executor only of the late George Lumley, he has failed to produce his title as executor, (Anderson, July 9th, 1847); (3,) the vote of Alexander Kay, claiming for £35 8s, in respect that the affidavit was vitiated *in essentialibus*, both the date and sum having been altered by an *ex post facto* operation, and the latter written upon an erasure; (4,) the vote of Andrew Nicols, claiming for £99 9s 10d, in respect the claimant is the bankrupt's brother-in-law, and the claim is vouched only by a bill, granted by the bankrupt within sixty days of bankruptcy, and (5,) the vote of John Nicols, claiming for £97 15s 5d, in respect that the voter is the bankrupt's father-in-law, and the claim is vouched only by a bill granted by the bankrupt. The only other objection of any nicety, stated by Mr Thomson, was to the vote of the said C. F. W. Rust, as known agent for Ferdenard Glier & Son, claiming for £141 7s 1d. A mandate was granted by the agent and not by the principal creditor, which it was maintained was *extra vires*. But, as under sec. 23 of the statute, a known agent is entitled to emit an oath, and under that oath is entitled to be ranked and to vote as a creditor; and, as under sec. 63, a vote by a mandatory of any person entitled to vote as a creditor, is to be held as the vote of the creditor himself, the objection to this vote was repelled. The above votes, however, which were thrown out, amounted to the sum of £390 3s, which sum being deducted from the cumulo amount of the votes for Mr Smith, put Mr Thomson in a majority of value of £52 2s 9½d. But, on the other hand, the following votes for Mr Thomson were held bad, viz., those of Samuel Davis, claiming for £26, John Wooley & Co, claiming for £21 4s 9d, Charles Lawford, claiming for £26 19s 3d, and W. J. Vale, claiming for £29 6s 5d, to the extent of £22 16s 5d, in respect that the bills founded on, as the vouchers of these respective claims, were not produced. The value of these respective votes being £97 5d, Mr Smith regained a majority of £44 17s 7½d.

For James Smith—T. G. Wright.
For James Thomson—W. B. Faulds.

3d May, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Bell.)

Barr Brothers and Mandatory *v.* William Forbes.

Guarantee—Liability of Cautioner—Novation.—*A sold goods to B, upon the guarantee of C, at the usual credit; A there-*

after took payment from B by bill and cash and discharged his claim, B failed to pay the bill at maturity, and gave another bill as a renewal, which was not accepted as such by A; no notice of the dishonour of the first bill having been given to C.—Held, that the cautionary obligation of C was discharged.

On 4th February, 1858, the firm of D. C. Forbes & Co. were indebted to the pursuers the sum of £130 13s 7d, on which date the defender wrote to the pursuers a letter of guarantee in the following terms:—

"I hereby hold myself responsible to you for the sum of £130 13s 7d, being value of goods received from you by Messrs D. C. Forbes & Co., which sum I guarantee shall be paid you in the beginning of April next, when your usual journey is due. Of the above sum £87 5s 4d to be paid nett, and £43 8s 3d, less 2½ per cent. discount. I will also hold myself responsible and guarantee you payment for any goods which you may send the before-designed D. C. Forbes & Co., from this date to the 1st day of April next."

The pursuers, upon receipt of this letter, continued to supply Forbes & Co. with goods, and upon the 1st of April had done so to the value of £89 8s. Thereafter the pursuers brought this action against the defender for the sum of £108 4s 8d, being the above sums of £130 13s 7d and £89 8s, in all £220 1s 7d, less payments made in cash by Forbes & Co. to them, £111 16s 11d.

The defender pleaded in defence, that the pursuers had discharged the defender by giving time to the principal debtors, and taking their bill for the amount due without consulting the defender, and had otherwise acted in a way to liberate, and then that they held as liberated the defender from the guarantee libelled.

The Sheriff-Substitute, having heard parties' procurators on the grounds of action and defence before answer, allowed the defender a proof, *pro ut de jure*, of his averments.

From the proof adduced, it appears that the pursuers, in the month of April, called upon Forbes & Co. for payment of the amount due to them; that Forbes & Co. not being prepared to pay the whole amount in cash, they granted the pursuers their bill at 2 months for £120, and paid the balance in cash, whereupon the pursuers delivered to Forbes & Co. a discharged account acknowledging settlement of the whole debt; that Forbes & Co. being unable to retire their bill at maturity, sent to the pursuers another note for the same amount, which, however, they did not consent to receive as a renewal on discount; that no intimation was made to the defender of the pursuers having taken a bill from Forbes & Co., nor did the pursuers intimate to the defender the dishonour of the bill till more than a month after its maturity, when Forbes & Co. had become insolvent.

The Sheriff-Substitute having thereafter heard parties' procurators, pronounced the following Interlocutor:—

Finds, that this action is founded on the letter of guarantee No. 6/1, granted by the defender to the pursuers, of date 4th Feb., 1858, in which he guarantees the payment to them of the sum of £130 13s 7d due by D. C. Forbes & Co. for goods received, and which sum he guarantees "shall be paid in the beginning of April next, when your usual journey is due:" and the said letter farther guarantees payment of any goods which may be sent to the said D. C. Forbes & Co., between the date of the letter and the said first day of April: Finds, that the pursuers called on the 14th of April on D. C. Forbes & Co. for payment of the amount then due to them, amounting to £130 16s 11d: Finds, that D. C. Forbes & Co. not being prepared to pay the whole amount in cash, the pursuers agreed to take the bill No. 10/1, at two months for £120, and the balance in cash, which was accordingly paid, and thereupon the pursuers delivered to the said D. C. Forbes & Co., the discharged account in No. 10/6, acknowledging a settlement of the whole debt: Finds, that when the said bill fell due, D. C. Forbes & Co. being unable to retire it, sent to the pursuers, as a renewal for one month, the promissory note for £120, dated 16th June, 1858, also in process, but the pursuers did not consent to receive it as a renewal, and did not discount it, and do not found on it in any way in this action: Finds that no intimation was made by the pursuers to the defender of their having taken a bill from D. C. Forbes & Co. on the 14th April and discharged their account, nor did the pursuers make any intimation to the defender of the dishonour of said bill till more than a month afterwards, namely, on the 18th or 19th July, by which time D. C. Forbes & Co. had become insolvent: Finds, in point of law, that where a creditor agrees to give time to his debtor beyond the limits of the original obligation, so as to tie up the cautioner by virtue of that agreement from having the same remedy he might otherwise have had, the cautioner is freed, and, accordingly, where one selling goods on the suretyship of another at the usual credit, either takes a bill which he renews, or in the expiration of the credit takes a bill at a renewed credit, the surety is discharged; *Bell's Com.*, vol. I., p. 361, note 4; see also *Samuel*, 1817; 3 *Merwalis' Rep.*, p. 272; and *Combe*, 1832; 8 *Bing Rep.*, p. 156; also *Hume*, Jan. 12th, 1830: Finds, therefore, that in the present case the pursuers having so transacted with D. C. Forbes & Co. as to put it out of the defender's power to take his remedy against them at the proper time, that is, the time contemplated and specified in the letter of guarantee, the defender was thereby discharged from his cautionary obligation; sustains the defences and assoilzies the defender: Finds the pursuers liable in expenses, of which allows an account to be given in, and remits the same to the auditor to tax and report, and decerns.

The pursuers having appealed against this judgment, the Sheriff (Sir A. Alison) adhered to the Substitute's Interlocutor, appending to his Interlocutor the following Note:—

NOTE.—The Sheriff concurs with the Sheriff-Substitute in thinking that the pursuers have, by their own acts, liberated the defender from the guarantee granted by him, on account of the primary debtors, D. C. Forbes & Co., and that they cannot now enforce implement of that guarantee. At the time the pursuers took the bill from D. C. Forbes & Co., the primary debtors, for £120, dated 14th April, 1858, at two months, they did so without acquainting the defender, and having taken that bill and the payments in cash as a settlement of the whole amount due, being then £130 16s 11d, they discharged the account, (No. 10/6) acknowledging the settlement, and delivered the same to Forbes & Co. The taking of this bill, without the defender's knowledge or consent, was a *novatio debiti*, and a discharge of the *original debt* was then given, though not of the older guarantee, which, however, fell when the debt itself was discharged. The pursuers are not entitled to found on the subsequent promissory note for £120, dated 16th June, at one month, sent to them with the defender's indorsation upon it; seeing they refused to receive it as a renewal of the former bill, and did not discount it, and do not libel upon it in any way in this action, and seeing they had, prior to that, discharged the original debt itself in April, by taking the £120 bill from the primary debtors, which discharged the guarantee.

Act. D. FORBES. *Alt.* J. NAIRNITH.

10TH MAY, 1859.

STEWARD COURT, KIRKCUDBRIGHT.

(Mr STEWARD DUNBAR.)

KIRKWOOD AND MILLER v. MILLAR.

Sale—Breaking Bulk—Mora—Neutral Custody—Personal Exception—Res Noviter.—*A farmer bought a quantity of oilcake, which was represented as being of the best quality. Immediately after receiving delivery he became aware of its inferior quality, and refused to pay the price, but retained possession. On a subsequent occasion he again refused payment, and intimated to the sellers that they were at liberty to take back the oilcake.—Held, in an action for the payment of*

the price, that the purchaser having failed to place the cake in neutral custody on discovering its inferiority, and intimating his intention to reject it; and having broken bulk, was barred by personal exception from resisting payment of the price. Statement which held sufficient to ground a plea of bulk broken, and render a condescendence of res noviter unnecessary.

In June, 1857, the pursuers, merchants in Leith, sold a cargo of oilcake in the Stewartry of Kirkcudbright, through their agent Mr William Gordon, Auctioneer, Gatehouse-of-Fleet. The defender, Andrew Millar, farmer, Kempleton, in the parish of Twynholm, purchased a quantity of the oilcake, which was represented as being of the best quality, and equal to a sample shown; and got delivery thereof on 10th July, 1857. Immediately after delivery rumours reached the defender that the oilcake was of bad quality, and on being applied to by Mr Gordon he refused payment, assigning the current reports as his reason for doing so. Again, on 23d September, 1857, the defender's agent wrote the pursuers' law agents declining payment on the ground of the inferior quality of the cake, and intimating that the pursuers were at liberty to remove it "on sending for it to Kempleton, where it lies untouched." The defender kept the oilcake in his own premises from the time of receiving delivery; and it came out in the proof that the defender's daughter had used part of the cake for feeding calves "twice a-day for a short time." The present action was raised on 30th October, 1857, for recovery of the price.

The pursuers pleaded:—(1.) Oilcake was not rejected within a proper time. (2.) Bulk broken. (3.) Defender should have placed the oilcake in neutral custody.

The defender pleaded:—(1.) Inferior quality of oilcake. (2.) That defender gave intimation of his refusal of the oilcake as soon as he knew of its spurious quality.

The only statement in the pursuers' condescendence with regard to bulk having been broken was, "and it is believed that the defender has consumed a portion of it;" and there was no plea in law founded on this: but in the defender's revised answers, the fact was specifically denied, and one of his pleas in law was to the following effect:—"The defender not having broken bulk, and having timeously objected to the article, he is not liable in the price thereof." After the record was closed the pursuers lodged a condescendence of *res noviter* to have an averment of bulk broken added to this record.

Proof having been led on both sides, and parties' procurators heard, the Steward-Substitute pronounced the following judgment, which has been confirmed on appeal:—

Having resumed consideration of this cause, and advised the pleadings Nos. 20, 21, 22, 23, and 24, finds, that the fact alleged in article 1 of the condescendence for the pursuer, No. 23, is not *res noviter veniens*, in respect 1st, The said fact is substantially and sufficiently set forth in article 5 of the pursuers' revised condescendence, No. 7, is specifically and distinctly denied in the defender's revised defences, article 5, and 3d plea in law applicable to that defence in said revised defences, No. 9; 2d, The said allegation in the revised condescendence was, by Interlocutor of 12th March, 1858, remitted to probation; and 3d proof has been accordingly led relative to that allegation: Therefore finds it unnecessary, and refuses to add to the record, or to allow further proof of the fact set forth in the condescendence for the pursuer, No. 23, article 1: Finds the pursuer liable to the defender in the expenses relative to the discussion on the said matter of *res noviter veniens*, as the same shall be taxed by the auditor of this Court: Finds it admitted that the defender in June, 1857, gave to Mr William Gordon, Gatehouse, who acted as the pursuers' agent in the Stewarty for the sale of oilcake, an order for a ton of the pursuers' said oilcake at the price of ten pounds per ton, which Mr Gordon, with the pursuers' sanction, represented to the defender as being of the best quality, and equal to a sample shown by Mr Gordon when the order was given: Finds it proved that, on 10th July, 1857, the defender got delivery of the ton of oilcake so ordered from the pursuers, and at the same time he purchased from the pursuers and got delivery of six hundred weight and three-quarters more of the same oilcake, being the broken part or sweepings of the cargo from which the foresaid ton had been taken, at the price of nine pounds per ton: Finds it proved that the defender placed the said oilcake in his barn, and afterwards in his granary, where it still remains, diminished in quantity if not deteriorated in quality: Finds it proved that, immediately after delivery of the oilcake, rumours reached the defender that its quality was bad: Finds it proved, that the defender, on being applied to for payment of the price of the said oilcake by Mr Gordon, the pursuers' agent, declined to make such payment on the ground of its being reported to be of bad quality; and on 23d September, 1857, the defender's agent, by his instructions, wrote to the pursuers' agents, again formally declining payment, and intimating that the pursuers might have the oilcake "on sending for it to Kempleton, where it lies untouched:" Finds it neither alleged nor proved, that the defender, either on first suspecting the quality of the said oilcake, or after intimating his intention to reject it as of inferior quality, took any means for placing it in neutral safe custody, and preserving it from all risks of injury or interference, until the rights of parties regarding it should be determined: Finds it proved that, in consequence of that omission on the defender's part to put the said oilcake into safe keeping, the defender's sister, in order to test its quality, took a portion of it and consumed it, without the defender's knowledge or sanction, in feeding twice a-day, for some time, the defender's calves: Finds it proved that a portion of oilcake, taken from the oilcake in the defender's granary, was transmitted by the defender to Professor Anderson of Glasgow for analysis, and found to be of inferior quality; but, with reference to the circumstances in which that analysis was made, finds, that it cannot receive effect against the pursuers in this cause: Finds, that the defender is not entitled, after having kept the oilcake purchased from the pursuers for so long a period under his own absolute care and control after intimating his intention to reject it, and having broken bulk and used a part of it, to repudiate the bargain and return what remains of it: Therefore, repels the defences and decerns in terms of the conclusions of the summons, for payment to the pursuers of the sum of thirteen pounds and nine pence, with interest at the rate of 5 per cent. on the said sum from the date of citation: Finds the defender liable in expenses, except as above disposed of, etc., and decerns.

Note.—The Steward-Substitute is very far from disputing the validity and reasonableness of the defender's objections to the oilcake, as originally furnished to him by the pursuers; nor is it possible to doubt that if these objections had been properly followed out, and not obviated by personal exceptions, effect would have been given to the defender's pleas. There is abundant evidence that the cargo of oilcake, out of which the defender was supplied, did not, as a whole, fulfil the pursuer's representations. It was not all of the same quality, nor all of superior quality. A part of it appears to have been analysed for behoof of other purchasers, and found to be inferior; and, in some instances, the price originally stipulated was reduced to the purchasers on account of that inferiority. To that extent of redress, if not more, the defender would clearly have been entitled, if he had asserted his right timeously, and in a regular manner.

It appears from his own deposition that the defender objected to the quality of the oilcake, *about a week after it was delivered to him*, in consequence of rumours which had reached him regarding it, and wished the agent to take it back. This was declined by the agent, and soon afterwards the price was again demanded from him, and a settlement was again refused by the defender on the same ground of alleged inferiority in the article.

This amounted to a plain intimation of his intention to reject the article. It was then incumbent on him at once to return the article to the pursuers, or if that was opposed by them, or was otherways impracticable, or clearly inexpedient from the difficulties or expenses attending it, the only other course was to place it in safe neutral custody, or hold it himself for the pursuers' behoof, that no injury to, or improper interference with it, could occur. The defender, unfortunately, followed neither of these courses. He intimated, in due time, to the pursuers his objections to the article, and his wish to return it. The pursuers neither admitted the validity of these objections nor the defender's right to return the article. If

they had admitted the inferiority of the article, their opposition to its return would have transferred to them the risks attending its retention in the defender's custody. But the defender undertook all these risks by retaining the article in his own absolute custody so long after intimating his intention to reject it; and while the validity of his objections and of the bargain was undecided and unascertained. Moreover, the risks incurred by his retention of the oilcake were not visionary. For, in consequence of insufficient precautions, or instructions regarding it, a part was withdrawn by the defender's sister, and used by her in feeding the defender's calves. It is, in the Steward-Substitute's opinion, immaterial whether that interference took place with the defender's knowledge or not; because it was clearly his duty to have taken effectual means to prevent it. Nor can it be alleged that the quantity removed was so insignificant that no objection could be raised on that ground. For, it appears, that for some time it was given to the defender's calves *twice-a-day*, and when seen by Mr Cavan shortly before 10th August, 1858, in the defender's granary, it had dwindled from one ton six hundred weight and three quarters down to *less than one ton*; or, in other words, *more than six hundred weight and three quarters of the original quantity delivered had been removed or disappeared.*

It cannot well be maintained, in the face of these facts, that bulk was not broken while the article was in the defender's custody, or that it was kept in such a way as to afford adequate protection to the pursuers.

It has been held in a consistent series of decisions, that when an article has been retained by the purchaser and bulk broken, it cannot be returned on the seller, however inferior in quality it may be to the purchaser's order. The Steward-Substitute will only refer to one of the latest cases, *Ranson and Mandatories* v. *Mitchell*, 3d *June*, 1845, where that doctrine has been most luminously expounded and fully recognised.

The only point on which the Steward-Substitute had at first some doubt, was *the period when bulk was broken*. If it had been proved that only a *small* quantity had been taken out of the heap, before its inferior quality had been suspected or objected to, and for the purpose of testing the quality, the personal exception founded on *breaking bulk* would have been less tenable, more especially if (as in the instance referred to by Lord Fullerton in Ranson's case) "the party taking and using the goods had been thrown off his guard by the representations of the seller, and relying on his honesty, had dispensed with that caution he might otherwise have exercised." But these facts the defender was bound to establish. Now, unfortunately, no such proof has been adduced, or seems adducible. For the quantity taken has been shown, on reasonable grounds, to have been considerable, and as the defender admits that he suspected the inferior quality almost *immediately after delivery*, it must be inferred, in the absence of all proof to the contrary, that bulk was broken *after the quality of the article was suspected and objected to.* Indeed, the defender's conduct, from first to last, is irreconcileable with the supposition that the article was used incautiously under the belief that it was sufficient. For he not only applied to pursuers' agent soon after delivery, and subsequently, to be relieved of the article and bargain altogether, on account of alleged inferiority in its quality, but he further instructed his agent to write to the pursuers' agents *so late as 23d September*, 1857, that the pursuers "may have the oilcake he received, on sending for it to Kempleton, *where it lies untouched.*" The defender cannot, with reference to the statement in that letter, plead consistently, or honestly, that bulk was broken *before* he had rejected the article on the ground of its inferior quality. At all events, he has made no relevant averment, nor led any evidence in support of such a plea.

The Steward-Substitute is relieved of the necessity of considering and deciding whether the defender is barred from resisting payment of the article, on the ground of its inferior quality, by the retention of it in his sole custody so long without any active measures to return it, or put it into neutral custody, *even on the assumption that bulk had not been broken!*

That question is not, in his opinion, so free from difficulty in the present case, in consequence of the important specialty that *the defender did not, at any time, refuse to return the article to the seller*, as was done by the purchasers in the cases of *Watt* v. *Glen*, 6*th February*, 1829, and *Tudgett & Co.* v. *M'Nair & Brand*, 24*th November*, 1852. The defender here was not only willing, but was apparently desirous, to return the article, and it was the pursuers who declined to take back the article, and insisted on the bargain being adhered to.

But, on the other hand, the pursuers never admitted the inferiority of the article sold and delivered to the defender, and until that fact was admitted or proved, the defender had not a legal right to return the article. One part of the cargo sold to other parties may have been bad, and rejectable by the purchasers on that ground, while the other part of the cargo sold and delivered to the defender may have been unexceptionable in quality; as it appears, from one of the chemical reports produced, that the cargo was composed of different qualities. Nor is it possible to receive and give effect to the report, No. 18, as a trustworthy analysis of the *article, as originally delivered to the defender in July*, 1857. The sample submitted for that analysis was not taken by judicial authority; with the consent or knowledge of the pursuers, or by neutral persons. It was altogether an *ex parte* proceeding, and although the pursuers admit that the analysis or report, No. 18, refers to the sample of oilcake "referred to in the deposition of the said Samuel Cavan, dated 17th August, 1858," they expressly deny, or, at least, they refuse to admit, that the oilcake referred to in No. 18 of process is a fair sample of the article sold to the defender. In these circumstances, the report, No. 18, must go for nothing, and it must, consequently, be held that the defender, while rejecting the article on the ground of its inferior quality, *kept it in his sole custody from July*, 1857, *when it was delivered, until the date of the present action, without adopting any steps judicially or regularly to have his objections verified, and the article removed from his possession.*

In these circumstances, the Steward-Substitute is inclined to think that *without the introduction into the case of the element of breaking bulk*, there is enough to subject the defender in payment of the price stipulated.

In the recent case of *M'Bey* v. *Gardener*, 22*d June*, 1858, the retention by the purchaser in his sole custody of the horse sold to him, from 15th June till 11th August, was held to deprive him of his right to reject the animal as unsound, although he had intimated the unsoundness to the seller, and his rejection of her *on the 18th June* and *on the 4th July*, and although the purchaser then refused to take her back.

Act. W. Alder, Gatehouse.
Alt. W. Craig, Castle Douglas, & D. Jenkins, Kirkcudbright.

11TH MAY, 1859.

SHERIFF COURT, GLASGOW

(Mr Sheriff Bell.)

Ormerod Jervis and Thomson and Mandatory v. Black and Co.

Principal and Agent—Mora.—*An agent having purchased from the pursuers a quantity of goods in his own name, without disclosing the names of the defenders, who were the principals in the transaction,—Held, that the pursuers having allowed the period of credit allowed to the agent to expire without making a demand for payment on the principals, and having also, subsequent to the expiry of the credit, taken a partial payment or security from the agent, they were barred from claiming the price from the defenders, who had previously settled with the agent.*

This was an action raised at the instance of Ormerod Jervis & Thomson, merchants and commission agents in Manchester, and mandatories, against James Black & Co., merchants, Glasgow. The summons concludes for payment by the defenders to the pursuers of the sum of £812 12s 6d sterling, for goods sold by the principal pursuers to William Wardlaw & Co., commission agents in Glasgow, and which were purchased by the latter in their own name, without disclosing at the time that of the defenders, who were their principals in the trans-

action, as the pursuers have since learned, and for whom the purchase was really made.

The defenders in their defences deny that Wm. Wardlaw & Co. acted as their agents in the said transactions, or that they are liable in any way for the sum sued for—and explained that in said transactions, as in others of a similar nature, the pursuers dealt with Wardlaw & Co. as principals—and more particularly, that the pursuers, in the transactions libelled, actually elected Wardlaw & Co. as their debtors, and took from them payments to account, and granted them time after the ordinary period of credit had expired.

The record was closed upon these statements of parties, and after proof had been led, Sheriff Bell pronounced the following Interlocutor:—

Having heard parties' procurators, and resumed consideration of the proof, productions, and whole process—Finds that the summons concludes for the sum of £812 12s 6d, for goods sold by the principal pursuers to William Wardlaw & Company, commission agents, Glasgow, between the 21st July and 7th August, 1857, both inclusive, the said goods having been purchased by Wardlaw & Co. in their own name, without disclosing at the time that of the defenders, who, it is alleged, were their principals in the transaction: Finds that the first defence stated for the defenders is a denial that, in the transactions referred to in the summons, William Wardlaw & Co. acted as their agents, or that the defenders stood in the relation of principals towards the pursuers; but finds it proved, both by the parole testimony and by the five invoices recovered from the defender Drew, being the invoices of the goods in question, that the said goods were purchased by William Wardlaw & Co., as the defenders' agents, and on their account, and that the said defenders were therefore the principals in the transactions: Finds that the second defence founded on by the defenders is, that the pursuers have lost any right of recourse which they might otherwise have had against them as principals, in respect that they so dealt with Wardlaw & Co. as to elect them their debtors, having both given them time after the period of settlement had expired, without making any demand on the defenders, and having also obtained a partial settlement from Wardlaw and Co.: Finds, in point of fact, that the pursuers were in the habit of dealing with William Wardlaw & Co.'s Manchester firm as principals, and of invoicing to them as such goods sold to them from time to time, and of receiving from them settlements in that capacity: Finds, in particular, that it is instructed by the invoices 5/2 to 5/5 inclusive, that the goods now in question were inveiced by the pursuers to Wardlaw & Co. as principals, and it is not denied by the defenders that Wardlaw & Co., in purchasing said goods, did not disclose that they were acting merely as agents: Finds, that the terms on which said goods were sold to Wardlaw & Co. were thirty days' credit from the date of the invoices, with a discount of 1½ per cent.: Finds, that according to the dates of delivery, the first parcel would thus have been due on the 21st July, and the last on the 7th September, 1857; or, if an average of the dates had been taken, the whole would have been due on the 3d September: Finds, that Wardlaw & Co. having in the interval forwarded the said goods, together with some others, to the defenders, they paid Wardlaw & Co. in full for the same, first by a bill at four months for £1000, granted on 21st August and duly retired, and second, by a payment in cash, on the 4th September, of £263 12s 6d, all as instructed by the receipted account No. 5/6, and not denied by the pursuers: Finds, that William Wardlaw & Co.'s books, from which the production No. 11 contains excerpts, show only a balance of £411 11s 6d, as due by them to the pursuers, but this balance is brought out by taking credit for a bill for £400, as paid by them to the pursuers on the 22d September, 1857, independent of which bill their books show the whole sum now sued for to be due, less 21s: Finds, that the said bill was an acceptance of the Manchester firm of Lewis Atterbury, Jun., & Co., at three months, from 19th September, 1857, which was forwarded by Wardlaw & Co. to their Manchester house; and finds it proved that it was by them handed to the pursuers on the 23d September, conform to the receipt, a copy of which is contained in the letter No. 15, and is in these terms:—"£400.—Manchester, 23d Sept., 1857. Received from Messrs Wm. Wardlaw & Co., their draft on Lewis Atterbury & Co. at 3 mos., dated Sept. 19, for four hundred pounds sterling. (Signed) for Ormerod Jervis & Thomson, H. CARRIGG. (Stamped.)" Finds, that Lewis Atterbury, Jun., & Co. became insolvent before the said bill reached maturity, and the pursuers, therefore, cannot now be debited with it as a payment, nor, in the state of the evidence regarding it, can they be held to have taken it from Wardlaw & Co. other than as a security: Finds, that Wardlaw & Co. became insolvent in October, 1857, and the manager of their Manchester firm, the witness A. M. Francis, has deponed—"The name of the defenders was first given to the pursuers about the time of Wardlaw's stoppage. The pursuers did not ask for the defenders' name until after they had repeatedly pressed Wardlaw & Co. for payment. It may have been after Wardlaw's stoppage. They, the pursuers, looked to us for payment. It was because they could not get the money from us that the name transpired." Finds, that the pursuers did not make any demand against the defenders till the 28th October, which was subsequent to Wardlaw & Co.'s stoppage: Finds, in point of law, that the general rule that an unknown principal when discovered is liable on the contracts which his agent makes for him, is subject to this qualification, that the vendor may preclude himself from recovering against the principal by the manner in which he chooses to transact with the agent: Finds, more particularly, that whilst, on the one hand, it is no sufficient answer to the vendor's claim, when timeously made, that the principal has already settled for the goods with his agent; such settlement will, on the other hand, protect the principal, provided no demand is made upon him till some time after the period of credit upon which the agent bought the goods has expired, the vendor having in the interval either given time to the agent, or otherwise transacted with him, so as to lead to the inference that he had elected him as his debtor: Finds, that in the present case, although the goods were all due and payable not later than the 7th September, 1857, the pursuers made no demand upon the defenders till the 28th October thereafter, by which time Wardlaw & Co. had become insolvent, and they had in the meantime so far transacted with, and changed the state of accounts between them and Wardlaw & Co., as to have taken from them on the 23d September their draft on Lewis Atterbury and Co. at three months; whilst, on the other hand, the defenders, long before any demand was made upon them by the pursuers, settled with Wardlaw & Co. for the price of the goods: Finds, that in these circumstances, there was not only such *laches* on the part of the pursuers, but also such election of the agents as their debtors after the credit had expired, as, coupled with the alteration in the state of accounts between the defenders and Wardlaw & Co., previous to the former being sought to be charged with liability, exonerates said defenders: Therefore, and under reference to the authorities referred to in the annexed note, sustains the defences, and assoilzies the defenders from the conclusions of the action: Finds the pursuers liable in expenses, subject to considerable modification, in respect of the defenders having denied in the record that Wardlaw & Co. were their agents; allows an account of said expenses to be given in, and remits the same to the auditor to tax and report, and decerns.

NOTE.—The most recent case on the important branch of law involved in this action, appears to be that of Heald v. Others, 17th January, 1855, English Jurist, vol. I., p. 70. It was there very distinctly laid down that when a man purchases goods through the medium of an agent, the seller, though ignorant that he is dealing with an agent, is not precluded from afterwards sueing the principal, unless he so conduct himself as fairly to lead the buyer to conclude that he has elected the agent as his debtor. The inquiry necessarily follows—What shall be held to be conduct on the part of the seller that will liberate the principal? In the case of Kymer, 1st Camp. p. 109, Lord Ellenborough upon this point said, and his dicta are quoted as sound by Baron Park, in the case of Heald—"If the seller lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if, in that case, the price of the goods has been paid to the broker, on account of this deception, the principal shall be discharged." It is true that, in the present case, it cannot be directly asserted that the defenders were induced to settle with Wardlaw & Co., through the conduct of the pursuers, after the goods had become payable to them, seeing that the defenders paid their agents in the ordinary course of business with them *before* the period of credit allowed by the pursuers had fully expired. But the defenders cannot

be put in a worse position by their prompt payment to Wardlaw & Co., than they would have been if they had allowed a month or six weeks to elapse beyond the proper time of settlement. In point of fact, they paid before any demand was made on them by the pursuers; if the demand had been made timeously, the defenders would have had themselves to blame, if they had been obliged to pay a second time, but they might also have had immediate recourse against Wardlaw & Co.; as, however, the pursuers continued for six weeks to look to Wardlaw & Co. alone, and until their insolvency supervened, all chance of relief through them was lost to the defenders. In Petgrave's recent treatise on the law of *Principal and Agent*, the general doctrine, as deducible from the decisions, is thus laid down:—"There is a qualification to the liability of a principal, in cases where a third party has an election, whether he shall be charged or not, which is this—If there has been any *laches* on the part of the person seeking to charge the principal, so that an alteration is made in the state of the accounts between the principal and his agent, previous to the principal being sought to be charged, he will be exonerated from liability." In the valuable notes to *Smith's Leading Cases*, vol. 2, p. 302, the law is stated thus:—"Although the person who has dealt with an agent, believing him to be a principal, may elect to treat the after-discovered principal as having contracted with him, still, if the principal, following the ordinary course of business, after his liability to the contractor is complete, altered the state of his accounts with the agent, this right of the contractor exists, subject to the state of those accounts." (See also *Story on Agency*, p. 528.) In *Smith's Mercantile Law*, p. 132, it is laid down, that the seller cannot abandon the responsibility of the agent, and charge the principal, if he "has suffered the time for payment to elapse, and the principal to alter the state of his account with the broker in such a manner that he would be a loser if called on to pay to the seller, for then, indeed, sooner than that the principal should be injured, the seller will be taken to have elected the agent for his debtor." All this doctrine becomes still stronger when the specialty occurs, as it does here, that the agent has purchased for a party who lives furth of the country where the purchase is made. In the case of Thomson, (*Smith's Leading Cases*, vol. 2, p. 286,) Lord Tinterden said:—"In this case the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, whether, in consequence of their living at Dumfries, it may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to Mr Kime (the Liverpool agent) only, and not to a person living, though not in a foreign country, yet in that part of the King's dominions which rendered him not amenable to any process of our courts." In his notes (*Id.*, p. 311), Mr Smith says:—"In each case it is a question as to the intention of the parties, to be collected from the facts, and the circumstance of the principal being foreign, may be sometimes considered as of great weight in the determination of that question. Thus, in an ordinary sale and purchase of goods in this country, it is perhaps not an unreasonable inference of fact that the parties residing here are looked to as principals, where there is no stipulation to the contrary." Now, it is in evidence here that the pursuers had had a long course of dealing with the Manchester house of Wardlaw & Co., and had settled all their transactions with them alone. It does not even appear to have suggested itself to the pursuers to inquire whether Wardlaw & Co. had bought the goods in question, as agents, till after their insolvency. The witness Francis says:—"The pursuers looked to us for payment; it was because they could not get the money from us that the defenders' names transpired." They not only looked to Wardlaw & Co., but they took from them, either as a partial payment or as a security, the bill on Lewis Atterbury & Co. some time after the account was past due. It surely cannot be held that they were entitled thus to lie by and thus to transact with the Manchester house, and then, when it came down, to turn round for the first time on the defenders. If such were the rule, it is difficult to say when it would be safe for a principal to settle with his agent.

The pursuers appealed against this judgment, and the Sheriff (Sir Archibald Alison) adhered, adding the following

NOTE.—It is here admitted on both sides that the facts of the case are correctly abridged in the Sheriff-Substitute's interlocutor. The law also, as laid down by him, is generally admitted to be correct. But it is pleaded that, by the later authorities, an exception is admitted to the general rule, which applies here, as there was a payment by Black & Co., the principals, to Wardlaw & Co., the agents, during the currency of the period of credit, which, though made in good faith, did not liberate the principal, at least as to that portion of the price. *Story on Agency*, p. 449, is also founded on to the same effect. In the case of Heald, referred to by the Sheriff-Substitute, the whole authorities are summed up by Baron Park, and the import of them is, that where the conduct of the seller has really worked a wrong to the buyer, as, by inducing him to alter his condition with reference to the principal, or affecting the accounts between them, the principal will be liberated. The general rule certainly is, that a seller has a claim against an undisclosed principal, when he discovers him, but that obligation cannot last for ever. It is subject to the limitation that the claim must be made against the principal *tempestive*, and that this, in cases such as the present, means *within the period of credit*, which the seller himself has given to the agent or broker who made the purchase, to pay the price. Here, the furnishings of the goods took place between the 21st July and 7th August, each parcel being to be paid for in thirty days. The defenders settled with their agents, Wardlaw & Co., for all the furnishings except one, *after* the period when the credit had expired, the 7th September being the date when the credit for the price of the last parcel expired, and on the 22d September the sellers take from the agents a partial payment or security bill for £400, dated 19th September, 1857, at three months, drawn upon Atterbury & Co., and it is not till the 28th of October, after the insolvency of Wardlaw & Co., the agents, that the pursuers, for the first time, make a demand upon the present defenders, the then discovered principals, for the price of the goods formerly settled for with the agents. Under the authorities referred to by the Sheriff-Substitute, and in the state of the facts as found in his interlocutor, the Sheriff concurs with him in thinking that the demand is not well founded, either in law or equity.

Act. JOHN NAISMITH. *Alt.* DANIEL FORBES.

13TH MAY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

WADDELL v. GRAY & CO.

Landlord and Tenant—Damages—Acquiescence.—*Held, that where, in an offer of lease, the subject was described as "Wilkie's Old Blacksmith's Shop," and the subject was afterwards used as a blacksmith's and wright's shop combined, the landlord's claim for damages on its destruction by fire was barred, in respect that he had seen and acquiesced in the repairs and alterations made on the premises, and that these, from their nature, indicated that they were for the purpose of adapting them for carrying on said trades.*

IN this action the circumstances were these:—The defenders carry on business as agricultural implement makers, at Uddingston. By letter, dated 24th July, 1856, and note thereto appended, dated in October following, they made offer for premises known as "Wilkie's Old Blacksmith's Shop." This offer was in the first instance accepted verbally by the pursuer, and he, in terms of the offer, proceeded to put the subject of the let into repair before finally accepting it in writing. These repairs having been executed, and the defenders having entered into possession, the pursuer, on the 25th May, 1857, by letter of that date accepted the defenders' offer—adjecting to his acceptance the qualification, however, that the defenders would not be allowed to use the premises otherwise than as a blacksmith's shop—and that, if they were to be used as a wright's shop, the defenders would have to pay

the extra premium of insurance, and be liable for any loss that might be sustained by the pursuer by their so using them.—The subjects were destroyed by fire in June, 1857. Under the policy of insurance the pursuer recovered £249, but averring that the sum so recovered did not cover his actual loss, he brought the present action concluding for £300 of damages, in respect that the fire had been occasioned by the defenders converting the premises let into a wright shop, or at least by using part of them as such.

The defender averred in defence that the pursuer was aware at the time of the let, that the premises were to be used as a blacksmith and wright shop, and that the repairs, etc., made by him indicated the purpose for which the premises were to be used—that he had received payment of the half-year's rent due at Whitsunday, 1857—that he then knew the premises were being used as a blacksmith and wright shop, and had thus acquiesced in the defenders so using them.

Proofs having been led for both parties, Sheriff Bell pronounced the following Interlocutor:—

Having heard parties' procurators, and resumed consideration of the proof, productions, and whole process: Finds that, in as far as the summons concludes for several sums of rent, amounting, *in cumulo*, to the sum of £30, the same are admitted to the extent of £13 10*s*, and the balance is denied, in respect it effeirs to those parts of the premises which were destroyed by the fire, which took place in June, 1857: Finds that, in as far as the summons concludes for the sum of £300, in name of damages for the loss occasioned by the said fire, the defence is the same as regards the said balance of rent, namely, that the fire was not occasioned, as the pursuer alleges, by any negligence or breach of contract on the part of the defenders, but by some other cause over which the defenders had no control, and for which they are not responsible: Finds that the said fire broke out in that part of the premises commonly known by the name of "Wilkie's Old Blacksmith Shop:" Finds that the defenders made offer for the said shop, in addition to other premises in which they were previously tenants under the pursuer, by the missive letter, No. 5-3 of the summary process produced herein, which letter is dated July 24th and October 22d, 1856: Finds that the pursuer admittedly accepted said offer verbally, and the repairs stipulated for were ordered and executed at sight both of the pursuer and defenders: Finds that the defenders got possession of said shop prior to Martinmas, 1856: Finds that, after the defenders had been for a good many months in possession, the pursuer wrote to them on the 25th May, 1857, the letter No. 44-1, in which he formally accepts their offer of 24th July and 22d October preceding, with the following modification or explanation:—"Having offered for and taken these premises as a blacksmith's shop, you will not, of course, be at liberty to use them, or part of them, unless properly partitioned off, for any more dangerous purpose, without being liable for the extra premiums of insurance, and any other loss that may be sustained by such more dangerous occupation:" Finds that, in answer to this letter, the defenders wrote immediately the letter, No. 5-8 of said summary process, of date 20th May, 1857, in which they say—"As to any further conditions as to Wilkie's old smith shop, we recognise nothing further than what we have already mentioned in our offer for it. With insurance, etc., we can have nothing to do. It is used for the purposes we contemplated when taking it, as you know very well, and (we) will so use it as the requirements of our business suggest, and can admit of no such supervision as you mention:" Finds that, in point of fact, after obtaining possession of said shop on or about Martinmas, 1856, the defenders used it partly as a wright's and partly as a smith's shop: Finds that, although in the original missive offer, No. 5-3, they describe the shop as "Wilkie's Old Blacksmith Shop," they, at the same time, mention that they propose to take it in consequence of being short of room at their works, and that, among other repairs, they will require a cart entrance to be made, "so as to allow Norwegian harrows to go out and in:" Finds it proved that the repairs which the pursuer sanctioned and saw made were of a character to adapt the shop to be used by wrights as well as by smiths, and there is no evidence that the pursuer ever absolutely prohibited said use, or treated it as an inversion of possession, but rather that he acquiesced in it, though stating that he considered it dangerous, as making fire more likely: Finds that even in the pursuer's said letter of 25th May, 1857, above quoted, there is no absolute prohibition of the partial use of said shop as a wright's shop, but only an intimation that if so used the pursuer would hold the defenders liable for extra premiums of insurance, and any other loss sustained in consequence of such occupation: Finds further, and *separatim*, that the pursuer has failed to prove that the fire which took place in said premises on the 5th June, 1857, was occasioned by the mode in which the defenders occupied the said shop, or by any fault or negligence on their part: Finds, on the contrary, that all the evidence goes rather to show that the fire was communicated from without, and apparently wilfully, by some person or persons unknown, to the woodwork of the roof near its north end, there being at the time no fire of any sort within the premises, a fact distinctly deponed to both by the last persons who left the shop on the night of the fire, and the first who entered it after the fire was discovered, and who saw the roof blazing, and no fire below from which fire could have been communicated to the roof: Finds still further, that the pursuer, who admittedly received from the Sun Insurance Company the sum of £249 for the damage done by the fire, has failed to prove that the said sum did not cover the whole damage sustained by him, much less that a sum of £300 is still exigible for damage not covered by the insurance: Finds that the report now in said summary process is entirely *ex parte*, and was apparently written out or dictated by the pursuer himself, according to the evidence of James Scott and James Littlejohn, two of the nominal reporters, as well as that of the witness William Barr, who refused to have anything to do with said report: Finds that no receipts or vouchers of any actual expenditure incurred by the pursuer in making repairs have been produced, and the inference on the whole is, that any loss occasioned to the pursuer by the fire has been compensated by the payment made by the insurance company, the more especially considering that it is instructed by the estimate No. 54 of the damage claimed by the pursuer from said insurance company, that the whole estimated amount was £290, and it is further instructed by letters in process that the pursuer afterwards expressed himself well satisfied with the office in paying him £249: Therefore sustains the defences, and decerns against the defenders only for the said admitted sum of rent, namely, thirteen pounds ten shillings, but *quoad ultra* assoilzies them, and dismisses the action: Finds the pursuer liable in expenses; allows an account thereof to be given in, and remits the same to the auditor to tax and report, and decerns.

The pursuer appealed to Sheriff Alison, who adhered, but on somewhat different grounds. The following is his Lordship's judgment:—

Having heard parties' procurators under the pursuer's appeal upon the Interlocutor appealed against, and having made avizandum and considered the proof and whole process, for the reasons stated by the Sheriff-Substitute, as also those contained in the following Note—adheres to the Interlocutor complained of on the merits, but with this variation or alteration as to expenses, that *half* costs only are found due to the defenders, and *quoad ultra* dismisses the appeal.

NOTE.—The Sheriff has arrived at the same conclusion in this case as the Sheriff-Substitute has done, except on the matter of expenses, for a reason to be afterwards stated, but he has arrived at this conclusion upon somewhat different grounds from those stated by him. The view of the case which he takes is this, 1st, The difference between the amount of risk of fire in premises occupied solely as a smith's shop, and in premises occupied jointly as a smith's and carpenter's shop, is so great that it appears to be an inversion of possession, in point of law, to change a shop taken as a smith's shop into either a carpenter's one, or a shop used as a smith's and carpenter's one jointly. It is proved in evidence here that while the ordinary rate of insurance for a smith's shop is from 2*s* 6*d* to 3*s* per cent., the risk for a wright's shop is so much greater, that the rate varies from 25*s* to 31*s* 6*d* per cent., or from ten to fifteen times the amount. It is evident that an inversion of possession is committed by a person who takes premises to be occupied solely as a smith's shop, and subsequently converts them into a wright's and smith's shop jointly. If, therefore, the

case had rested here, the Sheriff would have held that an inversion of possession had taken place which threw the *onus* upon the defenders of proving that the fire which ensued had been accidental. But, unfortunately for the pursuer, the case for him does not rest here. It is true that in the original offer which the defenders made for the shop, it was expressly stated that it was taken for a *smith's* shop, and, if nothing more had ensued, the subsequent conversion of it into a joint smith and carpenter's shop would have been an inversion. But, unfortunately, the subsequent conduct of the pursuer was such as to lead the defenders to believe that the conversion of the premises to the smith's and carpenter's shop *had been acquiesced in by him*. For it is proved that, while the pursuer was frequently, and sometimes every day, inspecting the premises when the changes were going on, he made no complaint from the beginning of November, 1856, till the end of May, 1857, that these changes amounted to an inversion of the possession, and could not be acquiesced in by him. Nevertheless those changes were of a kind which unequivocally proved the intention to convert the premises into a joint smith and carpenter's shop, for not only were wrights' benches and a wood rack put up without objection, and windows struck out in the roof to allow the light to strike on the wrights' benches, but on the 9th of May, 1857, the pursuer wrote a letter, produced in process, in which he approved of the work executed "on the old smith s shop *now occupied as a wright's shop, the work being executed to my satisfaction*." This decisively proves that, although the change *was* an inversion, it was homologated by the pursuer. He cannot, therefore, found upon his own letter of 26th May, 1857, in which he states that the joint occupation must not be attempted, and a partition run between the wright's shop and the smithy, and that he would hold the defenders liable for any damage or extra insurance for this not being done, as a part of the contract of lease. He may, however, still hold it as a serious warning given to the defenders of the great danger with which the inversion of the possession would be attended, which would throw the *onus* upon them of showing that any subsequent fire which took place had been casual.

2d, If, therefore, it had appeared from the proof which has been led, that the fire which broke out in the premises in June following had been owing, in any degree, to the joint occupation, or had been other than merely accidental, the Sheriff would have held the pursuer entitled to such additional damage from the defenders as he could show was legitimately sustained by him, over and above the sum of £249 recovered from the Insurance Company. But it is here that the pursuers' case entirely breaks down. Not only is there no evidence to connect the fire with the joint occupation of the premises, but the proof rather tends to the reverse. It is proved that the fires were all put out when the premises were left at 8 o'clock p.m., that the fire broke out at 11, and was then first seen in the roof near where the rafters lay upon the wall, and that although there was a rack of wood in one part of the shop, and the carpenters' shavings had more than once taken fire before; yet there was no visible communication between the fire below and the flames from the roof, and the rack of wood was at the opposite end of the shop from where the fire was seen. The defenders' theory is, that the fire from the roof was kindled maliciously from the outside; but not only is there no evidence of such a diabolical deed, but the evidence seems to preclude it because it is proved that the roof was partly slated and partly tiled, and there is no evidence of these having been broken or the roof entered from the outside.

Were the Sheriff to hazard a conjecture as to the real origin of the fire he should think that it arose from a few sparks from the fire in the smithy having risen up and settled in the inside of the roof or possibly among some shavings that had got up there, in consequence of its having been used as a wright's shop. But that is mere matter of conjecture, and cannot afford any solid ground for decision. In this state of matters it appears to the Sheriff that the pursuer, who would have had a perfectly good case upon the defenders' original missive offering to take the smith's shop, has lost it in consequence of 1st, his having acquiesced, within the six months after the defenders had entered into possession, of the alteration of the premises, evidently pointing to the joint occupation of the premises as a wright's shop as well as a smithy; and 2d, in not having been successful in tracing the conflagration which subsequently ensued, after the warning that he had at length given of the effect of the joint occupation, to any other cause which might equally have arisen had the occupation been confined to that for which the premises were originally taken, as for a blacksmith's shop. The defenders' expenses are modified to a half, because although the defenders have been in the circumstances specified from the action, they were in fault in the outset in inverting the possession, and inducing a state of things imminently, and in the highest degree hazardous. But for the pursuer's acquiescence *rebus ipsis et factis*, in that inversion, they would in all probability have been found liable in part, at least, of the damages sought.

Act. JAMES MURDOCH. *Alt.* T. G. WRIGHT.

13TH MAY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

ARCHIBALD JOHNSTON *v.* ROWLEY AND DICK.

Interdict—Assignation of Moveables—Retenta Possessione.—*Held, that in the circumstances, the sale was not one falling under the provisions of the Mercantile Law Amendment Act.*

THE respondents, on 1st Nov., 1858, caused certain articles of household furniture, in possession of Robert Johnston, painter in Glasgow, to be poinded on an extract decree obtained in an action at their instance against him. Immediately thereafter Archibald Johnston, who is Robert Johnston's father, presented a petition to the Sheriff of Lanarkshire setting forth that the articles poinded belonged to him, and praying that the respondents should be interdicted from interfering therewith. He produced an assignation by Robert Johnston in his favour, dated 21st July, 1857, by which, "In consideration of the sum of twenty-five pounds sterling, being the gross amount of goods sold and delivered by Archibald Johnston, and of cash advanced to me, being the agreed on price or value of the household furniture, and others aftermentioned," the granter sold and made over to the petitioner the whole effects poinded. The defence was, that the furniture was in possession of the respondents' debtor and was his property. A proof having been allowed, Robert Johnston was examined, and stated that the sum acknowledged to have been received by him had been advanced in several sums before the granting of the assignation; that there was no stipulation at the time the money was advanced as to the furniture, and that the furniture had all along remained in his possession. It was admitted by the defenders, that the petitioner, if examined, would concur with his son—and no further proof having been led, it was contended for the petitioner that the sale had been proved, and that delivery was not now necessary to complete his title. The respondents pleaded, (1,) That there was no sale in the sense of the Mercantile Amendment Act, 1856, sec. 1; and (2,) That the respondent's debtor was the reputed owner of the effects. Mr Sheriff Bell pronounced the following judgment:—

Having heard parties' procurators, and resumed consideration of the proof and whole process: Finds, that the pursuer has failed to prove that the poinded effects in question are his property: Finds, that they admittedly belonged to the pursuer's son, Robert Johnston, who is the defenders' debtor, but are said to have been assigned to the pursuer by the assignation No. 8: Finds, that notwithstanding said assignation, the effects remained as formerly in the house and possession of the defenders' said debtor, who does not reside with the pursuer, but in a house of his own: Finds, that neither the said assignation, nor the parole evidence adduced *in causa*, shows that there was a *bona fide* sale of the said effects, it being, on the contrary, instructed that the defenders' debtor executed the said assignation voluntarily, at the suggestion of a Sheriff's officer, not for any price paid him at the time, but in respect of alleged prior advances made to him by the pursuer: Finds, that such a transaction is not a sale falling under the provisions

of sec. 1 of the Mercantile Law Amendment (Scotland) Act, and both the real and reputed ownership remained with the defenders' debtor, as in any question between him and his creditors: Therefore sustains the defences, recalls the interim interdict formerly granted, and dismisses the petition: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same to the auditor to tax and report, and decerns.

On appeal, Sir A. Alison adhered in the following terms:—

Having considered the Interlocutor appealed against, and reviewed the process, and heard parties' procurators under the pursuer's appeal, in respect the assignation founded on by the pursuer is *inter conjunctos*, and it is admitted that no delivery of the effects followed on the alleged assignation, but the articles remained in the possession of the party against whom the decree and diligence was directed, for a period of above a year. Dismisses the appeal and adheres to the Interlocutor appealed against.

Act. J. L. Lang. *Alt.* T. G. Wright.

13th May, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Strathern.)

Ker, Bolton and Company *v.* M'Quaker, *et e contra*.

Consignment—Advance—Power of Sale—Intimation.—*An advance was made by bill at six months, on the security of a consignment to Singapore, but the proceeds of sale of the consignment were not sufficient to repay the advance.—Held, in an action at the consignees' instance, for the difference between the proceeds realised and the advance made, and in a counter action, conjoined with the former, at the consigner's instance, for the difference between the prices at which the goods were sold and those under which, according to him, they ought not to have been sold—that the consignees were not bound by restrictions imposed upon the sale of the goods after consignment—that they were not obliged to give the consigner an opportunity of repaying advances by intimating their intention to sell before entering the market, and that when there is no express restriction along with the consignment, the consignees are presumed to have the power of selling at discretion.*

The party M'Quaker consigned goods to Syme & Co. of Singapore, receiving an advance of £103 by bill, at six months, on their security, from the Glasgow firm of Ker, Bolton & Co., who have a share in the Singapore business.

The bill was drawn on 19th October, 1855, became due on 22d April, 1856, was several times renewed, and lay over nearly two years without being retired by the acceptor, M'Quaker, till at last the parties Ker, Bolton & Co. had to retire it themselves.

In these circumstances Syme & Co. sold the consigned goods to repay the advance, but the proceeds were less than the contents of the acceptance by £15 19s. For this sum, accordingly, Ker, Bolton & Co. sued M'Quaker. His grounds of defence were:—

(1.) That the Glasgow firm, (Ker, Bolton & Co.,) were agents and partners of the Singapore firm, (Syme & Co.,) in the matter of consignments.

(2.) That the consignment was made upon the express condition that the goods were not to be sold under certain prices paid by him, and represented to be cost prices; that they were so sold without intimation, and that, consequently, not only was he not liable for the sum sued, but they were liable to him for the difference between the prices he had paid and the prices the goods had brought in the market.

M'Quaker, therefore, raised an action for this difference, amounting to £27 2s 7d; and to the suit Ker, Bolton & Co pleaded—

(1.) That they and Syme & Co. were totally different firms.

(2.) That they did not receive any note from M'Quaker at the time of the consignment; restricting the sale of the goods to certain limits.

At this stage the cases were conjoined, *ob contingentiam*, and a general proof allowed.

In the course of proof it came out that the Glasgow and Singapore firms were substantially the same, so far, at least, as the transactions in question were concerned, but that there was no condition or obligation come under by them at the date of the consignment, that M'Quaker's goods should not be disposed of under prices fixed by him; besides, the letter restricting the power of sale was not written till 1st August, 1856. To this letter an answer was sent from Singapore on 15th October of that year, wherein Syme & Co. do not say they will obey the instructions they had received, but merely say "contents noted."

After debate on the concluded proof the Sheriff-Substitute pronounced the following elaborate judgment, repelling the defences for M'Quaker in the action at Ker, Bolton & Co.'s instance; sustaining them in the counter suit, and finding M'Quaker liable in full costs in both:—

Finds, *in point of fact*, that M'Quaker, the defender in the leading case, and who was then carrying on business in Johnstone, on or about 19th Oct., 1855, consigned per the ship Jacatra, eleven cases and sixty-six tins sewing thread, through the firm of Ker, Doering & Co., merchants, Glasgow, to the house of Syme & Co. at Singapore, for sale on commission by that house there; and there accompanied the goods an invoice, of which No. 7 of process is a copy, the goods being stated at 5s per gross, and 1s 3d and 7½d per dozen respectively: Finds, that *concurrent with the consignment*, the said Ker, Doering & Co. granted the defender their acceptance for £103 at six months date, and which became due on 22d April, 1856, as an advance on the said consignment, and the defender as an acknowledgment subscribed the letter of date—"Glasgow, 19th October, 1855," appended to the summons at Ker, Bolton & Co.'s instance; and in which letter he engages to provide cash to retire the acceptance at maturity: Finds, that at the date when said goods were consigned, and advances made—it is not proved that any orders were given that the goods were not to be sold below any price then fixed—and the consignment was therefore made unconditionally: Finds, that when the said acceptance fell due on 22d April, 1856, the defender M'Quaker failed to provide cash to retire it in terms of his obligation, although required to do so, and it was retired by the present pursuers: Finds, that the said goods were duly despatched to, and received by Syme & Co. at Singapore, and a sale of one case thread was made and reported on 15th May, 1856, amounting, conform to account current appended to said summons, to £20 14s 2d, and of the account sales of that transaction No. 8 is a copy; and the defender does not complain of the prices realised for that case: Finds, that the defender wrote direct to Syme & Co. the letter of 1st August, 1856, (No. 9 of process,) and which was duly received—wherein he states that his 100 yards three-cord spool thread "is invoiced at selling price here (Johnstone), charges added as per note at foot, and says—You must not sell more to nett under cost;" and the note at the foot referred to contains items of the cost of the thread amounting to 5¼d per gross: Finds, that on 15th October, 1856, Syme & Co. wrote the defender in answer the letter No. 10 of process, acknowledging receipt of his letter of 1st August; but expressing regret that they had still to advise a dull market for sewing thread, and citing the selling prices of that date, they conclude—"We are consequently unable to find buyers for any portion of your stock, at rates that would remit cost:" Finds it not proved, that after receipt of that letter, the defender wrote to, or received from Syme & Co., or the pursuers, any other letters: Finds, that after delaying till 15th July, 1857, but without any communication being made to the defender, (the amount of the said acceptance remaining still unpaid by the defender,) Syme & Co. sold at Singapore the remainder of the thread, and realised, according to the said account current, £32 12s

8d, and of the account sales of that transaction No. 11 is a copy: Finds, that the prices at which this last sale was made were less than the last prices quoted in the defender's letter of 1st August, 1856, and were under the prices stated in the invoice which accompanied the goods when consigned: Finds, that the prices realised on both sales, after deducting commission, interest, and charges, amounted to £15 19s *less* than the sum advanced when the goods were consigned; and this is the sum for which the pursuers Ker, Bolton & Co. sue the defender, and they maintain that they were entitled to sell to reimburse the advances made, and these prices are less by £27 2s 7d than the note of the cost prices given in said letter of 1st August, and for this difference the defender sues Ker, Bolton & Co., on the ground that the sale was made contrary to the defender's directions as to the price: Finds, that it is not alleged by the defender, M'Quaker, that the last sale in July, 1857, was made by Syme & Co. recklessly, or at rates under current prices: Finds, that the firm of Ker, Doering & Co., with whom the defender originally transacted, has merged in, or is now represented by the present pursuers; and in these conjoined actions they are dealt with on all hands as entitled to sue for the advances made by the former firms, and as liable to answer for the alleged deficiency on the sales: Finds it proved that the pursuers' firm is, as a firm, partners of the house of Syme & Co. of Singapore, and liable for any breach of agreement or condition in the matter of the defender's consignment; and from these findings in fact, Finds, *in law*, that in the absence of express contract otherwise, as is the case here, "Where goods are consigned to one at a distance, there is an implied mandate to sell at such price and time as may seem most beneficial; and this is especially to be inferred where advances have been made on the goods." *Bell's Com., by Shaw*, vol. 1, p. 178; *O'Reilly, Hill, May & Co.* v. *Jaffray*, 7th June, 1821; 1 *Shaw* 61; *Ure & Millar* v. *Jaffray*, 31st Jan., 1818: Finds, that where goods are so consigned, and advances have been made upon them concurrently with the consignation, it is not within the privilege of the consignee to alter the nature of the mandate to sell at discretion, which such a transaction implies, by any after instructions limiting the powers of sale to a fixed or certain price—the consignee, when the goods were consigned, and advances made, having acquired from the consignee, at the same instant, an authority to sell at discretion, coupled with an interest in the goods, which authority thereby became irrevocable, *Storey on Agency*, (5th ed., 1857,) sec. 477: Finds, that the principle of law is different where the goods consigned without special orders have not been advanced upon contemporaneously with the consignation—in such a case the consigner is entitled to *vary* the implied mandate, to sell at discretion, and to assign limits to the consignee's authority, and, in case after consignation, while the consignee is in course of selling the goods, he makes advances to the consigner, he merely acquires a lien over the goods in his hands for the advances; but the nature of the mandate, under which the goods come into his possession, undergoes no change, and may be varied or revoked at the consigner's pleasure, even after his failure on requisition to pay the advances; but subject always to the consignee's lien, *Smart* v. *Sanders*, 12th May, 1848; 5 *Manning & Granger* v. *Scotts*, Rep. 895: Finds, therefore, that the defender's prohibition to sell under the last prices, as stated in his letter of 1st August, 1856, was ineffectual, and that the pursuer's constituents, Syme & Co. were entitled to sell the goods at their discretion in July, 1857, at the prices then received, which are not denied to have been the current prices, and the soundness of the discretion exercised has not been assailed by the defender: Therefore, in the action, Ker, Bolton & Co. *v.* M'Quaker, repels the defences, and finds the defender liable to the pursuers in the sum of £15 19s, and with interest as concluded for. And in the action, M'Quaker *v.* Ker, Bolton & Co., assoilzies the defenders from the conclusions thereof: Finds the party M'Quaker liable to Ker, Bolton & Co., in the expenses of both actions; allows accounts thereof to be lodged, and remits the same to the auditor to tax, and report, and decerns.

NOTE.—The decision of these conjoined cases turns on the power of M'Quaker, the defender in the leading case, to revoke the original implied mandate to sell the consigned goods. As stated in the record, M'Quaker alleges that the goods were consigned "on the condition that they should not be sold under certain prices, which he represented to be the cost prices." And on this condition the consignment was accepted and an advance made. Had this statement been proved, the result could easily have been foreseen, and the case would have presented no difficulty. But the statement has not been proved. On the contrary, the note of the cost prices, and the direction that the goods were not to be sold under these prices and charges, (which in the summons, M'Quaker *v.* Ker, Bolton & Co., were said to have accompanied the consignment), were not forwarded to the pursuers' foreign house till 1st August, 1856, a date after the goods had not only been received at Singapore, but after one case of them had actually been sold. No document relating to the consignment, when actually made, is produced, except the letter of the defender, M'Quaker, acknowledging the advance acceptance on the goods, and binding himself to furnish funds to retire it; but, in that letter, there are no limits to the authority of the foreign house to sell, and the prices stated in the invoice have never been pretended to limit the consignees; like all such invoices, it simply furnished an index to what the consigner wished he might obtain for his goods, but specified no directions to take these or any higher prices if he could get them—or lesser prices if the market, after a fair trial, would not afford so much. The transaction was, therefore, one of a very common kind. A consignment of goods, to be made the most of in the contemplated market. It was a consignment without special instructions, and implied discretion in the consignees to sell at what times and prices they might in their judgment deem most advantageous. In a simple case of this description, the consignees' authority might, of course, be entirely recalled or altered, and limits set to their discretion whenever the consigner chose; but other elements and interests are evoked, when the consigner anticipates the market, and obtains advances on his goods. These advances, made *at the time* of consignation, or *afterwards*, lead to different consequences, according to the Sheriff-Substitute's view of the law, as stated in his Interlocutor. When goods have been consigned without special instructions, and advances have been simultaneously made on them by the agent to whom they are consigned, the agent is invested with an *authority* and *interest inseparable* in their nature—it is an authority to sell at discretion—and on the faith of which the advances have been made. The fact of giving advances at the moment of consignment, confers more than a lien on the goods until the advances are repaid; it confers an irrevocable authority to *sell*, and not merely to *hold* until reimbursed the amount advanced. In a falling foreign market, or in a market subject to mutations in the description of goods to suit it, certain kinds might become in a month totally unsaleable, or a glut might render a sale hopeless, at remunerating prices, for a whole season; but in either event, it would be unreasonable to argue that the advancing agents were to take these risks and lie out of their money for an indefinite period. So it has become settled that the consignee is entitled, in cases like these, to sell and reimburse himself, independently of any attempt on the part of the consigner to alter the authority originally given. Speaking of a mercantile factor's power once conferred, Professor Bell says—"Express or tacit revocation by act of the principal, or by death, bankruptcy, or insanity will have no effect either to deprive the factor of the benefit of his authority in extricating himself from transactions already begun, or from the consequences of his having acted," 1 *Com.*, 489. But still more explicitly, and appropriately, Justice Story states the law—"Where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of security then, unless there is an express stipulation that it shall be revocable, it is from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so upon the face of the instrument conferring the authority or not," *Com. on the law of agency*, (5th ed.,) vol. iii., 477. This learned Jurist cites a variety of cases in support of the doctrine thus stated; but the noted American case, *Brown* v. *M'Grau*, 14 *Peter's Rep.*, 480, and which afterwards underwent much consideration by the Superior Court of New York; in *Marfield* v. *Douglas*, 1, *Sandford's Sup., Court Rep.*, 360, may be regarded as an authority entitled to much respect. There, as in the present case, the advance was made at the precise time of the consignment, and no controlling directions were given to the agent; there, however, the principal sought to direct the sale of the goods in accordance with his own views; but, in pronouncing judgment, the Court, through Justice Story, ruled that, "where consignment is generally, without any specific orders as to the time or mode of

sale, and the factor makes advances, or incurs liabilities on the footing of such consignment, then the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time, and in such mode, as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of sale; and the consigner has no right, by any subsequent orders given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities." (*See this judgment quoted in Story, on Agency*, p. 95.)

At the debate it was strongly urged by the defender, M'Quaker, on the authority of the case *Smart* v. *Sanders*, which was twice argued before the Court of Common Pleas, and finally decided in the Easter term of 1848, *Manning*, vol. V., p. 895, *Granger and Scott*, that a different rule prevailed in the commercial law of this country; and that whether unrepaid advances remained or not, that the consigner of goods, on which advances has been made, was entitled to control their sale and to vary the original mandate of the consignee to that effect. And, at first sight, *Smart's* case seemed an authority in point, but the Sheriff-Substitute has come to the conclusion that it does not conflict in principle with the law as stated by Justice Story, or with English text writers, who also state the law as that eminent judge has done. In *Smart's* case the goods were consigned without any advance being made at first. The factor undertook the sale, having no other orders than are implied in the relation of principal and agent, of being controlled at pleasure by his principal; but after the consignment had been made, and after the relation between him and his principal had thus been formed, the factor made advances to the principal, which eventually, when required, he did not repay; and the factor, contrary to the orders of his principal, sold the goods to reimburse his advances, at prices less than those below which the principal forbade him to sell. The question arose whether, in these circumstances, the factor was entitled so to sell? The Court held that the factor was not entitled to sell contrary to his principal's instructions; but *Justice Wilde*, in delivering judgment, having noticed the cases in which the irrevocable authority of factors to sell to cover advances had been recognised, then proceeds: "The result appears to be, that where an agreement is entered into on *sufficient consideration*, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, *such an authority is irrevocable*. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable. But we think this doctrine applies only to cases where the authority is given *for the purpose of being a security*, or, as Lord Kenyon expresses it, as a part of the security; not to cases where the authority is given *independently*, and the interest of the donee of the authority arises afterwards and *incidentally* only. As, for instance, in the present case, as disclosed by the 13th plea, the goods are consigned to a factor for sale; that confers an implied authority to sell. *Afterwards* the factor makes advances; this is an authority coupled with an interest, but an *independent authority* and an *interest subsequently* arising. The making of such an advance may be a good consideration for an *agreement*, that the authority to sell shall be no longer revocable; but such an effect will not, we think, arise independently of agreement."

The Sheriff-Substitute thinks the principle thus broadly stated in *Smart's* case does not affect the rule of decision in *Brown* v. *M'Graw*, or the circumstances of this case. Here the authority and the interest were not independent and occuring at different periods, but were dependent on each other, and happened contemporaneously. The advance was made on the goods consigned subject to the nature of the authority there conferred to sell—that authority was to sell on discretion, and the consigner accepted the advance, giving that authority which became thereupon irrevocable until the advances were repaid. In *Smart's* case, the advance was made on no such footing, and the Court simply held that to entitle the consignee to secure such irrevocable authority, he ought to have made it the subject of express agreement at the time of advance, for until that time he got and held the goods under an authority which was revocable at the consigner's pleasure.

An appeal was taken by M'Quaker, and after hearing parties, the Sheriff Principal adhered, appending to his judgment the following Note:—

NOTE.—The Sheriff-substitute has pronounced a very elaborate and able interlocutor in this case, in the whole findings in which, the Sheriff entirely concurs. It appears that the original consignment of the goods was made in the usual way from Glasgow to India, for sale, without any limitation as to the price to be got for the goods. The sum of £103 was advanced in the form of a bill, at six months, upon the consignment, shortly after the goods arrived in India, and this bill lay over unpaid for eighteen months, the goods being in the meantime still undisposed of. On the 1st of August, 1856, the consigner wrote to the consignees that they must not sell any more of the goods below prime cost, an invoice having accompanied the goods when consigned, and the consignee answered that they noted the contents. But this letter was written after the advance had been made in the form of the bill above mentioned. The consigner M'Quaker was aware that the bill was lying over unpaid, and had been successively renewed, and at length the Indian consignees sold the goods for their own protection, and the present action is brought at the consignees' instance for the balance due upon the advance made over the price received for the goods. In these circumstances, the weight of authority seems to be in favour of the opinion in point of law, that the sale by the consignees was justifiable, and that the consigneer is bound to acquiesce in it. It is quite true that, in the general case, a consignee, even when he has made an advance, is bound to intimate an intention to sell the goods to the consigner, in order to give him an opportunity of repaying the advance, and preventing the possible sacrifice of the goods. But in the circumstances that here occur, where the consignment was made from Glasgow to so distant a country as India, without any limitation or restriction as to price, and an advance is made upon the strength of that *unlimited* consignment, and a bill granted for the advance by the consigner, which lies over for nearly two years, the *onus* seems to lie upon the consigner of repaying the advance, and thereby acquiring the entire command of his goods. If he does not do that, and allows the consignee to remain so long under the burden of his advance, the latter becomes entitled to take steps for his own security, and the consigner has himself to blame, if, by not relieving him of the advance, after so long a period, he sustains a loss by the sale.

Act. JOHN KERR. *Alt.* JOHN CLARK.

24TH MAY, 1859.

SHERIFF COURT, BERWICKSHIRE.

(MR SHERIFF WOOD.)

HELEN STEWART *v.* WILLIAM RAE.

Process—Proof.—*Held, that the pursuer, in an action of filiation and aliment, is bound to have proof at the first diet, to rebut any evidence adduced by the defender against her credibility, though such evidence could not have been anticipated.*

THE pursuer raised an action against the defender, concluding for payment of certain sums as aliment of her illegitimate child, of which child the defender was the father. Decree passed in absence; but the case was afterwards re-heard, and the defender minuted "that the defence was a denial of the paternity of the child in question."

The record was then closed, and proof was allowed under the following Interlocutor:—

The Sheriff-Substitute having closed the record, allows to both parties a proof of all facts and circumstances relevant to support this action and defence, with conjunct probation, and assigns Thursday, the tenth day of March next, for the proof proceeding before him, within the Court House, Dunse, at eleven o'clock forenoon.

At the diet the pursuer adduced evidence in support of her action, and the defender adduced proof in support of the defence. He further produced witnesses to prove facts tending

to impeach the pursuer's credibility; the statements on this latter head were now heard of for the first time, and were of such a nature that they could not by any possibility have been anticipated by the pursuer, who averred that they were grossly untrue. The defender craved circumduction, and the pursuer objected, and craved to have the diet continued, that she might "*finish*" her *conjunct proof*. She having examined her witnesses in conjunct evidence to that for the defender, as to the facts showing that he was in her company at late hours, etc., but not to rebut statements affecting her character.

The Sheriff-Substitute (on 15th March) refused the pursuer's request, and circumduced the term for proving against both parties.

Against this the pursuer appealed, and pleaded—

That the question was whether the parties are bound to be prepared to lead both proof-in-chief and conjunct proof at *one diet*, or at *separate diets;* that the Act of Parliament contemplates that the proof should be continuous if possible, and should only be adjourned on cause shown; that the fact of wishing to continue her conjunct proof, was a sufficient cause; that the record had been closed on a general denial, which amounted to nothing more than a plea in law, without any statement of facts on either side, and that the proof adduced to affect her credibility could not have been anticipated; that the statements were untrue, and that such could be proved by the parties referred to; that it was out of the question to expect her to be prepared to rebut statements which she had never heard of before, and that as conjunct proof was allowed to her, she was entitled to another diet at which to complete it, to prevent her action being injured by a *surprise*, which was not what the Sheriff Court Act contemplates.

Answered for the defender—The question was whether circumduction, which followed on the proof and conjunct proof led by the pursuer, should be opened up; that no sufficient cause has been shown for a continuation of the diet; that the pursuer ought to have stated the points which she wished to rebut, and the witnesses she meant to adduce, and that her mere wish to lead more conjunct proof was not a sufficient cause, such as the Act contemplates; that as she had tried to filiate her child on the defender, she ought to have been prepared at the diet to vindicate her character against every possible objection.

The Sheriff (Mr Bell) pronounced the following Interlocutor:—

The Sheriff, having resumed consideration of this case, with the reclaiming petition for the pursuer, No. 16, and answers thereto for the defender, No. 17, the Sheriff-Substitute as advised by him, refuses the desire of the said reclaiming petition, and adheres to the Interlocutor complained of.

Act. T. Broomfield, Lauder. *Alt.* J. P. M'Watt, Dunse.

27th May, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Bell.)

Hunter, Newall & Company's Sequestration.

Bankruptcy—Deed of Arrangement—Composition Contract. —*Held, that it is no objection to a Deed of Arrangement that it comprehends inter alia a Composition Contract—Circumstances in which a Deed of Arrangement held not unreasonable.*

The estates of Hunter, Newall & Company, warehousemen, Glasgow, and William Hunter and James Newall, both warehousemen there, the individual partners of that company, as such partners, and as individuals, were sequestrated by the Sheriff of Lanarkshire on the 22d day of December, 1858. At the meeting called for electing a trustee and commissioners, which was held on the 31st day of December, it was resolved by a majority in number and four-fifths in value of the creditors present or represented at said meeting, that the estates should be wound-up under a deed of arrangement, and that an application should be presented to the Sheriff to sist procedure in the sequestration for a period not exceeding two months, all in terms of the "Bankruptcy (Scotland) Act, 1856," and particularly sections 35, 36, 37, and 38 thereof.

The bankrupts having reported this resolution to the Sheriff, they presented an application for sist accordingly, and craved:

That his Lordship should sist all procedure in the said sequestration for a period of two months; and thereafter, on a deed of arrangement, duly entered into and executed, in terms of the statute, being produced to his Lordship, and after such farther order or proceedings as to him should seem proper, approve of such deed of arrangement, declare the said sequestration at an end, and appoint the judgment of recall to be entered in the Register of Sequestrations, and on the margin of the Register of Inhibitions; reserving always the full effect of the said sequestration in so far as might be necessary for the purpose of preventing, challenging, or setting aside preferences over the estate; or to do otherwise, etc.

The Sheriff, having considered the application, (on 4th January, 1859) ordered service upon those creditors who voted against the resolution, their mandatories, or known agents, and after hearing objections, which were subsequently abandoned, by one of the creditors, (on 19th January) he pronounced an Interlocutor, in which he—

Finds that a majority in number and four-fifths in value of the creditors, assembled at the first statutory meeting, have resolved that the estates of the bankrupts ought to be wound-up under a deed of arrangement, that such resolution has been duly carried, and that the present application is reasonable; therefore sists procedure in the sequestration for the period of two months from this date.

A deed of arrangement between the bankrupts and four-fifths in number and value of the whole creditors on their estates* having in the meantime been executed and produced,

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* Deed of Arrangement.

This deed of arrangement, entered into and executed by and between Hunter, Newall & Company, warehousemen in Glasgow, and William Hunter and James Newall, both warehousemen there, the individual partners of the said company, on the one part; and the subscribers, named and designed in the testing clause hereof, creditors, or mandatories for creditors in the sequestration of the said Hunter, Newall & Company, and William Hunter and James Newall, and constituting four-fifths in number and value of the whole creditors of the said Hunter, Newall & Company, and William Hunter and James Newall, on the second part; Witnesseth—That upon the 22d day of December, 1858, the whole estates of the said Hunter, Newall & Company, and William Hunter and James Newall, were sequestrated by the Sheriff of the County of Lanark, by virtue of the "Bankruptcy (Scotland) Act, 1856," and the "Bankruptcy and Real Securities (Scotland) Act, 1857:" That at the statutory meeting of creditors on the said sequestrated estates, held at Glasgow on the 31st day of the said month of December, 1858, for the purpose of electing one trustee on the estates of the said company, and individual partners, or separate trustees, or trustees in succession and commissioners in the said sequestration, and doing the other acts provided by the said statutes, a majority in number and four-fifths in value of the creditors present or represented at said meeting, resolved that the estates ought to be wound-up under a deed of arrangement, and the said resolution having been represented to the Sheriff of Lanarkshire by the said Hunter, Newall and Company, and William Hunter and James Newall, and an application presented by them to the said Sheriff to sist procedure in the said sequestration for the period of two months, in terms thereof, his Lordship, after hearing all parties interested and compearing, found that the said resolution was duly car-

the Sheriff (on 21st March) appointed intimation of the production thereof to be made, by advertisement and circular, to every creditor who did not concur in the deed.

At this stage, Douglas, Mitchell & Company, merchants, Bradford, and William Brayshaw & Company, merchants there, and M'Grigors, Stevenson & Fleming, writers in Glasgow, their mandatories, creditors of the bankrupts, entered appearance to oppose the approval of the deed, and subse-

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ried, and sisted procedure in the said sequestration for the period of two months from the 19th day of January, 1859; And whereas an arrangement has been effected on the terms under-written, betwixt the first and second parties hereto; and it is necessary and proper that these presents should be executed: Therefore, it is hereby arranged and agreed, by and between the parties as follows, viz.:—On the one part, the said Hunter, Newall & Company, and William Hunter and James Newall, as principals, and David Harrower, warehouseman in Glasgow, as cautioner, surety, and full debtor for and with the said Hunter, Newall & Company; and William Hunter and James Newall hereby bind and oblige themselves, jointly and severally, and their respective heirs, executors, and successors, to pay to each and all of the just and lawful creditors of the said Hunter, Newall & Company, and William Hunter and James Newall, the sum of three shillings per pound of the several just and lawful debts owing by them at the date of sequestration, and that by three equal instalments, at three, six, and nine months from the date of this deed of arrangement being finally approved of by the said Sheriff, and the said sequestration declared at an end, together with interest at the rate of £5 per centum per annum on the said sum, from and after the term of payment, and during the non-payment of the same, and a fifth part more of each payment in name of penalty in case of failure in the punctual payment thereof; and in the meantime to deliver bills for the amount thereof to each of the creditors of the said Hunter, Newall & Company, and William Hunter and James Newall, duly signed by the said Hunter, Newall & Company, and William Hunter and James Newall, and me, the said cautioner; as also to pay the whole expenses incurred in obtaining and following forth the sequestration, and in carrying through and obtaining the approval of this deed of arrangement: Declaring that any creditors, named as such in the state of affairs produced by the said first party at the meeting appointed under the sequestration for the election of a trustee, on production of said state of affairs, or an excerpt therefrom, of the name and amount of debt due to said creditors, certified by George Robson, accountant in Glasgow, shall be forthwith entitled to an extract of this deed of arrangement from any books in which it may be recorded, and to do all manner of diligence on the said deed of arrangement for recovering payment of the said composition, or delivery of the said bills; and for the said purposes the said state of affairs shall be deposited with the said George Robson, and shall be patent to all parties claiming to be creditors in the said sequestration whose names are not mentioned in the said state of affairs, or shall constitute their debts by action in the Sheriff Court of Lanarkshire at Glasgow, which is hereby declared to be a competent Court for the purpose; and upon their debts being so constituted, they shall be respectively entitled to delivery of the aforesaid bills, and payment of the aforesaid sum of three shillings in the pound, so far as the same may be due, when the said debts are constituted: Declaring that all creditors holding securities over any means and estate belonging to the said Hunter, Newall & Company, and William Hunter and James Newall, or belonging to any party against whom the said Hunter, Newall & Company, and William Hunter and James Newall have relief, shall be bound to deduct the value of the said securities from the amount of their respective debts, and that the said three shillings per pound shall be payable only upon the balance of their debt after such deduction: Declaring that in the event of any dispute as to the value of the said securities between the said Hunter, Newall & Company, and William Hunter and James Newall, and any creditor, it shall be competent to either party to apply to the Sheriff of the County of Lanark, or his Substitutes, to appoint a valuator or valuators to take such other means as they, or any of them, may think fit, for ascertaining the value of the said securities, and thereafter to find and declare the value of such securities; and the judgment or deliverance of the said Sheriff, or any of his Substitutes thereon, shall be final and conclusive, and shall not be subject to review by any other judge or court: Declaring also, that although the said securities may eventually turn out when realised to be of more value than they are valued at, either with or without the judgment of the said Sheriff, at the time of payment of the said three shillings in the pound, or delivering the said bills, the said valuation shall nevertheless be conclusive between the said Hunter, Newall & Company, and William Hunter and James Newall, and the creditors holding the securities, and it shall not be competent to the said Hunter, Newall & Company, and William Hunter and James Newall, to claim repetition or repayment to any extent in respect of the proceeds of the securities exceeding their respective valuations, and it shall not be competent to the creditors holding securities to claim more than the said three shillings per pound, or bills computed upon the balance of their debts as aforesaid, in respect of the proceeds of their securities being less than their respective valuations: Declaring that in the event of the said Hunter, Newall & Company, and William Hunter and James Newall, being again sequestrated under the law of Scotland, or any country, or making a trust deed, or calling a meeting of their creditors as insolvents, at any time before the said sum of three shillings in the pound is paid, then and in that case the debts of the creditors who have not received payment thereof, shall revive against the said Hunter, Newall & Company, and William Hunter and James Newall, and they shall be entitled to rank for their whole debts on the estates of the said bankrupts and insolvents, under deduction of any sum that may have been paid to account; and that the said Hunter, Newall & Company, and William Hunter and James Newall, bind and oblige themselves and their foresaids, to free and relieve, and harmless and scaithless keep the said David Harrower, warehouseman in Glasgow, and his foresaids, of all or any of the foresaid sums, principal, interest, and penalty, and of all loss, damage, and expense which the said cautioner may sustain by and through his subscribing these presents; and, on the other part, the said creditors or mandatories for creditors of the said Hunter, Newall & Company, and William Hunter and James Newall, have exonered and discharged, and do hereby exoner, acquit, and *simpliciter* discharge the said Hunter, Newall & Company, and William Hunter and James Newall, and their heirs and successors, subject to the provisions foresaid, of all debts and obligations contracted or owing by them at the date of the said sequestration, reserving always the claims of the creditors for the said sum of three shillings in the pound and interest, and also reserving to such of them as hold collateral securities or obligations for the debts owing by the said Hunter, Newall & Company, and William Hunter and James Newall, their claims against such collateral securities and obligations as accords. And the said creditors, and mandatories for creditors, hereby authorise and empower the said Hunter, Newall & Company, and William Hunter and James Newall, or their agents, to apply forthwith to the Sheriff of the county of Lanark to approve of this deed of arrangement, and declare the said sequestration at an end. And in the event of the said sequestration being declared at an end, we the said creditors, or mandatories for creditors, for all right and interest we and them have acquired by or through the said sequestration, do hereby renounce and discharge the said sequestration, and the rights and interests thereby conferred on us or them, and the other creditors of the said Hunter, Newall & Company, and William Hunter and James Newall, and we restore and retrocess, assign and convey to the said Hunter, Newall & Company, and William Hunter and James Newall, their heirs, executors, and assigns, the whole estates, heritable and moveable, real and personal, which belonged to them at the date of the said sequestration, or otherwise falling under the said sequestration, subject to the foresaid provisions; surrogating and substituting the said Hunter, Newall & Company, and William Hunter and James Newall, in our and their full rights and place of the premises; and in the event of these presents not being approved of, and the said sequestration declared at an end, then and in that case the debts of the creditors hereby discharged shall revive and be in full force, as if these presents had never been executed; and we, the said creditors and mandatories, warrant this discharge from the respective facts and deeds of us and our constituents; and the whole parties to this deed

quently lodged objections, which were answered for the petitioners. Of these objections and answers the substance will appear in the following:—

Obj. 11. The objectors deny the accuracy of the states of affairs produced, and aver that the bankrupts have not sustained losses to nearly the extent set forth in the states produced in process; that the bills, stated as bills receivable, are not of that character, but are in numerous instances bills accepted for the accommodation of the bankrupts, and that, in at least one instance, the party described as an acceptor denies that he has accepted any of the bills entered under his name. Generally, the objectors aver that the states produced do not contain a true disclosure of the state of affairs of the bankrupts, and that this would appear if the bankrupts were subjected to judicial examination.

Ans. Denied that the bills stated as bills receivable are not of that character, or that they have been in any instance accepted merely for the accommodation of the bankrupts, and explained that the assets, consisting of outstanding debts, are the balances undrawn for, owing to the bankrupts by the acceptors of the bills in question. One instance is here referred to of a party denying having accepted any of the bills entered under his name, but the name is not given. The bankrupts presume, however, from the productions made with the objections, that the party referred to is Peter Nicholson, of Carlisle. The letter, No. 2 of these productions, addressed by Nicholson to the objector, James Douglas, and dated 20th December, 1858, must have been extorted from him by Mr Douglas, through force or fear. There is herewith produced a letter addressed by Nicholson to the bankrupts, of date 1st April, 1859, admitting that the statements contained in the letter in question (No. 2 of the objector's productions) are untrue, and were made to Mr Douglas to mislead him as to the extent of his liabilities. The objectors, Douglas, Mitchell & Co., of which firm Mr James Douglas is a partner, were creditors of Nicholson, and the latter sometime ago executed an assignment of his estates in favour of the said James Douglas, as trustee for behoof of his creditors. *Quoad ultra* denied.

Obj. 12. The whole circumstances attending this bankruptcy demand the strictest investigation; and to defeat the objectors' right to make such an investigation, by evading a judicial examination and the statutory declaration on oath, is the sole object of the attempt to bring the sequestration to an end under the guise of a deed of arrangement.

Ans. Denied. The proposal of a deed of arrangement was the wish of a large body of the creditors, from a conviction that they would realise more in that than in any other way. The bankrupts have nothing to conceal, and can have no wish for concealment. Their desire is that the creditors should get as much as possible, and they aver that under the present deed of arrangement much more is provided to the creditors than could ever otherwise be realised. They aver further, that the objectors both asked the bankrupts to give them preferences over the other creditors, and that it is in consequence of the bankrupts' refusal that they now come forward to object to the deed of arrangement.

Obj. 13. The deed produced is not a deed of arrangement within the meaning of the statute. It contains no provision for *winding-up* the estate of the bankrupts, but, on the contrary, retrocesses the bankrupts' *simpliciter*. It is simply a composition-contract, whereby the bankrupts and a cautioner become bound to pay 3s per pound to their creditors. The creditors lose all control over the estate, and have not even the statutory facilities for recovering summarily the composition which they would have had under a composition arrangement carried through in the ordinary form, but must constitute their claim by an ordinary action. The cautioner is a mere servant of the bankrupts, is not engaged in business on his own account, and has no means. He is described in the "Glasgow Directory" for the year 1858–9 as at "Hunter, Nowall & Co.'s."

Ans. Denied, under special reference to the deed itself for its terms.

Obj. 14. The deed produced has not been duly entered into and executed. Only a small proportion of the parties who execute the deed have produced affidavits, and of these many have not produced the vouchers of their debts.

Ans. Denied. The deed is assented to and subscribed by, or by authority of, the requisite majority of the creditors, in terms of the Statute.

Obj. 15. The deed produced as a deed of arrangement is not reasonable in the sense of the Statute, and ought not to be approved of.

Ans. Denied.

The parties having consented to judicial examination of the bankrupts, and the Sheriff-Substitute having heard parties' procurators, and resumed consideration of the objections, answers, the judicial examinations of the bankrupts, productions, and whole process, including copies of the *North British Advertiser* of 26th March last, and *Edinburgh Gazette* of 25th March respectively, each containing the intimation ordered by the Interlocutor of 21st March last, and also including the certificate, No. 48, of posting of circulars to the non-concurring creditors, (on 23d May) pronounced the following Interlocutor:—

Finds, *first*, that it was found by the Interlocutor of 19th January last, now final, that a majority in number and four-fifths in value of the creditors assembled at the first statutory meeting had resolved that the estates of the bankrupts ought to be wound-up under a deed of arrangement, and that such resolution had been duly carried: Finds, that the deed of arrangement No. 34, was thereafter produced on the 19th March: Finds it admitted by the objectors that the said deed is subscribed by, or by authority of, four-fifths in number and value of the creditors of the bankrupts who have produced affidavits, and also by four-fifths in number and value of the total creditors of the bankrupts in as far as known: Therefore finds, that whether it is meant by the provisions of sect. 38 of the Bankruptcy (Scotland) Act that the deed must be subscribed by four-fifths in number and value of the creditors who have lodged affidavits or by four-fifths in number and value of all the creditors, the enactment of said statute, in as far as regards subscription, has been complied with, and repels the objection founded on the want of due execution of said deed: Finds, *second*, that whilst the said statute is silent as to the precise requisites and form of a deed of arrangement, it cannot be held an objection to such deed that it comprehends *inter alia* a composition-contract, seeing that full power is given to the creditors by the 35th section to resolve that the estate should be wound-up under a deed of arrangement, without any limitation as to the terms of such deed; and in point of fact a composition-contract has almost always formed a leading and material part of deeds of arrangement which have been approved of both in this Court and in the Court of Session since the passing of the Act: Finds further, that the deed of arrangement in question contains other provisions favourable to the creditors besides those relating to the matter of composition; and the statutory majority of creditors in number and value having subscribed the same, the inference is that they consider it a deed satisfactorily carrying out the previous resolution as to the mode in which the estate should be wound-up; therefore repels the objection founded on the averment that the said deed is not a deed of arrangement within the meaning of the statute: Finds, *third*, that the Sheriff-Substitute having—on the motion of the objectors, and in virtue of the powers conferred upon him by the 38th section of the statute, to "make any inquiry he may think necessary,"—appointed a judicial examination of the bankrupts, the same was taken at great length, and parties' procurators were thereafter heard of new on the whole cause: Finds, that whilst it appears from the objections and answers, and admissions made in the judicial examination, that the bankrupts took too favourable a view of their circumstances, and held themselves out, up to the eve of their bankruptcy, as being in a better financial position than they really were, nothing has been elicited by said examination to show, nor have the objectors instructed *aliunde* that the bankrupts have not made a true disclosure of their affairs, and a full surrender of their estate; and although it appears that they expect, upon being reinvested, to buy up their bills in

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of arrangement consent to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation, and if needful, that letters of horning, and all other legal execution on a charge of six days, may pass upon a decree to be interponed hereto, in form as effeirs; and thereto constitute pro-curators.—In witness whereof, etc. Dated 2d February, 1859, and other dates.

the hands of the bank at eight shillings per pound, such transaction, which may or may not turn out profitably, does not affect the reasonableness of the deed of arrangement: Finds, that the objectors have failed to show that said deed is unreasonable, therefore repels the objections upon the merits, but before pronouncing farther, or finally approving of the deed of arrangement, appoints the bankrupts to appear before the Sheriff-Substitute, within his chambers, on Wednesday the 25th instant, at one o'clock p.m., to emit a declaration that the state of affairs, No. 25, is a true and correct state, that it contains a full and true list of all their creditors, and that there are no other non-concurring creditors than those to whom circulars have been sent, as contained in the said certificate.

The bankrupts having appeared and emitted the declaration ordered, the Sheriff-Substitute then pronounced the following Interlocutor:—

Having again resumed consideration of this process of sequestration of the estates of Hunter, Newall & Company, warehousemen in Glasgow, as a company, and of William Hunter and James Newall, both warehousemen there, the individual partners of that company, as such partners, and as individuals, awarded on the 22d day of December, 1858, together with the within deed of arrangement between them and their creditors produced in process on the 19th day of March last, and having advised the declaration made of this date by the bankrupts, Finds, that the said deed of arrangement has been duly entered into and executed, and is reasonable, and hereby approves thereof, and declares the said sequestration at an end; farther, appoints the said deed, together with this deliverance, to be recorded in the Sheriff-Court books of Lanarkshire at Glasgow, all in terms of the "Bankruptcy (Scotland) Act, 1856," and the "Bankruptcy and Real Securities (Scotland) Act, 1857;" and in respect of the findings contained in the Interlocutor of the 23d current, Finds the objectors and their mandatories liable to the creditors supporting the said deed in the expenses occasioned by their opposition; allows an account thereof to be lodged, and remits the same to the auditor of Court to tax and report, and decerns.

For Concurring Creditors—J. NAISMITH.
For Objectors—J. G. FLEMING.

27TH MAY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

EPHRAIM MOORE *v.* PETER BEATTIE.

Summons—Relevancy—Bastard—Aliment—*Mora.*—*Where a party had alimented a bastard child, under an agreement with the mother for payment of a certain sum per week, for a period of fifteen years, but had received no payments from either of the parents of the child for twelve years, the child having been allowed an aliment by the Parochial Board for upwards of two years of said period.—Held, in an action at the instance of the party alimenting the child against the Inspector of Poor of the parish of the child's residence, brought after a lapse of fifteen years from the birth of the child, that the pursuer's claim was barred* mora.—*Averments in a summons not relevant to support its conclusions.*

THE pursuer brought this action against the defender, as Inspector of Poor for the Barony Parish of Glasgow. The conclusions of the summons were that "the defender ought to be decerned to pay to the pursuer the sum of £61 4s sterling, being the amount of an account for the upbringing and maintenance, from the 1st day of September, 1847, till the 1st day of January, 1859, of an illegitimate female child, named Mary Morton, daughter of Agnes Brayden, sometime residing in Barnhill Poor-house, Glasgow, said child having been left by her said mother in the pursuer's custody and keeping on or about the month of August, 1844, on the understanding and agreement that she was to pay the pursuer 2s 6d per week as aliment for said child, but which aliment she, from the 1st day of September, 1847, failed to pay, having previously deserted her said child—said child being chargeable on the Parochial Board of the said Barony Parish of Glasgow, who were bound to support it, but deducting always from said sum sued for, the sum of £15 6s sterling, being the amount of sundry payments to account of said aliment, made by the defender to the pursuer, conform to account annexed."

This account was in these terms:—

"Mr Peter Beattie, Inspector of Poor for the Barony Parish of Glasgow, to Ephraim Moore, 5 Canal Street, Port-Dundas, Glasgow, 1859. To keeping and bringing up of Mary Morton, an illegitimate child, daughter of Agnes Brayden, from 1st September, 1847, till 1st January, 1859, being 136 months, at 9s, £61 4s. By cash at sundry times to account £15 6s. Balance £45 18s."

The defender pleaded in defence:—1. The summons irrelevant, in respect the action is founded on an alleged contract between the pursuer and the mother of the child, and there is no averment of her having been discussed, and she is not called to this action. 2. The claim is barred by *mora* on the part of the defender. The child, on the pursuer's showing, is 15 years of age, and no averment being on record that the child is unhealthy, no claim for aliment beyond 12 years could be sustained, and no claim was ever made by the pursuer till now. The defender had therefore lost his recourse against any parish to which it might be found the child was chargeable. 3. The libel was denied—under the explanation that a child of the name of Mary Morton was put on the roll of paupers, and that aliment was afforded it at the rate of 9s per month from June, 1855, to December, 1857—but these payments were not made to account of any claim for aliment such as that sued on.

The Record having been closed on the summons and minute of defence, the Sheriff-Substitute having heard parties' procurators, pronounced the following Interlocutor, which has been acquiesced in:—

Finds, that the pursuer's claim is founded on an alleged contract with the mother of the bastard child, named in the summons; that the pursuer does not aver that he ever made any claim either against the mother or father of said child, or ever attempted to obtain payment from either of them for its support: Finds, that although the pursuer states that he has alimented the child since the year 1844, he does not aver that he ever made any claim against the defender, or his predecessors in office, or even intimated to them that he had any claim against them, till this action was raised: Finds, therefore, that the averments in the summons, even if proved, do not support the pursuer's claim: Finds, further, that the pursuer is barred *mora* from making the claim against the defender. Therefore, sustains the defences; assoilzies the defender; finds the pursuer liable in expenses; allows an account to be given in, and remits the same to the auditor to tax and report, and decerns.

NOTE.—By the pursuer's *mora* in making this claim, he has prevented the parish from having any recourse against the parents of the child, or against any other parish that may have been liable for its support. He says the mother placed it under his care in August, 1844, on an agreement to pay him 2s 6d per week for its support, and soon afterwards deserted it. After this desertion, he was under no obligation to have kept the child any longer, and ought then to have applied to the parish to support it, and probably they might have been bound to do so, if they could not obtain relief against its parents, but in place of doing so he continues to support it, according to his own statement, for upwards of sixteen years, and then makes this claim against the parish.

Act. J. M'BRIDE. *Alt.* R. MACLUCKIE.

29TH MAY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

DOUGLAS AND M'MILLAN'S SEQUESTRATION.

Bankruptcy—Commissioners—Competency.—*Held, that it is incompetent for a body of creditors to appoint a committee with certain powers to the exclusion of the statutory powers of each and all of the commissioners.*

AT a general meeting of the creditors on the sequestrated estates of Messrs Douglas & M'Millan, shawl and dress manufacturers in Glasgow, it was resolved that a committee be appointed to confer with, and assist the trustee, and procure advice as to whether any, and what proceedings should be taken against Mrs Douglas, the bankrupt's mother. This committee was appointed as the creditors supposed the bankrupts to have some interest in the succession of the late commissary, General Miller, in whose estate Mrs Douglas had been vested.

Mr George Black, one of the commissioners, and who appeared as mandatory for Mrs Douglas, was excluded from the committee, in respect of his being her law agent, and therefore an interested party.

He protested at the meeting against said resolution, and appealed to the Court, pleading *inter alia*—

1. That the Bankrupt Acts do not authorise the appointment of a committee of creditors other than the commissioners to superintend or advise with the trustee. 2. That a commissioner cannot be superseded or removed, except at a meeting called for that purpose. 3. That the appellant, as a commissioner, acts for the creditors generally, and not as mandatory only for individual creditors. 4. That the trustee is bound to advise with the commissioners on all matters relating to the management and disposal of the estate or any part of it, and it is the duty of each commissioner to superintend and assist him. 5. That the procedure in sequestration is statutory, and it is incompetent for creditors by resolution or otherwise to adopt a form of management inconsistent with that provided by the Bankrupt Acts. 6. That so long as invested with the office, a commissioner is entitled to exercise all the functions thereof.

The respondent pleaded—

1. That the creditors are entitled to direct the management of the estate or any branch of it. 2. That it was not only lawful to exclude the appellant from the committee of management, but it would be illegal to keep him in it. 3. That the appellant was not entitled to vote.

The Sheriff-Substitute, after hearing parties, has pronounced the following Interlocutor, sustaining the appeal, and finding the respondent liable in costs:—

Having heard parties' procurators, and reviewed the process: Finds, that the committee appointed by the resolution appealed against consists of two of the commissioners, namely, James Black and George Younger, and of a creditor Robert Boyd, to the exclusion of the appellant, who has been duly elected one of the commissioners: Finds, that the said committee was appointed "to confer with, and assist the trustee, and take advice as to whether any, and what proceedings should in the circumstances be taken against Mrs Douglas," (a creditor, and mother of one of the bankrupts,) "and in the management of such proceedings, if adopted with concurrence of a quorum of the committee:" Finds, that the ground assigned for excluding the appellant from said committee, is, as the minutes bear, that he is the law agent of Mrs Douglas: But finds, that it is enacted by section 85 of the Bankruptcy Statute, that the commissioners shall superintend the proceedings of the trustee, concur with him in submissions and transactions, give their advice and assistance relative to the management of the estate, decide as to paying or postponing payment of a dividend, and may assemble at any time to ascertain the situation of the bankrupt estate, and any one of them may make such report as he may think proper to a general meeting of the creditors: Finds, therefore, that whilst it may not be incompetent for the creditors, when lawfully assembled, to appoint a committee of their body, other than the commissioners, for a specific purpose, it is incompetent for them to appoint such committee for the purpose of excluding or interfering with the exercise of the statutory powers committed to each and all of the commissioners: Finds, that the avowed object of the appointment of the committee in question, and its constitution, shows that it is intended to exclude the appellant from discharging his office of commissioner, in as far as the particular matter remitted to the committee is concerned, and this apparently without any sufficient cause, because, even although the appellant's judgment should be biassed by the fact of his agency, he can always be put in a minority by the other two commissioners and the trustee: Finds, that the attempt thus made is contrary to the provisions of the statute, sustains the appeal, and recalls the resolution, reserving to the creditors any right they may have to appoint a committee to act without interfering with the powers of the commissioners: Finds the respondents liable in expenses, of which allows an account to be given in, and remits the same to the auditor to tax, and report, and decerns.

Act. HONEYMAN. *Alt.*

1ST JUNE, 1859.

SHERIFF COURT, DUNBLANE.

(MR SHERIFF GRAHAM.)

JAMES COUSIN *v.* THE HON. ARTHUR DRUMMOND.

Landlord and Tenant—Lease—Removing—Tacit Relocation—Interdict.—*Held, notwithstanding an obligation in the lease of a farm to remove at its termination without warning, that the lease having been taken up by an heir-at-law, it is necessary to warn him as tenant; that it is not sufficient to give notice to a younger brother, who had managed and been resident on the farm since the commencement of the tack, (the heir not having resided on the farm), although the younger brother had an interest in the stock and profits to the extent of one-half; and that the selling of the crop and stock, and displenishing of the farm, and other circumstances following upon the notice to the younger brother, did not bar the heir from pleading the necessity of formal warning to him, in order to entitle the landlord to remove him, but that he was entitled to retain possession of the farm, on tacit relocation, till duly warned to remove.*

THE Earl of Kinnoull, then heir of entail in possession of the estate of Cromlix, let to William Cousin, overseer at Cambus, the farm of Barbush, on that estate, for nineteen years, from Martinmas, 1838. The lease contained power to William to assign the lease to any one of his lawful children, and the usual obligation on the tenant to remove, without warning. William Cousin did not take up his residence on Barbush, but continued to act as overseer at Cambus. He placed at Barbush his younger son, William Cousin, Junior, who managed the farm. William Cousin, Senior, died in 1842, without having made any settlement, or assigned the lease of Barbush. James Cousin, his eldest son, then acted as overseer on an estate six miles distant, where he continued till 1850; and after a few months' residence at Barbush, he took up his residence in the county of Clackmannan, on a farm about twelve miles distant, of which he and his brother William had become joint-tenants. With the exception of the few months in 1850, James never resided at Barbush; but on his father's death the crop and stocking of the farm were valued, and he and William agreed to pay the other members of the family their shares of the stock and crop; that they should have a joint interest in the stock and profits, and that William should continue to manage the farm, and to receive £20 a-year for doing so. No transference, however, was made

of the lease, and in 1844 James was enrolled as a voter in respect of his being tenant, on information obtained from the factor for the landlord; and in 1845 he was again enrolled, as tenant, on information so obtained, and his name stood in the county roll of voters, as tenant of Barbush in 1857.

In 1852, the Honourable Robert Drummond took up the estate of Cromlix, under the provisions of the entail, and on his death in 1855, he was succeeded by the defender, the Honourable Arthur Drummond. The estate was also placed under the charge of another factor in 1852.

During the life of William Cousin, Senior, the rent receipts were granted simply in name of William Cousin, and after his death, till 1857, the receipts bore that the rents were paid by William Cousin, the rent having invariably been handed to the factor by William Cousin, Junior, and no entry was made in any of the factor's books indicating a change in the tenancy. Since the formation of the Scottish Central Railway, which intersects the farm of Barbush, William Cousin, Junior, had also been in the practice of granting receipts in his own name for railway damages, for "my farm of Barbush," and other matters connected with the farm, and he otherwise acted as tenant of the farm.

The tack expired at Martinmas, 1857. In the spring of 1857, William Cousin, Junior, negotiated with the factor for a new lease of the farm, but not having succeeded in satisfying the factor as to the amount of rent, he intimated that he was done with it, and the farm was accordingly advertised, and afterwards let to another person. He subsequently got the overseer for the proprietor to sow grass seeds with the crop of 1857.

In consequence of William Cousin, Junior, having given up the farm, a formal summons of removing was served upon him as tenant of Barbush, and decree obtained against him on the 4th of April, 1857.

In August, 1857, the greater part of the crop was sold, with the sanction of the pursuer, James Cousin, and the stock and implements, and remainder of the crop, were sold in October following, and a complete displenishing of the farm took place. The whole turnips growing on the farm were sold to the incoming tenant, and the incoming tenant, who purchased also the thrashing mill and other farming utensils, was permitted, with the sanction of William, to stack the crop purchased by him in the corn yard.

In the end of October a charge was given to William Cousin on the decree of removing against him, and on the 31st of October, James intimated to the proprietor, that as he had not been warned, he would not remove, and thereafter presented to the Sheriff an application for interdict against the defender molesting him in the possession of the farm, till he was duly warned.

The defender opposed this application, and maintained that James was not the tenant, but that William was—that he had never taken up the lease or intimated to the proprietor his intentions to do so, but had allowed his brother William to act as the ostensible tenant on paying the rent, obtaining receipts therefor, and granting receipt for railway damages in his own name, and otherwise; and, at all events, the proprietor was entitled, from the dealings and actings of William after his father's death, to assume him to be tenant—that the summons served on him was sufficient warning, and that the sowing of the grass seeds, the intimation by William that he was done with the farm, and that it might be advertised, the displenishing of the farm, the sale of the thrashing mill and turnips to the incoming tenant, and other circumstances which occurred in 1857, barred James from pleading the want of formal warning to himself.

After hearing parties' procurators on the closed record, the Sheriff-Substitute pronounced an Interlocutor, granting interdict as craved, and finding the defender liable in expenses. The defender having appealed, the Sheriff (Mr Muir) recalled *hoc statu*, the Interlocutor appealed against, and remitted the case to the Sheriff-Substitute to allow parties proofs.

Thereafter proof having been led, the Sheriff-Substitute pronounced the following Interlocutor:—

Having resumed consideration of this case under the remit from the Sheriff, with the proof since led, and having heard parties' procurators thereon, and made avisandum with the whole case: Finds, as matter of fact, 1st, That by lease, dated 16th and 17th February, 1838, the Earl of Kinnoul, who is represented in the present action by the defender, let to the petitioner's father, William Cousin, the farm of Barbush and other lands for 19 years, from and after Whitsunday, 1838. 2d, That under the lease, William Cousin had power to assign it to any of his children he might think proper. 3rd, That the said William Cousin died in the year 1842. 4th, That it is not proved that up to his death he had done anything in exercise of the power of assignation contained in the lease. 5th, That the said William Cousin never himself occupied Barbush, but that it was occupied and managed on his behalf by his younger son, William Cousin, Junior. 6th, That the present petitioner is William Cousin, Senior's, eldest son. 7th, That upon William Cousin, Senior's, death, the petitioner claimed the right of succeeding to the lease of the farm of Barbush, as his father's heir. 8th, That the right of the petitioner to said lease, was recognised and acquiesced in by his brother William, and the other members of the family. 9th, That since the death of William Cousin, Senior, Barbush has continued to be occupied and managed by William Cousin, Junior. 10th, That the petitioner, for several years after his father's death, frequently visited the farm of Barbush, and superintended the operations thereon, and acted as if he had an interest in the farm. 11th, That the petitioner, as tenant under the said lease of Barbush, was enrolled in the year 1844, and again in the year 1845, as a voter in the County Register for Perth. 12th, That the enrolment in 1845 proceeded upon a declaration by the factor of the defender's author, dated 11th August, 1845, No. 144 of process, by which, "conscientiously believing the same to be true," "he solemnly and sincerely" declared—That the petitioner, "as eldest son of the deceased William Cousin, tenant of Barbush is now, and was for a period of not less than twelve months previous to the last day of July last, tenant of the farm and lands of Barbush." 13th, That in an action which depended before the Sheriff Court at Dunblane in 1850, in which the petitioner was defender, and in which he had an interest to support a different character, he, in a judicial declaration, asserted his character as his father's heir, and tenant of Barbush under the said lease. 14th, That it is not proved that any transference of the lease of Barbush was ever executed by the petitioner in favour of his brother William, or any other party. 15th, That it is not proved that the petitioner authorised his said brother to act as tenant of Barbush, or in any other character than that of his manager in the farm. 16th, That on 4th April, 1857, and in view of the expiry of the lease at Martinmas following, a summons of removing was served by the defender upon the said William Cousin, Junior, and decree thereafter obtained thereon. 17th, That it is not proved that the petitioner was then, or till the end of the month of October following, made aware of the serving of said summons upon his brother. 18th, That no summons of removing has ever been served upon the petitioner, or any warning or intimation been given to him by the defender to remove from the tenancy of the farm of Barbush. 19th, That shortly after the service of said summons of removing upon William Cousin, he entered into negotiations with the landlord's factor for a new lease of the farm to himself, and led the factor to believe that the farm would be left free at the ensuing term. 20th, That it is not proved that the petitioner had any knowledge of his brother William Cousin's proceedings in this matter. 21st, That a public sale of the growing crop of Barbush took place with the knowledge, and under the direction of the petitioner in August, 1857. 22d, That a second public sale of crop, and stock, and implements of husbandry, took place under the petitioner's direction, on the 15th October, 1857, by which the farm was displenished. 23d, That the petitioner is not proved to have himself given any promise to the defender, or made any bargain whatever with him to remove from the farm of Barbush:

Finds, in point of law, that the petitioner having taken up the lease of Barbush, and been recognised as tenant under it by his landlord, the defender's author, the defender was placed under the obligation of giving the petitioner a warning to remove in the ordinary form: That the petitioner's actings towards the defender do not *personali exceptione* bar him from pleading the necessity of a summons to remove in the ordinary form: That the petitioner's actings do not establish a *rei interventus* on the petitioner's part, with reference either to the general obligation to remove in the lease, or to the summons of removing served upon William Cousin, Junior, or to any other agreement previous to these actings: That no regular warning to remove having been given to the petitioner, and no facts having been proved which supply its absence in the present case, the petitioner is, on the principle of tacit relocation, still the tenant of Barbush: Therefore, continues the interdict as prayed for by the petitioner: Finds him entitled to the expenses of this action, and remits to the auditor of court, to tax the same, and report, and decerns.

NOTE.—The Sheriff-Substitute has already, in his note to his Interlocutor of date the 15th February, 1858, and to which he now refers, stated what he thinks are the principles applicable to the present case. He is not of opinion that the circumstances which have been established in the very long proof which has now been led, have placed the parties in a different position from that which he then held them to occupy. He still thinks that the main point at issue between the parties resolves into the question, whether the lease of Barbush was ever taken up by the petitioner. He thinks that the legal inference to be drawn from the facts of this case is, that the petitioner did take up the lease, that he became liable to the responsibilities, and acquired the privileges of the defender's tenant. The proving of the taking up of the lease of a farm by the heir to the lease requires much less evidence than is necessary to prove the constitution of a new lease in favour of any third party. If the acts of an heir are reconcilable with the belief of his claiming or taking up any right belonging to him as heir, he will not be relieved of the responsibilities which attach to him in that character, and any acts from which the responsibilities of the heir are to be inferred, must be held to be acts by which his privileges as heir are also secured. The acts of the petitioner were such as to render him liable to the defender as his landlord for the performance of the tenant's obligations, and by the same acts the Sheriff-Substitute thinks the petitioner has acquired a right to the enjoyment of the tenant's privileges. In the present case, the Sheriff-Substitute is not only unable to discover, on the part of the petitioner, any acts which are not reconcilable with the belief of his having, after his father's death, taken up the lease of Barbush in the character of heir; but he thinks that in the instances of the enrolments in 1844 and 1845, and in the declaration in Eadie's process, the petitioner has established acts with which no other belief is reconcilable.

It was argued on the part of the defender that the present case was essentially analogous to the case of Wilson against Stewart, December 2, 1853, 16 S. and D., and that upon the authority of that decision, it ought to be decided in the defender's favour. The Sheriff-Substitute thinks that the cases are essentially different. In Wilson's case it was not the heir, but his younger brothers, who were the pursuers of the action. The heir did not come forward at all till after the action had been instituted in the Sheriff Court, and before the case was called in the Court of Session, he entirely withdrew. He was, moreover, not proved to have ever been heard of by any one in connection with the farm of which it was maintained that he was tenant. The landlord or his factor had never in any way recognised him as tenant, and indeed had no good opportunity of knowing of his existence, for his residence was in England, and he was not proved to have been at the farm for several years previous to his father's death, or to have been there at all between the date of his father's death and the term of removal. In all these points, the case of Wilson differs from the present, in which it is the heir himself who is the pursuer, and in which, in addition to the proof of circumstances from which the landlord's knowledge of the petitioner's connection with the farm might readily be presumed, there is the declaration of the defender's author in reference to the petitioner's enrolment as a voter in 1845, by which the petitioner was recognised as possessing the character under which he pursues in the present action.

In coming to a decision in favour of the petitioner, the Sheriff-Substitute has proceeded on facts proved by evidence independent of that given by the petitioner and his brother. In the marked want of candour which their testimony exhibits, the Sheriff-Substitute finds a strong corroboration of the opinion which he formerly expressed in reference to the petitioner's conduct in the proceedings, out of which the present case has arisen.

On appeal, the Sheriff (Mr E. S. Gordon) adhered, and added the following note to his Interlocutor:—

The present question has now substantially resolved into one of expenses, as the pursuer removed from the farm last year.

The first impression produced by the consideration of the evidence was unfavourable to the pursuer's case; but a careful examination of the authorities which bear upon the question at issue, has satisfied the Sheriff that the Interlocutor appealed from ought to be affirmed.

The Sheriff has weighed the arguments of the defender with every desire to give them a favourable consideration; because it is obvious on the one hand that the defender acted under the impression that William Cousin, the pursuer's brother, was the tenant of the farm of Barbush; while, on the other hand, the conduct of William Cousin appears to have been undoubtedly calculated, if not latterly intended to produce that impression; and the pursuer has taken advantage of his extreme legal rights in a manner which cannot be approved of as a matter of straightforward dealing.

The lease was granted by the present Earl of Kinnoull in 1838, to William Cousin, the father of the pursuer, and his brother, William Cousin, excluding assignees or sub-tenants without the proprietor's consent in writing; but with power to William Cousin, the father, to convey the lease to any of his lawful children. It appears that William Cousin, the father, during his life, did not reside on the farm, but allowed it to be managed by his second son, William, who resided on the farm with some of his sisters, and managed it. This continued down to 1842, when William Cousin, the father, died. William Cousin, his second son, who had managed the farm during his father's life, continued to pay the rents, and no change was made in the factor's books, or in the terms of the receipts, in consequence of the death of William the father. No inquiry appears to have been made at this time by the factor whether William was the eldest son, or had acquired right to the farm by any conveyance from his father. But, it is clear in point of law, that the pursuer, James, being the eldest son, was entitled to take up the lease, and that there was no conveyance transferring it to William his brother. It is no doubt true that the general impression appears to have been that William was the tenant (of the farm) after his father's death; but that was very naturally caused by his being in possession of the farm, and apparently managing all matters connected with it, which, however, appears to have been the case, even when his father was alive, and when he was undoubtedly the tenant.

The following facts which have been proved, show, that prior to 1857, there was no design to conceal that the pursuer was tenant of, or interested in the farm; and, indeed, there does not appear to have been any object which could have been served by such concealment. In 1844 and 1845, the pursuer was, as tenant of the farm, enrolled as a voter in the County of Perth, and certificates were granted by the factor of the Earl of Kinnoull that he was the tenant. It may probably have been that the factor did not pay much attention to the Christian name of the tenant; but, on the other hand, it is impossible, in the face of such evidence, to hold that there was any intention to mislead the factor or proprietor into the belief that William and not James was the tenant. In 1847 the brothers entered into an arrangement by which William was to get one-half of the profits of the farm, and a small yearly allowance as remuneration for his management. In 1850 evidence as to this arrangement was given by the pursuer in a process of aliment, in which it was against his interest to make such admission. Having regard to these facts, the Sheriff, while he can quite well understand that the system of management of the farm by William was calculated to produce the impression that he, and not James, was the tenant, is of opinion that such impression was not consistent with the fact; and there do not appear grounds for supposing that there was any design on the part of the pursuer and William to create such an impression, or any object which could be served by it. It can be easily understood how the

factor who succeeded Lord Kinnoull's factor, and who acted for the present and late proprietor, came to regard William as the tenant; although there was no change in the position in which William stood to the pursuer. But supposing that the defender had insisted against James as liable for the rent of the farm, the Sheriff thinks that the landlord could have established such liability upon the evidence in this process against the pursuer. The Sheriff therefore holds, that the pursuer, as eldest son and heir of his father, was the tenant of, and had right to the farm. If so, then the warning to remove ought to have been given to the pursuer forty days before the term of removal; and it will not be sufficient to found upon warning given, and a decreet of removal obtained against William, whether he be regarded as the manager for the pursuer, or even if William could be regarded as joint tenant, which the Sheriff thinks he cannot be held to have been. *Grant*, 18th December, 1753; *Morr.* 1 S, 842; *M'Intyre*, 11th December, 1829; *F. C. Bell*, 14th February, 1845, VII. D. B. M., 447; *M'Donald*, 23d May, 1807; *Hume*, 580.

But it has been argued that the pursuer *fraudulently* induced the defender to believe that he was to remove from the farm at March, 1857. This defence must be considered with reference to the authorities which bear upon it, and also with reference to the facts which have been established in evidence. The rule of law appears to be, that forty days before the stipulated termination of a lease, legal warning must be given to the tenant, or a written obligation to remove obtained from him within the last year of the lease; and that no equivalents will be received in room of these legal solemnities. Lord Fullerton in the case of *Blair*, 8th Feb., 1840, (II. D. B. M. 549,) said: "In such cases it is not enough that the landlord acts as if he understood that the tenant was to remove at a particular term, or even that the tenant knew that the landlord was so acting; *mala fides* in that sense, on the part of the tenant, will not bar him from objecting that legal warning has not been given. Indeed, it would be difficult to see how, on that footing, the practice of requiring warning had been introduced; how a tenant, who by his lease had bound himself to remove at the termination of that lease without warning, could be in *bona fide* when he insisted to remain because warning had not been given." "In regard to a case of this kind, I should fully agree in the opinion ascribed to the learned Judges in the report of Baron Hume in the case referred to in the last page of these papers, (Magistrates of Perth, Feb. 20, 1798, Hume's Decr., 562,) that after introducing, whether rightly or not, the rule requiring a formal warning, we should increase the risk of litigation which it was intended to remove, by letting in facts and circumstances as supplying its place. And accordingly various decisions have been pronounced in which circumstances as strong as those which occur here have been disregarded."

No doubt in Blair's case a decision favourable to the landlord was given; but that was because it was held that in the special circumstances of that case formal warning was not required. The following cases bear upon this point, *Forbes*, 2d July, 1613, Morr. 13,821; *Haddington*, January, 1693, IV. Brown's Supplement, 86; *Magistrates of Perth*, 20th Feb., 1798, Hume 562; *Lockhart*, 8th March, 1800, Hume 564; *Gordon*, 13th Jan., 1803, Morr. 13,854. The case of the Duke of Argyle, 7th Dec., 1799, Morr. Appendix, Removing No. 2, was prior in date to some of those above referred to, and it is thought must have proceeded upon considerations similar to those which prevailed in the case of Blair. The case of *Marjoribanks*, 11th July, 1795, not reported, (referred to in the Session papers in the case of *Lord Dundas*, 11th July, 1796, also not reported,) appears to have been decided in favour of the landlord partly upon the fact of the grass seeds having been sown by the incoming tenant; but it appears to have been proved that was done with the consent of the outgoing tenant. In the case of *Wilson*, 2d Dec., 1853, there were these specialities, that the eldest son did not intimate his intention to take up the lease until after its expiry, and that he did not come forward to assert his right in Court. The Sheriff is of opinion that the defenders, on whom the *onus* of proving *fraud* lies, has not established such a case of fraud against the pursuer as can exclude him from the right to object to his being removed, in respect of his not having received legal warning. The pursuer swears that he was ignorant of the offers made by his brother, that he was not aware that the landlord had sown down the grass seeds, and that he never heard of the decreet of removing until *within* forty days before Martinmas, 1857, the term of removal, and indeed that having had some differences with his brother William, he supposes that his brother was acting for his own behoof in making the offers. The only other circumstances founded upon are the sales of the crop and the payment of the rent. No doubt such a sale is a strong indication of the tenant's intention to remove at the next term, but although such should have been his intention at that time, it may have been induced by the supposition that the landlord would insist on his removal and give him warning forty days before the term; and if he found that the landlord did not give such warning, the sales do not appear to be sufficient to prevent him from asserting his strict legal right to continue in possession of the farm. The payment of the rent was a condition which the landlord was in any view entitled to insist for before any of the crop could be sold or removed from the ground.

In these circumstances the Sheriff, while certainly not approving of the conduct of William Cousin, and regarding the conduct of the pursuer as not free from suspicion, cannot hold that the defender has established by proof that the pursuer was guilty of such fraud as precluded him from objecting to his removal from the farm at the term of Martinmas, 1857, in respect that he did not receive legal warning to remove forty days before Martinmas.

Act. J. M'Lean. *Alt.* Thos. Barty.

7th June, 1859.

SHERIFF COURT OF PERTHSHIRE.

(Mr Sheriff Barclay.)

M'Nab *v.* M'Farlane *arrestee*, and Flynn, *common debtor.*

Forthcoming—Judicial Examination—Process—Proof.—*Circumstances in which the arrestee and common debtor, in an action of forthcoming, were allowed to be judicially examined.*

On 9th November last (1858,) the pursuer, on the dependence of a summons of filiation at her instance against Flynn, the common debtor, used an arrestment to the extent of £25 in the hands of M'Farlane, the arrestee. Having obtained a decree in absence against Flynn, she raised, on 3d December last, an action of forthcoming—founding on the arrestment used on 9th Nov.—in which action a record was made by condescendence and defences. The pursuer averred—(1,) That Flynn engaged as a farm servant to serve, and he accordingly did serve the arrestee for the year, from Martinmas, 1857, to Martinmas, 1858, at the money wages of £19, with the usual alimentary allowances; (2,) That such "money wages, according to the agreement or understanding entered into or come to between the arrestee and the common debtor, or otherwise according to the usage of the district of Dunkeld, and of Perthshire generally, were payable at the termination of the engagement, namely, at Martinmas last;" and (3,) That on 9th November last, the date of the arrestment, the arrestee was indebted to the common debtor the money wages for the year ending at Martinmas last. The arrestee averred in defence—(1,) That, prior to 3d August last, he had paid £2 to account of such wages; and (2,) That, on 3d August last, he paid to the common debtor "the balance of his said money wages for the said year, conform to receipt" produced. These averments were denied by the pursuer, who averred in answer that the receipt had "been collusively and fraudulently concocted since the date of the pursuer's arrestment between the defenders, in order, if they can, to defeat the pursuer's claim." On the record being closed, the pursuer was allowed a proof of her averment, and the defenders were allowed a conjunct proof. Thereafter the pursuer moved that under the special circumstances, the arrestee and common debtor be ordained to appear to be judicially examined in regard to the matters of fact set forth in the record.

Soutar, in support of the motion, cited M'Glashan, p. 383; Mitchell & Bell *v.* Hepburn, 15th Jan., 1830; 8 S. 319.

M'Leish, for arrestee, answered—Judicial examinations are repugnant to recent law and practice.

Soutar replied—The latest evidence Act, (16 Vict. c. 20, s. 6,) passed in 1853, by a substantive enactment, declared that—"Nothing herein contained shall alter or affect the Authority or Practice of the Courts in *Scotland*, as to Judicial Examination."

Thereupon Dr Barclay pronounced the following Interlocutor:—

On the defenders' motion to fix a diet of proof, and on the pursuer's counter motion for an order on the arrestee and common debtor to appear and be judicially examined; and having made avizandum with the cause, in respect of the nature of the averments on record, grants the pursuer's motion, and appoints the arrestee and common debtor to appear and be judicially examined at such diets as may be forthwith fixed.

Note.—The Sheriff-Substitute is unwilling, in the general case, to sanction judicial declarations, where statements of a party are taken as evidence against him, but never for him. This is all the more to be observed, since parties now may be witnesses in the cause. Nevertheless, the Act which introduced that rule specially reserved the right of judicial examination. In the present case there is a direct allegation of *fraud* between the arrestee and common debtor, in order to defeat the pursuer's claim. It is certainly very unusual to anticipate payment of a farm servant's wages, nor is it the practice to take receipts; and therefore upon the whole the case appears exceptional, and where the judicial examination of the party may promote the ends of justice. This is the more especially the case, seeing that the two named parties are likely to be the only witnesses who could be called; and, considering the object of investigation, it is preferable that their statements should not be given under the sanction of an oath.

This Interlocutor was acquiesced in.

Act. T. Soutar, Crieff.
Alt. W. M'Leish, Perth, and J. Scott, Perth.

Digest of English Cases.

16th March, 1859.

PRIVY COUNCIL.

Kirchner & Others *v.* Vernus.

Bill of Lading—Lien.

Fairclough & Co., merchants, Liverpool, shipped at that port certain goods on board a vessel of which the respondent was master. The bills of lading, granted by the respondent, bore that the "freight was payable in Liver-"pool to Æneas M'Donald, one month after sailing, "vessel lost or not lost." M'Donald was not the shipowner. On the arrival of the goods at their destination in Australia, they were claimed by the appellants, who were onerous indorsees of the bills of lading, but the master having learned that the freight had not been paid, refused delivery. *Held*, that the master had no right to retain the goods for the freight. *Held*, farther, that an averment that, by the custom of the port of Liverpool, he had that right, was irrelevant.

4th March, 1859.

ROLLS COURT.

In re The Mexican & South American Company.

(Lund's Case.)

Winding up—Sale of Shares.

A partner who has sold his shares in *mala fide*, and with a view to avoid responsibility, is still liable as a contributory.

24th & 25th January, 1859.

COURT OF COMMON PLEAS.

Balfour & Another *v.* Ernest,

(Official Manager of the Sea, Fire, and Life Insurance Company.)

Joint Stock Company—Bill—Directors' Authority.

The directors of a company drew a bill in the form prescribed by the Statute 7 and 8 Vic., Cap. 110, which passed by indorsation for value, into the hands of the plaintiffs. The bill was not granted for purposes within the scope of the business of the company, nor had the directors power, by the contract of co-partnery, to grant it. *Held*, that the company were not bound, even as in a question with a bona fide onerous indorsee.

Held, also, that all persons dealing with a Joint Stock Company, must be taken to know the contents of its deed of settlement, deposited with the registrar.

20th April, 1859.

COURT OF EXCHEQUER.

Grinham *v.* Willey.

Damages—False Imprisonment.

"The mere circumstance of a man writing down on a "charge sheet, at the dictation of a policeman, the name "of the person whom he suspects to have robbed him, is "not a giving of that party into custody." Per Martin, B.

16th & 18th April, 1859.

COURT OF APPEAL IN CHANCERY.

Ex parte Barton *in re* The National Patent Steam Fuel Company.

Joint Stock Company—Forfeiture of Shares.

The deed of settlement of the company in question contained no power to forfeit original shares. Mr Barton had 100 shares allotted to him at the formation of the company, upon which he paid the deposit. The shares were forfeited by the directors in consequence of his not having signed the deed of settlement, and the forfeiture was confirmed by a general meeting of the shareholders. Prior to the declaration of the forfeiture, Barton had transferred the scrip. *Held*, that the forfeiture was invalid, and that Barton was still liable to contribute as a partner.

8th November, 1858.

QUEEN'S BENCH.

Athersmith *v.* Drury.

Truck—1 and 2 Will. IV., Cap. 1837.

In payment of the wages of a workman, falling within the classes specified in the Statute, the master gave a note for 11s on a shop kept for the supply of goods, meaning at the time, that it should be paid in goods, and not in money. The notice was taken to an office adjoining the shop, where it was exchanged for another note, to be handed into the shop, and upon presentation of which, payment was made in goods. *Held*, that the giving of the first note was an offence within the 3d sect. of the Statute.

28d March, 1859.

COURT OF PROBATE.

In the Goods of James Muir, deceased.

Probate and Confirmation Act, 1858.

The note or memorandum, provided in sect. 14, can only be made at the time the probate issues, and not afterwards.

30th April, 1859.

COURT OF QUEEN'S BENCH.

Roper *v.* London.

Fire Insurance—Condition.

A policy of insurance had indorsed thereon the following provisions:—"All persons insured by this company, sustaining any loss or damage by fire, shall, within fifteen days after the fire, deliver in as particular an account of the loss or damage as the nature of the case will admit of. In case any difference or dispute shall arise between the assured and the company, such difference shall be submitted to arbitrators." *Held*, (1) that the first of these stipulations was a condition precedent, and that unless he gave the stipulated notice, the assured could not recover the loss; but that (2) the condition as to a reference to arbitration did not bar an action.

Digest of English Cases.

22D JUNE, 1858, and 18TH and 21ST, JANUARY, 1859.

VICE-CHANCELLOR WOOD'S COURT.

ORR *v.* DICKENSON.

Merchant Shipping Acts—Registered Owner.

WHERE a bill of sale is in point of fact invalid, its registration under the Merchant Shipping Act, 1854, does not give a title at law.

1ST FEBRUARY, 1859.

EXCHEQUER CHAMBER.

(*Appeal from Queen's Bench.*)

THE BRITISH EMPIRE SHIPPING COMPANY *v.* SOMES AND OTHERS.

Shipwright—Repairs—Lien—Dock hire.

A SHIPWRIGHT to whom a vessel was delivered for repair, detained her by virtue of his right of lien for work and materials expended on her. Held that he was not entitled to dock hire for the period of such detention.

18TH JANUARY, 1859.

COURT OF QUEEN'S BENCH.

FLETCHER *v.* FLETCHER.

False Imprisonment—Lunacy.

A PARTY who obtains the imprisonment of another as a lunatic, in an asylum, is not privileged, and is liable to an action of false imprisonment, notwithstanding an averment of *bona fides* and probable cause, and that the defendant had procured medical certificates under the Act 8 and 9 Vict., cap. 100. To justify the imprisonment, it is necessary to aver and prove actual lunacy.

29TH JANUARY, 1859.

COURT OF COMMON PLEAS.

GARTON AND ANOTHER *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Traffic—Undue Preference.

THE Great Western Railway Company had been in the habit of carrying goods from London to Bristol at a certain scale of rates, from which they allowed a deduction to those parties who themselves collected and removed their goods from the station—these parties being generally carriers. At a certain date they stopped these deductions, and charged the same rate to those parties who themselves removed their goods from the station, and those to whom they delivered goods at the warehouses of the consignees. Held that this was an undue preference to the latter under the Railway and Canal Traffic Act, 1854.

7TH JULY, 1859.

ROLLS COURT.

WILLIAMS *v.* NASH.

Patent—16 Vict., Cap. 5, Sec. 2.

THE second section of the Act 16 Vict., cap. 5, provides that "all letters patent for inventions, to be granted under the provisions of the Patent Law Amendment Act, 1852, shall be made subject to the condition that the same shall be void, and that the powers and privileges thereby granted shall cease and determine, at the expiration of three years and seven years respectively from the date thereof, unless there be paid before the expiration of the said three years and seven years respectively, the stamp duties in the schedule to this Act annexed, expressed to be payable before the expiration of the third year, and of the seventh year respectively; and such letters patent, or a duplicate thereof, shall be stamped with proper stamps, showing the payment of such respective stamp duties, and shall, when stamped, be produced before the expiration of such three years and seven years respectively, at the office of the commissioners, and a certificate of the production of such letters patent or duplicate, so stamped, specifying the date of such production, shall be indorsed by the clerk of the commissioners on the letters patent or duplicate, and a like certificate shall be indorsed upon the warrant for such letters filed in the said office." Held that in reckoning the periods of three and seven years, the day of the date of the patent is excluded.

9TH JUNE, 1858, and 28TH JUNE, 1859.

COURT OF COMMON PLEAS.

INGHAM *v.* PRIMROSE.

Bill of Exchange.

A BILL torn in two by the holder, as alleged for the purpose of cancellation, and afterwards pasted together and put into circulation, is a good voucher of debt in the hands of a *bona fide* and onerous indorsee.

EXCHEQUER CHAMBER.

(*Appeal from Exchequer.*)

Sale—Consignor and Consignee—Bill of Lading.

BROWN & SON sold a quantity of goods to Hare & Co., to be shipped free on board, the price being payable on delivery of bills of lading. The transaction was entered into through a broker, who acted for both parties. The vendees instructed the vendors to ship part of the goods by the first vessel, and the vendors did so by a ship answering that description; and, in accordance with usage, handed the invoice, with the bill of lading, taken to the shipper's order, but indorsed by them to the vendees, and a bill of exchange for the price, for acceptance, to the broker. The ship was wrecked, and the goods lost. Held that they were at the risk of the purchasers.

8TH JUNE, 1859.

SHERIFF COURT, AIRDRIE.

(MR SHERIFF LOGIE.)

POOR, JAMES MALVIE v. ALEX. MACKENZIE, INSPECTOR OF POOR NEW MONKLAND.

Poor—Poor Law Act, sec. 74 and 75—Jurisdiction—Liability of Inspector to third parties for nursing and medical comforts supplied to Paupers.—*The pursuer, after requiring the defender to remove a pauper, then in the pursuer's house as a lodger, which it was proved the defender promised to do, sued for recompense for nursing, attendance, and furnishings supplied to the pauper.—Held entitled to recover, notwithstanding a monthly allowance made to the pauper, which was inadequate.*

THE special facts of this case are sufficiently stated in the judgment of Sir Archibald Alison, which is appended.

The Sheriff-Substituto, on the ground, *inter alia*, that the Sheriff's jurisdiction was excluded by the Poor Law Act, and that the facts were not sufficient to support the claim, dismissed the action, but without expenses.

At the hearing, on mutual appeals, it was pleaded for the pursuer, (1) The Sheriff's jurisdiction, although not competent in actions at the instance of a pauper for aliment, fell to be sustained in actions by third parties for advances, *Ettrick*, 14th Feb., 1824; 2 *Shaw*, 716; *Dunlop on Poor Laws*, 374; *Orr & Glassford*, 9th July, 1831; and *Matheson*, 22d Dec., 1831. (2) The claim of recompense for advances and furnishings was good in law, *Howie* v. *Kirk*, Session of Arbroath, 25th Jan., 1800; and *Ettrick*, *ut supra*; and in equity, the pursuer was at least entitled to such an amount as had been saved to the parish by his services. (3) It could not be held that the present claim was an attempt to increase the pauper's allowance, as he was dead, and was not represented in any sense by the pursuer; and no case of collusion was averred or proved by the defender.

The defender relied mainly on the general argument, that the claim sued for was a contrivance to increase the allowance of the pauper in an illegal form, and if sustained, no parish could at any moment estimate the amount of its liabilities; that there were defects in the proof, and that the jurisdiction of the Sheriff was excluded by sec. 74 and 75 of the Poor Law Amendment Act, which provide:—

(1.) "That in every case in which a poor person shall consider the relief granted him inadequate, such poor person shall lodge, or cause to be lodged, a complaint with the Board of Supervision, which Board shall and is hereby required, without delay, to investigate the nature and grounds of the complaint; and if, upon inquiry, it shall appear that the grounds of such complaint are well founded, and if the same shall not be removed, then the said Board shall, by a minute, declare that in the opinion of the Board such poor person has a just cause of action against the parish or combination from which he claims relief, and a copy of such minute, certified and signified by the secretary, shall, if required, be delivered to such poor person, and upon the production or exhibition of such minute or certified copy thereof, such poor person shall forthwith, and without any further proceedings, be entitled to the benefit of the Poors' Roll in the Court of Session; and it shall be lawful for the Board of Supervision, after any action has actually been commenced by or on behalf of such poor person, to award to him such interim aliment as to the said Board shall seem just during the dependency of such action, which award the Parochial Board of every such parish or combination shall be bound to obey." (2.) Provided always, "That it shall not be competent for any Court of Law to entertain or decide any action relative to the amount of relief granted by Parochial Boards, unless the Board of Supervision shall previously have declared that there is a just cause of action."

The following is the Sheriff's Interlocutor and Note:—

Having heard parties' procurators under their mutual appeals upon the interlocutor appealed against, proof adduced, and whole process, alters the interlocutor complained of, and in the whole circumstances of the case, decerns against the defender for ten pounds, with interest as libelled; but *quoad ultra* assoilzies the defender from the conclusions of the action: Finds expenses due to the pursuer, subject to modification, and that for the reasons stated in the subjoined note: Appoints an account of said expenses to be given in and taxed by the auditor, and decerns.

NOTE.—The facts of this case appear to be, that in the month of October, 1857, the now deceased pauper person came to lodge in the pursuer's house, in a very weak and infirm state of health, and he soon became incapable of earning anything for his own subsistence. Application was accordingly made to the inspector of the poor of the parish for parochial relief on the 24th of October, who gave interim relief of 2s. The same relief was given again on the 30th October, and on the 2d November, the pauper's case was brought before the parochial board, who awarded the pauper a permanent relief of 8s. a month, or an alternative of going into the poorhouse. The pursuer and his wife were very anxious from the beginning that the pauper should be taken into the poorhouse, and repeatedly asked the inspector, the present defender, to remove him, which he is proved to have promised to do, by sending a horse and cart for him before 30th of October. He never sent for the pauper, however, nor did the pursuer send him to the poorhouse, but they just went on drawing the aliment of 8s. a month from the parochial board, which was paid sometimes to the pauper himself, sometimes to the pursuer's wife, for his behoof, and sometimes to others, down to the pauper's death in June, 1858. During the time, the pauper was able to walk about a little, till May, 1858, when he became much worse; and as he had a sore under his arm, another on his foot, and an ulcerated stomach, his breath and state became very offensive, and the nursing of him by the pursuer and his wife extremely burdensome. About a week before he died, in July, 1858, he was visited by the medical officer of the Board, to whom the pursuer's wife again made the request, that the Board would send for him, and take him to the poorhouse,—and he had previously been furnished by the Board with some warm clothing.

Now, in these circumstances it is quite clear, that the allowance of 2s. a week, or 8s. a month, awarded by the board, was a great deal too little, probably not a third of what it should have been, under the distressing circumstances and condition of the pauper, and also that the inspector failed to fulfil his proved promise to send a horse and cart, to take him to the poorhouse.

No one can doubt, in these circumstances, that the pursuer has a good cause in equity; but a legal difficulty has been started against the claim which, under the last interlocutor, has been sustained by the Sheriff-Substitute, founded upon the objections that the present action is in fact an attempt by a side wind to enlarge the out-door allowance given to the pauper by the Parochial Board, without the previous sanction or authority of the Board of Supervision, as required by 74 and 75 sections of the Poor Law Act. This would have been a very formidable, if not insuperable objection, if the facts were assumed in the findings in the interlocutor on that point. But when the nature of the present case is considered, it appears, on the contrary, that there is no attempt whatever to do the incompetent thing of raising the allowance made to a pauper, without the previous sanction of the Board of Supervision, as required by the Poor Law Statute.

The present action is *not at the instance of the pauper* or any one in his right, or concluding for the enlargement of the parochial allowance at all. It is, on the contrary, one at the instance of a third party who is not claiming parochial relief at all for the pauper; but who alleges that a pauper afflicted with a loathsome disease, and requiring a great deal of attendance and nursing, was left in his hands, after promises made by the inspector of the poor that he would be removed and taken to the poorhouse; but that, instead of doing this, he left the pauper in the pursuer's hands, where he remained till his death, and that in that way he remained in the pursuer's house for upwards of eight months, afflicted with a loathsome

disease, and requiring much attention and nursing from the pursuer and his wife.

The question involved in the action, therefore, substantially is whether there was an implied contract between the pursuer and the defender, as inspector of the poor, to aliment and attend to the pauper in the loathsome state he was in, at the trifling allowance of 8s. a month. It is not pretended there was an express contract to this effect, and the Sheriff cannot see that there was any understanding or implied agreement for that purpose. If, indeed, the inspector had made no promise to the pursuer and his wife as to sending for the pauper, and taking him into the poorhouse, it might have been fairly pleaded in defence against the claim, that it was a bargain between the parties to keep the pauper at the rate allowed by the board, and that if it was an unprofitable one to the pursuer, *sibi imputet*, that he had entered into it. But in the circumstances that are brought out in evidence in the case, there is not only no room for such a presumption, but the presumption is rather the reverse. It was the duty of the parochial board, under the Statute, by the inspector or medical officer, to visit the pauper, and to give such orders regarding him as his case required. The inspector came accordingly to the pursuer's house and saw the pauper, and the pursuer and his wife earnestly requested him to have the pauper taken away, when he promised to send a horse and cart for him, and to remove him to the poorhouse, but which was never done. The pursuer was entitled to rely on the assurance and promise of the inspector that the pauper would be removed. Expecting this, he just went on from day to day, keeping and attending to the pauper, expecting the horse and cart to be sent for him, which it never did, until at length death relieved the pauper from his sufferings. In these circumstances, there is no room for presuming an implied agreement, on the pursuer's part, to keep and attend to the pauper for 2s. a-week; but on the contrary, there is clear evidence of an anxious desire, on the pursuer's part, to get quit of him on any terms; it was the duty of the inspector to send for the pauper in terms of his promise, and not having done so, the pursuer's claim became good for a reasonable sum for board and attendance on the pauper, on the principle of *quantum meruit*, which it seems reasonable to fix, after deducting the allowance of 8s. a month paid by the parochial board for the pauper, at ten pounds, the sum now decerned for. The parochial board were bound by the Poor Law Act, as the pauper was in a diseased and almost hopeless state, to have furnished him with cordials, medicines, and warm clothing, suited to his condition; but there is no evidence that he got more than the last of these articles, and his state of health was such as to require a most laborious and irksome attendance on the part of the pursuer's wife, night and day, for which his aliment of 2s. was totally inadequate as a compensation.

Act. JOHN C. WADDELL. *Alt.* JOHN MOLISON.

9TH JUNE, 1859.

STEWARD COURT, KIRKCUDBRIGHT.

(MR STEWARD DUNBAR.)

JAMES EDGAR *v.* THOMAS HARRIES.

Bastard—Aliment—Agreement—Personal Exception—Mora—Public Policy.—*An agreement entered into by the mother of an illegitimate child, by which she binds herself to relieve the father of the maintenance of the child, although entered into with the advice and consent of a third party, does not, in the event of such third party alimenting the child, prejudice his claim of relief against the father.* (2) *An agreement whereby the father of an illegitimate child binds himself to pay £10 at the end of nearly two years from the child's birth, on condition of the mother relieving him from all further aliment of the child, in so far as it is "manifestly iniquitous," and the mother's obligations "entirely gratuitous and unilateral," is invalid and illegal. Question—Whether such an agreement is against public policy?*

JAMES EDGAR, cooper, Creetown, the pursuer, is the grandfather of an illegitimate child of which Thomas Harries, seaman, Creetown, is the reputed father. The child was born on 10th October, 1849, and in the end of January, 1850, the pursuer's daughter, Joan Edgar (the child's mother) raised a small debt action against the defender for the in-lying expenses and aliment then due. On 4th February, 1850, the defender met with the pursuer's daughter in a public-house in Creetown, and a written agreement was entered into, by which the pursuer's daughter, with the verbal consent of the pursuer, who was present, and whose consent was recorded in the agreement, accepted £10 "to be paid at the expiry of eighteen months, or as soon before that as possible," and relieved the defender "in all time coming for any further maintenance of the child;" and also agreed to withdraw the small debt action on defender paying expenses; the defender, on the other hand, binding himself "to find caution that he will fulfil his part of that contract." The agreement was unstamped. The defender paid £10 to the pursuer's daughter as stipulated, and also the expenses of the small debt action, which was accordingly withdrawn. The pursuer, who had maintained the child from its birth, brought the present action on 28th March, 1858, for payment of aliment at the rate of £5 per annum from 18th October, 1851, to 18th October, 1857; allowing the defender credit for the £10 paid in terms of the agreement, and £1 paid formerly for in-lying expenses.

The pursuer pleaded—

(1.) Any agreement entered into by the mother of an illegitimate child to defeat its right of support, is *ultra vires* of her, and cannot, therefore, be binding on third parties.

(2.) Agreement unstamped.

The defender replied—

(1.) The pursuer having consented to the agreement by which the defender was discharged from the further maintenance of the child, is barred *personali exceptione* from making the claim sued for.

(2.) The pursuer having kept the child in the knowledge of the agreement, and having made no claim for aliment until now, is barred by the agreement, and by *mora* and acquiescence from receiving the sum claimed.

The record having been closed, and parties' procurators heard, the Steward-Substitute pronounced the following Interlocutor:—

Having advised the record and heard parties' procurators, finds it admitted that the defender is the father of the illegitimate male child which the pursuer's daughter, Joan Edgar, bore on 10th October, 1849: Finds it admitted, that towards the maintenance and education of the said child, and the in-lying expenses attending its birth, the defender has paid or contributed in whole only the sum of eleven pounds sterling up to the date of the foresaid action: Finds it not alleged that the defender was unable, from poverty or other cause, to contribute his due share of the expense or burden of maintaining his said child, during the period referred to in the summons: Finds, that the agreement, No. 5/3 of process, does not constitute a valid prejudicial defence against the claim concluded for in this action: Reserving to the defender any claim of relief against Joan Edgar, the mother of the child, in respect of said agreement which he may be advised to bring, and to her all competent defences against said claim of relief as accords, and before further answer allows the pursuer a proof of the averments in the 2d article of his revised condescendence, in so far as disputed, and to the defender a conjunct probation: grants diligence, etc.

NOTE.—The Steward-Substitute regards the defence founded on the agreement, No. 5/3, as neither consistent with justice nor strict legal right. The agreement is not subscribed by the pursuer, either as a witness or consenting party, and if it had been subscribed by him, it could not, it is thought, from its peculiar terms, have affected the mutual claims and interests of any other parties than the defender and Joan Edgar, the mother of the child. The pursuer's daughter had no power, by any such agreement, to surrender or prejudice the future claims of aliment competent to the child, and to any third party supplying that aliment, against the defender as its parent. The pursuer was under no legal obligation to aliment

the defender's child, and if he did aliment it he thereby founded a claim of relief both against its father and mother, *Mathison* v. *Hay*, 23d Dec., 1831; 4 *Jurist*, 212. 2d, Although there has been, in the usual form, re erved to the defender his right to institute any claim of relief, which he may think competent to him under that agreement, against Joan Edgar, the mother of the child, the Steward-Substitute considers it pertinent to the pleas raised on that agreement in the present action, to express his strong conviction against the onerosity and validity of that agreement as an *ex facie* settlement of mutual rights.

The defender was, at the date of that agreement, the acknowledged father of the child referred to in the summons. That child was born on 10th October, 1849, and in order to enforce the fulfilment, by the defender, of his obligations to contribute part of the aliment, Joan Edgar had been forced to raise a small debt action against him on 26th January, 1850, concluding for payment of one pound sterling as the quarter's aliment past due on 18th January, 1850, and one pound sterling for the next quarter's aliment payable in advance. It is not alleged, nor is there any ground to suppose, that the claim embraced in that small debt action was not fair and reasonable, or that the defender could, on any pretence, have successfully opposed it.

Its determination in the pursuer's favour would have established her right to receive aliment from the defender at the extremely moderate rate concluded for.

Apparently for the purpose of defeating that judicial ascertainment of the pursuer's claims, the defender prevailed on her to subscribe the agreement founded on.

It is, in the Steward-Substitute's opinion, impossible to conceive an agreement, *ex facie* dealing with mutual rights, more one-sided and iniquitous in its conditions. The defender thereby secured to himself large and most important advantages, in consideration of which, he gave and sacrificed literally nothing. The mother gave up her claim of aliment for the child, and not only so, but became bound to relieve the defender in all time coming of any further maintenance of the child, and consequently of all claims competent to the child or third parties for said maintenance: on the other hand, as the price of these profusely liberal concessions and obligations by the mother of the child, the defender undertook to pay to her, at the expiry of eighteen months, or as soon before that as possible, the sum of ten pounds sterling, and to pay the expenses of the small debt action at the mother's instance, which she agreed to withdraw.

Now, with regard to the payment of these expenses, it must be conceded, that if the action had proceeded, decree would have passed against the defender, both for the sum claimed in the summons, and for expenses. The undertaking to pay these expenses was therefore no consideration or concession whatever. The defender merely undertook to do what the law would have compelled him to do.

And the obligation to pay to the mother, by the 4th August, 1851, ten pounds sterling, for a discharge in full of all future claims of aliment, when viewed and pleaded as an onerous undertaking, or as an equivalent for the large sacrifices made and obligations undertaken by the mother, is simply ridiculous. On 18th July, 1851, the eighth quarterly payment for his share of the child's aliment became due and payable by the defender, and at the low rate of four pounds *per annum*, and two pounds for in-lying expenses, the child's mother was entitled to enforce payment from the defender *on 18th July*, 1851, of that sum of ten pounds, for past, due, and current aliment, which, by the agreement, he undertook to pay *only on the 4th August*, 1851. This obligation by the defender was thus the very reverse of a concession or benefit to the mother of the child; it was a postponement of her legal claim, and another pecuniary sacrifice on her part; although, in the peculiar phraseology of the agreement, it is coolly represented as a stipulation in her favour.

In so far, therefore, as the agreement imposed on the child's mother obligations to withdraw her small debt action of aliment against the defender, and to relieve him of future claims of aliment for the child at her own instance, it is manifestly iniquitous, as these obligations were entirely gratuitous, and unilateral, and injurious to her; and in so far as it undertakes to relieve him of future claims of aliment, at the instance of the child, or of third parties supplying the aliment, it is invalid and illegal. *Pott* v. *Pott*, 7th December, 1833.

The defender appealed this judgment, and the Steward (Sandford) altered the same, and allowed the defender a proof of his averment that the pursuer consented to the agreement. The Steward appended the following note to his interlocutor:—

NOTE.—The Steward is not prepared to say that if the pursuer was present when the agreement was entered into, and consented to it upon the part of his daughter, and was thus fully aware of its terms, and thereafter received payment of the stipulated sum, he may not be held to have homologated and acquiesced in it, and thus the aliment afforded by him to the child, in so far as beyond that sum, may have been given *ex gratia*. But this question is left open until the facts are ascertained.

Proof having been led accordingly, and parties' procurators heard thereon, the Steward-Substitute pronounced an interlocutor, in which, after finding the facts already stated, he further—

Finds it proved that the pursuer was present at the said meeting when said agreement was entered into, and that it was entered into by his advice, and with his concurrence and consent: Finds that the said agreement, No. 5/3 of process, is unstamped: Finds that the said agreement was entered into by the said Joan Edgar, and consented to by her father, the pursuer—persons in humble life and circumstances—under the influence, apparently, of representations by the defender's friends, that the defender was about to leave the country and desert his child: and finds further, that the conditions imposed on, and obligations undertaken by the said Joan Edgar by said agreement, were so imposed and undertaken without any fair reciprocal obligations being undertaken, or any just consideration given by the defender: Finds it admitted that the defender has paid to the pursuer's daughter, Joan Edgar, the sum of eleven pounds for in-lying expenses and aliment of said child: Finds it proved that said payment was made subsequent to the aforesaid agreement: Finds, irrespectively of the plea founded on the stamp laws, that in the circumstances above stated, and in respect of the doctrine laid down in the judgment of the Supreme Court in *Pott* v. *Pott*, 7th December, 1833, the said agreement and what has followed thereon, cannot be held as a valid defence, *personali exceptione*, nor otherwise, against the conclusions of the present action: And of new, before further answer, allows to the pursuer a proof of the averments in the 2d article of his revised condescendence in so far as disputed, and to the defender a conjunct probation: grants diligence, etc.

NOTE.—Believing that the Steward did not intend to indicate in his Interlocutor of 24th September last, any fixed opinion on the validity of the agreement, No. 5/3 of process, or on its effect as a defence against the conclusions of the present action, the Steward-Substitute has, not without considerable hesitation and difficulty, deemed it incumbent on him to embody his own views regarding that agreement in the annexed Interlocutor.

After a careful reconsideration of the grounds on which he formerly repelled the defence founded on that agreement, as fully explained in the note to his Interlocutor of 23d July, 1853, the Steward-Substitute, in still adhering to the views then entertained by him, deems it superfluous to recapitulate them in explanation of the finding in this present Interlocutor.

He has, however, further to remark, that if the agreement had appeared to him onerous and reasonable in its nature, it might then have been necessary to sist process to enable the objection on the stamp laws to be obviated. The expense, including the penalty attending that proceeding, would be a serious aggravation of the defender's loss, if eventually unsuccessful; but as the defence rests exclusively on that agreement, it is thought that the provisions of the stamp law must be enforced before that defence could be sustained.

In disregarding the agreement as a prejudicial defence against the action, the Steward-Substitute has proceeded on the fact of its being so palpably and grossly *unfair and injurious to the rights and interests of the mother, as to make it a gratuitous discharge*, and not an onerous contract; and given in circumstances which rendered it inoperative.

But even if it had embraced some fair consideration or equivalent to the mother for the heavy burden she was undertaking, the Steward-Substitute thinks there is room to question the validity of such an agreement. There can be little doubt, it is thought, of the impolicy and even danger, on

public grounds, of giving judicial encouragement to such agreements. The mother of an illegitimate child, where both the parents are in the lower ranks, has too often extreme difficulty in recovering, and not seldom fails to recover the father's contribution to the child's aliment. The father, in these cases, can and often does inflict much cruelty by evading, but he cannot legally relieve himself of the mother's claims. But if, by threats of desertion, and protracted opposition to her claims, he can force her into a contract legally binding, by which he can secure to himself a total release from his legal and natural obligations to his child, by the payment of a year's, or it may be a month's aliment, will not the judicial recognition of such contracts tend to encourage immorality by diminishing the burdens and responsibilities now laid on the fathers of illegitimate offspring, and operate most disadvantageously, and even dangerously, against the interests of the child, from whom one legal and natural source of support will thus be withdrawn.

The Courts of England have, it is believed, decidedly refused effect to such agreements when entered into by the father and a third party, as inconsistent with public policy in giving the persons undertaking the care of the child an interest against its life (*Cole* v. *Gower*, 6 East. 110); and, according to a learned author, the ground of judgment which prevailed in the English Courts, is applicable to such agreements when made in Scotland. *Thomson on Bills*, 136.

It may be contended that such ground of judgment cannot apply where the mother is the contracting party. The life of her child may be considered safe in her hands, whatever hardship and misery the entire unaided support of it may inflict on her. But the judgment of the Supreme Court in Scotland, in the case of *Pott* v. *Pott*, above referred to, seems to illustrate their repugnance to give a judicial sanction to such contracts, when entered into with the mother of the child. The Court there, on a claim at the mother's instance against the father, seems to have disregarded as invalid, a contract between the father and mother, by which the father bound himself to aliment their natural child till the age of twelve, and the mother bound herself to free him of all claim thereafter.

Whether, therefore, the present claim be regarded as a direct *bona fide* claim at the pursuer's instance as a *third party* who supplied the aliment to the child, or, as indirectly, a claim at the mother's instance for behoof of her child, it is not, in the Steward-Substitute's opinion, effectually met by the foresaid agreement. It would be, perhaps, inconsistent with these views to introduce any reservation of a claim of relief in the defender's favour against Joan Edgar, under that agreement; but he is not debarred by the present Interlocutor from asserting such a claim if he shall be so advised.

The defender again appealed, but the Steward adhered, adding the following note to his Interlocutor:—

NOTE.—The Steward having fully considered this case, which is attended with some difficulty, is not inclined to alter the Interlocutor of the Steward-Substitute; although, at the same time, he does not concur in all the reasons assigned by him in his note to his judgment.

The Steward is clearly of opinion that, whatever might be the effect of such an agreement as that founded upon in defence, in a question with the mother, it can have no effect upon a claim for payment of aliment against the father, at the instance of a stranger who has afforded the aliment, or to an action at the instance of the child and his administrators. Now the grandfather is, to all intents and purposes, a stranger to the child in the eye of the law, and it is not denied that the aliment was afforded by him; and therefore the defender is liable in the amount claimed, unless he has some special ground of defence.

When the case was previously before the Steward, and he pronounced the Interlocutor of 24th September, 1858, no appearance was made for the pursuer, and the Steward had not the advantage of hearing any reply to the arguments for the defender. He then thought that it might be questioned whether if the pursuer were fully cognisant of the agreement made with his daughter, he might not be held as having released the defender from any claim on his part, and to have taken her as the sole debtor; or to have alimented the child *ex gratia*, and there is some plausibility in this view. On the other hand, as there is no doubt of the legal obligation upon the father; and as this is an obligation which no agreement with the mother can discharge; and as, even in a question with the mother, it is at least questionable whether such discharge is not contrary to the principles of public policy; the Steward is of opinion that more was required than mere knowledge of the agreement to deprive the pursuer of all claim for the aliment which he afforded to the defender's child. The cases, so far as they go, are in the pursuer's favour, and there is much in the observations of the Steward-Substitute as to the advantage taken of the mother, and the circumstances under which the agreement was made. The Steward must have enforced the Stamp Acts before he could have given effect to the defender's plea.

The pursuer having proved that the aliment was furnished by him, the Steward-Substitute decerned against the defender for the modified aliment of £24, and expenses.

Act. W. ALDER, Gatehouse.
Alt. D. JENKINS, Kirkcudbright.

15TH JUNE, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

THE FERENEZE SPINNING CO. *v.* WILLIAM WALLACE.

I.O.U.—Acknowledgment—Blank Bonds—Act 1696, c. 25.—*Held, that an I.O.U., blank in the payee's name when delivered, was not struck at by the Act* 1696, *cap.* 25, *"anent Blank Bonds and Trusts."*

THIS was an action at the instance of James Orr, sole partner of the Fereneze Spinning Company, against William Wallace, spinner at Barrhead and in Glasgow, for payment of the sum of £20, being the amount of cash advanced and lent by the pursuer to the defender upon 15th January, 1858, conform to holograph I.O.U. or acknowledgment granted by the defender to the pursuer for said sum, bearing date the said 15th January, 1858. The document when produced bore the pursuer's name and address.

The defence stated was (1) a denial that the pursuer advanced and lent the sum sued for to the defender; (2) the document libelled was not, when subscribed by the defender, nor when it came into the pursuer's possession, addressed to him, and the defender offered to improbate the same.

A proof having been allowed and led, in the course of which the pursuer admitted the defender's statement that the I O.U. was not addressed when received by him, Mr Sheriff Bell pronounced the following Interlocutor, which was acquiesced in:—

Having heard parties' procurators, and resumed consideration of the proof, productions, and whole process, Finds that the pursuers admit in their minute No. 8, that the I.O.U. founded on (No. 5) was blank in the payee's name when delivered: but Finds it on the other hand proved, and not denied by the defender, that the said I.O.U. was delivered by the defender to the individual pursuer, James Orr, who carried on business under the name of the Fereneze Spinning Co., as a voucher of the debt for the sum therein contained; and the only defence now maintained is, that the I.O.U. is null and void under the Act 1696, cap. 25, in respect it was subscribed blank in name of the person in whose favour it is conceived: Finds, however, that the said Act applies to "bonds, assignations, dispositions, or other deeds," and does not comprehend or strike at such documents as I.O.U.'s: Therefore, and under reference to the annexed Note, repels the defences, and decerns against the defender in terms of the conclusions of the summons: Finds the defender also liable in expenses; allows an account to be given in, and remits the same to the auditor to tax and report.

NOTE.—The Act 1696, cap. 25, is entitled "Act anent Blank Bonds and Trusts." It proceeds upon the narrative that the subscribing of bonds, assignations, dispositions, and other deeds blank in the name of the person in whose favour they are granted, and also trusts without back bonds, are occasions of fraud: and it enacts that no bonds, assignations, dispositions, or other deeds, be subscribed blank in the person's name in whose favour they are conceived, and that the foresaid per-

son be either insert before, or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery, "Certifying that all writs otherways subscribed and delivered blank as said is, shall be declared null." It is afterwards declared "that this act shall not extend to the endorsation of bills of exchange or the notes of any trading company." Now, in the first place, it is doubtful whether such documents as I.O.U's. were in use at all in this country at the time the Act was passed; and, in the next place, whether they were or not, it has been held in cases where it was necessary to interpret the correct meaning of the Act, and especially in the recent case of *Dimmacle*, Feb. 1, 1856, that the only deeds struck at are probative deeds requiring to be executed according to the directions of the previous Act of 1681, and having a blank *in grœmio* requiring to be filled up with a name. In the above case, Lord Ardmillan said—"If the words 'other deeds' had not been introduced in this Statute, I do not think it could be reasonably doubted that its provisions apply only to bonds, assignations, and dispositions. But the expression 'other deeds' must be construed with reference to the context; and the operation of the Statute cannot be farther extended than to deeds of the same kind or class as those particularly enumerated. Now, it is a distinctive feature of the class of documents enumerated, that they shall be tested, if not holograph; and it would be contrary to the settled rules of construction, applicable to Statutes, to give to the words 'other deeds' such force and effect as to extend the penalty of the Act to a class of documents different in character." I.O.U's. have for a long period been recognised as writings exempted from the operation of those statutory enactments which render the observance of certain solemnities necessary in framing written instruments. In his book on conveyancing, Mr Menzies says (page 93), "In England, there is in familiar use an abbreviated form of an acknowledgment of money owing, called an I.O.U. The document contains simply the date, the three capital letters I.O.U., the amount, and the debtor's signature, *with or without the creditor's address.* Such acknowledgments receive legal effect, and are held exempt from stamp duty, as being neither receipts nor promissory notes." This is also the law in Scotland. In *M'Pherson*, February, 1854, where the I.O.U. founded on was blank in the grantee's name, the Interlocutor pronounced by the First Division was:—"Finds, that the acknowledgment referred to is receivable in evidence and does not require to be stamped." It is, of course, quite a different question whether an I.O.U. can be transferred from hand to hand like a bank note, or by endorsation like a bill, or whether it would not be a good defence to an action raised upon it, that the party founding on it was not the original receiver. But no such question arises here, the pursuer and holder being admittedly the holder *ab initio.*

Act. W. B. Faulds. *Alt.* T. G. Wright.

24th June, 1859.

SHERIFF COURT, BERWICKSHIRE.

(Mr Sheriff Wood.)

Delgaty v. Rae.

Process—Proof.—*Where a diet of proof had been twice adjourned for the examination of refractory witnesses cited by the pursuer—Held, that it was competent for the pursuer to adduce the evidence of other witnesses at the last adjourned diet, the Interlocutor of adjournment having been in general terms.*

The pursuer raised an action against the defender for aliment of an illegitimate child, of which she alleged the defender was the father. The record was closed on a short minute denying the paternity, and a proof appointed to proceed on 20th Jan., 1859. At the diet certain of the pursuer's witnesses failed to appear, and the diet was adjourned by the Sheriff-Substitute (Wood) under the following Interlocutor:—

"The pursuer's procurator stated that he had cited Elizabeth Outerson or Hogg, and Janet Dickson, and produced execution of citation, but that they had failed to attend, and on his motion the Sheriff-Substitute grants letters of second diligence against these parties, and assigns Wednesday next, the 26th instant, for the proof proceeding, at Dunse, at eleven o'clock forenoon."

On 26th January, the witness Hogg again failed to appear, and the diet was a second time adjourned in the following terms:—

"The Sheriff-Substitute adjourns the diet till Tuesday the 15th of March next, at eleven o'clock forenoon, within the Court House, Dunse."

On 15th March, Hogg was brought up and examined, and the pursuer then tendered the evidence of two other witnesses present.

Objected for defender.

The continued diet had been granted simply for the purpose of enabling the pursuer to examine Mrs Hogg, against whom letters of second diligence had been obtained, and the evidence of any other witness cannot now be received.

Answered for pursuer—

The interlocutor of 26th January did not limit the proof allowed—the pursuer's proof-in-chief was not concluded—it was therefore quite competent to examine the witnesses adduced.

The evidence of the witnesses tendered was then taken down on a paper apart, and on the 29th March, 1859, the Sheriff-Substitute (Wood) pronounced the following judgment:—

"Allows the evidence of Mary Ann Clayton and her mother, taken on paper apart on the 15th current, to be received as the interlocutor of adjournment of 26th January, although it was undoubtedly pronounced on the statement made by the pursuer, that Mrs Hogg had twice disobeyed citation, does not limit the evidence to be led at that adjourned diet to Mrs Hogg's testimony."

The case having been appealed, the Sheriff (Bell), on 24th June, 1859, adhered to the Sheriff-Substitute's interlocutor.

Act. J. P. M'Watt, Dunse. *Alt.* A. Weatherhead, Dunse.

27th July, 1859.

SHERIFF COURT, GLASGOW.

(Mr Sheriff Strathern.)

Macfarlane v. Sim.

Bastard—Aliment.—*The mother of a bastard had agreed to accept from the putative father the sum of one shilling and sixpence per week as aliment for the child. She afterwards raised an action concluding for aliment at the rate of £6 per annum.—Held, that as regarded prospective aliment, she was entitled to decree for the latter sum, but that she was bound by the agreement as regarded aliment due up till the date of the summons.*

The pursuer raised a summons concluding for payment of the sum of six pounds per annum for the period of ten years, from the first day of June, 1858, as aliment of an illegitimate female child, of whom the pursuer was delivered on or about 20th June, 1856, and of whom the defender was the father. The defender had all along admitted the paternity, and had, as the pursuer acknowledges in her summons, satisfied her claim for aliment up till 1st June, 1858. The defender in his defence stated that on or about the 5th day of April last the pursuer had agreed to accept in full of the aliment claimed the sum of 1s 6d per week, and that since that date the same had been regularly paid.

The Record having been closed upon the summons and minute of defence, the Sheriff-Substitute, on 10th June, 1859, pronounced the following judgment:

Finds that the paternity of the child in dispute is not denied: Finds, that so far as relates to by-past aliment, which was due in advance quarterly for the period from 1st June,

1858, till the first quarterly payment occurring after institution of this action on 6th May, 1859, the defence stated is relevant; but finds that for prospective aliment, beginning with the said first quarter, the pursuer is entitled to decree for a fair and reasonable sum, notwithstanding the agreement alleged in defence; therefore repels the defences, so far as relates to said prospective aliment: Finds that six pounds sterling per annum is a usual and reasonable sum in name of such aliment, payable quarterly and in advance, commencing as on 1st June current, being the first quarter after institution of this action, and continuing quarterly and in advance thereafter till 1st June, 1868, when the said child, if she survives, shall have attained the age of ten years, with the legal interest on each quarter's payment, from the respective dates when the same fall due, till payment: But with respect to the bypast aliment claimed, for the period between 1st June, 1858, and 1st June, 1859, allows the defender a proof of his averments that on 5th April last he agreed with the pursuer to make payment at the rate of 1s 6d per week, and of the payments which he alleges he has made under that agreement: Allows the pursuer a conjunct proof: Grants diligence against witnesses and havers, and appoints the case to be enrolled first Court day, that a diet for taking said proof may be fixed.

NOTE.—The pursuer gave birth to a female illegitimate child on 20th April, 1856, and she acknowledges in her summons that payment has been made of her claims for the child prior to 1st June, 1858. She demands aliment at the rate of £6, payable quarterly and in advance, from that date, and until the child shall have attained ten years of age. The defender does not deny the paternity, and but for a defence, which the Sheriff-Substitute thinks relevant, so far as relates to the aliment due *prior* to institution of this action, the conclusions of the action seem proper, and the pursuer would have been entitled to decree in terms of them. The defender alleges that an agreement was made between him and the pursuer in April last, whereby she agreed to accept 1s 6d weekly, or at the rate of £3 18s per annum, and under this agreement he has been making her payments. So far as concerns the aliment actually expended, the pursuer is a personal creditor on her own behalf, and may discharge it altogether, even without payment, or she may accept any sum less than the actual amount disbursed, if she chooses. But the Sheriff-Substitute is of opinion that, with respect to the future aliment, it stands in a very different position; that aliment is still to be expended—it belongs to the child—the pursuer sues for it as having right to the child's custody, and to administer for her benefit the aliment allowable by law for her maintenance; and it is thought that no unreasonable agreement, such as that alleged by the defender, can be sustained, to the effect of rendering the child's up-bringing difficult or impossible on so wretched an allowance as 1s 6d per week. The proof allowed is therefore limited to the aliment already disbursed by the pursuer, and for which she is a personal creditor.

Both parties having appealed, Sir Archibald Alison pronounced judgment as follows:—

Having heard parties' procurators under the mutual appeals for the parties upon the Interlocutor appealed against and whole process, in respect the paternity of the child in question is not denied by the defender, and the only matter in dispute is the amount of aliment claimed and falling to be decerned for, in respect the defender alleges that the pursuer had agreed, on 5th April last, to accept of 1s 6d a week as aliment for the child, and that he has regularly paid her the same since that date: Finds, that if these allegations are proved or admitted, that the said rate of aliment is to be held as the agreed on aliment *prior* to the date of the summons, but *quoad* the aliment subsequent to the date of the summons: Finds that the sum of £6 a year must be the rate, seeing the mother cannot, as to *future* or prospective aliment, barter away the rights of the child, although she may accept a less amount than what is usually awarded for past due aliment. Therefore so far varies the Interlocutor complained of, but *quoad ultra* adheres and dismisses both appeals.

Act. W. ANNAN. *Alt.* JAS. LOCKHART.

29TH JULY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

THOMAS THORBURN *v.* JOHN ARNOT.

Contract—Sale—Principal and Agent—Custom of Trade—Damages.—*A broker who buys iron for a principal, is entitled, according to the uniform practice in the iron trade in Glasgow, to resell, and to charge the principal with any loss which may arise, if the principal does not come forward timeously to pay the price and take the iron.*

THE pursuer, in this action, is an iron broker and commission merchant, and sues the defender for the sum of £131 16s 1d as the amount of loss and damage sustained through the defender's breach of contract, and for commission as per account annexed to the summons, all which, as is averred in the libel, "the defender is bound to pay to the pursuer, in respect the pursuer, who is an iron broker in Glasgow, by the orders of the defender, received in the month of May, 1858, on the 17th and 18th days of said month of May, purchased for and on account of the defender, but as is usual and customary, in his own name, 1000 tons of pig iron, viz., 500 tons on the 17th May, at the price of 54s. 9d. per ton, being the market price of the day, payable in exchange for warrants on 17th June following; and 500 tons on the 18th May, at the price of 54s. 6d. per ton, being the market price of the day, payable in exchange for warrants on the 18th June following—of which purchases intimation was made to the defender by sale notes sent to him on the 17th and 18th May, 1858, respectively. The defender repudiated the contract, refused to pay the price of said iron on the 17th and 18th June, 1858, respectively, when the same became payable, or to put the pursuer in funds to do so, although storekeepers' warrants were tendered and offered to be delivered to him in exchange for the price; and the pursuer being personally bound in implement to the seller, and having himself paid the price, after due notice and requisition to the defender of his intention, in terms of the custom in the Glasgow Iron Market, or at all events as a proper and reasonable mode of fixing the damage sustained when the purchaser of iron refuses or delays to implement his contract by not paying the price when it falls due, resold the iron he so bought for cash, viz., 500 tons on the 18th June, 1858, at 52s. 4¼d. per ton, and 500 tons on the 21st June, 1858, at 52s. 1¼d. per ton, and the defender is liable to the pursuer for the loss or difference between the price at which the iron was purchased, and the price obtained by the pursuer when he resold it."

The account annexed to the libel is in these terms:—

"John Arnot, Esquire, 46 Renfield Street,

1858. To Thomas Thorburn.

June 17.—To paid for 500 tons mix. Nos pig iron warrants, purchased for you on 17th May last, on your authority, at 54s 9d per ton,.....	£1368	15	0			
June 18.—By price of 500 tons mix. Nos. pig iron warrants sold out against you to day, at 52s 4¼d per ton,.....	1309	7	6			
				£59	7	6
June 18.—To paid for 500 tons mix. Nos. pig iron warrants, purchased for you on 18th May last, on your authority, at 54s 6d per ton,.....	£1362	10	0			
June 21.—By price of 500 tons mix. Nos. pig iron warrants, sold out against you to-day at 52s 1¼d per ton,.....	1303	2	6			
				59	7	6
Commission on sale at ½ per cent.....				13	1	1
				£131	16	1

The defender, in his defence, stated that—

Sometime in the month of May last, Mr —— Christy, Union Street, Glasgow, with whom the defender was only slightly acquainted, repeatedly urged the defender to speculate in iron, and invariably on these occasions the defender declined. Mr Christy also expressed himself particularly anxious to introduce the defender to the pursuer, whom he characterised as a shrewd broker, and one who could buy cheap; but the defender excused himself. That sometime after this, the defender saw the pursuer and Mr Christy in the Exchange, engaged in close and apparently confidential conversation; and on seeing the defender, they both walked towards him, and Christy took the liberty of introducing the pursuer. That Christy at this meeting introduced a conversation upon iron, and the pursuer remarked that it was a capital time to buy; and without any instructions or acquiescence on the defender's part whatever, Christy said to the pursuer, you had better buy 500 tons at one month, for Mr Arnot and myself, if you can get it at 54s 9d. Before the defender had time to remonstrate with Christy on his unauthorised order, and protest against it, the pursuer wheeled suddenly round to several iron brokers who were standing together, and in a few minutes he returned and said he was sorry he could not buy it at the price. The defender then informed the pursuer that he was glad of it, as if he had bought iron for him on such an order, he would have had nothing to do with it; and stated that when he wanted the pursuer to purchase for him, he would give him a written order. The defender never authorised the pursuer or Mr Christy to purchase iron on his account, and never held any conversation with them on the subject of any purchase of iron, after the meeting above referred to. That on the 15th May, several days thereafter, the defender left town, and did not return till the morning of the 18th May, when on opening his office in the evening, he was astonished to find two documents from the pursuer, intimating that he had purchased two lots of pig iron of 500 tons each, one on 17th May at 54s 9d, and the other on 18th May at 54s 6d. Next morning, the defender immediately called upon the pursuer, and told him that he had never ordered the iron in question, and would have nothing to do with it; and the pursuer replied that he had bought it on his own responsibility, as he was sure it would rise, and advised the defender to hold it; but he declined, and repeated that he had not ordered the purchase, and would have nothing to do with it; and seeing the defender peremptory, the pursuer replied that he relieved him of all responsibility. The defender then considered the unauthorised sales at an end. That shortly thereafter, the defender suspected, from an incidental conversation with Mr Christy, that it was still intended to hold him bound, and he accordingly wrote the pursuer on the 31st May, the following letter:—

46 Renfield Street,
Glasgow, May 31, 1858.

Thomas Thorburn, Esq.

Sir,—I saw Mr Christy on Saturday, and he hinted as much as caused me to understand that you had two lots of pig iron charged against me. This surprised me much, as I gave no authority whatever for the purchase. When I received your note announcing the purchase, I informed you next morning I had no intention whatever of buying, particularly as the price was considerably above the market rate.

As I am anxious you should understand this fully, I now intimate to you, that as I gave you no authority to purchase pig iron for me, I am in no way responsible for what you may have bought on my account.

I am, Sir,
Your obedient Servant.

Further, the pursuer, without any judicial warrant, or any consent from the defender, deliberately and illegally, and incompetently sold the iron which he averred to be the defender's property, and bought for him. It was, moreover, customary and usual in the trade, at least it is fair and reasonable, to insist on an interim deposit of 2s. 6d. per ton in first transactions in the purchase of iron through a broker, and the defender understood this to be the practice; it was also customary and usual, and certainly right and proper, that an order for the purchase of iron, if not executed on the day when given, should be repeated, to be binding on the purchaser. This is particularly so with any marketable article of a fluctuating price such as iron.

He therefore pleaded—

(1.) The defender never having ordered the pursuer to purchase the iron in question, is not bound to implement the alleged purchase, and is not liable for the sum now sued for.

(2.) Even supposing the alleged purchases actually authorised, the present proceedings are incompetent in their present form—an action of implement being the only competent course.

(3.) The pursuer having most illegally realised the iron in question, at his own hand, without the defender's consent or any judicial authority, acted most unwarrantably and wrongously, and is not entitled to recover any deficiency he may allege to have arisen.

(4.) The alleged order, even if true, not having been given on the day when the iron was purchased, does not bind the defender.

The pursuer, in answer, admitted that the defender had been introduced to the pursuer in the Exchange; that an order given him by the defender and Christy to purchase 500 tons iron could not be executed. He further averred that he had had several meetings with the defender as to purchasing iron for him. That the order was given at one of these meetings, and that sale notes of the purchase had been sent to the defender. That the letter of 31st May was the first intimation the pursuer had of the defender's objection to the sale—iron having in the meantime fallen in price. That according to the custom of the iron trade in Glasgow, when a principal repudiates and declines to implement the contract for the purchase of iron, made on his account by his broker, the latter being personally bound in implement of the contract, is entitled to sell the iron so purchased for cash, and the difference between the prices forms the measure of the damage sustained by the broker in consequence of the breach of contract on the part of the principal, at least such is a proper and reasonable mode of ascertaining such damage.

He therefore pleaded:—

(1.) The defender is bound to indemnify the pursuer for the damage sustained by him through the defender's breach of contract.

(2.) The defender having failed to put the pursuer in funds to pay for the iron purchased on his account, the pursuer was entitled to sell the same for prompt cash, and the defender is liable in the loss sustained on re-sale.

The Sheriff having allowed proof, which was led at some length, and thereafter heard parties thereon, pronounced the following judgment:—

Finds, that the sum of £131 16s 1d, for payment of which the summons concludes, is made up of two sums of £59 7s 6d each, being the loss upon the re-sale of two quantities of 500 tons pig iron, bought by the pursuer as broker for the defender, and afterwards re-sold against the defender, at a loss in each case to the said amount, and also of the sum of £13 1s 1d, being a commission of one-half per cent. on the sales: Finds, that the defences maintained by the defender are—1st, That he never authorised the pursuer to purchase the said quantities of iron for him; and 2d, That if he had done so, the pursuer was not entitled to re-sell the iron at his own hand, but only to insist for implement of the contract: but finds, under reference to the annexed note, that it is proved that the defender employed the pursuer to purchase the iron, and that, according to the uniform practice in the iron trade in Glasgow, a broker who has bought for a principal is entitled to re-sell,

and to charge the principal with any loss which may arise, if said principal has not come forward timeously to pay the price and take the iron: Finds it also proved that the commission charged is usual and reasonable: Therefore repels the defences, and decerns against the defender as libelled: Finds the defender liable in expenses, etc.

NOTE.—The state of the evidence upon the subject of the pursuer's employment by the defender is this:—The pursuer himself has deponed that he received the defender's instructions to make the purchase on the occasion of his being introduced to him in the Royal Exchange, Glasgow, by Andrew Christie, merchant, on the 13th or 14th May, 1858, and that the defender left to his own discretion both the precise time when the purchase should be made and the price to be paid. The party, Andrew Christie, who does not seem to have any personal interest in the issue of this action, gives evidence no less confirmatory of the authority and instructions to purchase. The only other witness is the defender himself, who gives an entirely different account of what took place at the meeting in the Exchange, and negatives the alleged employment. Had the case rested here, the evidence of the pursuer and defender might have been held to neutralise each other, and it might have been difficult to hold the employment established by Christie's testimony alone. But there is another fact of great importance. Immediately after the pursuer made the purchases on the 17th and 18th of May, he sent bought-notes, of which No. 24 contains copies, to the defender, intimating the respective purchases on his account, and the terms and date of settlement. The defender admits that he received these bought-notes, and that he never returned them to the pursuer. He says, no doubt, that he called on the pursuer the day after he received them, and remonstrated with him for having bought the iron, and that on returning to his office he destroyed the bought-notes. But in the first place the pursuer denies that the defender made any such communication to him; and, in the next place, it is clear that by keeping the bought-notes, he could have held the pursuer bound, had he seen it for his interest, to go on with the transaction; and there is no sufficient evidence as to when and how they were destroyed, nor is there any direct evidence of their repudiation by the defender till the 31st May, when he wrote the pursuer the letter, No. 9/7, by which time, it is stated, the price of iron had fallen. It is also to be observed that the sending of the bought-notes raises a strong presumption in favour of the pursuer's *bona fides*, and of the reality at least of his belief that he had purchased with the defender's authority. On the whole, therefore, although there is a painful discrepancy in the parole testimony, the Sheriff-Substitute considers the employment made out. As to the pursuer's right to re-sell to protect himself against the effects of the defender's repudiation, the custom of trade seems entirely to have warranted it, and the pursuer's letters in process instruct that the re-sale was not made without due premonition to the defender.

The defender having appealed, Sir Archibald Alison, in the following Interlocutor, adhered to the Sheriff-Substitute's judgment:—

Having heard parties' procurators under the defender's appeal upon the interlocutor appealed against and whole process, adheres to the interlocutor complained of, for the reasons stated by the Sheriff-Substitute, as also those in the following note, and dismisses the appeal.

NOTE.—The fact admitted by the defender on oath, of the bought-notes having been *received by him from the pursuer, and destroyed*, casts the balance in the pursuer's favour in a case in which, from the absence of any written evidence of the order to purchase the iron in question, and the contradictory nature of the evidence on the opposite sides in regard to it, would otherwise have been doubtful, especially when the unlimited nature of the order said to have been given by the defender, is taken into consideration. The preponderance of the evidence upon the whole, taking into view the defender's receiving, holding, and subsequently destroying the bought-notes is in the pursuer's favour. Mr Christie corroborates the pursuer as to the terms of the instructions given by the defender for the purchase of the iron, and no one corroborates the defender; and the absence of any entries in the pursuer's books of the order, is explained by the proof that such transactions, till they go farther, are not entered in the books. Had the defender desired to be clear of the business, he should at once have returned the bought-notes the day they were sent him by the pursuer,—the more especially as the defender was an accountant, who for five years had occasionally dealt in share transactions, and of course must have been familiar with the rules of the trade. There is no evidence which can be relied on of the defender's repudiation of the contract till the 31st May, when he wrote the pursuer the letter No. 9/7 of process, before which time the iron had fallen in price, which had been bought on 17th of the same month.

Act. T. G. WRIGHT. *Alt.* J. M. TAYLOR.

29TH JULY, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

ISABELLA M'KINLAY *v.* WM. INGLIS.

Process — Petition — Damages — Interdict — Relevancy.—*A petition for interdict of an illegal poinding, besides the usual prayer for interdict, contained a craving that the defender should be found "liable in £10 of damages for his illegal interference," etc. Held, that although no special averment of damage had been made in the petition, the narrative was still relevant to support the prayer for damages.*

JOHN BRACKENRIDGE, boot and shoe maker, whose estate is under sequestration, and who remains undischarged, is a debtor of the defender. On 31st December last, after the date of the sequestration, the defender executed a poinding of effects situated in the shop which the bankrupt occupied previous to the sequestration, and which the defender alleges he still continues to occupy. The pursuer, who is a sister-in-law of the bankrupt, thereupon brought the present action, alleging that the effects were her property, and that she was the tenant of the shop. She therefore craved interdict, and further prayed that the Sheriff might find the defender liable in £10 of damages, for his illegal interference with her effects.

In defence, it was pleaded (1) there was no narrative to support the prayer for damages; (2) a conclusion for damages under a summary application was incompetent; and (3) the poinded effects were not the property of the petitioner, but of the defender's debtor, Brackenridge.

Mr Sheriff Smith (26th April) gave effect to the first plea, holding that the narrative did not support the prayer for damages; but on the question of interdict, allowed a proof as to the property of the effects.

Both parties appealed to the Sheriff, (Sir A. Alison,) who, after hearing parties, pronounced the following judgment:—

Finds the petition in the present case concludes for interdict against the respondent's removing or selling certain effects alleged to belong to the petitioner in a shop in Eglinton Street, Glasgow, which had been poinded by the respondent under a diligence at his instance against his debtor, John Brackenridge, and concludes also for the sum of £10 of damages for the illegal poinding of the petitioner's effects: Finds it pleaded in defence, that the narrative in the petition is insufficient to support the prayer thereof, and that the conclusion for damages is incompetent under a summary application; and upon the merits that the effects poinded do not belong to the petitioner, but are the property of the respondent's debtor, Brackenridge, who is alleged to be the real possessor of the shop in question: Finds it admitted and proved, that the estate of the respondent's debtor, Brackenridge, had been sequestrated in the end of 1857, and that in January, 1858, the trustee on the estate sold to the petitioner certain effects in the shop belonging to the bankrupt, and right to occupy the shop till Whitsunday following, and finds it averred, that the petitioner subsequently retook the shop from the landlord after that, and has been in possession of the shop ever since: Finds it admitted and proved, that the respondent's poinding of the effects in question was not executed till December, 1858, and that at that date, his debtor, Brackenridge, was still under sequestration: Finds, that if, as alleged by the respondent the effects in question, so

poinded by him, were not the property of the petitioner, but belonged to his debtor, Brackenridge, the same in law belonged to the trustee in Brackenridge's estate, seeing, at the date of the poinding, the sequestration still subsisted, and all the effects and property belonging to the bankrupt at the date of the sequestration, or subsequently acquired by him were legally transferred to the trustee on the estate: Finds, therefore, that even although the effects in question belonged to the respondent's debtor, Brackenridge, which is denied by the petitioner, it was incompetent for the respondent, one of the creditors of Brackenridge, after the sequestration of his estates, to attach these effects, which in law belonged to the trustee for behoof of the general body of the creditors, and that instead of poinding or selling these effects at his own instance, for his own benefit, he should have called upon the trustee to vindicate his right thereto: Finds that the trustee has not claimed the effects, and the documents in process rather tend to show that he has no right thereto, but that the same belong to the petitioner, and that she is the tenant of the shop in question: Finds, therefore, that the proof allowed is unnecessary and irrelevant, seeing that if the effects so poinded really belonged to Brackenridge, they became the property of the trustee on the estate, and could not be poinded by the respondent, one of the creditors on the estate: Therefore grants interdict as craved in the original petition; and on the conclusion for damages, finds that the same is competent, in respect the primary conclusion is for interdict, and that although no special damage is condescended on, yet it is averred that the effects were illegally poinded by the defender, and there is a conclusion for damages on that ground: Finds the respondent liable in damages, but modifies the sum to £2, for which decerns against the respondent: Finds the petitioner entitled to expenses, of which appoints an account to be given in, and remits to the auditor to tax and report. Alters the interlocutor complained of accordingly, and decerns.

Act. JOSEPH TAYLOR. *Alt.* T. C. YOUNG.

29TH JULY, 1859.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

JANE ANN GARDNER AND HUSBAND *v.* JAMES M'LEISH'S EXECUTORS.

Bastard—Aliment—Obligation—Discharge—Mora.—*A father granted a letter of obligation for payment of the aliment of his deceased son's illegitimate child, "till the said child shall arrive at the age of eight years complete, or till it can maintain itself;" and implemented the obligation until the expiry of eight years, after which time no demand was made for further aliment for upwards of three years—Held that the father's executors, who were also next in kin of the son, were liable in subsequent aliment, and that the obligation was not discharged by the pursuers' mora and apparent acquiescence.*

THE female pursuer gave birth on 7th January, 1847, to an illegitimate male child, of which John M'Leish, farmer, Wellhill, acknowledged himself to be the father. John M'Leish and his father, James M'Leish, were joint tenants of the farm. John M'Leish having died upon 9th November, 1850, James M'Leish, upon 27th June, 1853, granted an obligation in favour of the pursuer, in the following terms:—"Having paid the aliment of the male illegitimate child of Jane Ann Gardner, of which my son, the late John M'Leish, was the father, down to the 7th July, 1853, at the rate of five pounds per year, I hereby bind and oblige myself to pay to the said Jane Ann Gardner the future aliment of the said child, at the above rate, quarterly and in advance, till the said child shall arrive at the age of eight years complete, or till it can maintain itself." James M'Leish accordingly paid the aliment at the said rate of £5 per annum till 7th January, 1855, when the child attained the age of eight years. James M'Leish died in 1857, and the defenders were appointed his executors by Deed of Settlement—they entered upon the administration of his estate, and the defender, the Reverend James M'Leish, took up the lease of the farm.

No aliment having been paid after the child had attained the age of eight years, an action was raised on 13th July, 1858, at the instance of the female pursuer (who had in the meantime got married) and her husband, against the Reverend James M'Leish, as representing his father and brother, by taking up the lease, concluding for aliment of the child under the obligation until he should attain the age of fourteen years. A supplementary action was raised against the defenders as executors. The actions were conjoined, and a record made up in which the pursuers averred that the boy was of a weakly constitution, and unable to maintain himself.

The defenders averred that the child was, on attaining the age of eight years, strong and healthy—that no demand was made after the expiry of that period, until shortly before the action was raised, and that the late James M'Leish had been ready, after the boy had attained eight years of age, to find a situation for him wherein he could maintain himself, and had expressed himself as prepared to do so; they, therefore, pleaded non-liability.

Proofs having been led, and parties' procurators heard thereon, the Sheriff-Substitute Finds, that under the said letter of obligation aliment was paid for the expressed term of eight years, and although notice was given on the last payment being made, no express demand is proved until shortly before the institution of the action, so as to enable the defenders to propose to provide for the custody and maintenance of said child after the expiry of the said term of years: Therefore assoilzies the defenders from the conclusions of the summons so far as regards aliment prior to its date, and decerns; but orders the cause to the roll of motions, that parties may state what they propose as to the future custody of the boy, or the rate of aliment to be allowed, and the duration thereof.

NOTE.—The status of the boy, as the acknowledged son (though illegitimate) of a respectable farmer, cannot be overlooked in a question of duration of aliment. It is impossible to say, that without help, he can maintain himself at his tender years, the more especially with a constitution not the most healthy. To set him to herd, it is feared, might be a dangerous experiment, and would so far be an interruption to his education. As to bygone aliment, the defenders, after the notice given and silence following thereon, were entitled to hold that the claim was foregone, and so made no question as to custody. If, under the terms of their father's cautionary letter they are bound in aliment until the boy can maintain himself, they are clearly entitled to be consulted as to the custody and proper upbringing of the boy. From the cleanly and intelligent appearance of the boy, he appears to have been well cared for; and, seeing the respectable character of the relatives, it is hoped that some amicable arrangement may be made for the future welfare of their young friend.

The pursuers appealed against this judgment, in respect they were not found entitled to aliment from the date when the child attained the age of eight years until the institution of the action.

After hearing parties, the Sheriff (E. S. Gordon, Esq.) pronounced the following judgment:—

The Sheriff, having heard parties' procurators on the pursuers' appeal, sustains said appeal, recalls the Interlocutor appealed from, in so far as regards the *third* finding, and also that part of the Interlocutor which "assoilzies the defenders from the conclusions of the summons, so far as regards aliment prior to its date;" *quoad ultra* affirms the said Interlocutor: Farther finds, that the aliment due under said letter of obligation was paid down to 7th January, 1855, when the said boy was eight years of age; but that he then was, and continued to be, of a weakly constitution and unable to maintain himself: Finds, that the pursuers have not done any acts which can be held as sufficient to operate as a discharge in favour of the defenders, as representing the granter of said letter, from the obligation to pay aliment to the boy's mother so long as he should be unable to maintain himself: Therefore decerns in favour of the pursuers against the defenders, under

the conclusions of the second summons, as executors nominate of the deceased James M'Leish, as therein set forth, for payment of £1 5s, being the aliment due for the support of said boy, as at 7th January, 1855, and quarterly thereafter, down to 7th January, 1859, reserving the pursuers' claim *quoad ultra*, and orders the cause to the roll of motions before the Sheriff-Substitute, in order that parties may be heard on the matters reserved in his Interlocutor.

NOTE.—The Sheriff is inclined to take a different view from that given effect to in the Interlocutor appealed from, in regard to the claim of aliment prior to the date of the summons. The claim is made in virtue of an *express obligation* by the child's grandfather in favour of the pursuer, the child's mother, to pay *to her* £5 till the said child shall arrive at the age of eight years complete, or *till it can maintain itself*. There is no reservation of the right of the grandfather, or of his legal representatives, to discharge themselves of this obligation by offering to take the child from the mother's custody until he can maintain himself; and it may even be questioned whether, supposing there had been no obligation or contract for the payment of the aliment to the mother till the child can support itself, a grandfather or his representatives are entitled to claim the custody of the child, who is of delicate constitution and unable to work for its support, so soon as he arrives at the age of eight years. The Sheriff thinks that the special terms of the obligation for aliment strengthen materially the pursuers' case, for aliment is made payable at the rate of £5 till the child can maintain itself. It is true that one of the defenders, Ann M'Leish, says, that when the last payment was made she told the pursuers that "it was the last payment," she (the mother) "said it was by the first bargain, but not by the second. She gave me no message to my father that she would expect more." See also the pursuers' proof, No. 14 p. 3. It cannot be held in the place of this evidence that there was any abandonment of the pursuers' right under the obligation. On the other hand, there is no evidence that the grandfather intimated *to the pursuer* that he would take the child, even if that could be held to be within his option; while it is proved that a demand for payment of the aliment was made against one of the defenders on 14th December, 1857, about 15 months before the date of the summons, but no offer was then made to take the boy from his mother's custody. In these circumstances the Sheriff thinks it is clear that aliment is due at all events from December, 1857, the date of the demand; and he farther thinks that the mere delay to ask for payment of the aliment, between the date of the last payment and December, 1857, is not sufficient to exclude the claim for aliment previous to the latter date, provided the defenders have not proved that the boy was able to maintain himself, which they have not done; on the contrary, the pursuers have proved that the boy was unable to maintain himself during that time. The defenders pleaded, when the demand was made in this action, that they are entitled to exercise some control in regard to the custody of the boy, and while the Sheriff thinks that such is no good defence against the claim for prior aliment, which must be held to have been expended, and especially as the plea was not put forward in 1857, on the occasion of the demand then made, he thinks it right to allow the defenders an opportunity of being heard on these and the other matters referred to in the reservation in the Interlocutor appealed from. It will, however, be kept in view that the defenders are not in the same position as a father, and that their liability to pay aliment does not arise *ex debito naturali*, but *ex facto* as representing the debtor in an express obligation, which appears to have been the result of a compromise. This may materially affect their right to exercise any control in regard to the custody of the boy.

Act. A. G. REID, Auchterarder.
Alt. MACKENZIE & DICKSON, Perth.

3D AUGUST, 1859.

SHERIFF COURT, GREENOCK.

(MR SHERIFF TENNENT.)

WIELAND *v.* KING.

Process—Sheriff Court Act, 16 and 17 Vict. cap. 80—Construction of Clauses.—*Found, on appeal, that the 13th section of the Act, limiting the revival of actions to 3 and 6 months, does not apply where the case has not been called in Court, but that the decree may be obtained on any Court day within year and day, as under the former practice.*

THIS was an action of ejection at the instance of Mrs Jane Clotilda Hatcher or Wieland, and John Frederick Wieland, her husband, proprietors of Rosebank, Port-Glasgow, against James King, formerly merchant, Port-Glasgow, residing at Morven. No appearance was made by the defender, but circumstances occurred which rendered it unnecessary immediately to enrol the case for decree. After the lapse, however, of six months, in consequence of certain proceedings on the part of the defender in another action, it was considered necessary to obtain decree, and accordingly, upon the 29th June last, the case was enrolled for that purpose. The Sheriff-Substitute, (Tennent,) *ex proprio motu*, there being of course no appearance by the defender, pronounced the following Interlocutor:—

In respect that no proceeding has been taken in this cause for more than three months: Finds, that the same stands dismissed, and cannot now be insisted in.

This Interlocutor was appealed and brought under the notice of the Sheriff Depute, by a reclaiming petition, in which it was argued—

That the provisions of the Sheriff Court Act are twofold: 1st, Such as regulate the procedure applicable to *undefended* actions; 2d, Such as apply to *defended* causes. The first and second sections apply to the former, the third and succeeding sections, including the fifteenth, apply exclusively to the latter.

The fifteenth clause is in the following terms:—"Where in any cause *neither* of the parties thereto shall, during the period of three consecutive months, have taken any proceeding therein, the action shall, at the expiration of that period *eo ipso* stand dismissed, without prejudice, nevertheless, to *either* of the parties within three months after the expiration of such first period of three months, but not thereafter, to revive the said action, *on showing* good cause to the satisfaction of the Sheriff why no procedure had taken place therein, *or* upon *payment* to the *other party* of the preceding expenses incurred in the cause; *whereupon* such action shall be revived and proceeded with in ordinary form."

Manifestly this clause cannot apply to a case which has never been in Court, and in which there is no defender. More particularly, as the second section of the Act states—"Where no appearance shall be entered for the defender, the Sheriff may, at *any* Court held after the day of compearance, give decree in terms of such summons, *in like manner as at present*, where no appearance is made for the defender; and such decree shall, in all respects, be equivalent to a decree in absence, obtained under the forms at present in use."

There can be no argument drawn against this view of the Act from any consideration of its policy. It is quite conceivable that parties, *after* they are in Court, should have as little opportunity as possible to procrastinate a cause; but there can be no good reasons for forcing them into Court sooner than year and day. In many instances, such a proceeding would have the effect of ruining parties who, by obtaining necessary indulgence, have been enabled to retain their credit.

The Sheriff (Mr M'Farlane) pronounced the following judgment:—

The Sheriff, having advised the pursuer's appeal, with the relative reclaiming petition and whole proceedings, sustains the appeal and recalls the Interlocutor appealed against.

NOTE.—The Sheriff is satisfied, on the reasoning in the reclaiming petition, that the Statutory provision founded on by the Sheriff-Substitute (sec. 15 of 16 and 17 Vict., cap. 80,) is

inapplicable to this or any case which has never been called in Court. The Sheriff-Substitute will now, accordingly, proceed on that footing as may be just; but in the event of decree in absence being pronounced, it ought to contain a qualification to the effect that the pursuer's expenses connected with the present appeal are not to be chargeable against the defender, seeing he did not occasion them. The pursuer was himself to blame for them, by his delay in proceeding with his action.

Act. MACDONALD. *Alt.* ———

6TH AUGUST, 1859.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

JAMES BURNETT *v.* RITCHIE'S REPRESENTATIVES.

Process—Proof—Writ or Oath—Incidental Proving of the Tenor—Jurisdiction.—*In an action for repayment of lent money, the proof being limited to writ or oath, the defender was called upon, as a Haver, to produce receipts for payments to account, which it was admitted had existed, but had since been lost or destroyed. Held, that to prove the tenor of these receipts incidentally was incompetent.*

Opinion—*That where an incidental proving of the tenor would be allowed in the Supreme Court, the same would also be competent in the Sheriff Court.*

THE pursuer sued the defenders for repayment of certain sums of money, alleged to have been lent to Mrs Ritchie, whom they now represent. He was allowed to prove his claim by writ or oath, and cited the defenders, as Havers, to produce certain receipts for partial payments, in which it was said to be declared that the payments were to account of a larger sum. The Havers admitted the existence of receipts, but averred that they had been lost or destroyed since the ancestor's death. The pursuer thereupon offered incidentally to prove the tenor of the receipts.

The defenders objected, on the ground that to allow a proving of the tenor, was to substitute parole testimony for the defender's writ.

The Sheriff-Substitute having heard parties' procurators on the point at issue, pronounced the following judgment:—

Finds it incompetent, incidentally, to admit to probation the tenor of the documents set forth in the minute for pursuer, number nineteen of process. Therefore refuses to allow the proof therein craved, and orders the cause to the motion roll, that parties may state what further procedure they now crave.

NOTE.—Where a proof is allowed *at large*, and in the course of which it is proved that a writing which once had existence has been lost, (it does not matter in *what* way,) then it is competent, and of every-day practice, to admit *secondary* evidence of the tenor of the lost writ.

But where a proof is *limited* to writing, as in case of sale, or of writing, or of oath, as in cases under the shorter prescriptions, the Sheriff is at a loss for the principle which would allow the tenor of a lost writing to be proved incidentally. In his opinion, this would undoubtedly be to substitute *parole* for *writing*, so that the debtor would be in a much worse position than had the writing been produced. The pursuer's procurator drew the distinction between the ordinary case and that where the document was destroyed or lost by the adverse party. The Substitute does not perceive that this affects the principle that parole cannot be substituted for writing, and it will be observed that in cases founded on by the pursuer, there was fraudulent and intentional destruction of the document. In odium of fraud, the law is inclined greatly to modify some of its rules, which are preserved in all their rigidity in other cases. In the present case there is no evidence of the fraudulent destruction of the documents, and nothing more than that they are now lost in course of time.

There may be a difficulty in drawing the exact line where a document may be proved incidentally, or where an action of proving the tenor is necessary. The Sheriff-Substitute, as above mentioned, has no doubt of the competency of incidentally proving the tenor of a document whenever the proof of the issue is at large or *pro ut de jure;* but he is of opinion, that whenever the writing sought to be proved is *essential* to constitute or discharge a claim, then a decree of proving the tenor must take the place of the writing itself.

There are several cases where the Court of Session has allowed proofs of the tenor of essential documents incidentally in an action depending before them, without requiring a separate action of proving the tenor, but this may be peculiar to the jurisdiction of the Supreme Courts; nevertheless, the Substitute is rather inclined to the opinion that what may competently be done incidentally in the Supreme Court, may also be done incidentally in the Court of the Sheriff.

Although it be only with the question of competency that the Court is now dealing, and if it were competent for the pursuer to get the receipts, if in existence, he could not be barred because they would have no effect on the issue; nevertheless, as the question now arises, it seems not expedient to look at the character of the writ sought to be set up by parole.

In the first place, the Sheriff-Substitute is at a loss how the *pursuer's* writ, by any process of reasoning, can be held the writ of the defender. No doubt, if recovered and put into the hands of the defenders, upon a reference to oath it might be made an important instrument of examination.

In the next place, the parties are not at one as to the particular dates and sums stated in the writings; but above all, the pursuer does not condescend on their exact tenor so as to show how they could by possibility prove his claims to the *amount* sued for. A mere general acknowledgment of a sum being paid *to account* would nowise establish an exact *amount* of balance.

The pursuer having appealed, the Sheriff (MR E. S. Gordon) pronounced an interlocutor, adhering to the Substitute's judgment, to which he appended the following note:—

After careful consideration of this case, the Sheriff is of opinion that the interlocutor appealed from is well founded. It will be kept in view that the claim made by pursuer is for repayment of money, alleged to have been given by him to Mrs Ritchie, in loan. Such a claim can be proved only by written evidence under the hand of the alleged debtor, acknowledging the loan, and the writing must be probative or holograph. If the writing is not tested or holograph, although subscribed by the debtor, it is not sufficient to establish the claim: and it will not be received as constructively the writ of the debtor, in order to prove a loan of money. *Stewart*, 12th December, 1815. This view renders it unnecessary to consider whether the case of *Hislop* (5 D. B. M. pp. 50, 73), can be regarded as a binding authority to the effect that an acknowledgment of the creditor of a payment to account, found in the keeping or repositories of the debtor is sufficient to elide the sexennial prescription. Besides other differences between the present and Hislop's case, it will be kept in view that in the latter case there was a written document of debt, affording evidence of the *original* constitution of the debt, and it was required only to produce some writ referring to the debt so constituted, as subsisting after the lapse of six years. But here there is no written acknowledgment of the loan.

Act. JAMIESON. *Alt.* ———

9TH AUGUST, 1859.

SHERIFF COURT, DINGWALL.

(MR SHERIFF CAMERON.)

ANN MACKENZIE *v.* THE INSPECTOR OF POOR OF URQUHART.

Poor—Relief—Able-bodied Pauper.—*Held, that a young woman, a widow, and the mother of a legitimate child, a year and a half old, admitting that she was able-bodied, but averring that she could not support herself, from her time and attention being occupied by the child, was not entitled to Parochial relief.*

THE pursuer in this case was an able-bodied young woman, twenty-seven years of age, a widow, and the mother of a child,

which had attained the age of nineteen months. She presented this application to have it found that she was entitled to parochial relief, averring, in general terms, that she was destitute, and that her child, being of tender years, so engrossed her time and attention, as to preclude her from doing anything for its support.

The defender pleaded:—(1.) It is not averred the pursuer's child is a sickly one, and therefore requiring extreme attention, (2.) The pursuer is an able-bodied woman, and (3.) no relevant case was stated, to entitle the pursuer to relief.

The Sheriff-Substitute gave judgment as follows:—

Finds the applicant entitled to parochial relief for herself and her child, ordains the Parochial Board forthwith to determine the question of amount; finds the inspector liable in costs; modifies the same to two pounds two shillings, and decerns.

NOTE.—The applicant in this case is a young widow, having an infant child, and destitute of the means of living. She admits her ability to work, but states that the care required at her hands by the child puts it out of her power to work sufficiently for the support of the child and herself.

The claim of the applicant to relief, in these circumstances, involves a question of some practical importance, and is not altogether free from doubt in points of law. But the Sheriff-Substitute is humbly of opinion that the child being of so tender an age as to occupy almost all the time and attention of the mother, she must be held to be thus disabled for other work in the same manner, in effect, as if she laboured under physical disability.

It has been decided, it is true, that an able-bodied man is not entitled to parochial relief for himself or his family, but it is believed that this rule has not yet been applied, in the Supreme Courts, to the case of a mother. See the cases of *Hay* v. *Doonan*, 25th June, 1851; *Mackay* v. *Baillie*, 20th July, 1853; and the opinion of Lord Deas in *Hay* v. *Thomson*, 6th February, 1856.

Assuming, then, the claim of the present applicant to be well-founded in law, the extent of the relief is, of course, in the discretion of the Parochial Board, subject to the control of the Board of Supervision; and if, notwithstanding her declaration to the contrary, she can command the scantiest out-door sustenance for herself and her child, by means of labour or otherwise, the test of an offer of the Poor-House will speedily relieve the parish of the burden of their support.

The attention of the Sheriff-Substitute has been directed to a statement in a foot note, by the Sheriff of Aberdeenshire, on page 114 of the twelfth report of the Board of Supervision, "that it has been decided that an able-bodied woman, whether married or single, with only one child, has no legal claim;" but it has been ascertained that the decision referred to, was pronounced by the Sheriff who mentions it, in a case where the child had attained an age at which it could take care of itself.

This judgment having been apppealed by the Inspector of Urquhart, the Sheriff-Depute (Mr A. S. Cook) altered the same in the following interlocutor:—

The Sheriff having resumed consideration of the appeal, with the reclaiming petition for the Inspector, and answers for the applicant, and having advised the process, alters the interlocutor complained of: Finds that no relevant case has been stated by the applicant in support of her application for relief, and therefore dismisses the same, and decerns: Finds no expenses due.

NOTE.—This is a case of importance in the administration of the Poor-Law, and it has not been without an anxious consideration of the circumstances of the case and of the authorities referred to, that the Sheriff has arrived at a different conclusion from the Sheriff-Substitute.

The Sheriff must observe that he does not proceed at all upon the supposed application to such a case as the present of the recent decision quoted in the reclaiming petition, in the case of *Petrie* v. *Meek*, 4th March, 1859.

That decision seems to have gone the length of holding it to be illegal to supply even temporary relief from the poor's funds to an able-bodied man; but a distinction has always been taken, both in the decisions of the Court and in the practical administration of the law, betwixt the case of an able-bodied man, and that of a woman burdened with a family, and, although able-bodied, unable *de facto* to maintain herself and family.

The reports are full of cases in which relief has been afforded to women in such circumstances, and the Sheriff has no idea that the decision in the case of *Petrie* v. *Meek* was intended to over-rule, or interfere at all with, the authority of these cases. But although this be so, the Sheriff is aware of no case in which an able-bodied woman, in such circumstances as occur here, has been held a proper object of parochial relief.

The child is upwards of nineteen months old, past the usual age of a nursling, and is not said to be at the breast. Neither is it said to be a sickly child, nor to be in a state requiring on any account more than usual care and attendance.

The applicant herself is about twenty-seven years of age, admittedly able-bodied, not a stranger in the locality where she is situated, and is thus in circumstances, in so far as her own personal condition is concerned, as favourable for enabling her to earn a maintenance for herself and her child as can occur in any case.

It is said, in general terms, that she is destitute; but the facts of the case, as stated by herself, contradict this statement. She has her own youth and strength to depend upon; and it appears, moreover, that since the death of her husband she has been living alternately with her father-in-law and with her mother, neither of whom are paupers, and both of whom are liable for her support. It is said, no doubt, that her mother is likely soon to become a pauper, and that her father-in-law is a poor man; but these are vague statements. They are both now keeping house, and the applicant has been living since her husband's death with one or other of them; and the Sheriff is quite unable to see how a young able-bodied woman, so situated, can, with any propriety, be described as a destitute person.

No doubt the applicant has a child still of tender years; but, as already stated, it is a weaned child, and nothing is more common than for a woman, so situated, to make such arrangements for the custody of her child, as to leave herself free, in a great measure, to labour for its support and her own.

It would be a most inexpedient precedent, the Sheriff thinks, and likely to lead to much mischief, were a woman in such circumstances to be found entitled to parochial relief for herself and her child, until, as seems to be assumed in the Sheriff-Substitute's note, the child shall arrive at an age at which it can take care of itself.

The present case is that of a widow left with one legitimate child, but the law knows no distinction in the supply of parochial relief, betwixt legitimate and illegitimate children, and what an amount of profligate idleness might be engendered, if every able-bodied young woman under thirty years of age, who has had a bastard child, were to be held entitled, simply on that account, to come upon the parochial funds for support, both to herself and her child, until the latter was of age to enable it to take care of itself?

The Sheriff observes one recent case (Laing v. Adamson or Fisher, 22d May, 1857) in which a woman, deserted by her husband, and burdened with the support of one child, was held entitled by the Sheriff of Stirlingshire to parochial relief; but in that case the application was made on the ground that the child was sickly, and that the applicant herself was unable to work.

The Sheriff appears to have been of opinion that the *onus* of controverting these statements lay upon the Inspector, and his judgment proceeded on the ground that he had not discharged himself of this *onus*. The Court, however, in an advocation, recalled the Sheriff's judgment, and, on the ground that the proof taken hitherto was inconclusive and unsatisfactory, remitted the case with instructions to allow a proof to both parties of their averments.

The averment of the Inspector there, as in the present case, was, that the applicant was able-bodied, and the Court allowed him a proof of the averment.

In the present case such a proof is unnecessary, as it is distinctly admitted that the applicant is an able-bodied woman; while, on the other hand, no special circumstances whatever are, in the opinion of the Sheriff, averred by the applicant, relevant to entitle her to parochial relief, or demanding a proof.

The inspector has very properly refrained from asking expenses against the applicant, and the Sheriff has found none due.

Act. W. R. THOMSON, Dingwall. *Alt.* A. SMITH, Dingwall.

16TH AUGUST, 1859.

SHERIFF COURT, PERTH.

(MR SHERIFF BARCLAY.)

THOMAS LANDALE *v.* GEORGE RITCHIE.

Process—Action ad factum praestandum—Relevancy—Submission.—*One of the parties to a submission to referees, mutually chosen, wrote to the referee named by him before acceptance, not to accept, and the referee accordingly refused. An action at the instance of the other party to the submission, to compel the first party to write to the referee, withdrawing the first letter, and requesting his acceptance, in order that the arbitration might proceed—Held incompetent.*

THE pursuer and defender were the outgoing and incoming tenants of a farm, and they entered into a deed of submission, whereby they referred all disputes between them to two referees, with power, in case of difference in opinion, to name an oversman. The defender afterwards, and before the referees had accepted, wished to resile from the arbitration, and wrote to the referee named by him requesting him not to accept, which instructions the referee obeyed. The pursuer then brought this action to compel the defender to write again to the referee, withdrawing his (the defender's) former letter, and requesting the referee's acceptance of the arbitration, in order that the same might proceed.

The defender pleaded in defence—the action was unknown and incompetent.

The Sheriff-Substitute, after having heard parties' procurators on the closed record, pronounced the following judgment, which, on appeal, was adhered to by the Sheriff (Mr E. S. Gordon) *simpliciter*:—

Finds that the summons is incompetent; dismisses the same, reserving all other and competent remedy; finds the defender entitled to expenses; remits the account thereof to audit, and decerns.

This summons is a novelty, and the Substitute has been unable to find authority or principle, either direct or analogous, in support of such an action.

An action to perform a fact is well known, and a decree following thereon can only be operated on by imprisonment. The fact must be one which the party has bound himself, or is bound by law to perform, and must be one within his power, and independently of the will of a third party. Without these concurring elements, a person might be held in perpetual imprisonment for non-performance of an act, which he either is not bound to perform, or which may be beyond his power of performance.

In the present case there is no consensual obligation on the part of the defender to grant the letter which it is the object of the action to compel him to write. The letter complained of, and which it is the object of the action to compel the defender to recall, may be assumed to be wrong, but there does not appear to be a remedial power to compel a retractation. If the principle be admitted, then every letter of slander, and which might found an action of damages, might also found an action to compel retractation thereof. This would be the form of *palinode* known in the Commissary Court, wisely now fallen into desuetude, and which was only enforced by an increased award of damages, if not granted.

The object of this action is to compel the defender to write a letter which may induce an arbiter to accept a concluded Deed of Arbitration, and which acceptance it is alleged the defender has by his act prevented. This may or may not be true, and if true, it may perhaps found an action of damages for depriving the pursuer of any advantage he could instruct by the arbitration proceedings. But the answer to this action is, that the defender can confer no greater powers on the arbiters than he has done by the deed of submission, and which he cannot, and in law has not recalled. The law cannot compel arbiters to accept, but having accepted, they can be compelled to proceed in discharge of their duty. Mr Todd is still quite at liberty to accept and act. But he cannot be compelled to do so; and even though the defender were decerned to grant the letter sought by this action, this would not compel Mr Todd to accept, and there is no presumption that he would do so. The letter therefore is quite unnecessary to authorise his acceptance, and it is equally inoperative to compel him to accept. Therefore, the action has for its object a mere nonentity which can never be entertained by a court of law.

Act. CONDIE. *Alt.* D. MACKENZIE.

23D AUGUST, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

ANDREWS AND MANDATORY *v.* DREW AND MACLURE.

Agent and Client—Reparation—Liability—Transmission of Documents through Post Office—Registration of Letters.—*An agent recovered a debt due to his client, and, as authorised, took the debtor's bill or promissory note to his client for the amount. The bill was transmitted in due course to the client through the Post-Office, but was lost in the transit. Held, in an action for the value of the bill, that the agent was not guilty of negligence in not registering the letter containing the bill; that the practice of registration applied to letters containing bills blank endorsed only—he was not therefore liable.*

Opinion—*That after the notice now given by the Post Office authorities, cautioning the public against the transmission of valuable letters without registration, liability would attach on failure to register.*

GEORGE ANDREWS, clothier, No. 9 Cork Street, Bond Street, London, and William Johnston, patent and design registration agent in Glasgow, his mandatory, sued Drew and Maclure, sometime writers in Glasgow, and James Drew, writer in Glasgow, and John Maclure, writer there, the individual partners of said firm, as partners and as individuals, for the sum of £96 sterling, "being the balance of an account for goods sold and delivered by the said George Andrews to John Archibald Cumming, an officer in Her Majesty's first Regiment of Infantry (Royals), then with his regiment in Scotland, commencing said account, the 11th of March, 1853, and ending the 31st of August, 1855, a copy of which account was produced and referred to, including a small sum of lent cash, amounting to 15s or thereby; as also of the sum of £1 6s 8d, the amount of charges incurred by the said George Andrews to Charles B. Teague, solicitor in London, the agent of the said George Andrews, in relation to the said account; making together, the sum of £97 6s 8d, for which sums the said defenders made themselves liable to the said George Andrews, having in or about the month of February, 1857, been professionally employed and instructed by the said George Andrews, through his agent or solicitor, the said Charles B. Teague, and having in consequence undertaken to apply to, and demand payment of the amount of said account from the said John Archibald Cumming, and in case of delay or refusal to make payment, to adopt all legal proceedings usual and necessary for securing and enforcing payment of the same from the said John Archibald Cumming, the latter being then in Glasgow, and on the eve of going abroad with his regiment, and in place of executing their said instructions, and without consulting or having authority from the said George Andrews, or the said Charles B. Teague, having taken a draft bill or order from the said John Archibald Cumming, upon Messrs Cox and Greenwood, army agents in London for the above sum of £96 sterling, in satisfaction and payment of the said account, giving a receipt for, and discharging the same; and having transmitted the said draft bill or order along with postage stamps, to the amount of £1 6s 8d in a parcel or envelope, through the post-office to the said Charles B. Teague to London, without

registering the said packet or envelope, or its contents, or taking any step or precaution to ensure their safety, and the said packet and contents never having reached their destination, but having been lost or abstracted during their transmission to London, and the said John Archibald Cumming having, subsequently to giving the said draft bill or order, gone abroad with his regiment, and drawn from the said Cox and Greenwood, all his funds in their hands, and without making any provision for meeting the said draft bill or order, with interest.

The defenders pleaded in defence—

1. That the statements in the summons were irrelevant.

2. That the defenders admitted, that they having been employed to recover the debt in question, took the bill of the pursuer's debtor for the amount of his claim, and averred that this was done by the pursuer's instructions, conveyed through his solicitor Mr Teague; admitted also, that the defenders transmitted this bill through the Post Office, together with postage stamps to the amount of Mr Teague's costs, to Mr Teague on the 27th February, 1857; *quoad ultra* the statements in the summons were denied.

The Sheriff-Substitute having heard parties' procurators on the closed record, (on 11th February,) pronounced the following Interlocutor:—

Finds, that the statements of parties on record, and the documents in process, instruct that the pursuer employed the defenders to recover a debt due to him by John Archibald Cumming, an officer of the 1st Royal Regiment of Infantry, and instructed them to take legal proceedings for this purpose, if necessary; that the defenders accepted said employment, and applied to Mr Cumming for payment, and ultimately with the pursuer's consent, they arranged with Mr Cumming that he should give the pursuer a draft or order on Messrs Cox and Greenwood, army agents in London, for the amount of his debt to the pursuer: Finds, that in terms of the arrangement, Mr Cumming gave the defenders a draft or order on Messrs Cox and Greenwood, in favour of the pursuer for £96, being the balance of the debt due by Cumming to him, and the defenders enclosed said draft in a letter addressed to the pursuer's London agents, and posted the same in Glasgow, but the pursuer avers that the letter, with its contents, never reached its destination, said letter having been lost, or its contents abstracted during the transit to London: Finds in law, that the pursuer having consented that the defenders should settle with Cumming by taking his draft, and that they having transmitted the same, when got, to the pursuer through the post office—the usual mode of transmitting such documents—the defenders discharged their duty to the pursuer, and are not liable for the loss sustained by him, in consequence of the draft having been lost in the post office, over which the defenders have no control; therefore sustains the defences, assoilzies the defender: Finds the pursuers liable in expenses, etc.

The pursuer having appealed against this judgment, the Sheriff (Sir A. Alison) recalled the same, *hoc statu*, and allowed parties proofs of their averments, appending to his Interlocutor the following note:—

The negligence here alleged against the defenders as agents for the pursuers, is their having enclosed a promissory note or draft or order for £96 on Greenwood & Cox in London, payable at two months, in a letter sent through the Post Office addressed to the pursuer's agent in London, not registered, and enclosing £1 6s 8d in postage stamps instead of a post office order; which letter, it is said, never reached its destination, whereby it is alleged the debt has been lost, as the debtor who granted the bill has left the country, having previously drawn all the money due to him that was in the hands of Greenwood & Cox, on whom the draft was drawn. Without saying anything on the legal import of the facts, the Sheriff is of opinion that a proof of the facts which actually occurred is desirable, and should be allowed before deciding the case. The taking of the bill by the defenders from the debtor in payment of the original debt, being authorised by the pursuer or his agent, *scripto*, of course, need not be made the subject of probation. *Non constat*, that the debt is really irrecoverable, even although the bill or draft was lost; and there is no evidence as to the practice of sending such bills in registered letters, or whether the sending of the letter here, containing the draft or order, was before or after a notice sometime ago issued by the Post Office authorities, on the subject of sending money or other valuables in letters through the Post Office without being registered, which every one is bound to know, as it is placarded in front of the letter-box at the General Post Office.

Proof having been led, principally with reference to the practice in Glasgow of registering letters containing bills, drafts, etc., it appeared that a notice, cautioning the public against sending letters containing valuable documents unregistered, was painted below the letter-box of the General Post Office in Glasgow, shortly after the sums referred to in the action had been lost. It further appeared that the document which was lost was a bill or promissory note, not a document blank endorsed.

The Sheriff-Substitute, having heard parties' procurators upon the proof and whole process, found that the pursuer had failed to prove that it was usual to register letters containing bills, draft, or orders, unless the same were blank endorsed, or that the defenders were guilty of negligence in sending the drafts in question in an ordinary letter; he therefore adhered to his former Interlocutor, and assoilzied the defenders with costs.

The pursuer having again appealed, Sir A. Alison adhered to the Sheriff-Substitute's judgment, adding the following important Note:—

Had the bill been accepted by the parties on whom it was drawn, and blank endorsed by the payee, or party in whose favour it was drawn; or if the bill, such as it was, had been sent through the Post-Office without being registered, after the notice now placed in Glasgow at the slip for receiving the letters, cautioning the public not to send money or other valuable articles or documents without registering the letters, the cost of which is only sixpence, he would have held that the precaution of registering the letter was an act such as a man of ordinary prudence would have exercised in his own affairs, and which could not have been neglected without rendering the party responsible for the consequences. But the *species facti* in this case were different in both particulars. The bill or draft was not blank endorsed, and could only have been drawn by a stranger forging the name of the payee, ignorant what the signature of that payee was, or how it was to be forged; and it was proved that the public notice at the Post-Office of Glasgow was not put up for three months after the transmission of the draft in question. In addition to this, the pursuer's London solicitor appears to have been not altogether free from blame, for if he had written timeously to the defenders upon the letter not arriving, there was at least a chance of tracing and recovering the document, or securing the funds in the army agents' hands before they were drawn out by the debtor.

Act. J. G. Houston. *Alt.* Naismith.

23D AUGUST, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF STRATHERN.)

REDMANN AND KLAMBERG v. STEPHENS.

Summons—Informality—Jurisdiction—Domicile—Citation. —*A party whose name was Robert Peare Stephens, carried on business in one county, and resided in another. In an action against him for a business debt to which he was personally cited under the name of Robert Parfit Stephens—Held* (1) *he was amenable to the jurisdiction of the Judge within whose territory he carried on business;* (2) *that having made appearance to defend, the error in the name was not important, and the erroneous part might be held* pro non scripto.

REDMANN & KLAMBERG, Insurance Brokers, Old Broad Street, London, and John Gebbie, Writer in Glasgow, their mandatory, sued Robert Parfit Stephens, shipping agent in Glasgow, for the sum of £46 8s 6d, "being premium of insurance,

and £1 4s, being policy stamp, amounting together to £41 12s 6d, due by the defender to the pursuers, on account of an insurance effected by the pursuers for, and on account of the defender, on the ship called 'Prince of Wales,' for the space of six calendar months, commencing the risk the 14th day of February, 1858, and ending on the 13th day of August, 1858."

The defender pleaded in defence—

1. The defender has no domicile in Lanarkshire, and is not otherwise within the jurisdiction of this Court.

2. The summons is libelled against an individual of the name of Robert Parfit Stephens, the defender is not that individual, and is not aware of there being any such.

3. On the merits. The ship "Prince of Wales," referred to in the summons, went ashore on the coast of South America during the six months specified in the summons. As this was the result of dangers of the sea, the underwriters, on whose behalf the pursuers are constituting their claim, are liable for the damage the ship has sustained.

The Sheriff having allowed the defender a proof of his defence, it appeared that the defender's name was "Robert *Peare* Stephens;" his residence was in the county of Renfrew; his counting-house in the county of Lanark; that he was entered in the *Glasgow Directory* for the present year, "Robert P. Stephens, of Stephens and Co., ship and steam-packet agents, 58 Oswald Street;" and the citation to the action had been given personally to the defendor within his office.

The Sheriff-Substitute, after having heard parties, pronounced the following judgment, which on appeal, has been adhered to by (Sir A. Alison) the Sheriff:—

Having heard parties' procurators on the concluded proof, applicable to the preliminary plea of want of jurisdiction, and whole cause, finds it proved that the defender resides at No. 12 Rutland Place, Govan Road, near Glasgow, which is in the county of Renfrew, and that he has resided there, and in an adjoining crescent in the same county, for three or four years past, and that his ordinary domicile is therefore within the said county: Finds it proved that the defender carries on business as a ship and steam-packet agent in an office rented by him at No. 58 Oswald Street, Glasgow, and which was his place of business in and prior to the month of April, 1858: Finds it proved that it forms part of the defender's business to effect insurances on ships, when employed to do so, and that he insures vessels of which he is owner or co-owner: Finds, that in the course of this business, the defender, through the instrumentality of Mr Bulcraig, a shipbroker in London, to whom he sent instructions, effected with the pursuers the insurance libelled during the said month of April, 1858: Finds that the defender was personally cited to this action, within his said place of business in Glasgow, and in these circumstances, and with reference to the transaction in question: Finds that the defender is amenable to the jurisdiction of this Court, within which jurisdiction he carries on his business, directed the insurance in question to be effected, and where he received the policy, and from whence he acknowledged its receipt, *(see Barclay's M'Glashan*, pp. 74-5): Therefore repels the preliminary plea of want of jurisdiction: Finds the defender is described in the summons as Robert Parfit Stephens, whereas it is pled in defence, that that is not his proper name, and in the proof led, he gives his correct name, "Robert Peare Stephens," and in the *Glasgow Directory* he is announced as "Robert P. Stephens:" Finds that the defender's name and designation, as given in the summons, are not disputed in any other respect: Finds that as it is not denied that the defender's Christian and surname, and his designation, are correctly set forth, and as he is the person against whom the action was intended, and has been directed, and as he has made appearance to defend, the error in his middle name is unimportant, and the letters after the initial may be held *pro non scripto:* Therefore, repels the second preliminary defence, and on the merits finds that the policy of insurance, No. 5/4 of process, was effected for the defender, and that he is the R. P. Stephens mentioned in it: Finds that the letter, No. 6/1, of date 14th April, 1858, was written by the defender from the counting-house in Glasgow to the pursuers, acknowledging receipt of the policy, and in which he expresses the hope that that transaction will lead to further business: Finds that the letter was written in answer to one from the pursuers to him of the previous day, enclosing the policy copy, and stating the amount for premium and stamps incurred at £41 12s 6d, being the sum now sued for: Finds that the defender, neither in his said letter, nor in his defence, has challenged the accuracy of this charge, and the defender has not disputed the pursuers' right to receive the same: Finds, that the defence offered on the merits is, that during the currency of said policy the vessel insured was cast ashore on the coast of South America, and damages occasioned exceeding the sum sued for, and which the underwriters in the policy were liable in payment of: Finds, that the pursuers are not any of the said underwriters, and claims due by the underwriters cannot be set off against the undisputed sum demanded in this action by the pursuers: Therefore, repels the defences on the merits: Finds the defender liable in payment to the pursuers of the said sum of £41 12s 6d, being the amount of the premium of insurance and policy stamp sued for, with legal interest on that sum, from 8th October, 1858, when the same was due, and until paid: Finds the defender liable in expenses, allows an account thereof to be lodged, and remits the same to the auditor to tax and report and decerns.

Act. J. GEBBIE. *Alt.* J. CLARK.

Digest of English Cases.

1st JUNE, 1859.

COURT OF APPEAL IN CHANCERY.

In re THE WINDING UP ACTS AND THE MEXICAN AND SOUTH AMERICAN MINING COMPANY.

Evidence—Privilege of Witness.

A WITNESS declined to answer a question on the ground that by so doing he might criminate himself. *Held*, that it was for the Court to judge of the validity of the objection.

10TH AND 12TH MAY, 1859.

ROLLS COURT.

WILSON *v.* KEATING.

Sale of Shares—Agency—Payment of Purchase Money.

A, at the desire of B, and in his own name, though really as trustee for B, entered into a deed of transfer with C, whereby in consideration of certain sums stated to have been paid by A to C, the latter transferred to him certain shares in a Joint-Stock Company. It was admitted that the price of the shares was not really paid. B and the company afterwards became insolvent, and the shares became valueless. *Held*, that the deed of transfer was a valid contract betwixt A and C, (C having been ignorant of the understanding betwixt A and B), and that A was bound to pay the price of the shares, which he admitted notwithstanding the recital in the deed had not been paid.

15TH MARCH, 1859.

VICE-CHANCELLOR STEWART'S COURT.

KNIGHT *v.* BULKELY.

Assignment of Pension.

A PENSION for wounds granted to a retired officer in the army, may validly be assigned by way of security for payment of annuity.

21ST JANUARY, 1859.

COURT OF QUEEN'S BENCH.

REG. *v.* THE INHABITANTS OF THURLESTONE.

Poor Rates—Shooting.

CERTAIN lands were let to a tenant, but the right of shooting was reserved to the landlord. The annual value of the land without the right of shooting was £11 5s 8d, and with that right £26 19s 8d. *Held*, that the tenant was only liable to be assessed for the relief of the poor in the smaller sum.

Digest of English Cases.

24TH JANUARY, 1859.

COURT OF COMMON PLEAS.

CHOPE v. REYNOLDS.

Construction of Policy of Marine Insurance—Loss—Profit on Oil to arrive by a certain Ship.

A PURCHASED of B goods to arrive by the ship James Daly, and immediately effected an insurance on the goods at and from Africa to Bristol, "beginning the adventure upon the goods from the loading thereof." By a memorandum on the policy, it was declared to be on profit on palm oil, valued at £3000, etc. The ship was lost on the voyage home, but the goods in question were saved, and sent home by other vessels, safe and uninjured, and were sold by the insured. *Held*, that the insured was not entitled to recover as for loss of profit which he would have gained had the goods arrived by the ship James Daly.

The case of *M. Swiney* v. *The Corporation of the Royal Exchange Insurance*, (14, Q. B., 634,) referred to as the leading case on the subject.

17TH JANUARY, 1859.

COURT OF QUEEN'S BENCH.

BOOTH *v.* COLEMAN.

Insolvent—Discharge—Schedule.

AN insolvent, who had obtained his discharge, was sued by the indorsee of a bill which he had granted previous to his insolvency. In his schedule, in ignorance of the indorsation, he had stated the drawer as his creditor, and he had slightly understated the amount of the bill. *Held*, in the absence of any allegation of fraud, that the discharge was good against the indorsee.

COURT OF COMMON PLEAS.

TOWN *v.* THE LONDON AND LIMERICK STEAM SHIP COMPANY (Limited).

Practice—Service of Process—19 & 20 Vic. c. 47, sec. 53.

SERVICE of a writ of summons against an Irish Joint Stock Company cannot be made on one of the directors while in England, the Company having no office or place of business in England.

23D AUGUST, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

MILNE & Co. v. M'KEANDS.

Discharge—Suspensive condition—Settlement.—*Where, on adjustment of an account current, there was credited a sum as the probable dividend to be received from a bankrupt estate, it was stipulated that if the dividend should be more, the debtors should be credited with the difference, and if less, debited therewith. The creditors having received bills for the dividend, they, at a second adjustment of accounts, while the bills were still current, granted to the debtors a discharge in full of all claims; thereafter the bills having been dishonoured at maturity—Held, that the second settlement did not interfere with the suspensive condition of the first, and therefore the creditors were entitled to decree for the deficiency between the amount credited and the sum actually received.*

THE pursuers in this action concluded for payment of the sum of £20 2s 6d, as the amount due to them in respect in an account current, dated 19th March, 1858, they credited the defenders with a sum of £39 as the "probable dividend" to be received by them from William Miller Junior's estate, and on the express condition that if they should receive more, the defenders were to get credit for the difference, and if less, they were to be debited with the same. The pursuers had ranked on Miller's estate, as arranged with the defenders, for three bills handed by the defenders to the pursuers for that purpose, and received two composition bills for £18 17s 6d each, the one dated 29th May, 1858, payable at three months, and the other of same date, payable at six months. The first of those was paid, but the second was not, Miller having absconded before it fell due.

The defence to the action was a denial that any sum was resting owing, that all transactions between the pursuers and defenders were adjusted and settled between them on or about 5th July, 1858, and in support of the defence there was produced a letter or acknowledgment by the pursuers to the defenders in the following terms:—"Glasgow, 5th July, 1858. Messrs J. & T. M'Keand, Dear Sirs, We have this day received from you your acceptances at three and four months from 1st inst. for £24 each, the same being settlement in full of all our claims against you, it being understood that you pay Messrs Alexander M'Gavin & Co. their account for rent and charges against eighty kegs butter. Yours truly, (signed) James Milne & Co." To this letter there was appended the following note:—"We have granted the above bills, being settlement of account against us, (signed) J. & T. M'Keand." The receipt and payment of the two acceptances mentioned in this acknowledgment were admitted by the pursuers.

After a proof had been led for the pursuers, and the case debated, his Lordship (Mr Sheriff Smith) pronounced as follows:—

Having resumed consideration of this process, with the proof led, and productions, and having heard parties' procurators thereon: Finds, that on the 19th March, 1858, the pursuers and defenders adjusted the accounts between them, crediting the defenders with the sum of £39, as the probable dividend to be received by them from William Miller Jun.'s estate, on the express condition that should they receive more, the defenders were to get credit for the difference, and if less they were to be debited with the same: Finds, that the pursuers ranked on William Miller Jun.'s estate, and on 29th May, 1858, they received two composition bills of £18 17s 6d each, payable, one at three months, and the other at six months after said date, as their dividend on said estate; that the pursuers received payment of the three months' bill when it fell due, but the said William Miller Jun. absconded about the time the six months' bill became due, and they did not receive payment thereof: Finds, therefore, that the pursuers only received the sum of £18 17s 6d of dividend on William Miller Jun.'s estate, being £20 2s 6d less than they had credited the defenders with: Finds, that on 5th July, 1858, the pursuers and defenders again adjusted their accounts as at that date, and the pursuers granted the defenders the letter of acknowledgment, No. 6/1 of process, founded on by the defenders, that this was done during the currency of the two composition bills granted by William Miller Jun. to the pursuers: In law, finds, that the settlement of date, 5th July,

1858, must be held to have been made on the assumption that the two composition bills would be paid to the pursuers when due; that said settlement, therefore, did not interfere with or discharge the suspensive condition of the settlement on 29th March, 1858, and the pursuers are entitled to debit the defenders with the £20 2s 6d, being the difference between the sum then actually received from William Miller Jun.'s estate, and the sum of £39, which they credited the defenders with: Therefore repels the defence in terms of the conclusions of the summons: Finds the pursuers entitled to expenses, allows an account to be given in, and remits to the auditors to tax, and report, and decerns.

This judgment the Sheriff-Depute (Sir A. Alison) affirmed on appeal.

Act. T. G. WRIGHT. *Alt.* WM. MATHESON.

24TH AUGUST, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF SMITH.)

HOLLAND AND SON v. ARMOUR AND CO.

Bill—Composition—Discharge—Process—Proof—Writ or Oath.—*The indorsees of two bills having ranked upon the acceptors' estate with consent of the drawers, received composition bills, and before these became payable took the drawers' acceptances for the difference between the composition and the amount of the bills ranked, and granted a receipt to the drawers, settling all claims to its date. In an action at the instance of the indorsees against the drawers—Held, that an averment by the indorsees, that it was the understanding and arrangement between the parties, that if the composition bills were not paid, the drawers should still be liable to the indorsees for payment, could only be proved by the drawers' writ or oath.*

THE pursuers, who are silver-plate manufacturers in London, had, in the years 1857 and 1858, various business transactions with the defenders, who are watch manufacturers and wholesale jewellers in Glasgow. In the course of their dealings the pursuers discounted, or there were handed to them for value by the defenders, three bills of the aggregate amount of £274 18s 3d, drawn by the defenders upon, and accepted by Benjamin Tonks of Birmingham. During the currency of two of these bills Tonks became insolvent, and the pursuers, with consent of the defenders, ranked for the amount on his estate. The letter conveying the defenders' consent was expressed as follows: "Glasgow, 10th May, 1858, I hereby authorise you to accept of the composition offered by Benjamin Tonks of Birmingham on the bills indorsed by us to you."

Tonks' estate appeared to show a composition of 12s per pound, and the pursuers were put in possession of six composition bills, each for the sum of £18 16s 6d, payable at 3, 6, 9, 12, 15 and 18 months. The first of these bills fell due on 4th September, 1858, and was paid. Some few weeks after this bill fell due, the pursuers, at the defenders' request, furnished the latter with a statement of accounts between them, with the view to an adjustment of the pursuers' claims. In the statement rendered to the defenders, the pursuers credited the full amount of the six composition bills, and there being still a balance of £125 1s 2d due by the defenders, the latter handed the pursuers two acceptances for that sum dated on or about 2d October, 1858, and payable by two equal instalments.

On receiving these two last mentioned acceptances, the pursuers forwarded to the defenders at Glasgow the following receipt, which the defenders had previously written out and sent to the pursuers for their subscription in the same letter that enclosed the acceptances:—"Glasgow, 1st October, 1858, Received from Armour & Company, Glasgow, their acceptances at four and six months, each for the sum of sixty-two pounds nineteen shillings and sevenpence drawn by Robert Armour, Sen., and indorsed by him in our favour, said bills being balance of account for bills discounted by us for you which were dishonoured, and which now settles all claims to this date. (Signed) HY. HOLLAND AND SON."

Along with the receipt the pursuers returned to the defenders certain watches which had been deposited with the former, in security of the payment by Tonks of the three original bills indorsed by the defenders to the pursuers, and for two of which the pursuers had ranked on Tonks' estate.

When the above arrangement was made, and the receipt quoted granted, only one of the six composition bills had fallen due and been retired, the other five at maturity having been dishonoured, the present action was brought, concluding for decree against the defenders for the sums represented by these dishonoured bills.

In support of their claim the pursuers maintained that there had never been any intention on their part to discharge the defenders of their liability in the event of the composition bills not being paid, and they further averred that they were to retain in their possession Tonks' original acceptances as an evidence of their claim against the defenders, in the event of the composition bills being dishonoured.

The defenders pleaded in defence—(1,) That the pursuers having discharged their whole claims against the defenders by the receipt and arrangement referred to, they were not liable in payment of the sums sued for; and (2,) That the two original dishonoured bills by Tonks to the defenders, indorsed by them to the pursuers, being the only ground of debt on which the claim now made for the pursuers at any time rested, having become due before the granting of the receipt in question, the pursuers' claim was excluded.

Mr Sheriff Smith, after hearing parties' agents, pronounced the following Interlocutor:—

Having considered the closed record and whole process, and having heard parties' procurators thereon: Finds, that the statements of parties on record, and documents in process, instruct in point of fact, *first*, That in the years 1857 and 1858 the pursuers had a variety of transactions with the defenders, in the course of which the pursuers held two bills of exchange, drawn by the defenders upon, and accepted by Benjamin Tonks of Birmingham, both dated 13th Jan., 1858, one for £88 5s, payable four months after date, the other for £100, payable five months after date. *Second*, That during the currency of said two bills of exchange Benjamin Tonks the acceptor became insolvent, and applied to, and obtained from the Courts of Bankruptcy in England the benefit of a private arrangement under the superintendence and control of said Courts, in terms of the provisions of the Statute 12th and 13th Vic. cap. 106, and the pursuers, with the consent of the defenders, ranked upon Tonks' estate for the amount of the said two bills, amounting together to the sum of £188 5s; that the object of the defenders' consent being asked and given, was to entitle the pursuers to claim from them the amount of the difference between the sum in the bills and the composition. *Third*, That on the 1st June, 1858, the pursuers received from the said Benjamin Tonks six promissory notes, each for the sum of £18 16s 6d, and payable respectively at three, six, nine, twelve, fifteen, and eighteen months, being in all £112 19s, the amount of a composition of 12s in the pound, on their debt of £188 5s due by the said Benjamin Tonks. *Fourth*, That on the 1st March, 1858, and prior to Tonks' insolvency, the defenders deposited with the pursuers a quantity of watches to be held by them in security of any debt that might come to be owing by the defenders to the pursuers. *Fifth*, That the first of the promissory notes, granted by Tonks in payment of his composition, fell due on the 4th Sept., 1858, and was duly retired by the said Benjamin Tonks, who, however, became

bankrupt soon afterwards, and his estates were regularly sequestrated under the English Bankruptcy Statute, so that the pursuers never received payment of the other five promissory notes granted by him on 1st June, and amounting to the sum of £94 2s 6d. *Sixth*, That prior to Tonks' final bankruptcy the pursuers and defenders adjusted and settled their accounts, the pursuers crediting the defenders with the £112 19s, being the amount of the six promissory notes granted by Benjamin Tonks as his composition, the defenders granting the pursuers their acceptances to Robert Armour, Sen., for the sum of £124 19s 2d, and endorsed by the said Robert Armour to the pursuers, being the balance then due by the defenders to the pursuers, and the pursuers at the same time returned the defenders the watches deposited with them, and granted them the receipt and acknowledgment, No. 9 of process: Finds, that the pursuers aver that said settlement of accounts took place, and said receipt was granted by them on the faith, belief, and understanding, that the said Benjamin Tonks would be able to carry out his composition arrangement, sanctioned by the Court of Bankruptcy, and that the promissory notes granted therefor would be duly retired by him when due, and that it was part of the arrangement between the parties that the pursuers should still retain the original acceptances by Tonks to the defenders, endorsed by them to the pursuers as an evidence of their claim against the defenders, but the defenders deny this arrangement: In law, finds, that in the face of the receipt and discharge, No. 9 of process, the pursuers' said averment can only be proved by the writ or oath of the defenders; and before farther answer, allows the pursuers a proof of said averment by the writ or oath of the defenders, and to the defenders a conjunct probation so far as the same may be by writ: Grants diligence against havers, and appoints the case to be enrolled for the 15th inst., to fix a diet for proving.

Upon appeal the Sheriff Principal adhered. The following is his deliverance:—

Having heard parties' procurators under the pursuers' appeal upon the Interlocutor appealed against, and made avizandum, and considered the closed record, productions, and whole process; in respect the pursuers' offer of proof in regard to the circumstances attending the granting of the receipt and acknowledgment, No. 9 founded, goes to qualify or cut down a written instrument not challenged on record, on any ground competent in an improbation thereof, which is incompetent, and the averments thereanent can only be proved by the defenders' writ or oath: Dismisses the appeal, and adheres to the Interlocutor complained of.

Act. J. B. Dill. *Alt.* T. G. Wright.

24th August, 1859.

SHERIFF COURT, PERTH.

(Mr Sheriff Barclay.)

Freeman and Son v. Peter Comrie.

Bankruptcy—Preference—Diligence—Poinding.—*A creditor executed a poinding of the effects of his debtor, who more than sixty days afterwards became bankrupt. In the sequestration the creditor claimed to rank for his debt as preferable. The bankrupt having been discharged on a composition, and reinvested in his estate—Held, in a question with the discharged bankrupt, that a nexus having been laid upon the effects poinded, the creditor was entitled to carry out the diligence by sale.*

Quer: (1) *Whether a creditor, who by his diligence has acquired a preference prior to the sequestration, may proceed to sell pending the sequestration, or must the trustee realise the whole estate and recognise the preference?* (2) *What steps of diligence are necessary to complete a preference?*

The facts of this case are so very clearly set forth in the annexed Interlocutor of the Sheriff-Substitute, as to render recapitulation unnecessary:—

Finds, as *matters of fact*, (1) That Peter Comrie, (who shall be called defender) by his acceptance, No. 12 of process, bound himself to pay the poinders, (who shall be called pursuers,) the sum of £25 3s 11d three months after date, which was 10th March, 1857. (2) That said bill was protested, and the protest recorded and extracted on the 9th, and the defender charged to make payment on 10th July, 1857, all conform to No. 13 of process. (3) That on the 4th of August thereafter a poinding of certain household furniture was executed under the said recited diligence, and duly reported on the sixth of said month, all conform to execution of poinding, No. 1 of process. (4) That the defender was applied to by the pursuers' agent for payment of the sum in the diligence after the date of the poinding, when the defender asked for and obtained delay, and stated that if he was pressed he would require to go into the *Gazette*. (5) That upon the 19th October, same year, the defender paid to the pursuers' agent a sum of six pounds, part of which, with the defender's consent, was applied in payment of expenses, including that of said poinding. (6) That upon the 5th November, same year, the defender was incarcerated on the pursuers' said diligence, and on the same day a sequestration of the defender's estate was applied for by him and issued. (7) That the pursuers claimed in said sequestration, but preferably, to the extent of their said poinding. (8) That the defender having offered a composition on his debts, the same was accepted, and on the 28th May, 1858, he obtained his discharge conform to extract thereof, No. 9 of process. (9) That the defender by letter, No. 10 of process, on 15th December, 1857, objected to the pursuers' claim of preference founded on their poinding. (10) That on 16th August, 1858, the pursuers applied for warrant to sell under the said poinding for the balance remaining unpaid on their said bill and diligence, and under the order of Court the defender appeared to oppose such warrant: Finds as *matter of law* applied to the facts as herein before found—(1) That the pursuers by their poinding acquired a *nexus* or right in the effects therein included to be perfected in due form and order of law. (2) That under the admitted facts, and there being no competition of diligence, the defender cannot be heard to plead in bar of the pursuers' farther diligence the delay obtained on his own solicitation. (3) That the issue of the sequestration prevented the pursuers farther proceeding with the realisation by sale of the effects poinded; but the act of poinding being anterior of sixty days from the sequestration, the preference thereby obtained was not cut down and was maintained in the sequestration by the claim lodged for the pursuers. (4) That the defender being discharged under a composition contract, became reinvested in his estate, but subject always to such legal preferences as existed at the date of sequestration, and which were not thereby destroyed or limited. (5) That the defender by reason of his notice of challenge, is not precluded by his discharge from challenging the pursuers' preference if such challenge be otherwise valid in law. Lastly, That the delay between the date of the defender's discharge and the application for warrant to sell is under the circumstances not sufficient to preclude the pursuers from their legal remedy, seeing there exists no competing diligence, and the defender avers no prejudice by such delay. Therefore finds the pursuers entitled to warrant of sale as craved: Finds the defender liable in the expenses occasioned by his opposition thereto, remits to the auditor to tax the account thereof, and decerns.

Note.—The case is novel, and at first sight not without difficulty, though on closer examination this disappears.

The act of poinding was anciently a very solemn act, or series of acts, all of which were necessary to the full completion of the transference diligence.

The simple act of poinding now confers on the poinder an immediate right in the effects poinded, but which requires to be forthwith reported and followed out by sale and report thereof to complete the diligence and give right to the money proceeds of the sale, or to the effects themselves, where adjudged at the appraised values in default of purchasers. If in all or any of these acts there be *mora*, another creditor may by competition of diligence defeat the first attachment; but there is no principle or authority for setting aside the begun diligence on the objection of the debtor himself alleging nothing but delay, especially when such delay is the result of his own solicitation.

A mercantile sequestration arrests all individual diligence.

Those acts which fall within the term of sixty days are set aside, with some preference of the expenses which may have preserved the subject for the common benefit; but those steps of diligence which range beyond the prescribed period are valid as preferences. It is not clear whether the individual creditor may proceed to sell notwithstanding the sequestration, or whether the trustee must realise the whole estate, and recognise the preferences which are still good in law.

When a bankrupt gets his discharge on a composition contract, he is reinvested in his estate, but must take it as it existed at the date of sequestration, subject to all the preferences which were then valid in law. He is discharged of his common or unpreferable *debts*, but the *rights* obtained on such debts as are not cut down by the sequestration, and as such admittedly good against the trustee and the general body of the creditors, can on no reasoning be held less so as against the bankrupt himself.

On the whole, the poinders appear clearly now entitled to their warrant as much so as they were previous to the date of the sequestration of their debtor's estate.

On an appeal the Sheriff (Gordon) pronounced the following Interlocutor:—

The Sheriff having considered the defender's appeal, dismisses the same, affirms the Interlocutor appealed from for the reasons assigned in the Interlocutor and Note of the Sheriff-Substitute, and decerns.*

* The above decision has an additional interest from the following fact:—The Sheriff-Substitute at Perth, and his old friend, the late lamented Sheriff Steele of Glasgow, were in the practice of consulting each other on questions of nicety. The former stated the case to Mr Steele, asking whether such a case had occurred in the Glasgow Court, and to this request the following answer was returned:—

SHERIFF'S CHAMBERS, COUNTY BUILDINGS,
GLASGOW, 5th October, 1858.

MY DEAR BARCLAY,

Your question is a puzzler, and I cannot learn that the point has ever been decided here. Owing to a questioning some years ago, a general idea has prevailed, on which I myself have repeatedly acted, that until the warrant of sale, which is statutory and imperative, is granted, there is no *nexus* on the goods; but that thereafter there is a *nexus*, and that the proper course, therefore, is to go on until you get the warrant, and then if delay be wanted, renew the warrant on cause shown from time to time. I cannot myself say that considering the whole series of acts and cases, I am satisfied that this is a sound view; and I refer you more particularly to the *resumè* of the whole cases given by *Burton*, pp. 104, 5, 6, and to the opinion which he gives, that nothing short of the *report of sale* will complete the preference. I do not think that the observations in *Bell*, pp. 6, 16, 17, of *Shaw's Edition* detract from this view: and therefore were the questions arising in any competition, I would hold the diligence as clearly inept. But it occurs in no competition; here it occurs with the debtor. In that view I would be inclined to hold that as the debtor has reacquired the estate as it was in the hands of the trustee, who as a competitor would have been clearly preferable on the ground of the creditors' *mora*, the bankrupt is now in the same position as the trustee was, and is so far entitled to the benefit of the challenge of which he has given due notice; but if his hands are not clean in the matter, if he himself then *sui juris* interfered to occasion the delay, or if the position of his estate otherwise at that time rendered such delay beneficial to him, then I would on grounds of equity be inclined to hold that he was barred *personali exceptione* from any challenge now, and that he ought to admit the preference by which he is so far *lucratus*. At the same time, the matter is very far from clear either way, and I do not think that it would be absolutely wrong to cut down the poinding altogether on the one hand, or to support it altogether on the other, on the ground that the reporting of the poinding was all that was imperative, and that the warrant of sale, although imperative as to the Sheriff, if applied for, was *res merce facultatis* with the creditor if a *bona fide* and legitimate reason existed for delay.

You would see by our papers that the bar yesterday here donned their gowns and dress suits, which I am very glad of. These things have an effect that does not at first appear.

Ever yours, WILL. STEELE.

31st AUGUST, 1859.

SHERIFF COURT, WIGTOWN.

(MR SHERIFF REID.)

JOLLY OR M'CLINTON AND OTHERS v. JOHN M'CLEW.

Process — Submission — Action ad factum praestandum — Sheriff Court — Jurisdiction — Competency. — *One of two joint arbiters, mutually chosen to a submission, after having accepted and acted, refused to pronounce an award, or to concur with his co-arbiter in naming an umpire.—Held, that a summary action to compel him was incompetent in the Sheriff Court.*

Opinion—(*Sheriff differing from the Sheriff-Substitute,*) *that one of two arbiters cannot be compelled to pronounce an award, or to concur in nominating an umpire.*

THE petitioners, who were the personal representatives of the late William Jolly, farmer, Cairngarroch, entered into a submission with their brother, John Jolly, who was in possession of the moveable estate of his father, to the respondent and John M'Caig, farmer, Barnultoch, whereby they left to their decision the amount which they were respectively entitled to receive as legitim, and in the event of their differing in opinion they were to appoint an overman. The referees accepted of the submission, took evidence on various points, and made a valuation of the stock, crop, and other effects which belonged to William Jolly at the time of his death, and were ready to pronounce an award so far, but there being a sum of money in bank, which John Jolly alleged was his exclusive property. The arbiters on this point differed in opinion, the respondent holding the petitioners were not entitled to any share of it, and his co-arbiter (Mr M'Caig) holding the reverse. The money was deposited in these terms: "William Jolly, Cairngarroch, in liferent, and his son, John Jolly, in fee." Mr M'Caig was of opinion, that William Jolly having an interest in the sum in bank, it was part of the goods in communion, and the petitioners entitled to a share. The respondent (Mr M'Clow) having differed with him on this point, thereupon threw up the submission and declined to proceed farther, and also refused to concur in the naming of an umpire, which gave rise to the present summary action to compel him.

The defender pleaded in defence—(1,) That the matter in dispute undecided involved a point of law of which the respondent was not qualified to judge; and (2,) That he being one of two arbiters, was neither bound to decide, nor to name an umpire.

The record having been closed on the petition and minute of defence, after hearing parties' procurators, the Sheriff-Substitute pronounced the following judgment:—

Repels the defences and grants the prayer of the petition as craved: Finds the respondent liable in expenses, of which allows an account to be given in, and remits the same to the auditor of Court to tax and report, and decerns.

NOTE.—The general obligation resting upon an accepting arbiter to go on to a decision, and that he is not entitled to renounce the submission without stating a sufficient reason, has been determined. The validity of the reasons for refusing to proceed are for consideration upon the specialties of each particular case.

In this case there appears to have been a difference of opinion, 1st, as to a matter of fact, viz., whether one of the parties to the reference had a sum of money in bank, in his own name at his father's death; and 2d, as to whether, if he had such a sum, it should form part of the defunct's assets.

But it is plain that before any question of law could arise, which either of the arbiters might wish to devolve upon a qualified overman, the matter of fact ought to have been first ascertained. The point which was settled in the case of *White* against *Fergus*, in which one of two arbiters who refused to

decide a point of law of which he was not qualified to judge, was assoilzied from an action to compel him to decide or name an umpire, does not emerge in this case. Even where legal advice may be required by arbiters in the course of a submission, there is nothing to prevent their having recourse to it, and there may be cases in which, upon a difference between the arbiters, a qualified professional person would be preferred as oversman. But here the difference was, upon an unascertained matter of fact, which, as it should turn out, might or might not involve a difficulty or question of law. This forms no sufficient reason for the respondent's refusal to continue to discharge his duty as arbiter, and the Sheriff-Substitute has therefore granted the prayer of the petition. But even with a judgment against him, as the Lord President said in the case of the *Edinburgh and Glasgow Railway Company* against *Miller*, "How is the recalcitrating arbiter to be compelled to discharge his duty?" *Scottish Jurist*, p. 349, 23d March, 1853.

The respondent reclaimed and maintained that, he being one of two joint arbiters, he could not be compelled to decide or concur in naming an umpire, and in support thereof cited the case of *Millie or White* v. *Fergus*, 7th July, 1796; *Fac. Colln. and Mr Parker on the Law of Arbitration*, (2d edit.,) pp. 230, 231.

The petitioners answered, that although an arbiter was in no way bound to accept of a reference when tendered to him, it was a principle of the Roman law which had been adopted into ours from a very early period, that if he accept and act he is bound to discharge himself of the duty he has undertaken, and to pronounce his award disposing of the matter submitted, (*Regiam Majestatem*, B. 2, C. 4; *Erskine*, B. 4. 7, 3, S. 30; *Bruce*, 4th Dec., 1702; *Cairncross* v. *Hunter*, 8th Feb., 1704; *Skeeng*, 6th July, 1708; *and the Edinburgh & Glasgow Railway Co.* v. *Miller*, 23d March, 1853.) They farther pleaded that the case of *White* v. *Fergus*, founded on by the respondent, was one of very special circumstances involving nice and difficult questions of law, particularly as to whether legitim had been discharged, and as to which, after taking the opinion of counsel of high professional eminence, expressed in doubtful and ambiguous terms, the arbiters found themselves totally unable to come to any satisfactory or proper determination of the matters submitted to them, and that in these circumstances, the Court held that the arbiters were entitled to be relieved from the duty they had undertaken. The petitioners also referred to the *dictum* of Lord Braxfield in that case as noted by Mr Parker on *Law of Arbitration*, p. 229, which was, "arbiters cannot *dolore* throw up a submission, but may for good reasons," and in the whole circumstances, the petitioners maintained that the respondent had stated no reasonable nor even intelligible ground on which he ought to be relieved from discharging his duty, and craved that the Interlocutor ought to be affirmed.

The Sheriff (Urquhart) after considering the reclaiming petition and answers, pronounced the following Interlocutor, dismissing the action upon a defence adopted *ex proprio motu*, and indicating an opinion that the respondent being one of two arbiters, could not be compelled to decide in the submission or to concur in nominating an umpire:—

The Sheriff having resumed consideration of the appeal, with the additional answers and whole process, finds that this Court has no jurisdiction in the matter prayed for in the petition, No. 1 of process, and in respect thereof, recalls the Interlocutor under appeal, dismisses the action, and finds the respondent (appellant) entitled to expenses since the date of closing the record: allows an account thereof to be lodged, and remits the same to the auditor of Court to tax and report, and decerns.

NOTE.—The Sheriff can find no authority, nor perceive any principle for entertaining an action such as this in an inferior Court. A contract between two persons to submit their claims to a certain person named in the contract may no doubt be enforced against either of the parties to the contract in any Court having jurisdiction in the subject-matter of the agreement; but an arbiter is a judge solicited by the parties, and any action directed against him to compel him to proceed in his office and discharge his functions, if maintainable at all, can, it is thought, be brought only in the Court of Session, which has a super-eminent jurisdiction over all inferior judges and magistrates to enforce them to do their duty. If the Sheriff had felt himself entitled to entertain the action, on the merits, he must say that he would have found it very difficult to concur in the judgment of the Sheriff-Substitute in the face of the decision in White against Fergus. The Sheriff, considering the manner in which the record was prepared, does not mean to allow the expense incurred in adjusting the record to either party.

Act. C. BROWN, Stranraer. *Alt.* J. & H. ADAIR, Stranraer.

19TH SEPTEMBER, 1859.

SHERIFF COURT, GLASGOW.

(MR SHERIFF BELL.)

M'LELLAND AND WILKIE v. STEWART AND OTHERS.

Master and Servant—Apprentice—Indenture—Clause—Construction—Suspension.—*A boy entered the employment of a master, when the amount of service required was sixty hours per week, but was shortly after restricted to fifty-seven hours; while the latter was the rule, the boy became an apprentice, and continued to work the restricted time for a number of months. The master having again increased the time to sixty hours, required the apprentice to work that amount, or suffer a deduction from his wages at the rate expressed in the indenture. The apprentice having worked fifty-seven hours only —Held, in a suspension of a charge for payment of the wages under the indenture, that the written contract not having expressed the quantity of labour, it was fairly to be presumed that the apprentice had in view the then existing hours (fifty-seven) when he bound himself, and the indenture must be construed accordingly. The apprentice was therefore entitled to his full wages.*

THIS was a suspension, at the instance of M'Lelland & Wilkie, joiners in Partick, of a charge given them at the instance of John Stewart, one of their apprentices, with consent of his father and cautioner, in virtue of a registered indenture entered into between the suspenders and chargers, for payment of a balance of wages due to the charger, and for £10 of penalty stipulated by the indenture to be paid by the suspenders on failure to perform the conditions therein specified and undertaken.

In support of their petition, the suspenders averred—

(1.) That by the indenture the charger, John Stewart, with consent forsaid, bound himself as an *apprentice and servant* to the suspenders, M'Lelland & Wilkie, for four years, from 22d August, 1856, and became bound not to absent himself from his said masters' service, holiday or week day, on any pretence whatever, except in case of sickness, or when he should have asked and obtained liberty from his said masters, and if he should so absent himself, he should, in his masters' option, either serve two days for each absent day, or pay two shillings for each thereof. The number of absent days being declared sufficiently proven by the oath, etc., of the masters, to the exclusion of all other or further proof, the masters being entitled to the money penalty as soon as the same was incurred, by deducting it from the wages falling due to the said apprentice.

(2.) That by the said indenture the apprentice's weekly wages were stipulated to be *eight* shillings per week, which

were declared to be paid weekly, and declared to have been presumed to be paid at the end of each week, and should not be capable of being proved resting owing thereafter, except by the masters' writ or oath.

(3.) That there was a penalty fixed of £10 sterling, to be paid by the party failing to perform their part of said indenture, to the party performing or willing to perform.

(4.) That the hours of the journeymen and apprentices in the suspenders' employment, and particularly of the said John Stewart, at the date of the commencement of the said indenture, were sixty per week.

(5.) That some time thereafter the journeymen wrights or joiners in the suspenders' employment commenced working only fifty-seven hours per week, and the apprentices, and particularly the defender John Stewart, not being trustworthy in the conduct of work without the superintendence of a journeyman, were not compelled to work while there was not such superintendence of their work, but were paid the full wages stipulated in the indenture up till and inclusive of 7th April last; but having become more experienced, he was, in or about the end of March or beginning of April last, required by the suspenders to work the full time of ten hours per day, or sixty hours per week, or suffer a deduction from his wages at the rate specified in said indenture, corresponding to the time he so failed to work. He did not work, and the deduction, in terms of the indenture, was accordingly made by the suspenders. That some time since the journeymen wrights or joiners in and around Glasgow, or an illegal association or combination of them, resolved to make their working hours only fifty-seven hours per week, and endeavoured to get the apprentices in the trade to insist for the same. This was resisted, and the consequence was a series of contests in the Sheriff Small Debt Court, and elsewhere. In these the apprentices and their coadjutors had been defeated.

(6.) That all along the charger's wages had been regularly calculated, and after deducting the hours of absence, been ready and offered for his acceptance, along with the wages of the other workers in the suspenders' employment, all conform to pay book exhibited, and which wages (amounting *in cumulo* to £4 4s 9d), were consigned in Court, but he would not take these, being supported by an illegal combination or society, who were the real instigators of the charges under suspension.

(7.) That the suspenders were not due the sums charged. They had all along been ready to pay every farthing of wages claimable in either law or equity by the chargers. They had not failed in performing any part of their contract with the chargers.

(8.) That the chargers had failed, at least the said John Stewart had failed in the performance of his part of the foresaid indenture, particularly by his wilfully and unnecessarily absenting himself without leave, and failing faithfully, honestly, and diligently, to attend to serve and obey his said masters the suspenders.

The suspenders pleaded—That on these grounds, and others, they were entitled to have the said charge and diligence suspended, and the chargers subjected in costs.

The chargers, in defence, admitted the first, second, and third averments of the suspenders, under reference to the indenture referred to; but denied the others under reference to their statement, in which they averred—

(1.) At a public meeting of joiners, employers and workmen, held in Glasgow, 11th March, 1854, the following regulations were, *inter alia*, agreed to by both parties:—"That fifty-seven hours is the full complement of a week's labour, instead of sixty as formerly;" and (2), "All hours more than the complement is overtime, and paid for as such." The suspenders were consenting parties to these regulations, and have since this date acted upon them.

(2.) From 11th March, 1854, to on or about the month of November, 1856, the workmen in the suspenders' employment wrought sixty hours per week, and were, in terms of the second regulation above quoted, paid for the additional three hours as extra time. Since the latter date, fifty-seven hours had been the full complement of a week's work in the suspenders' shop, and no extra time had been wrought.

(3.) On 22d August, 1856, the respondent, John Stewart, commenced to work in the suspenders' shop at Partick, and on 1st August, 1857, an indenture was entered into betwixt him and the said Donald Stewart, as his cautioner, on the one part, and the suspenders on the other, whereby the said John Stewart undertook to serve the suspenders in their business of joiners for, and during the full and complete space and period of four years, from and after the said 22d day of August, 1856.

(4.) By this indenture, the suspenders bound and obliged themselves (1) to teach, learn, and instruct their apprentice in the hail points and articles of their art and vocation of joiners, in so far as known to or practised by them, and in so far as the apprentice should be able to take up the same; and (2) to pay to the apprentice the sum of eight shillings weekly during the indenture, in full of all demands which the apprentice could have against them for his service. The penalty for failure to implement the obligation was fixed by the indenture at (£10) ten pounds sterling.

(5.) At the date when the indenture was entered into, and for at least a month preceding, down even to the present day, the working hours in the suspenders' shop were as in all the other shops in the trade in Glasgow, and are fifty-seven per week, the rule being that the week's work is completed at two o'clock on the Saturday afternoon.

(6.) Since the commencement of his indenture, the charger, John Stewart, had faithfully and honestly discharged his duties to the suspenders. He had wrought the full working hours of the shop, and continued to do so down to the date of this action.

(7.) Notwithstanding this, the suspenders, upon the unfounded pretext that John Stewart absented himself from his work without their authority, insisted upon retaining nearly the one-half of the wages earned by him for each week since the 24th of March last, from which date to the 1st September last, they had only paid him the sum of £3 14s 6d; and it was to compel the suspenders to implement the obligations undertaken by them in the said indenture, the respondents had recorded the deed, obtained warrant, and given the charge sought to be suspended.

They, therefore, pleaded that they were entitled to have the letters of diligence found orderly proceeded, and the suspension dismissed.

Proof having been allowed, and one of the suspenders examined, parties put into process a minute of the following admissions, which they agreed to hold as their respective proofs:—

From 11th March, 1854, till March, 1857, the suspenders' employees wrought sixty hours per week, the journeymen getting twenty-five shillings per week, while journeymen in other similar employment got remuneration at a lower rate, they only working fifty-seven hours per week, and the hours of labour of journeymen in the suspenders' employment are still the same, viz., fifty-seven hours per week.

(2.) The apprentice charger entered the suspenders' service when the hours were sixty per week, and these hours were, in March, 1857, reduced to fifty-seven, and that reduction continuing till April, 1858, when the apprentices were required

to work sixty hours per week, the journeymen working only fifty-seven.

(3.) In no other work are apprentices asked to labour longer than journeymen.

(4.) An apprentice of the charger's experience, as at April, 1858, could not work so as to obtain increased knowledge and experience of his business, without the superintendence or assistance of a journeyman or master.

The Sheriff-Substitute thereafter, having heard parties' procurators, pronounced the following judgment:—

Finds it instructed by the execution of charge annexed to the extract registered indenture, No. 6, that the suspenders were charged to make payment of the sum of £9 4s of wages, less £4 4s 6d, leaving a balance of £4 19s 0d, and also of the sum of £10 of penalty: Finds, that the suspenders admit that there is a sum of £4 4s 9d of wages due to the charger, so that the sum of wages really in dispute is only the difference between the said sums of £4 19s 6d and £4 4s 9d, being 14s 9d: Finds, that the right to withhold said 14s 9d depends upon whether the suspenders are entitled to demand that the charger shall work to them sixty hours in the week, instead of fifty-seven, which the charger maintains to be the full period: Finds, that when the charger entered the suspenders' service, in August, 1856, the hours for both their journeymen and apprentices were sixty per week, but their journeymen were paid at a higher rate than in other works where the hours were only fifty-seven: Finds, that in March, 1857, the suspenders reduced their hours to fifty-seven for both journeymen and apprentices, and these were the hours in August, 1857, and had been so for five months preceding when the indenture, No. 6, was entered into between the charger and suspenders: Finds, that the suspenders' journeymen have ever since worked only fifty-seven hours per week; but in April, 1858, being eight months after the execution of said indenture, the charger and the other apprentices were again required to work sixty hours per week, and the sum in dispute was deducted from the charger's wages in consequence of his refusal to do so: Finds it admitted by the suspenders, that in no other work are apprentices asked to labour longer than journeymen, and that the charger could not have worked since April, 1858, so as to have obtained increased knowledge and experience in his business without the superintendence or assistance of a journeyman or master: Finds, farther, that although sixty hours per week was the rule at the time the charger entered into the suspenders' employment, it had ceased to be the rule for some months before he bound himself to them as an apprentice by the said indenture, and it is fairly to be presumed that he had the then existing number of hours in contemplation when he so bound himself, and the suspenders reserved no power by the indenture to revert to the old hours, which they did not attempt to do for eight months afterwards: Therefore authorises the clerk of Court to pay over to the charger the sum of four pounds four shillings and ninepence, consigned by the suspenders in his hands; and as regards the balance of fourteen shillings and ninepence, repels the reasons of suspension, and recalls the interim sist of execution formerly granted: Finds, as regards the £10 penalty charged for, that the charger has failed to instruct any ground for demanding the same: Therefore, as regards that sum, sustains the reasons of suspension and dismisses the charge: Finds, in the whole circumstances, the suspenders liable in half costs.

This judgment the Sheriff-Depute on appeal confirmed, adding to his Interlocutor the following note:—

NOTE.—This is a case of considerable importance, as all cases are which relate to disputes between masters and workmen, or their apprentices; but after having given it his most serious consideration and attention, the Sheriff has arrived at the conclusion that, in the circumstances that here occur, the interlocutor of the Sheriff-Substitute is well founded, and that the period of time for which the charger contends he is bound to work, is that to which he is entitled. The two general principles that must regulate all cases of this description, are 1st, That where the parties have put their hands to a written instrument or contract, that must be the sole rule for decision in regard to all particulars of which distinct mention is made in the writing; and 2d, That in regard to those particulars of which no mention is made, which unfortunately is very frequently the case in regard to the most important ones, the matter is to be regulated by the existing custom, which it is to be presumed the two parties had in view in forming the contract. These are the sole elements of decision in all such cases, and are entirely exclusive of any subsequent resolutions, either of the masters on the one hand to increase the hours of labour, or diminish the remuneration, or of the workmen on the other to diminish the one, or increase the other. These principles appear to afford a satisfactory solution of the dispute between the parties in the present case. If the indenture between the parties produced in process had specified the number of hours of work, either of the day or week, it would have furnished the sole and most satisfactory ground of decision. But unfortunately it is entirely silent on that point, making no mention of the time at all, except to the effect that the apprentice is to give regular attendance, ordinary day and holiday, except when authorised to be absent by the masters; and that for every day of unauthorised absence he is to forfeit two shillings, to be deducted from his ordinary wages. In the absence, therefore, of any specific agreement in the written contract of parties on this point, the Court is driven to consider what *must be presumed to have been their understanding* and agreement in regard to the important matter on which the contract is silent. Upon this point the facts appear to be that, on 11th March, 1854, the journeymen joiners had come to an agreement, and put forth a placard declaring the hours of working for journeymen restricted from sixty to fifty-seven hours a week: that this restriction was acted upon from that day forward by the journeymen generally, though not by those in the suspenders' workshop, from whom the sixty hours were still exacted down to March, 1857, when they too adopted the fifty-seven hours a week. During all this time the hours for the apprentices, both in the suspenders' shop and elsewhere, were sixty hours a week. Meanwhile the charger entered into a contract of apprenticeship with the suspenders, which is dated 1st August, 1857, but in which the period of service is declared to have commenced on 25th August, 1856. The suspenders followed the other masters in adopting the fifty-seven hours service a week in March, 1857, both as to journeymen and apprentices: and subsequently after the contract was signed they reverted to the demand for sixty hours a week from the apprentices, and the decision of the present case depends on the question whether the charger, as an apprentice, was entitled to resist that regulation. The Sheriff thinks he was, and that the interlocutor appealed against, which is to that effect, should be affirmed, because in the absence of any written agreement on the point, we must look to what must be presumed to have been the intention of parties, though not expressed, in entering into the contract, and that in a contract entered into on 1st August, 1857, must be presumed to be in the matter of the hours of work, *those which had prevailed in the suspenders' workshop since the March preceding.* This is the ground of the Sheriff's decision, viz., that in the circumstances, fifty-seven hours a week must be presumed to have been in the contemplation of the parties when they signed the contract. This is the sole ground of his decision, and he rests nothing on the placard issued in March, 1854, except as an element in considering what must be presumed to have been the intention of parties in this particular contract. He would by no means be understood as giving any countenance to the idea that it is in the power of an associated body, either of masters or workmen, by a resolution of their own to break through existing contracts, or deprive the contract either for the time or the remuneration of labour, of any other character, than that of being an ordinary consensual agreement binding on both parties till altered by mutual consent. In the circumstances of the case, however, there does not appear to be any ground for demanding the penalty contained in the indenture, especially as both parties, by being silent in their agreement on the matter of time, inevitably ran the matter into a law-suit when it came to be seriously disputed. On this account, the finding of half costs due to the charger appears to be reasonable, but they must be taxed on the lowest scale for the Ordinary Court; both because the charger, by choosing to give a charge on the registered contract, necessarily drove the suspenders into this Court, where alone a suspension is competent, and because the case was one of too much delicacy and importance to be made the subject of a hurried decision in the Small Debt Court.

Act. J. L. LANG. *Alt.* J. GALBRAITH.

20TH SEPTEMBER, 1859.

SHERIFF COURT GLASGOW.

(MR SHERIFF BELL.)

W. L. M'PHUN, TRUSTEE FOR HUNTER AND NORWELL'S CREDITORS, v. C. AND R. BLACK.

Trust Deed—Competition—Preference.—*A conveyed his whole estate to B in trust for behoof of his creditors, and after intimation thereof to all concerned, transferred a portion of his stock to C, one of the creditors, in extinction,* pro tanto, *of a prior debt—Held, in a question between B (the trustee) and C, that the transference was not effectual, and that C was liable in the price.*

On 10th March, 1858, Hunter & Norwell, mill-wrights and tool-makers, Glasgow, executed a trust deposition, whereby they conveyed their whole estates, real and personal, including their entire stock in trade, in favour of the pursuer in trust for behoof of their creditors, with power to him to sell and dispose of the whole effects, and to settle with the creditors by composition or otherwise. The pursuer entered into possession under the deed, which was intimated to all the creditors, including the defenders. On 5th April, 1858, Hunter & Norwell, notwithstanding that they were divested of their estate, sent to the defenders, at their own hands, and without communicating with the pursuer, a dumbcraft, (an apparatus or tool for lifting heavy weights or loads,) along with an invoice or receive note. The pursuer having learned, on the same day, that this had been done, caused a receive note of the dumbcraft to be made out in his own name, as trustee for the creditors of Hunter & Norwell, and sent it to the defenders. The defenders having refused to pay to the pursuer the price of the dumbcraft, he raised this action against them, concluding for payment of £15 as the price thereof.

The defenders pleaded in defence—

(1,) No title to sue.

(2,) The dumbcraft in question was delivered to the defenders by Messrs Hunter & Norwell, the owners or reputed owners thereof, on the express agreement and understanding that the value of it was to be applied in payment *pro tanto* of certain counter claims which the defenders had against the said Hunter & Norwell.

(3,) Independently of such agreement, the defenders were entitled to impute the price or value of the dumbcraft towards payment of the defenders' claims, a statement of which was produced.

A proof having been allowed, Mr Sheriff Bell, after having heard parties' procurators, and resumed consideration of the proof, productions, and whole process, pronounced the following Interlocutor, which was adhered to on appeal:—

Finds, that on the 10th March, 1858, the trust deed, No. 5/1, was executed in favour of the pursuer, by Hunter & Norwell, mill-wrights and tool-makers: Finds, that by said deed, Hunter & Norwell conveyed their whole estates, real and personal, including their entire stock in trade, to the pursuer for behoof of their creditors, with power to the pursuer to sell and dispose of the whole effects, and to settle with the creditors by composition or otherwise: Finds that the pursuer entered into possession under said deed, which was intimated to all the creditors, and to the defenders among the rest: Finds that a trust deed for effecting the sale and equal distribution of an estate, though without any reciprocal contract on the part of the creditors, is nevertheless valid and effectual if completed, as was the case here, before diligence has been commenced by any of the creditors, and if sixty days elapse without the debtor being made a bankrupt: Finds that, notwithstanding that Hunter & Norwell were thus divested of their estate, they, upon the 5th April, 1858, sent to the defenders, at their own hands, and without communicating with the pursuer, the dumbcraft in question, along with the invoice or receive note, No. 6: Finds that the pursuer having learnt, on the same day, that this had been done, immediately instructed his clerk, the witness John Moir Wright, to make out a receive note of the dumbcraft in his, the pursuer's name, as trustee for the creditors of Hunter & Norwell, and send it to the defenders: Finds that this was done accordingly, and the defenders admit, by a minute in the pursuer's proof, that they got the said receive note: Finds that the dumbcraft so sent to the defenders, had been made by Hunter & Norwell previous to the execution of the trust deed, and had been sent by them to a Mr Gray in Washington Street, with a view to its being sold by him; but it was there pointed by some of Hunter & Norwell's workmen for their wages, which the pursuer afterwards paid, and got back the dumbcraft, and it was after all this, and when it was in the pursuer's exclusive possession, that Hunter & Norwell sent it to the defenders: Finds that said defenders refuse to pay for the dumbcraft, on the ground that the price is compensated by a counter account due to them by Hunter & Norwell, who had undertaken to send them a dumbcraft, in liquidation of said account; but Finds that the defenders cannot in the circumstances successfully maintain this plea, seeing that the dumbcraft was vested by the foresaid trust deed in the pursuer, who was alone entitled to dispose of it, and that it would have the effect of giving the defenders a preference over the other creditors of Hunter & Norwell, if they were entitled thus to get full value for their debt, at the expense of the general estate: Finds, that as the defenders personally knew of the granting of the trust deed, they were timeously certiorated by the receive note in the pursuer's name, that they would have to settle for the dumbcraft with him, and as they did not then offer to return it, nor have done so since, they must be held as having received it as purchasers from the pursuer, and the difficulty adverted to in the note to the interlocutor of the 14th inst. is thus obviated by the defender's admission, to which the Sheriff-Substitute had not formerly adverted, that the pursuer's receive note duly reached them, and was retained without objection: Therefore repels the defences, and decerns against the defenders in terms of the conclusions of the summons: Finds them also liable in expenses.

Act. W. B. FAULDS. *Alt.* J. B. DILL.

END OF VOL. I.

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Reparation—A boy of six years of age having been killed through falling into a reservoir, used for cooling hot or boiling tar, upon the premises of manufacturing chemists, the father of the child brought an action to recover solatium and damages from the owners, on the ground that the field in which it was situated, although in a populous district and adjoining the high road, was unfenced—Held, that premises being private property of defenders, the boy was a trespasser, and no liability attached. Farther, that the pursuer was not *in titulo* to raise the question whether the injury might have been prevented had there been a fence around the cooling pit, 59.
Retention—
(1.) The agent for a branch bank became bound, by the bond granted by him, to pay to the bank one-eighth of the losses that might occur in the business transacted by him. He discounted in this capacity certain bills. He had previously made a purchase of timber from the party who was one of the obligants on the bills. This party having become bankrupt, in an action at the instance of the trustee on his sequestrated estate against the bank agent for the price of the timber—Held, that as the bankrupt had not come under any obligation to pay to the agent the amount of loss he had bound himself to pay to the bank, and as there was no privity of contract on the part of the bankrupt with the agent and the bank, he was not entitled to plead retention of the price of the timber, as against the bankrupt estate; and as the bank had ranked upon the estate for the full sum in the bills, to sustain the plea would be to allow a

second ranking on the estate for the same debt, 11.
(2.) Where, under the provisions of the Mercantile Amendment Act, a seller of goods attaches them, while in his own possession, by arrestment or poinding, prior to the date of intimation of a re-sale of the goods to a subsequent purchaser—Held, that an arrestment or poinding so used is entitled only to the same limited operation and effect, in a competition, as any arrestment or poinding used by any other creditor of the original vendee; and therefore does not interfere with the right of the sub-vendee to demand delivery under the provisions of sec. 2 of said Act, 44.
Removing. See Landlord and Tenant.
Revival of Action. See Process.
Road. See Turnpike Act.

Sale—
(1.) A purchaser held not entitled to dock warrants or delivery orders, where contract stipulated goods to be shipped f.o.b., 6.
(2.) Circumstances held to constitute a contract of sale of heritage, 8.
(3.) The seller of goods found entitled to take them back after delivery, the buyer having absconded insolvent, 9.
(4.) The owner of a stolen horse held entitled to recover its value from a *bona fide* purchaser, 13.
(5.) Circumstances in which action desired on a warranty of soundness, 61.
(6.) Seller assoilzied, where, at sale of a cow to a butcher, no warranty was given, and the purpose it was to be applied to not specified at time of sale, 62.
(7.) A purchaser's claim for repetition of price of oil bought by him, barred by failure timeously to reject it, and breaking bulk, 70.
(8.) An Iron Broker found entitled by custom of trade to re-sell iron purchased for a principal, and to claim loss on re-sale from the latter, 95.
Sequestration. See Bankruptcy.
Settlement. See Discharge.
Sheriff Court. See Process.
Sheriff Court Act. See Appeal—Citation.
Small Debt Act. See Expenses—Decree—Suspension.
Submission. See Process.
Suspension—Suspension granted of a Small Debt Decree followed by imprisonment, 7.
See also Master and Servant.
Suspensive Condition. See Discharge.

Tontine—A Tontine Society sold its property to meet debts, and made further calls upon the shareholders—Held, that a shareholder, whose nominee had survived the sale of the Society's assets, but died before the call was made, is liable for a proportion of the loss incurred effeiring to such nominee's interest in the concern, 47.
Trust Deed—A conveyed his whole estate to B in trust for behoof of his creditors, and after intimation thereof to all concerned, transferred a portion of his stock to C, one of the creditors, in extinction, *pro tanto*, of a prior debt. Held, in question between B (the trustee) and C, that the transference was not effectual, and that C was liable in the price.
Turnpike Act—
(1.) A dissenting clergyman found entitled to exemption from toll dues, 29.
(2.) A summons against Road Trustees and others, which did not state the place where accident occurred, was under control of defenders, dismissed, 32.
(3.) The exemption of the 37th section of the General Turnpike Act applies to traffic between detached portions of land, although leased under different writings, 46.

Vesting. See Deed.

Wakening. See Process.
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Witness (Instrumentary). See Deed.
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