

Wednesday, November 17.

FERRIER v. CONNELL'S TRUSTEE.

*Advocation—Accounts—Agent—Delivery—Expenses—Petition—Taxation.* A trustee presented a petition in the Sheriff-Court to have his late agent ordained to deliver up the documents connected with the trust-estate, and to have the agent's accounts taxed. *Held* such taxation is incompetent on a petition.

Circumstances in which neither party allowed expenses in Sheriff-Court.

Mr Ferrier was for some years agent for the trustees of the late Mr Alexander Connell. Mr James Connell, the respondent in this advocation, is the sole surviving trustee; and having transferred the agency of the trust to Messrs J. & J. Milligan, S.S.C., towards the end of 1864, requested Mr Ferrier to send in his account and vouchers and the various documents belonging to the trust. But Mr Ferrier refused to deliver the latter till he received payment of his account. After much correspondence, however, he agreed to give up the documents on receiving payment of his account as taxed; and to this the respondent consented. But in the meantime an account had grown up for correspondence, duplicates, inventories, &c., in all amounting to £6, 6s. 7d., as between Mr Ferrier and Messrs Milligan, as the respondent's agents; and he insisted on payment of this account, as taxed, before delivery of the writs asked for. The respondent refused to agree to this; and on 31st May 1867 presented a petition to the Sheriff to have Mr Ferrier ordained to make the delivery requested. On 28th June he consigned the £6, 6s. 7d. in the hands of the Clerk of Court; and in respect of this consignment the Sheriff-Substitute (HALLARD) ordained Mr Ferrier to deliver up the whole documents craved for, and appointed his whole accounts to be laid before the auditor of the Court of Session for taxation. On appeal the Sheriff altered this interlocutor by restricting the accounts to be laid before the auditor to the amount for £6, 6s. 7d. Mr Connell brought an action of count and reckoning in the Sheriff-Court against Mr Ferrier; and on 29th April 1868 the Sheriff sisted procedure in the petition till this action should be settled. Thereafter he ordered payment to Mr Ferrier of £5, 8s. 3d., being the balance of the account as taxed; but found the petitioner entitled to expenses. These were taxed at £20; and on 22d July 1868 the Sheriff decreed against Mr Ferrier for payment of a modified sum of £15 of expenses.

Mr Ferrier advocated the cause, on the ground that he should not have been found liable in expenses. The Lord Ordinary (JERVISWOOD) affirmed the Sheriff's interlocutor. The advocator reclaimed.

J. C. SMITH, for him, argued—The granting of expenses by the Sheriff is inconsistent with his judgment. Mr Ferrier should get his expenses; or, at least, not have to pay the respondent's.

GIFFORD and M'KIE for the respondent.

The Court reversed the Lord Ordinary's interlocutor, holding no expenses were due by the advocator in the Sheriff-Court, and that the advocator's accounts to the trust could not be taxed on a petition; and gave the advocator the expenses of the advocation.

Agents for Advocator—Ferrier & Wilson, W.S.  
Agents for Respondent—J. & J. Milligan, S.S.C.

Wednesday, November 17.

JURY TRIAL—Warranty.

TORRANCE v. PATON.

John Torrance, horsedealer in Edinburgh, claimed from David Paton, residing at Monorgan, near Dundee, £28, 8s. 5d., as being the loss he had sustained in consequence of a horse purchased by him from the defender being disconform to warranty. The pursuer purchased the horse at Perth on the 5th March. The sum paid for it was £41, and the defender gave pursuer a warranty that the horse was sound, free from vice, and a good worker. After removing the horse to Edinburgh, the pursuer resold it, but the purchaser shortly afterwards complained that it was so troublesome that he could not keep it. The pursuer was convinced that the horse was not in the condition described in the warranty, and accordingly wrote to the defender asking him to take the animal and return the purchase-money. No satisfactory answer being returned to this communication, the pursuer got the horse sold by authority of the Sheriff. The sum realised by the sale was £21, 2s., and the difference between this sum and the original cost, along with £8, 4s. 3d. for keep and maintenance of the horse for two months, and 6s. 2d. for interest, made up the claim.

The pleas in law for pursuer were—(1) The defender having sold the horse with express warranty that it was sound and free from vice, and the horse having been unsound and vicious, and disconform to warranty, at the date of sale, the defender is bound to repeat and pay back the price received by him, with interest, less the free proceeds of sale, all as concluded for. (2) The defender is bound to make payment to the pursuer of a reasonable sum for the horse's keep while in the pursuer's possession, and other expenses and charges incurred by the pursuer as above set forth. (3) The pursuer, in respect of the facts above set forth, is entitled to decree against the defender in terms of the conclusions of the action, with expenses.

The pleas-in-law for defender were—(1) The retaining the horse in the pursuer's own possession, and under his own treatment, till the 16th of April 1869, in the face of the defender's notification of non-liability, made in direct course on 25th March, constitutes such *mora* as to bar the pursuer from suing the action. (2) The statements of the pursuer as to the horse being unsound at or before the date of sale being untrue, and the action being groundless, the defender should be assoilzied, with the expenses.

The issue sent to the jury was in the following terms:—"Whether on or about the 5th day of March the defender sold to the pursuer a brown horse, at the price of £41, which was then paid by the pursuer; and whether the defender warranted the said horse as sound, free from vice, and suitable for all farm work; and whether at the date of said sale the said horse was unsound, was not free from vice, and was not a good worker, or was disconform to warranty in one or more of the above particulars; and whether the said horse was offered back to the defender by the pursuer within reasonable time; and whether the defender is due and resting-owing to the pursuer the sum of £28, 8s. 5d.?"

MACDONALD and DEAS for the pursuer.

SCOTT for the defender.

Evidence was led at considerable length, which went chiefly to support the pursuer's allegations;