

1871, which was not brought under review, and on 12th September the pursuer quitted the premises.

The pursuer now raised the present action of damages, on the ground (1) that the defender had falsely and calumniously represented in the proceedings referred to that the pursuer had fabricated, or caused to be fabricated, the missive of lease which had been produced and founded on by him, or at least that he had used the same knowing it to be fabricated; (2) that the defender, by granting the missive, and otherwise, having undertaken that the pursuer should not be disturbed in the possession of the subjects till Martinmas 1878, was bound to make reparation to the pursuer for the loss sustained by him through his being ejected.

The Lord Ordinary (MURE) allowed the pursuer two issues, the first on the question of slander, the second in the following terms:—

“Whether, on or about the 9th day of August 1867, the defender undertook to give the pursuer possession till Martinmas 1878 of the subjects at or near Wester Mugdock, which at the date of said missive were tenanted by the pursuer; and whether the defender failed to implement his said undertaking, to the loss, injury, and damage of the pursuer?” Damages claimed under each issue £500.

The defender reclaimed.

WATSON and BALFOUR, for him, argued that there was no relevancy in the pursuer's statements to entitle him to the second issue.

SOLICITOR-GENERAL and RHIND for the pursuer.

The Court having intimated that the construction of the missive was a question for the Court, and not for a jury, parties were heard thereon.

At advising—

LORD PRESIDENT—The question before us is, in form, Whether a certain issue be sent to trial? But the substantial question is, What is the construction of the missive of lease? The defender, the tenant of Wester Mugdock, has a formal written lease for nineteen years, with a stipulation that either party may terminate it at the end of ten years, on three months' notice. In these circumstances, he lets to Logan a house and other subjects at £9, 10s. a-year, “for a lease of, to the end of my lease.” The missive is a very informal document, but it contains the elements of a lease. For one of the essential elements of a lease, the *ish*, it refers to the defender's own lease. When you go to that lease you find that it is to end after nineteen years, or ten, and that in the option of either party. The question is, Did that informal missive give the pursuer a lease for eleven years certain? I think not. It gave the grantee the same tenure as the granter himself had. I find it impossible to sustain the issue. There are other objections to it, but into these it is unnecessary to go, as the whole foundation is gone.

LORD DEAS—I think that by the terms of this missive the defender subsets the subjects on the same footing as he held his own lease. I entirely agree with your Lordship.

LORD ARDMILLAN—I concur. Had the tenant and not the landlord taken advantage of the break, the case would have been different.

LORD KINLOCH concurred.

The Court disallowed the second issue.

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

Agents for Defender—Webster & Will, S.S.C.

Saturday, February 3.

SIR WILLIAM STUART FORBES v.

LORD CLINTON AND OTHERS.

(*vide ante*, vol. v. p. 593).

Process—Transference—31 and 32 *Vict.* c. 100, §§ 96, 98.

Where the merits of a cause had been exhausted in the Court of Session by a decree assolzieing the defenders, who were also found entitled to expenses,—

Held that the cause was still depending in this Court so long as the expenses were not modified and decerned for, and that the pursuer was entitled, with the view of appealing to the House of Lords, to crave a transference of the cause against the heir of entail of one of the defenders, who had died in the meantime, though he had no interest in the depending question of expenses.

This action was originally raised in 1867 by Sir William Stuart Forbes of Pitsligo and Fettercairn against the Right Honourable Harriet Williamina Hepburn Stuart Forbes or Trefusis, Baroness Clinton and Saye, and against Baron Clinton as her husband, and for his own interest. The Court on 11th June 1868 pronounced an interlocutor assolzieing the defenders from the conclusions of the action, and finding them entitled to expenses. No further step was taken by either party to the action, the expenses were never taxed or modified, nor was the decree extracted. In the meantime Lady Clinton died, and was succeeded by her son the Honourable Charles Trefusis, a pupil, in the entailed estates of Fettercairn and others which had been the subject of the action.

The pursuer now lodged a minute of transference under the 96th and 98th sections of the Court of Session Act 1868, craving to have the action transferred against the said Honourable Charles Trefusis, and against Lord Clinton, his father, as his administrator-at-law. It was admitted that the sole object of the pursuer in asking to have the case transferred, was to take an appeal to the House of Lords—the expense of a transference in the House of Lords being much greater than in the Court of Session.

Lord Clinton appeared, and objected to the warrant of service of the summons authorised by sections 96 and 98 of the Court of Session Act being granted, on the ground that the merits of the cause were decided in this Court, and that he, both for himself and *jure mariti* in right of his wife, was the only person who had any interest in the question of expenses.

FRASER for the pursuer.

SOLICITOR-GENERAL (A. R. CLARK) and LEE for Lord Clinton.

At advising—

LORD DEAS—This was an action of reduction and declarator at the instance of Sir William Forbes against Lady Clinton, and her husband for his interest, the object being to reduce the titles made up by Lady Clinton under a certain entail. It is not necessary to follow in detail the course of the cause. It is sufficient to say that it ended in a judgment of the Inner House assolzieing the defenders, and finding them entitled to expenses, which were remitted to the auditor to tax and report in the usual way. Before this was done,

however, Lady Clinton died, leaving a son who has now the substantial interest in the property which was at stake in the action. The question now is, whether the process is in such a state that it can be transferred against her son. I am humbly of opinion that the cause is a depending cause in the Court; that there is more still to be done in it; and that it is not material that one party only has an apparent interest to move in it. I am not able to doubt that the pursuer is entitled if he choose to insist on getting in the auditor's report upon the defender's account of expenses, and bringing the case to an end. The pursuer has a legitimate interest in knowing how much these expenses are, and in objecting to have such an account of expenses kept hanging over his head for an indefinite time. Now the whole question that we have to do with here is, whether this is a depending cause or not. I think that, independently of the question of appeal to the House of Lords, either party is entitled to move in it. There may be, and no doubt is, a *bona fide* intention to appeal, and though it may be quite possible to get the case transferred in the House of Lords for that purpose, yet that is no reason why it should not be done here if the cause is still depending before us, and it certainly will be a saving of expense to the parties.

LORD ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that the objections to the proposed transference should be repelled. The action is very clearly a depending action. A finding of expenses has been pronounced, but the auditor's report has not been returned, and in consequence no decree for expenses has been pronounced. And the process is not extractable. In this position of things Lady Clinton has died. I consider that, as a matter of course, the opposite party is entitled to have the action transferred against her heir in the estate now in question. I think the Court cannot inquire into the probable or possible judgments which may be afterwards pronounced. It would be, as I consider, most perilous to make the competency of the transference turn on a speculation as to these. The transference, I think, must follow on the fact of the dependence of the process. What may afterwards happen cannot anticipatively affect its competency.

LORD PRESIDENT—I have had some difficulty in deciding this question, arising from a technical objection, which presented itself with some force to my mind. But, on the whole, as your Lordships are agreed, I am not disposed to dissent.

I think it right, however, to explain the difficulty which I did feel. So far as the merits are concerned, the case has been exhausted in this Court. The question of expenses also has been determined up to a certain point. That is to say, the original defender has been found entitled to them, and the pursuer liable in them. The effect of that is, I think, to give Lord Clinton a right, and the only right, to ask decree for them when taxed against the pursuer or his representatives. The person against whom it is sought to transfer this cause has no interest whatever in the expenses, and no interest in any discussion that could now take place in this Court. The technical objection thus arises, that though he is a proper party in any appeal case that may be taken to the House of Lords, and must be made respondent there, he is not and cannot be made a proper party

so far as any interest goes to the case while it remains in this Court. While I feel the force of this difficulty, I am not, however, disposed to differ from your Lordships.

The Court granted warrant, accordingly, to serve a copy of the summons in terms of the 96th section of the Court of Session Act 1868, and allowed six days to lodge a minute of objections, if so advised.

Agents for the Pursuer—Adam & Sang, W.S.

Agents for Lord Clinton—Mackenzie & Ker-mack, W.S.

HIGH COURT OF JUSTICIARY.

(Before the Lord Justice-Clerk, Lord Cowan, and Lord Neaves.)

Wednesday, January 31.

M'CLURE v. DOUGLAS.

Suspension—Mora—Acquiescence.

A conviction was obtained before Justices under the Master and Servant Act, and the accused paid the fine at the time. After five months he brought a suspension, and stated that he paid "under protest"—*Held* that he was barred from raising objections to the conviction.

This was a suspension of a conviction, under the Master and Servant Act, 30 and 31 Vict. c. 141, obtained before the Justices of Ayrshire on 10th August 1871. The conviction was objected to on various grounds, such as vitiation in the amount of the penalty, but these are of no moment, as the Court founded their judgment on the delay and acquiescence. The prisoner made payment of the fine of 5s. at the time, and now alleged that he did so "under protest."

MACLEAN for the appellant.

FRASER for the respondent.

At advising—

LORD JUSTICE-CLERK—I think it is unnecessary to refer to the other points argued, as I think the delay and acquiescence are sufficient to debar the suspender from the remedy he seeks. It is admitted that the sentence has been obtempered. It is said by the suspender, on the one hand, that he paid the fine under protest, and from the fear of imprisonment, while, on the other hand, the respondent says that the sum was paid in Court when he knew that the interlocutor was not written out. If these averments had stood on an equal footing, we might have required investigation, but in the face of the precise statement by the respondent, the suspender is unable to say when and to whom the money was paid. In short, he can make no very relevant reply to the statement that payment was made in Court, and by the agent for the suspender. The date of the sentence is 10th August, and we are now in the end of January. I am very far from saying that the delay would be a bar to bringing a suspension if the accused had been put in prison, but when a party implements a sentence by paying the fine, he must be prepared to state very precisely the circumstances under which he so acquiesced. He has given us no such precise statement, and, on that ground, I think we must refuse the suspension.