

an action that can be sustained either as an action for payment of a price, or for damages for breach of contract.

Interlocutor finding the action not relevantly laid, and dismissing it accordingly.

Agents for Pursuers—Murdoch, Boyd, & Co., S.S.C.
Agent for Defenders—William Mason, S.S.C.

Tuesday, July 14.

STIELLS v. HOLMES.

Bankrupt—Bill—Law-Agent—Presumption—Writ or Oath. Possession of a bill by an indorsee is *prima facie* evidence of his being creditor for the amount unpaid; and there is no presumption that where the indorsee is the agent of the acceptor he holds the bill as such agent.

This was an appeal against a deliverance of the Sheriff-substitute of Renfrewshire, in the sequestration of Archibald Watson, saddler in Johnstone. Holmes, agent at Johnstone for the Union Bank, had for some years acted as law-agent for the bankrupt. In the sequestration he claimed on six bills. The first of these was drawn by him upon, and accepted by, the bankrupt. The other five bills were drawn by other parties upon, and accepted by, the bankrupt, and had been discounted with the Union Bank, who indorsed them to Holmes. On these five bills there appeared markings of payment to account, and Holmes now claimed the balance due after these partial payments. The trustee admitted the claim. J. & W. Stiell, creditors, appealed, alleging that Holmes and the bankrupt had various monetary transactions, but no account was ever adjusted between them, and that on a just accounting it would be found that no such sum as that claimed by Holmes was really due to him; and that the bills in question came into Holmes' possession solely as agent for the Union Bank, and did not instruct any advances on the bankrupt's account.

The Sheriff-substitute (Cowan) pronounced an interlocutor in which, after certain findings of fact, he found in law that Holmes was holder of the bills; that there was a presumption that they were paid by him as law-agent of Watson, and that in so doing he was acting in accordance with the practice between him and the bankrupt; that any objection to Holmes' claim could only be established by his writ or oath; and continued the case for the appellant to lodge a minute of reference to the claimant's oath.

J. & W. Stiell appealed.

MACLEAN for appellants.

BALFOUR, for respondent, was not called on.

At advising—

LORD PRESIDENT—I am satisfied as to the result arrived at by the Sheriff-substitute, although I am not quite sure of the means by which he has arrived at it. The claim by Mr Holmes is laid on six bills; and, as regards the first, that for £416, 15s., there is no question. As regards the others, he claims only certain balances due on these bills, because it appears that various sums had been paid to account by the bankrupt. The history of the matter seems to have been this:—That bills were drawn by Muirhead and others on Watson, the bankrupt, and accepted by him. The drawers discounted these bills with the Union Bank. The Union Bank indorsed the bills to "John Holmes, Esq., or order, for value in account with the Union

Bank of Scotland." It is said that this is the way in which the Bank usually indorse bills which they send to their agents for collection, and that Mr Holmes is agent for the Bank at Johnstone. There is nothing in this, however, to limit the title of Mr Holmes as indorsee. His legal title is absolute, and is conceived in the usual terms; and we know nothing about the arrangement he may have with the Bank as regards bills. All that we see is, that by the indorsation he, *qua* indorsee, becomes a creditor in the bills. To take the case of one, which illustrates them all: Mr Holmes marks three payments on the back of a bill for £187 odds, but this still leaves a balance of some £60, which, with interest, brings out the exact sum he claims on that bill. The only evidence of any payment having been made at all is the evidence afforded by these markings on the back made by the holder. But possession of a bill by Mr Holmes as indorsee is *prima facie* evidence of his being the creditor for the balance remaining unpaid; and the only answer made to this is, that Mr Holmes held the joint character of agent for the Bank and law-agent for Watson; and there is said to be a presumption of law that a person holding a bill in these circumstances holds for behoof of the debtor in the bill, the acceptor, and as his agent. I know of no law for that presumption, and none of the cases we were referred to countenance such a presumption. The true state of the matter is that which lies at the bottom of his claim, viz., that to the extent to which it is admitted that these bills have not been paid, the claim of Mr Holmes as indorsee is a good claim for the balance unpaid.

The other Judges concurred—LORD ARDMILLAN remarking, that it would be a most serious thing for law-agents if, as contended for the appellants, there was a legal presumption that all sums disbursed by them on account of clients were furnished by the clients, and that such a presumption could only be overcome by the client's writ or oath.

The Court allowed the appellants to lodge a minute of reference to oath, and found them liable in expenses.

Agent for Appellants—John Galletty, S.S.C.

Agent for Respondent—A. Kirk Mackie, S.S.C.

Tuesday, July 14.

LONDON STEAM COLLIER AND COAL COMPANY v. WINGATE AND CO.

Expenses—Witnesses—Counsel. Where witnesses had been precognosed in England, held that same fees must be charged as if the recognitions had been conducted in Scotland, and the higher fees usual in England *disallowed*. Expenses of precognosing and bringing from England witnesses who were not examined in the cause *disallowed*. Expense of employing English counsel to attend on examination of havers in London *disallowed*. *Question*: Whether two senior and one junior, or one senior and two junior counsel should have been employed? referred to the judge who tried the cause. *Question*—Whether the expense of witnesses coming from England should be calculated on the footing that they travel by day only?

The pursuer objected to the Auditor's findings in regard to the following items:—(1) As to

charges incurred to English solicitors in Sunderland and London in connection with the precognitions of witnesses, the Auditor allowed only the drawing fees of precognitions usual in Scotland. The pursuers maintained that the higher fees usual in England should be charged. (2) The Auditor disallowed expenses of precognoscing and bringing from England certain witnesses who were not examined in the cause. (3) The expenses of English counsel for attending the examination of havers in London were also disallowed. (4) The Auditor had restricted the time allowed to English witnesses to travel from Sunderland and Hartlepool to Edinburgh. The pursuer objected, that witnesses should not be compelled to travel by night, and that their expenses should be calculated on the footing that they travelled by day only. There was further a question specially reserved by the Auditor for disposal by the Court, viz.: Whether this was a case where the expense of a third counsel should be allowed, and if so, whether the pursuer was entitled to two senior counsel and one junior, or one senior and two junior?

GIFFORD and MACLEAN for objectors.

WATSON and SHAND in reply.

At advising—

LORD PRESIDENT—The first question is, whether for precognoscing witnesses in England (and it would apply equally to any foreign country) we are to allow charges at a higher rate than in Scotland? Now, to introduce a difference of this sort would be anomalous in the highest degree. The charges must be the same wherever the witnesses are. As to the second objection I agree with the Auditor. The third objection involves a point of some importance. I can quite understand how the examination of havers might be attended with matters of some delicacy, and in such cases I should be very sorry to prevent the employment of counsel. It does not appear, however, that there were matters of delicacy involved here, or that the learned gentleman who attended contributed much either to the administration of justice or the facilitation of the proceedings. In fact, I don't see how he could. English counsel know nothing of our incident diligences. The fourth point is one on which I should not be inclined to disturb the Auditor's decision. I have only to say that I do not see why these witnesses, who are all in the prime of life, business men, and men accustomed to make the most of their time, should not travel for a few hours by night. As to the question specially reserved by the Auditor for the disposal of the Court, the judge who tried the cause is the best person to decide. We will ask Lord Ormisdale (the judge in the cause) verbally whether in his opinion two senior counsel and one junior, or one senior and two junior were required?

LORD DEAS—I agree with your Lordship except in this, that I don't think a witness is bound to travel during the night.

LORD ARDMILLAN concurred.

Agent for Objectors—William Miller, S.S.C.

Agents for Respondents—Campbell & Smith, S.S.C.

Wednesday, July 15.

FINNIE v. M'INTOSH AND OTHERS.

Burgh—Town-Clerk—Town Council. Held that the Town-Clerk of a Burgh is the legal custodian of the books, records, documents, &c. of the

burgh, and that the Town Council may not deprive him of them against his will.

This was a petition and complaint by John Finnie, Town-Clerk of the Burgh of Fortrose, with the concurrence of the Lord Advocate, praying for an order on the respondents, members of the Fortrose Town Council, forthwith to deliver up to him certain records and documents belonging to the burgh, of the custody of which he alleged he was forcibly deprived by them at a meeting of the Town Council held on the 19th of June last. The petitioner stated that the meeting had been called by him for the purpose of considering certain accounts which had been prepared by him under the instructions of the Town Council; that these accounts gave rise to a good deal of discussion, in the course of which some of the respondents objected to them, and moved that the Council should disclaim them; that other members of Council proposed to have them submitted to an accountant; that, on the Clerk craving to make an explanation with reference to the preparation and publication of the accounts, the majority of the Council refused to hear him, and that, in the confusion which ensued, several members left the meeting, and there then ceased to be a quorum present. The petitioner alleged that the respondents—being the Provost and the members of Council who remained at the meeting—then demanded from him the books and papers in his possession connected with the burgh. "With this demand the petitioner declined to comply, and explained that he, as the town-clerk, was legal custodian of the burgh records and documents. It was then proposed by Bailie Hossack that the documents should be carried away by the burgh officer. The petitioner declined to cede the possession to the burgh officer, who refused to use any violence, although instigated to do so by several members of Council. The Provost then called on a police-officer to assist the burgh officer, but he declined to interfere; and Bailie Hossack suggested that a couple of special constables should be sworn in for the purpose. On the burgh officer again declining to use any violence, Bailie Hossack himself wrestled with the petitioner, seized hold of the books, and violently pulled them away from the petitioner, and flung them on the table, where they were taken possession of by Councillor Watson and the members of Council present. The petitioner attempted to leave the room, but was intercepted by Councillor Watson and others, by whom he was prevented from leaving until he gave up the documents and papers which were still in his possession. The petitioner was hemmed in and jostled by the members of Council and the audience, and the door was also locked or kept shut by two members of Council. He was thus forcibly compelled to deliver up the documents."

In their answers the respondents denied the accuracy of the petitioner's statement as to the circumstances under which they obtained possession of the books and documents, which, they admitted, were in their custody, and gave the following account of the matter:—"After numerous ineffectual attempts to get the business of the meeting orderly conducted, and after many vain attempts to induce the petitioner to resume his duties as clerk, the Provost became quite satisfied that no farther business could be done; and he held that the motion to submit the accounts, books, and papers to a neutral professional accountant had been substantially agreed to, no amendment having been proposed. It was getting dark, and the Provost proceeded to