

should continue, but that he should relieve the seller of their payment. Six days before Whitsunday the seller demanded to be relieved of his liability under the bonds, and on a refusal he raised an action of relief, and two days before the term, arrested the rents. The purchaser offered to have a factor appointed to collect the rents, and, after payment of the interest due on the bonds, to allow the balance to be consigned in bank; but the seller refused this offer. The Court loosed the arrestments *simpliciter*, on the ground that the time of using the arrestments was peculiar, that the petitioner had made a reasonable offer, and that the respondent had refused it.

Dobbie bought from Duncanson, in October 1870, certain house property in Glasgow. Under the missives of sale it was stipulated that, "it being understood that there are bonds to the extent of £12,000 sterling over these properties, and which are supposed to remain on the security thereof, I hereby bind and oblige myself to pay you the sum of £4000 sterling, and to free and relieve you of the payment of the said sum of £12,000, making the price, as above stated, £16,000 sterling." About six days before Whitsunday 1871 Duncanson demanded to be relieved forthwith of his liability under the bonds by Dobbie's paying the bondholders, or him, or having himself made, *habili modo*, debtor in the bonds. This being refused, he raised a summons of relief, and, on the dependence of the summons, arrested the half-year's rents in the tenants' hands two days before Whitsunday. The summons was served on Whitsunday. The half-year's rents amounted to about £570, and the interest on the bond and feu-duty to about £320. Dobbie's law agents wrote to Duncanson that, "in order to save loss, we propose that you should concur with us in the appointment of a respectable house-factor to collect the rents falling due at this term; from which rents he should pay the present term's feu-duty and interests, and thereby so far relieve your client of liability under the bond—the balance of the rents to be consigned by him in bank, there to remain as a surrogatum for the sums arrested, subject to the orders of the Court, in all respects in the same way as if the rents had remained in the hands of the tenants." As Duncanson refused to agree to this proposal, Dobbie presented a petition for loosing of the arrestment, and prayed they should be loosed *simpliciter* because of his offer to have a factor appointed, and as none of the bondholders had required payment of the bonds, and the security of Duncanson was therefore unaffected. He also urged that several of the tenants were leaving to avoid paying their rents, and that he was not bound to pay the bonds unless the bondholders demanded payment of Duncanson. He therefore suggested that a judicial factor should be appointed. Duncanson pleaded, that as he was personally liable under the bonds he was entitled to relief—especially as further securities had been effected on the buildings—and that, though consignment was a proper course, the interest and feu-duty should not be deducted. He opposed the appointment of a factor, and urged it was not competent for the Inner House to make such an appointment, no action being actually in dependence, but stated he was willing that the arrestments should be loosed on the petitioner's getting him relieved of

liability under the bonds, or finding caution to a satisfactory amount, or consigning the sum of which relief was sought, with expenses.

SHAND and LORIMER for Dobbie.

BALFOUR and LEES in answer.

At advising—

LORD PRESIDENT—The petitioner's proposal to have a factor appointed appears to me to have been a very reasonable one. It was rejected by the other side, we must therefore be the more careful in considering the grounds upon which the arrestments were used. Mr Duncanson had been possessed of certain house property in Glasgow, which Mr Dobbie was willing to purchase. So they stood at the date of the missives of sale. The property was largely encumbered with debt, and it suited the convenience apparently of both parties that it should be conveyed by the seller, and accepted by the purchaser, without its being first disencumbered of this debt. This is made the subject of a special stipulation in the missives. It is thus made matter of arrangement between the parties that the debt is to remain on the security of the property, by which I understand that the bonds are to remain undischarged, and the purchaser undertakes to relieve the seller of the payment both of principal and interest. But that obligation surely refers to the time when payment is demanded. No doubt it is reasonable, after the transfer of property has been made, and the purchaser has entered into possession, that the seller should say, It is time now to change the personal liability under the bonds, and transfer it from me to you. But if he does propose it, there may be a very serious question raised as to the expenses to be incurred, with which question we have nothing to do. Now I shall not say anything here about the transaction previous to the arrestment of the rents, and should not have said so much, were it not indispensable for the disposal of the question before us, as to whether the arrestments were unreasonable or not. The time at which they were laid on is of importance. It was not till the 13th May, two days before the term, when it was almost certain, and especially in a house property of this nature in Glasgow, to be productive of embarrassment and loss to the persons whose rents were thus arrested. Farther, the diligence was only preceded by four days by any demand for payment, and that not from the parties in right of the bonds. This was a most strange course for Mr Duncanson to take; and, as the case stands, the arrestment must be loosed, and that *simpliciter*. I do not, however, wish to be understood as giving my opinion that they were nimious and oppressive, as that might be prejudging some other questions that may arise between the parties.

The other Judges concurred.

Arrestments *simpliciter* recalled.

Agent for the Petitioner—D. J. Macbrair, S.S.C.

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

Saturday, May 27.

SECOND DIVISION.

STEWART v. CLARK.

(Ante, p. 402.)

Reference to Oath. Damages being sought for breach of a parole agreement alleged to have

been entered into previous to a written lease—*Held*, a minute referring the matter to the defender's oath must definitely refer to the contract alleged; and a form approved which referred to certain articles of the condescendence.

*Interlocutor—Expenses.* As the interlocutor bore approval of a reference "proposed by the defender," the Court recalled the interlocutor, and declined to find the defender entitled to the expenses of the reclaiming note.

By lease, dated 31st March and 1st April 1870, the defender let to the pursuer certain premises at Silvermills and a specified amount of steam power. In December last the pursuer raised an action in which he claimed damages from the defender for breach of a verbal contract which he said had been entered into in or about February between the parties, for the supply of heating steam to him for his machinery. The defender denied that any such contract had been made, and pleaded that if made it could only be proved by writ or oath. The Lord Ordinary (JERVISWOODE) and the Second Division in March last adopted this contention. The pursuer accordingly gave in a minute referring the whole matters dealt with by the Lord Ordinary's interlocutor to the defender's oath. The defender objected to the indefiniteness of the reference, and the minute was refused. On the request of the pursuer a minute was adjusted by the parties, and given in by the pursuer, but was withdrawn by him from process before any interlocutor was pronounced by the Court upon it. He thereafter gave in the following minute:—"The pursuer hereby refers to the oath of the defender whether he contracted to supply the pursuer with steam for heating purposes to be used in his business as a comb manufacturer in the premises at Silvermills, let to pursuer by the defender in terms of a written lease, dated 31st March and 1st April 1870." The defender objected that the reference should be more specific, as the only contract alleged was anterior to the lease; and urged that the proper form for the reference would be in terms of the minute that had been adjusted, viz., "the pursuer hereby refers to the oath of the defender whether in or about the month of February 1870 the defender contracted to supply the pursuer with steam for heating purposes as set forth by the pursuer in the second and third articles of his condescendence."

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the minute of reference by the pursuer to the oath of the defender, No. 12 of process, refuses to sustain the same in the terms therein stated; approves of a reference proposed by the defender, whereby the pursuer refers to the oath of the defender—'Whether in or about the month of February 1870 the defender contracted to supply the pursuer with steam for heating purposes as set forth by the pursuer in the second and third articles of his condescendence; appoints,' &c."

The Court, considering the minute proposed by the pursuer too indefinite in the circumstances, directed him to amend his minute by incorporating a reference to his condescendence, and approved of the following minute:—"The pursuer hereby refers to the oath of the defender whether the defender contracted to supply the pursuer with steam for heating purposes as set forth by the pursuer in the second and third articles of his condescendence." As the Lord Ordinary's interlocutor bore that it approved of a "reference proposed by the

defender," the Court recalled the interlocutor, and refused to make any finding on the matter of expenses of the reclaiming note.

Agents for Pursuer—J. B. Douglas & Smith, W.S.

Agents for Defender—Gillespie & Paterson, W.S.

Tuesday, May 30.

## FIRST DIVISION.

NICHOLSON & WILSON v. BRUCE.

*Agent and Principal—Railway—Engineer—Process*

*Defences—All Parties not called—Expenses.* A, the engineer of a private railway belonging to B, being sued for the price of certain furnishings for the use of the line, averred that the pursuers were fully aware that in ordering the goods he had acted in his factorial capacity as engineer to the line, and that they had looked to the proprietor for payment. A plea of all parties not called was stated. The Lord Ordinary, without noticing this plea, allowed a proof, and on the proof, *held* that the pursuers had failed to establish that the goods were furnished on the personal credit of the defender, and assolizied him accordingly. The pursuers reclaimed, and the Court, after hearing argument on the merits, sisted the case, to give the pursuers an opportunity of calling B. On application B paid the sum sued for. On the case coming up again on the question of expenses, *held* that the pursuers ought to have called B at first, and were therefore liable to A in expenses. At the same time the Court were of opinion that the Lord Ordinary's judgment on the merits was well founded.

The present action was raised by Nicholson & Wilson, ironfounders, Blaydon-on-Tyne, against G. C. Bruce, civil engineer, Edinburgh, concluding for payment of £120, 17s. 11d., being the amount of an account for railway chairs. The defence was that Mr Bruce had ordered the chairs in question as engineer for the Ballater Extension Railway, a private undertaking belonging to Colonel Farquharson of Invercauld; that the pursuers were fully aware of this, and transacted with him in the capacity of engineer; that by the usage of trade the defender in giving the order did not engage his personal credit, and that the pursuers in executing it relied for payment on Colonel Farquharson alone. The defender pleaded that the action ought to be dismissed, in respect that all parties concerned were not called.

The Lord Ordinary (MURK), without noticing the preliminary plea, allowed both parties a proof of their averments. A considerable amount of evidence, both documentary and parole, was accordingly led, in regard to the circumstances under which the order for the goods was given and accepted. The letters of the defender in regard to the transaction, though they did not bear *in gremio* that the order was for the railway, were uniformly headed "Ballater Extension Railway." Evidence was led in regard to the communications which passed between the pursuers and a Mr Eckersley acting for the defender. The Lord Ordinary found that the pursuers had failed to prove that the goods in question were furnished on the personal credit of the defender, and assol-