

at the request of the fishermen of that place and relatives of the men lost, asking the Board to institute an inquiry. The Board took steps to get further information as to the matter; and thereafter, on 28th October 1864, they forwarded to Mr Wilson a copy of the explanation of the master of the steamer as to the cause of the accident. The present action was not brought until September 1865, the Board having taken no steps in the interval. In these circumstances the Lord Ordinary thinks it must be held that the Board refused to institute the inquiry. It appears from the recent correspondence produced in process that this is the view taken by the Board itself; and the Lord Ordinary thinks it is the true construction to be put on the facts of the case. The defenders found upon the special provision in the clause that 'the Board of Trade shall, for the purpose of entitling any person to bring an action or institute a suit or other legal proceeding, be deemed to have refused to institute such inquiry, whenever notice has been served on it by any person of his desire to bring such action or institute such suit or other legal proceeding, and no inquiry is instituted by the Board of Trade in respect of the subject-matter of such intended action, suit, or proceeding for the space of one month after the service of such notice.' The defenders maintain that it was only by compliance with this provision that the pursuers could be entitled to bring the action, and that it was requisite that there should be notice of the intention to bring the action, and that it should be served upon the Board by the pursuers themselves or their agent. The Lord Ordinary cannot adopt this construction of the provision. He thinks it was intended to protect the rights of parties alleging injury, by enabling them to require the Board either to proceed with an inquiry, or to leave the field open for an action by the private party. He does not think it was intended to derogate from the effect of the general provision as to the Board refusing to institute an inquiry. Wherever it can be established in a satisfactory manner that the Board has already refused to institute an inquiry, no matter from whom the application to do so may have proceeded, it does not appear to the Lord Ordinary to be necessary for the party wishing to bring an action to serve notice upon the Board of his intention to do so."

Counsel for Pursuer—Mr Gifford and Mr Thomson. Agent—Mr James Renton jun., S.S.C.

Counsel for Defenders—Mr Millar. Agents—Messrs J. & R. Macandrew, W.S.

Thursday, May 17.

## FIRST DIVISION.

### M'CUBBING v. SPALDING.

*Reparation—Wrongous Sequestration—Relevancy—*  
Averments in an action of damages for wrongous sequestration which held irrelevant.

This is an action of damages for wrongful sequestration by a landlord. The defender pleaded that the action was irrelevant.

The pursuer was tenant of certain lands under the defender, on a lease for a term of years. On 3d December 1862 an agreement was concluded, by which the pursuer gave up the farm as at Whitsunday 1863, in regard to the houses and grass; and at the separation of the crop of the year, as to the arable lands. The defender agreed to take the white crop of that year off the tenant's hands at a

valuation to be fixed by arbiters mutually chosen. On 10th August 1863 the landlord presented a petition for sequestration of the growing crop to the sheriff of the county. There was then due by the pursuer a balance of the half-year's rent payable at Martinmas 1862, amounting to £26, 1s. 6d., and the whole half-year's rent, amounting to £77, 16s., payable at Whitsunday 1863. In other words, there was an amount of rent in arrear, of which part was nine months and part was three months past due. Under this application a sale was made of the growing crop, by warrant of the sheriff. The pursuer now complains that this sequestration and sale were wrongful proceedings, seeing that the landlord had full security in the agreement to make over the growing crop at a valuation. He says that the sale under sequestration was made at inadequate prices. But he admits that no pecuniary damage rose to him in consequence, for a valuation of the crop took place by arbiters mutually named. The pursuer got credit for the amount of the valuation in settling with the landlord, and received payment of the balance due to him after paying his rent. His present action of damages is accordingly limited to reparation of the alleged damage to credit and feelings by the proceedings of the defender in the sequestration of August 1863.

The pursuer proposed the following issue:—

"It being admitted that the defender applied for and obtained the warrant of sequestration dated 10th August 1863, annexed to the petition, No. 10 of process, and that the said warrant was executed:

"It being also admitted that the defender applied for, and obtained the relative warrant of sale, dated on or about 21st August 1863, and in virtue thereof sold by public roup the growing crop belonging to the defender on the said farm of Cub-box:

"Whether the said warrants were wrongously applied for and executed, to the injury and damage of the pursuer?"

Damages laid at £300.

The LORD ORDINARY (Kinloch), in reporting the issue, observed that he thought the action was irrelevant, on the pursuer's own statement. The pursuer showed no ground in law on which the landlord was to be held not entitled to exact payment of the rent when it fell due, or barred from using the appropriate diligence for its recovery when unpaid, merely on account of the bargain about taking the tenant's white crop at the issue of the lease. There might have been very good reasons why the landlord did not trust to this security, or delay exacting his rent. For anything that appears, the landlord was entitled to use all ordinary personal diligence for recovery of the past due rents, and there seems no reason why he should not equally use sequestration. The pursuer did not maintain that the sequestration was used for rent not covered by the hypothec. It was admitted that no actual loss was sustained by the tenant. The Lord Ordinary could see no legal ground for sustaining a claim at his instance for injury to credit and feelings.

After hearing counsel for the pursuer, who referred to Mackay v. Grant, June 14, 1865, 3 Macq. 994, the Court to-day, adopting the reasoning of the Lord Ordinary, unanimously dismissed the action, with expenses.

The LORD PRESIDENT—I think, on the whole, there is no tangible ground of damage here. As to real injury, it has been held that the landlord is

liable for the amount of the valuation, and that has been paid. I see no good basis in law for the claim of damage for injury to feelings.

Lord CURRIEHILL.—The landlord's hypothec undoubtedly attached to this crop; and if there had been no agreement, it is clear he was entitled to do all he did. The question is, did the agreement prohibit him from making his hypothec effectual? Some proceeding was necessary for the purpose. I don't see anything in the agreement which prohibits him. I think the landlord has done nothing which he was not legally entitled to do. Any damage which has been caused has resulted to him, and not to the pursuer.

Lord DEAS—I am of the same opinion. The question is whether the landlord did anything illegal, and that depends upon the terms of the agreement. It was entered into in December 1862. Is there anything in it to prevent the landlord sequestrating if he sees that necessary? The tenant's ordinary creditors might have carried off the crop if it had not been secured by sequestration. I see nothing in the agreement by which the landlord abandoned his legal rights. We are not in the habit of sending parties out of Court in cases of this sort very readily; but on the pursuer's own showing he has no case against the defender.

Lord ARDMILLAN concurred.

Counsel for Pursuer—Mr Millar and Mr J. G. Smith. Agent—Mr W. S. Stuart, S.S.C.

Counsel for Defender—Mr Gordon and Mr J. H. A. Macdonald. Agent—Mr John A. Macrae, W.S.

#### GLEBE SUGAR REFINING COMPANY v. LUSK.

*Reparation—Slander—Company—Issue.*—Form of issue in an action of damages for slandering a mercantile company.

*Process.*—An action having been raised by a company and its partners, as partners and as individuals, and not insisted in by the partners as individuals, held that the defender was entitled to have the action dismissed in so far as not insisted in.

In this action of damages in which the Glebe Sugar Refining Company, sugar-refiners in Greenock; and James Johnstone Grieve, Charles Philip Hunter, John Kerr, and Walter Grieve, all merchants and shipowners in Greenock; and Abram Lyle, merchant and sugar-refiner there, partners of the said Company, are pursuers; and Robert Lusk, wholesale grocer and sugar broker in Greenock, is defender, the following issue was to-day adjusted: "Whether, on or about 14th November 1865, the defender, within the public coffee-room or news-room in Greenock, commonly called and known by the name of the Greenock Coffee-room, situated in or near Cathcart Square, Greenock, and in the hearing and presence of Hew M'Ilwraith, writer in Greenock, and then one of the bailies of the town of Greenock; Mr William Neill, surveyor at Greenock to the Glasgow Underwriters' Association, and shipowner there; Mr Peter Ballingall, accountant, Bank of Scotland, Greenock; Mr Robert Morrison, assistant surveyor or officer of customs, Greenock; and Mr John Lyle, wine and spirit merchant, Greenock, or one or more of them, did falsely and calumniously say of and concerning the said Glebe Sugar-Refining Company that their conduct or actings in regard to what the defender called Ker Street of Greenock was infamous, or most infamous, or did use words of similar import; meaning thereby that the said company had been guilty of dishonest and dishonourable conduct,

to the loss, injury, and damage of the pursuers?"

Damages laid at £2000.

The action had been raised at the instance of the company and its individual partners, as such partners and as individuals; but at the adjustment of the issue,

GIFFORD and WATSON, for the pursuers, stated that they did not intend to insist in the action for the individual pursuers as individuals. Whereupon

The LORD ADVOCATE (with him the SOLICITOR-GENERAL and J. G. SMITH), for the defender, moved that the action should be dismissed, in so far as it was raised at the instance of the individual pursuers, as individuals.

GIFFORD submitted that this was not usual or necessary. He was willing to delete the words "and as individuals" from the principal summons.

The Court thought that the defender was entitled to have the action dismissed to the extent asked, which was done.

Agents for Pursuers—Patrick, M'Ewen, & Carment, W.S.

Agent for Defender—W. Archibald, S.S.C.

## SECOND DIVISION.

M.P.—CAHILL v. SPENCE AND OTHERS.

*Presumption of Life*—Circumstances in which held (aff. Lord Kinloch) that there was no evidence to prove that a person was dead.

This case was raised for the distribution of the estate of the late Captain John Cahill, who died at the Cape of Good Hope in 1853, survived by a brother, Lieutenant David Cahill, who died in 1854. Mrs Mary Wilson or Cahill, the widow of David, was appointed administratrix of the estate of John by the Prerogative Court of Canterbury; and the main question raised in this process was whether a third brother, named Patrick Cahill, was alive, and if dead, when he died.

If he predeceased either John or David the whole of John's estate went to David's widow. If he survived David, the one-half of John's estate would fall to him, or to his next of kin.

It appeared from the proof which was led that Patrick sailed from London in 1852 for Australia, on board the ship Mermaid, that he wrote from off the Cape, but that nothing had been heard of him since.

After the proof had been taken, Mrs Spence appeared as a claimant, alleging that she had been married to Patrick in 1843, that he soon after deserted her, that she had obtained decree of adherence in February 1852, and also alimony at the rate of £30 a-year from 1843. She then obtained a decree of divorce, and now claimed £270 of arrears of alimony decreed for and £203 of interest.

The Lord Ordinary (Kinloch) held that there were no circumstances established sufficient to prove or raise a presumption that Patrick Cahill was dead; and preferred Mrs Spence as his creditor.

The other claimants having reclaimed, the Court, unanimously adhered, on the ground that, it being impossible to say that Patrick Cahill was dead, neither of the other claimants were entitled to appear.

Counsel for Claimant Mrs Wilson—Mr Horn and Mr Guthrie Smith. Agent—Mr Andrew Scott, W.S.

Counsel for Mary Ann Cahill—Mr Pattison. Agent—Mr Somerville, S.S.C.

Counsel for Mrs Spence—Mr Napier and Mr Lamond. Agent—Mr Steele, S.S.C.