

Thursday, June 29.

SECOND DIVISION.

ANDERSON v. FRASER.

Sheriff—Jurisdiction. A party raised an action in the Sheriff-court, founding on a letter as an obligation to convey a heritable subject, and concluded (1) for a conveyance, and (2) for money expended on the subject on the faith of the letter. Action *dismissed* as incompetent in the Sheriff-court.

This was an action raised in the Sheriff-court of Inverness by John Anderson, gardener, against James Fraser, sometime residing at New York, and at present at Inverness. The pursuer alleged that the defender sometime previous to 1859 succeeded to certain subjects in Inverness; and further, "in the end of the year 1858, or beginning of the year 1859, the pursuer wrote to the defender, informing him that the buildings on said property were in a ruinous condition, and of the necessity of repairs, and the defender, on the 22d day of February 1859, wrote to the pursuer the letter of that date herewith produced. Said letter is holograph of the defender, and he then, *inter alia*, writes as follows:—"This last letter gives me bad accounts about the leaky house. What on earth do you want me to do with it? Is it not your own, to do with it what you please? and do you really want me to repair it besides for you? So you need not be afraid to expend on it. Me or my heirs will not trouble you in this life, or the life to come, or dispute it with you; and if it is not worth keeping, let it go." The expressions in said letter above quoted refer to said property above mentioned." The conclusions of the summons were for a disposition of these subjects, or for payment of £200 expended on them.

The Sheriff-Substitute (THOMSON) allowed a proof.

The Sheriff (IVORY) pronounced an interlocutor in the following terms:—"Recals the interlocutor appealed against: Finds that the process involves a competition of heritable rights, and is therefore incompetent in this court: Dismisses the action, and decerns: Finds the pursuer liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report.

Note.—The pursuer in the present action asks to have the defender decerned to deliver to him a valid conveyance of certain heritable subjects in Fraser Street, Inverness, or alternatively to pay him the sum of £200, expended by him upon the said property.

"The pursuer maintains that the defender is bound to grant the said conveyance, on the ground that the latter, by holograph letter dated 22d February 1859, conveyed, or undertook to convey, to him the property in dispute; and that on the faith of the said letter he laid out a large sum in improving it.

"The defender, on the other hand, resists the pursuer's demand, on the ground that he is the true proprietor of the subjects in question, and that the said letter does not contain either a conveyance in favour of the pursuer, or any obligation to convey the property to him.

"There seems, then, no room to doubt that the right to the said property in dispute is directly in the present action. Further, before the defender

can be decerned to grant the said conveyance, it must first be determined whether by the said letter the defender conveyed, or undertook to convey, the said subjects to the pursuer, and whether on the faith of it the latter expended a large sum in improving the property. But the determination of these questions will substantially decide whether the pursuer or defender is the proprietor of the subjects in dispute, and thus involves a question of heritable right.

"It appears to the Sheriff, therefore, that the present action involves a competition of heritable rights, and is incompetent in the Sheriff-court."

The pursuer appealed.

ÆNEAS J. G. MACKAY for him.

THOMS and RHIND for the respondent.

The Court unanimously adhered to the judgment of the Sheriff. The Lord Justice-Clerk had some doubt whether it would not be proper to sustain the competency of the action so far as the second conclusion of the summons was concerned.

Agent for Pursuer—Æneas Macbean, W.S.

Agent for Defender—William Officer, S.S.C.

Thursday, June 29.

WILSON v. WILSON.

Oath—Extrinsic—Deletions. Under a reference to oath the deponent admitted receipt of upwards of £50 of coppers, but admitted the validity of a state of his affairs in which his brother was entered as creditor for £98 and corresponding dividends. The name and first sum were deleted, but not the dividends; and the sums deleted were included in the summation, and two other names deleted were those of admitted creditors. The deponent stated repayment of the debt by delivery of flour—*Held* the oath was affirmative of the reference both as to the amount of the debt and its resting-owing, as the repayment by flour was extrinsic.

In this action the pursuer, who is a baker in Glasgow, sought payment of the sum of £98, which he alleged had been lent by him to his brother the defender in 1861. Under a reference to his oath the defender deponed that he had received in 1861 upwards of £50 of copper coin from the pursuer, in order to be transmitted to the Mint, but he could not remember whether he had got any loan, or any discharge for repayment of this money, or whether the sum received amounted to £100, or whether he had given silver or other money in exchange. It was, however, not due, as he had repaid his brother by supplying him with flour to the extent of £300; but whether this flour was supplied previous to his business difficulties in 1862, or after, or before or after the date of his state of affairs, or in what quantities, he could not remember; as all record had been lost by the burning of his books a few years ago. He, however, admitted the validity of a draft scheme of ranking and division, prepared for his creditors in 1862. In this the pursuer was inserted as a creditor for £98, but both the name and the figures were scored out. Why they had been so deleted he did not know. He had inserted his brother's name for this sum "to protect him fully in the event of it going to a trustee." And the sum, though scored out, was included in the summation; the dividends for the pursuer were not deleted, and two others, who were unquestion-

ably creditors, were similarly deleted. In these circumstances the Sheriff-Substitute (MURRAY) held the oath affirmative of the reference to the extent of £50. On appeal the Sheriff pronounced the following interlocutor:—

"Glasgow, 11th February 1871.—Having heard parties' procurators on their respective appeals, and reviewed the whole process, Finds that it is contended for the defender that his oath of reference is negative of the resting-owing of the sum sued for, in respect he has deponed that said sum was repaid in flour; but finds that it is not deponed either that it was a part of the original transaction that the debt was to be so extinguished, or that the pursuer afterwards agreed to hold the debt discharged in respect of the receipt of flour: Finds therefore that the statement is not intrinsic but extrinsic, being merely that of a counter claim or independent transaction, which is not inconsistent with the subsistence of the debt (see Dickson on Evidence, secs. 1650 and 1655, and authorities there quoted): Finds that the defender admits in his said oath that he received coin from the pursuer amounting in value to more than £50, and he cannot say whether it did not amount in value to £100: Finds that the defender afterwards gave up the pursuer in his state of affairs as a creditor for £98, and he depones that he cannot say that he made any payment to him subsequent to the date of said state: Finds that in these circumstances the oath is substantially affirmative of the reference: Therefore dismisses the defender's appeal, but sustains the pursuer's, and, alters the interlocutor appealed against; and instead of restricting the sum decerned for to £50, decerns against the defender in terms of the conclusions of the summons; and *quoad ultra* adheres."

The defender appealed.

WATSON and JOHN GIBSON for him.

GUTHRIE SMITH and J. M. LEES in answer.

Authorities cited—*Thomson v. Thomson*, 20 Feb. 1830; *Murray v. Murray*, 12 Feb. 1839; *Thomson v. Duncan*, 10 July 1855; *More's Stair*, p. 418; *Hunter v. Kinnaird*, 9 Dec. 1830.

The Court adhered.

Agent for Appellant—Alex. Wylie, W.S.

Agent for Respondent—Ralph Richardson, W.S.

Thursday, June 29.

BROADHEAD v. YULE.

Ship—Charter-Party—Agent. By the charter-party it was stipulated that a ship should be addressed to the charterers' agents in this country. When the ship arrived the agent collected the freight on behalf of both the owner and charterer, and, without the knowledge of the owner or master, arranged with a third party a claim for damage to cargo. Held that this arrangement was not binding on the owner or master.

This was an action by John Broadhead, master of the ship "Puck," against T. B. Yule, merchant, Leith, concluding for £45, 7s. 9d., as a balance of an account-current between them. The defender denied that he acted as agent for the pursuer in collecting freight, or in any other matter than as broker in the ship's customhouse business; and he explained that "the 'Puck' was chartered by Messrs Scott & Allan of Leith by charter-party, dated 13th April 1870, to convey a cargo of wine

and other lawful merchandise for Yarmouth and Leith, the freight payable by the charterers on the right delivery of the cargo being at the rate of 32s. per imperial ton of 252 gallons of wine delivered for what she could carry; but the captain was to be obliged, without prejudice to the charter, to sign on presentation bills of lading, at any rate of freight which the charterers could succeed in obtaining, and the ship was to be addressed to the charterers' agents in Cadiz, Yarmouth, and Leith; that the ship was accordingly addressed to the defender in his capacity of agent in Leith for the charterers; that on the out-turn of the cargo it was found that one butt of wine, of the estimated value of £45, received by the pursuer in good order and condition at Cadiz, had been crushed by the pursuer during the voyage, through the fault of the pursuer or those for whom he is responsible, and that the pursuer had failed to carry the same in safety, in terms of his contract of carriage. The charterers declined to authorise the defender to settle the freight on their behalf, except on the footing of his retaining in his hands on their behalf the £45 to settle the price of the said butt of wine; and to this the pursuer consented. An account upon this footing was accordingly made up by the defender, and the balance appearing therein was paid to the pursuer on 29th July 1870, as per receipt produced. That subsequently to that date the charterers, through the defender, succeeded in effecting an arrangement regarding the said butt of wine, whereby Messrs Wauchope, Moodie, & Hope, of Leith, the owners thereof, accepted in full £33, 7s., and the difference betwixt that sum and the £45 in his hands the defender, though in nowise bound to do so in a question with the present pursuer, has all along been willing to pay to the pursuer, and offered to do so before the service of this action."

The Sheriff-Substitute (HAMILTON), after a proof, pronounced the following interlocutor:— "Finds the defender, as broker, or otherwise acting for the pursuer, collected the freight due to the pursuer under the charter-party, and that he is bound to account to him therefor: Finds that the items of the account annexed to the summons are not objected to: Finds that the sum of £33, 7s. mentioned in the minute of defence, does not form a proper charge against the pursuer, the same having been paid to Messrs Wauchope, Moodie & Hope without the pursuer's knowledge or authority: Therefore, and with reference to the foregoing findings, decerns against the defender in terms of the libel: Finds the pursuer entitled to expenses, allows an account, &c.

"Note.—This is a very clear case. By the charter-party with Messrs Scott & Allan the pursuer was to be paid freight at the rate therein mentioned on delivery of the cargo; and although there was a clause binding the master to sign bills of lading at any rate of freight which the charterers could obtain, yet, as this was to be without prejudice to the charter, the pursuer's right of lien remained complete, and he was not bound to give delivery of any particular portion of the cargo except upon payment of the freight stipulated in the relative bill of lading. In collecting and granting discharges for the freight due by the various consignees, the defender necessarily acted as the pursuer's broker or agent, and was bound to account to him in the first instance, and not to the charterers. Accordingly, in the account-current which he rendered to the pursuer after the discharge of