

offence and bodily harm from the respondent, to all which the petitioner is ready to depone."

He thereafter deponed that his statement was true, and the Steward-Substitute thereupon *ex parte* ordained the complainer to find caution of lawburrows under a penalty of £50.

The complainer then suspended, on the ground chiefly that the proceedings had been taken by the respondent maliciously and without probable cause. No caution was offered. Lord Mure refused the note, for the reasons stated in the following

"*Note*.—The Lord Ordinary has refused this note, in respect of the decisions in the case of Barbour, March 11, 1825, 3 S. 647; and Baxter, June 16, 1827, 5 S. 752, in both of which it was ruled that it was not a relevant ground for suspending a charge on letters of lawburrows regularly obtained, to allege that they have been taken out maliciously. The cases are very shortly reported, but the Lord Ordinary has examined the session papers, and he finds that in the case of Barbour the decision was pronounced upon written argument, and that, although the note was presented on caution, the petition was refused without answers. Notwithstanding, therefore, of the older case of Smith v. Baird, January 26, 1799, M., 8043, relied on by the complainer, the Lord Ordinary has considered himself bound, in obedience to these later authorities, in which the case of Smith appears to him to have been brought under the consideration of the Court to refuse the present note. "D. M."

The complainer reclaimed.

YOUNG and WATSON for the reclamer.

MONRO and SHAND for the respondent.

The following authorities were cited:—Ersk. 4, 1, 16; Bankton 1, 10, 157; Stair 4, 48, 2; Barclay's M'Glashan, p. 408-9; Stat. 1424, c. 2; 1449, c. 113; 1581, c. 117; 1661, c. 38; Barbour and Others v. Hogg, 11th March 1825, 3 S. 453 (647); Taylor v. Taylor, 25th June 1829, 7 S. 794; Gadois v. Baird, June 1856, 28 Jurist, 682.

After discussion, the complainer stated that he was willing to find caution of lawburrows binding him to keep the peace towards the respondent in common form under a penalty of £50 sterling *ad interim*, and until the suspension shall be finally disposed of.

On this offer being made, the Court recalled the Lord Ordinary's interlocutor, and remitted to him to pass the note. The Lord President observed that this case on the passed note would form a very fitting opportunity for considering the whole law on the subject, and putting it on a proper footing.

Agents for Complainer—Jardine, Stodart, & Frasers, W.S.

Agents for Respondent—Ronald & Ritchie, S.S.C.

PET.—DARLING.

Diligence—Inhibition—Husband and Wife—Aliment. Question—whether an inhibition by a wife against her husband, founded on a claim of aliment, under a decree of separation and aliment, is competent, the aliment having been regularly paid, and the husband not being *vergens ad inopiam*.

This was a petition for recal of an inhibition which had been used against the petitioner by his wife, who had, in the year 1865, obtained decree of separation and aliment against him, the aliment awarded being £55 yearly during the joint lives of the parties. The petition prayed for absolute

recal, and made no offer of caution, and it was therein alleged that the aliment had been regularly paid to the petitioner's wife in terms of the decree. In her answers, the wife did not dispute this fact, but alleged that her husband was in course of disposing of his heritable property (which formed his sole source of income), and that he had, just before the inhibition was used, advertised his dwelling-house with its fixtures for sale. She alleged that he also desired to dispose of his furniture, and that it was his intention to remove to some place abroad, *animo remanendi*, and to place his person and effects beyond the jurisdiction of the Courts of this country. On behalf of the petitioner, it was denied that he was about to go abroad, but it was conceded that he had disposed of a considerable part of his property, and that he was in course of disposing of other portions when the inhibition was used—with the explanation that he was so acting for the purpose of making a more profitable investment of his money.

FRASER and SCOTT, for the petitioner, argued that the inhibition was incompetent:—1. The wife's claim was a future debt, and inhibition cannot proceed upon a future debt unless the debtor is *vergens ad inopiam*, which is not alleged here; 2 Bell's Com. 144. 2. A wife should not be allowed in this way to tie up her husband's property.

SOLICITOR-GENERAL and MACLEAN, for the wife, cited Stair, 1, 4, 15; Glenbervie, 16th July 1638, M. 6053; A. v. B., 15th June 1678, M. 6054; Geddes v. Geddes, 14th March 1862, 24 D. 794.

Some of the Judges regarded the question raised by the petitioner as one of great importance, but the petitioner offered to find caution to pay the aliment in all time coming, and it became unnecessary to decide it.

The inhibition was recalled on caution being found, and the wife was found entitled to expenses.

Agents for Petitioner—Watt & Marwick, S.S.C.
Agent for Respondent—John Leishman, W.S.

Tuesday, March 19.

SECOND DIVISION.

MURRAY v. STEWART.

Sale—Delivery—Implement—Abandonment of Contract. Circumstances in which held that a contract for sale of potatoes, after there had been partial delivery, had been abandoned by mutual agreement of parties, and accordingly that farther implement could not be enforced.

This is an advocacy from the Sheriff Court of Forfarshire. On November 2, 1861, the respondent's husband, David Stewart, purchased from the advocator the potatoes, both regents and rocks, which he had on the farm of Ingliston, at the price of £4 per ton, the whole potatoes to be carried away by the 26th of the said month, and to be paid for in cash when weighed over the steelyard. Stewart took delivery of certain quantities of the potatoes, but after the 7th of December of the same year he ceased to take further delivery. The parties then had a litigation as to the price of the potatoes, and when it was ended, and when the price of potatoes had considerably risen in the market, the respondent, on 4th April 1862, intimated that he proposed to take delivery again on the following Thursday. The defender then refused to give such delivery, on the ground that the contract had come to an end by the previous

failure of the respondent to take delivery. The Lord Ordinary (Kinloch), recalling the interlocutor of the Sheriff (Heriot), who held that the respondent, in April 1862, was entitled to delivery of the potatoes in dispute on paying £4 per ton, in terms of the contract, and returning to the judgment of the Sheriff-Substitute (Robertson), held that by the said failure to take delivery, the respondent had lost all right to demand the same, or to insist further for implement of the contract.

Murray reclaimed.

BALFOUR for him.

SCOTT for the respondent.

At advising,

Lord COWAN—Upon the findings in fact contained in the Lord Ordinary's interlocutor, the principle of law on which this case has been decided may admit of question. It was ably argued on the part of the claimer that the delay in taking delivery of the potatoes beyond the period stipulated in the bargain was not in itself sufficient to entitle the seller at his own hand to sell them, to whatever claim for damages it might subject the purchaser. The law to that effect was stated by Lord Ellenborough in the case of Greaves, 1813, in the passage referred to, and apparently adopted by Mr Bell in his Treatise on the Law of Sale. But this doctrine, it is thought, must apply to a case where there have been no intervening circumstances leading to the inference that both parties understood the bargain to have been abandoned. And in a case which occurred in England in 1825 (*Bloxam v. Sanders*, 2 Ross' Com. Cases, p. 51), I find Justice Littledale stating the doctrine of Chief-Justice Holt, that if "the vendee does not come and take the goods, the vender ought to go and request him, and then, if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." However, in the general case, irrespective of specialities, Mr Bell justly says that the correct course is that followed in Scotland, to apply for judicial authority to sell the goods, the buyer being cited as a party.

In this case delivery of the potatoes according to the written memorandum of sale subscribed by the parties, ought to have been taken on or before 26th November 1861; but delivery continued to be given and taken at various times until 7th December, after which date no more was delivered; and the question on the proof is whether there are not facts established sufficient to support the seller's contention that before the date of the application for interdict, 15th April 1862, the agreement as to the potatoes had come to an end by mutual consent.

On 25th January 1862 the agents for the seller, Messrs Clark & Boyd, applied to the purchaser for payment of a balance of £16, 9s. alleged to be due for the potatoes which had been delivered, and in the same letter they say "we are also instructed to call upon you to fulfil your contract by removing and paying the remainder of the potatoes immediately." To this no written answer was returned; but it is averred by the defender that on the evening of the day when this letter was written the pursuer, after he had received it, positively refused to take delivery of any more of the potatoes, and said that the defender might do with them as he pleased, and to this the defender alleges that he agreed. The Lord Ordinary does not refer to this matter nor to the import of the proof regarding it. But on consideration of the evidence and of the intervening communications between the parties, I

think it proved that the bargain was brought to an end by mutual consent, as alleged by the defender.

The pursuer in his evidence certainly denies that he had any meeting with the defender in the end of January, regarding the potatoes; that he ever stated that he would have nothing farther to do with them; and that he ever said to the defender that he might do with them as he pleased. But (1) the defender swears to his having had a meeting with the pursuer in January 1862, in the street at Coupar-Angus, when James Grant was present; that the pursuer said he had got a letter from Mr Boyd about the potatoes; that he would have nothing farther to do with them; and that he, the defender, then agreed to take the potatoes off his hands. (2) James Grant supports this statement in his evidence, for although he refers to the meeting having been about January 1st, he is certainly wrong as to the date, because he afterwards details what occurred thus—"The occasion that I met pursuer and defender in the street at Coupar-Angus, pursuer said he had had a letter from Mr Boyd, and that he would have nothing more to do with the potatoes. The defender said he would take the potatoes himself in that case. I consider the bargain was then at an end." And (3), although there is no farther direct evidence as to this matter, the real evidence afforded by what subsequently occurred supports the statements of the defender and Grant.

On 30th January the threatened action for payment of the balance of £16, 9s. was instituted in the Sheriff Court. To this action the defence stated by the pursuer was that no balance was due by him, but that there had been, on the contrary, over payments, so that there was a balance due to him; and as arrestments had been used on the dependence of the action, he reserved his claim of damages in respect of the transaction, but no statement was made in the defence or throughout the proceedings by either party that there remained potatoes to be delivered in terms of the original bargain. The proof in this action was led before the Sheriff-Substitute on 26th March 1862, when it appeared, on his own proof, that the pursuer had been misled by erroneous certificates of the weights of the potatoes sent down to be delivered at the railway station, and that the true weights of the successive deliveries of the potatoes as entered in the station steel-yard keeper's books, proved that the defender was right in his statement that there was a balance due to and not by him. The Sheriff-Substitute thereupon held it unnecessary to examine any evidence in support of the defence; and of a subsequent date assozied the defender with expenses. This was on the 3d of April 1862.

Now, from the date of the meeting at Coupar-Angus until the day after the proof had been led before the Sheriff-Substitute, nothing whatever passed between the parties as to the remainder of the potatoes. And this reticence is of itself very significant as regards the abandonment of the bargain made on 27th March 1862. On that day the agents of the defender (pursuer of the other action), aware what would be the result of the proof led on the previous day, wrote the letter on page 82-83 of the print, containing an offer of compromise to which they thought their client would agree, although they had no instructions. This offer stipulates for a mutual discharge of all claims for loss and damage, in respect of the transaction and proceedings, and proposed that delivery of the remaining potatoes should be taken as payment—

delivery to be taken of the whole in three weeks. This is the first reference to the bargain subsequent to January, and it is made obviously by the defender's agents to induce the pursuer to discharge his claim for damages in respect of wrongful arrestment which he had reserved in his defence. It cannot, I apprehend, be held to indicate that the defender still held the original bargain binding; and the proposal of the agents rather points to the opposite inference. But, however this may be, it was not agreed to, and on 4th of April 1862 the pursuer reverts to the bargain as if still entire, and intimates his intention now to take delivery of the remainder of the potatoes. Possibly the reference to the undelivered potatoes in Messrs Clark & Boyd's letter of 27th March led to this intimation of 4th April, for the price of potatoes is proved to have then greatly risen. But, whether so or not, the pursuer's continued silence from the end of January until April, and his total inaction in the matter, affords powerful confirmation of the evidence that exists of the bargain having been mutually departed from as alleged by the defender in the record.

Entertaining these views, I am of opinion that in addition to the findings in fact contained in the interlocutor, there ought to be a finding that the proof establishes that the bargain was departed from by mutual consent at a meeting of the parties towards the end of January. With this addition and a corresponding alteration on the finding in law, so that the legal ground on which the Court has proceeded may not be misunderstood, I am of opinion that the interlocutor of the Lord Ordinary should be affirmed, and the reclaiming note refused.

The other Judges concurred, and the interlocutor of the Lord Ordinary was therefore substantially adhered to.

Agents for Advocate—J. & J. Gardiner, S.S.C.
Agent for Respondent—D. F. Bridgeford, S.S.C.

Wednesday, March 20.

FIRST DIVISION.

PET.—SCOTT AND ANOTHER.

Trustee—Removal—Resignation. A petition having been presented for the removal of a trustee, who put in a deed of resignation, *Held* that this rendered it unnecessary to consider the application.

This was a petition by a trustee and beneficiary and another beneficiary, under a voluntary trust-deed, for the removal of another trustee under it on the ground of alleged misconduct. It was ordered to be served and answered.

When the petition again appeared in the roll,

FRASER, for the respondent, stated that the allegations in the petition were denied, but he put in a deed of resignation of his office, which had been executed by the respondent under section 1 of the Act 24 and 25 Vict., c. 84.

M'LAREN, for the petitioners, asked an order upon the respondent to deliver up the whole books, papers, and documents, belonging to the trust-estate in his possession.

LORD PRESIDENT—There is no prayer for such an order.

M'LAREN—Then I ask leave to amend the petition by adding it.

FRASER—I can't consent to that.

LORD PRESIDENT—We cannot allow any amendment except of consent.

M'LAREN then submitted he was entitled to the order without a special prayer for it.

The LORD PRESIDENT—We appointed this petition to be served and answers to be lodged. But a deed of resignation has been put in which seems to me to put an end to the petition; for the prayer is simply to remove the respondent from the office of trustee, and the only other prayer is for such interim order as may be necessary pending the consideration of the application. There is no prayer for delivery of trust papers. The sole object of the application is removal, and that having become unnecessary, the petition just drops.

The other Judges concurred.

Agents for Petitioners—White-Millar & Robson, S.S.C.

Agent for Respondent—J. F. Wilkie, S.S.C.

PET.—SHEARD.

Proof—Deposition of Aged Witness to lie in retentis.

Commission granted to take the deposition of an aged pursuer of an action, without deciding whether it could ever be used as evidence.

The petitioner is pursuer of an action in which defences have not yet been lodged. She now, in respect of her old age, applied for a commission to take her deposition as a witness to lie *in retentis*.

ASHER for the petitioner.

The Court granted the commission without expressing any opinion at present as to whether the deposition could be used in evidence, or whether, in any circumstances, a pursuer of an action can make his own deposition, when taken on commission, evidence.

Agents for Petitioner—Murdoch, Boyd & Co., S.S.C.

DIXON AND OTHERS v. CAMPBELL.

Bankruptcy—Discharge of Bankrupt—Trustee's Report. A bankrupt's discharge refused in respect he had been engaged in reckless speculation which had caused his bankruptcy. Observations (per Lord President) as to what a trustee's report under sec. 146 of the Bankruptcy Act should consist of.

This was an appeal by the trustees of Mr Dixon, of Govan Colliery, and the Commercial Bank against an interlocutor pronounced by Sheriff-Substitute Galbraith, of Glasgow, finding John Campbell, junior, of the firm of Campbell Brothers, entitled to his discharge. The interlocutor proceeded upon a report by Mr Wylie Guild, the trustee on the estate, that Mr Campbell had complied with all the provisions of the statute; that he believed he had made a fair discovery and surrender of the estate, and had not been guilty, so far as known to the trustee, of any collusion; and that his bankruptcy had arisen from innocent misfortunes, and not from culpable or undue conduct. There was also a minute of concurrence in the application for discharge by a majority in number and four-fifths in value of the creditors who had produced oaths in the sequestration.

According to the state of affairs given up by the bankrupts, the amount of their assets was £4925, 4s. 6d., and of their liabilities £187,225, 7s. The appellants, Dixon's trustees, have lodged claims to the amount of £80,098, 6s. 10d.; and the Commercial Bank for £10,840, 17s. 8d.; and the claim of Dixon's trustees to the extent of £73,137, 10s. was not lodged till after expiry of six months from the date of the sequestration.