

in form on a reclaiming-note against an interlocutor disposing of a reference to oath, but on the attention of the pursuer's counsel being called to the interlocutor of 6th February, Mr Fraser was heard on the argument that he had proved the constitution of the alleged debt *scripto*. The question for the Court therefore is, Whether the pursuer has proved his debt *scripto* of the defenders? The first thing to do, when the triennial prescription is pleaded, is to see whether the case is within the statute which creates that prescription. That was done here, for the Court held that this claim of debt was within the act. The effect of prescription being applicable is to limit the pursuer to prove both the constitution and subsistence of the debt by the writ or oath of the party. The pursuer now says he has proved the constitution of the debt by writing. In looking at the documents upon which he founds, it seems quite clear that they do not prove the debt—(reads minute of directors *ut supra*.) That simply means that all who think they have claims are to lodge them, but it does not amount to the constitution of any debt. Then Ironside writes—(reads letter *ut supra*). Does that also constitute the debt of the London brokers? Neither singly nor together do these documents prove the constitution of the debts. I concur in thinking that in dealing with such a claim it is impossible to keep out of view the peculiar character of the claim. No one can read the documents here without seeing the nature of the claim. It is absurd to say that we must first find that a debt is constituted and then consider whether it is a lawful debt. We cannot separate the constitution of the debt from its intrinsic quality. I have no doubt that this debt cannot be held to be constituted *scripto*.

LORD KINLOCH—The question here raised is, whether it has been proved *scripto* that the debt claimed was contracted? The defenders do not maintain that the pursuer is precluded from adducing written evidence on this point, either by the proposed minute of reference, or by anything which has already been done in the case. The previous judgment of the Court merely decided that the debt claimed was not constituted by a written contract. It remains open to inquire whether there is a debt which was contracted verbally, proved, *scripto*, to have existed?

I agree with the Solicitor-General that in every question of this sort a great deal depends upon the character of the debt claimed. There are some debts as to which the general fact that an account has been incurred goes far to prove the whole case, *e.g.*, where a law agent has been employed to prepare a deed, in which case, if the preparation of the deed is admitted or established, the amount of the fees may be very easily settled. But the present is not a case of this description. It is a case of a very peculiar nature; and one in which I think that a great deal is incumbent on the pursuer to establish before he can make out his claim. It is not enough for him to prove that services of some description were performed by him. He must show what these services were, and that they were such as would afford a legal claim to remuneration; and I think that there has been a failure on the part of the pursuer to prove what it was necessary for him to show. It is true that there is some evidence of written instructions communicated to the pursuer to do something for the Provisional Committee of the Crieff Junction Rail-

way. But this goes a very short way to support the claim. And here I would advert to a very common mistake in reference to the triennial prescription, *viz.*, to suppose that a written order for goods constitutes a written contract. The mere fact that an order has been given proves nothing. There must be evidence that the goods were delivered, and at what price. Now, all we have here is a correspondence which affords a surmise, and nothing more, that something was going on of the most doubtful legality, on the part of the pursuer; the precise details of which are not established. It is closed by Mr Ironside's letter, which merely amounts to a request to the pursuer to send in any account which he might have. It seems ludicrous to say that this proves the debt. It is not proved even that the pursuer had an account against the committee, much less what it was, and that it was legally due. I think it quite impossible to hold that the alleged debt is established. The case is a very different one from that in which employment has been proved and the only question is the amount of the charge. Even in some cases of that kind I am disposed to think that the Court has gone rather too far in holding the claim to have been made out; but the present is a very different case. Any proof to be allowed here would not be of the mere amount, but of all the elements of the constitution of the debt.

I do not think it necessary to go into the question as to the responsibility of the defenders for the contracts of the Provisional Committee. The consideration is by no means irrelevant, but there is enough in the case otherwise to dispose of it against the pursuer.

In answer to a question from the Bench,

FRASER, for the reclamer, stated that he could not say whether the defenders were now personally interested in the defenders' railway or not.

The Court refused the reference.

Agents for Pursuer—J. W. & J. Mackenzie, W.S.

Friday, February 27.

STEEL v. SWAN.

Arbitration—Sale—Valuation of Stock in Trade—Signing of Inventory. Held, on a proof, that a party who had agreed to take over a stock-in-trade at a valuation, was bound to pay the price set out in the inventory prepared by the valuers, although there was no formal award or signing of the inventory.

Mrs Steel, who for some time carried on business as a draper and grocer in Mid-Calder, proposed in March 1868 to give up business. The defender, Swan, proposed to take up the business, and arranged with the landlord for a lease of the premises. He also, on 25th March, addressed this letter to the pursuer:—"I do hereby agree to take the remaining goods that may be in the shop at Whitsunday, at a valuation of two men, you choose one and me another, with the full understanding that you do not add anything to it but what is necessary for carrying on the grocery department. JOHN SWAN."

The pursuer answered—"Dear Sir,—I agree to accept you as the purchaser of my stock-in-trade, and promise to add nothing to its extension, except what is required for the grocery department;

but, at a future date, there must be a proper agreement drawn out, witnessed and signed in due form on both sides, relative to entire settlement."

This minute of reference was afterwards entered into—"I, Sarah Steel, draper and grocer in Mid-Calder, on the one part, and I, John Swan, tailor, Mid-Calder, on the other part, do hereby agree to refer the valuation of the drapery and grocery goods in the shop at Mid-Calder, presently occupied by the first-named party, to the decision of Mr Robert Mochrie, Dundas Street, Edinburgh, and Mr John Mungle, merchant, West Calder, and, in the event of their not agreeing, with power to them to choose an oversman.—Dated at Mid-Calder, this 28th day of April 1868. SARAH STEEL, JOHN SWAN."

The arbiters accepted, and, on 28th April, Mr Mochrie and Mr James Rodger, in room of Mr Mungle, made a valuation of the stock, fixing the total value at £187, 2s. 4½d. The pursuer alleged that thereafter the inventory and valuation were delivered to the defender, who took delivery, but refused to pay the price.

The defender, on the other hand, alleged—"Upon the 28th of April the defender, who had not been present at the inspection by Mr Mochrie and Mr Rodgers, received the keys of the shop from the pursuer, he being in the belief that the valuation had been properly and validly completed. On going to the shop he discovered that the quantity of goods in the shop was very much greater than it had been when he had agreed to purchase the stock. While in the shop, the defender, for the first time, ascertained that Mr Mochrie and Mr Rodgers had not made any examination by weight and measure, but had only fixed the prices at a certain rate per yard or per pound according to quality and condition. Whenever the defender ascertained this he at once relocked the shop, and returned the keys to the pursuer. The defender did not interfere with the stock in any way, and has never been in the shop since."

After this action was raised the goods were sold under judicial warrant for between £80 and £90.

A proof was taken. The pursuer and her sister deponed that shortly before the valuation they measured all the drapery goods and weighed all the grocery goods in the shop, correctly, marking the goods accordingly. The pursuer deponed further that Swan had stated that he was not satisfied with the valuation, without assigning a reason. Mr Mochrie deponed—"In the case of such valuations it is not customary for the valuator to weigh or measure the goods. They take the weights and measurements from the tickets, and merely fix the values that are to be put upon the goods. We found tickets on the goods indicating the quantities. They seemed to have been brought up to date. I understood the goods had been measured the day before. I have valued many stocks, and have always done it in this way. We tested some of the measurements and found them to be correct. There was one piece that I thought rather short, but on being measured it turned out full length. When the purchaser enters the shop and takes possession of the goods, he is quite entitled to measure and weigh them to see if the quantities given in the valuation are correct. The practice is, to allow about a day for checking the quantities."

Mr William Maxwell deponed—"I am one of the partners of the firm of Kennington & Jenner, drapers, Edinburgh. I have had considerable ex-

perience in valuing drapery stocks to be taken over by one shopkeeper from another. In these cases the valuator does not measure the goods. The duty of the valuator, however, depends a good deal upon circumstances. Generally he sends his own men or women previously to measure the goods, and the valuator on the other side does the same; and then, when the valuation is made, they take these measurements as correct. In the case of small stocks, the measurements might be done by the parties themselves, but, as a general rule, that is not the practice. The valuator merely puts a value upon the articles after they have been counted or measured. He is bound to sign his inventory, and that becomes a sort of guarantee to the buyer that the stock is correctly valued."

Mr Shepherd, of M'Nab & Shepherd, drapers, gave similar evidence, stating, however, that it was not his practice to sign the inventory, never being asked to do so.

Mr William Lyon, of Lyon & Turnbull, auctioneers, gave similar evidence.

Mr Brownlee, auctioneer in Mid-Calder, and landlord of the shop in question, on the other hand, deponed—"I had had some conversation with Mr Rodgers about the valuation before I proposed that we should go to the shop. I asked him, 'Have you weighed and measured all the articles?' and he said, 'No.' I said, 'That is surely a curious way of doing; I should like to go in and see what you have done.' I was quite astonished to hear that two valutors had made a valuation without weighing and measuring; I never heard of such a thing before. I would not have done it as an appraiser. When we went to the shop I opened out two or three of the webs, and found there were remnants inside in the rolls of cloth. I think I only opened three or four, and in two I found remnants—in one of 4 yards, and in the other 3½ yards, or something like that. One of these pieces was marked 17 yards, and there were only 12½ yards, the rest being remnants. That, in appraising, would make a considerable difference in value. Then there were pieces that had been lying in the window, and were very much soiled. I called Mr Rodger's attention to these things, and he said he supposed Mr Swan had examined the stock before, and that it was not his business to do so. Mr Rodgers indicated that he was not aware of these pieces being cut. I said to Mr Swan that I thought it was a very unfair valuation, and I recommended him to have nothing to do with the stock until the valuation was properly taken."

The Lord Ordinary (BARCAPLE) pronounced this interlocutor:—"Finds that, in valuing the goods in the pursuer's shop under the contract of sale between her and the defender, in so far as the same fell to be disposed of by measurement or weight, the valutors only determined the price thereof per yard or per pound, or other *integer* of measurement or weight, and that the actual measurements and weights thereof were not ascertained by the valutors, or in any other way binding on the defender: Finds that the document, No. 7 of process, purporting to be a valuation of said goods, was, except as regards the calculations therein contained, dictated by the valutors to William Campbell, who was authorised by the parties to act as clerk in the said valuation, and was correctly taken down by him, and the calculations therein contained were thereafter correctly made by him, but the weights and measurements of said goods therein contained were so dictated by the valutors from tickets pre-

viously affixed thereto by the pursuer: Finds that the whole of said goods in the pursuer's shop have been sold by authority of the Court since this action was raised, without the measurements and weights thereof having been ascertained: Finds that, in these circumstances, the contract of sale of said goods entered into between the pursuer and defender was never fully completed, and cannot now be completed: Finds that the objection, that the measurements and weights of the goods were not ascertained, was not stated by the defender before the action was raised; and that he did state, both before the action was raised and afterwards on record, other objections rested on grounds which are entirely unsupported by the evidence: In these circumstances, assails the defender from the conclusions of the libel, and decerns; and finds no expenses due to either party."

The pursuer reclaimed.

SCOTT and ORPHOOT for claimer.

MACDONALD for respondent.

The Court unanimously recalled the interlocutor of the Lord Ordinary, and gave judgment for the pursuer, holding that if there was any hardship in the case it was entirely due to the fault of the defender. It was clearly proved by the evidence of skilled witnesses that the valuers had done all they could be expected to do, and had followed the usual practice in such cases. If the defender was to object to the valuation, he should have done so betimes. He did not do so, and he even allowed the goods to be sold under judicial warrant, so that the measure and weight were now beyond ascertainment, without getting a new valuation. On such an informal reference it was absurd to expect a formal award, and even the signing of the inventory by the valuers seemed quite immaterial, provided they actually performed their duty of fixing the prices.

Agent for Pursuer—H. Buchan, S.S.C.

Agent for Defender—J. Keegan, S.S.C.

Saturday, February 27.

SECOND DIVISION.

GARDNER v. KESSACK.

Sheriff—Act 16 and 17 Vict. c. 80, § 4—*Record*. Mistake by a Sheriff-substitute in making up a record under the Act 16 and 17 Vict. c. 80, held not to invalidate the procedure so as to justify the action being dismissed. Remit made to the Sheriff to make up a record of new.

This was an appeal from an interlocutor of the Sheriff of Banffshire, dismissing an action in respect of irregularities committed in the course of making up the record.

The Sheriff Court Act, 16 and 17 Vict. c. 80, 4, makes certain provisions for the adjustment and closing of records; and in this case, in terms of that section, it was necessary to have closed the record on the 8th April 1868, or to have adjourned the meeting for closing for eight days, and then closed. In place of taking this course, the Sheriff-substitute, on 8th April, simply ordered answers to the defender's statement, and this order was afterwards prorogated on 6th May. The Sheriff-principal held that, in these circumstances, the whole proceedings, commencing with 8th April, were inept; and, as he could "devise no scheme for taking up the broken thread at the point where the

stitch was deserted, which would not be an evasion of the Act of Parliament," he dismissed the action.

SHAND for appellant.

ASHER in answer.

The Court recalled this judgment, and held that it was competent in the circumstances to order a new record to be made up. They accordingly remitted to the Sheriff for that purpose, and to proceed in the cause as might be just.

Agent for Appellant—David Milne, S.S.C.

Agent for Respondent—David Cook, S.S.C.

COURT OF JUSTICIARY.

Monday, March 1.

HIGH COURT.

H. M. ADVOCATE v. HOLMES AND LOCKYER.

Post-Office Act, 1 Vict. c. 36—*Opening of Letters*—*Trap-Letter*—*Verdict*.

Section 35 and 36 of the Act, 1 Vict. c. 36, apply to Scotland.

Relevancy of common law charge of detaining and opening post-letter *sustained*.

A "trap" letter, not posted in the ordinary way, but inserted otherwise among the letters given out for delivery, is not a post-letter.

Objection to verdict, on the ground of uncertainty, *repelled*.

George Wilkie Holmes, sometime letter-carrier in Edinburgh, and Edmond Beatty Lockyer, residing in Edinburgh, were accused—"That albeit, by an Act passed in the first year of the reign of her Majesty Queen Victoria, cap. 36, intituled 'An Act for consolidating the laws relative to offences against the Post-Office of the United Kingdom, and for regulating the judicial administration of the Post-Office laws, and for explaining certain terms and expressions employed in those laws,' it is enacted by section 25, 'that every person employed by or under the Post-Office who shall, contrary to his duty, open, or procure or suffer to be opened a post-letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed a post-letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the Court shall seem meet;' and albeit, by section 35 of the said Act, it is *inter alia* enacted that 'every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under the Post-Office Acts, shall be liable to be indicted and punished as a principal offender;' and albeit, by section 36 of the said Act, it is enacted, 'that every person who shall solicit, or endeavour to procure any other person to commit a felony or misdemeanor punishable by the Post-Office Acts, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being thereof convicted, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years;' and albeit, by the laws of this and of every other well-governed realm, the wickedly, unlawfully, and feloniously intercepting, opening, or detaining, or causing or procuring to be intercepted, opened, or detained, letters transmitted by means of the public post to any of the lieges, and not addressed to or intended for the person so intercepting, opening, or detain-