

the brieve, the verdict must be Not Proven; and the reason for such a course is obvious. But in this case why should the verdict be Not Proven, for the jury have affirmed each head of the brieve, that is to say, they have found that the respondent is of unsound mind, second, that is the nearest agnate, and third, that he is of lawful age; and the nearest agnate will yet be entitled to take the office when the formal writing embodying the verdict is returned to Chancery, if he chooses to do so.

I cannot think that a clause of an Act of Sederunt can be construed so as to destroy the title to pursue which otherwise would be good.

The Court pronounced this interlocutor:—

“The Lords having considered the Bill of Exceptions for the defender (respondent) and heard counsel thereon, Disallow the Exceptions.”

Counsel for the Claimant—Blair. Agent—John Latta, S.S.C.

Counsel for the Respondents—Balfour and Pearson. Agents—Morton, Neilson & Smart, W.S.

Thursday, December 10.

FIRST DIVISION.

GARDNER v. YOUNG.

Proof—Conjunct probation—Proof in replication.

A Sheriff in a cause allowed “to both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation.” Evidence was led by both parties, and then the pursuer led his conjunct proof, in which he went minutely into various questions raised by him on record, but which he had not touched in his proof. *Held* that the defender was entitled to a proof in replication.

The pursuer John Gairdner, wood merchant, Newton on Ayr, raised an action in the Sheriff-court of Ayrshire against the defenders Messrs J. & T. Young, Engineers, also at Newton on Ayr, to obtain payment for an account of wood furnished.

The defenders admitted that the account sued for was due and resting-owing by them, with the exception of a small sum of £1, 10s. 7½d., which they averred that the pursuer had agreed by writing under his own hand to deduct as an overcharge. But they claimed payment of a contra account due by the pursuer to them for machinery and other articles furnished, and pleaded compensation.

The pursuer, in answers to the defenders' statement of facts objected to the various items of the defenders' account as overcharged.

The Sheriff (N. C. CAMPBELL) on appeal, allowed “both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation,” and remitted to the Sheriff-Substitute.

The pursuer, his account generally being admitted, tendered himself as a witness merely to explain the circumstances connected with the allowance of a deduction averred by the defenders, and then closed his proof in chief.

The defenders thereupon adduced two persons

in their own employment, and three men of skill, and examined them generally as to the quality of the articles furnished, and the reasonableness of their charges, and closed their proof.

The pursuer then led his conjunct proof, adduced eight witnesses, and entered with great minuteness into the questions of material, workmanship, and price, and also into the question of the efficiency of the article in working.

On the pursuer's conjunct proof being closed, the defenders moved for a proof in replication, which the Sheriff allowed on the particular points specified, and by the witnesses named in a minute put into process.

After the defenders' proof in replication was led, the Sheriff found generally in favour of the defenders in the action.

The pursuer appealed to the Court of Session.

At advising—

LORD PRESIDENT—The first thing to be determined in this case is whether proof in replication was properly allowed to the defender. I cannot say that this process has been well conducted. From first to last the proceedings have been faulty, and the blame attaches equally to all parties concerned. The original allowance of proof was made in the interlocutor of the Sheriff Principal, of 4th June 1869, “Allows both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation.” It seems to me that under that order for proof it was the duty of the pursuer to lead evidence on all the points raised by him on record. He was not entitled to confine himself to the particulars of his own account. He had raised the question whether the defender had overcharged the items contained in his contra account, and if he did not lead proof of his averments on this point he was really leaving that proof till his own anticipated conjunct proof came to be led. Such a method of conducting his case was quite unjustifiable. It was depriving the defender of any reply to his proof of the real matter in dispute between them. The pursuer was quite wrong in not entering upon this subject in his proof in chief. Very naturally the defender was not very careful in leading evidence on this point, for he had nothing to meet but the pursuer's averments on record, which had not yet been supported. He contented himself with adducing two of his own people, and two men of skill. But then comes the pursuer's conjunct probation, in which, for the first time, he enters upon a very large question, judged at least by the mass of evidence. He goes minutely into a question of overcharge, and assails not only the material and the workmanship, as well as the price of the article supplied by the defender, but also the effectiveness of the article when put in use. And there, according to the terms of the Sheriff's interlocutor, the proof should have ended. But the Sheriff very naturally said, “Looking to the way in which the pursuer has conducted his proof, he has exposed the defender to a great disadvantage, and a proof in replication must therefore be allowed.” I cannot say that he was wrong in this conclusion. It was very wrong that the case should ever have come into such a position as to require a proof in replication. But under the circumstances I think the Sheriff was entitled to grant it.

We must therefore enter on a consideration of all the evidence that has been led.

LORDS DEAS, ARDMILLAN, and MURE concurred.

The Court pronounced the following interlocutor:—

“ Find that pursuer's (appellant's) account sued for is admitted by the defenders (respondents) with the exception of £1, 10s. 7½d.; Find that the pursuer agreed to abate the said £1, 10s. 7½d. from his account, and rendered his account to the defenders bearing the said deduction on the face of it: Find that the articles contained in the defenders' contra account were furnished by the defenders to the pursuer: Find that it is not established in evidence that the said account is overcharged: Therefore refuse the appeal, and decern; find the appellant liable in expenses; Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report.”

Agents for Pursuer—Fyfe, Miller, Fyffe, & Ireland, S.S.C.

Agents for Defenders—Miller, Allardice, Robson, & Innes, W.S.

Friday, December 11.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

M'LAREN v. BRADLY.

Prescription—Act 1579, c. 83—Cash advances.

A sued B for the balance of an account, partly for articles furnished to B, and partly for cash advanced to redeem goods which B had pledged. A averred that he had applied the sum paid to account by B for payment of the goods furnished, which were the items in the account of earliest date, and that the balance sued for was entirely due for cash advances.

Held (1) that A was entitled to apply the payment to the items first incurred; and (2) that the Statute of 1579, c. 83, did not apply.

This was an action brought by John Fisher M'Laren, writer in Glasgow, against Mrs Morrison or Lacy or Bradley, and her husband, Henry Bradley, for payment of £30, 5s. 6d., “being the balance of an account due by the defenders to the pursuer as assignee or indorsee of Messrs James Muirhead & Sons, jewellers in Glasgow, conform to account and assignation or indorsation thereon in favour of the pursuer.”

The pursuer averred that James Muirhead & Sons had sold goods and advanced cash to Mrs Bradley and done work for her prior to her marriage with Mr Bradley, and conform to account commencing 25th July and ending 4th November 1869. As shown by this account, the goods and work amounted to £175, 17s. 6d., and the cash advanced to £38, 6s. 0d. In payment of this debt James Muirhead & Sons admitted that they had received in cash and goods the sum of £184, which they had applied to payment of the goods and work in the first place, being the items in the account of the earliest date, thus leaving owing the sum of £30, 5s. 6d. sued for, being the balance of the said cash advances.

The defender admitted that James Muirhead &

Sons had received goods and cash to the amount of £184, but otherwise denied the pursuer's averments.

The defenders pleaded, *inter alia*,—“(1) No title to sue, the assignation or mandate founded on not being stamped conform to law. (2) Prescription. (3) The pursuer's averments can only be proved by writ or oath.”

The Lord Ordinary (MACKENZIE) pronounced this interlocutor:—

“*Edinburgh, 30th October 1874.*—The Lord Ordinary having heard counsel for the parties, and considered the Closed Record and process, repels the First Plea in Law for the defenders: Finds that the provisions of the Statute 1579, c. 83, apply to the furnishings of goods and to the work charged for in the account libelled on: *Quoad ultra* allows the parties a proof of their respective averments in terms of ‘The Evidence (Scotland) Act 1866,’ and appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed.”

The pursuer appealed.

At advising—

LORD PRESIDENT—In this case the summons concludes “for payment of £30, 5s. 6d. sterling, being the balance of an account due by the defenders to the pursuer as assignee or indorsee of Messrs James Muirhead & Sons, watchmakers and jewellers in Glasgow, conform to account and assignation or indorsation thereon in favour of the pursuer, to be produced at the calling hereof, with the legal interest thereof from the 31st December 1869 until payment.”

The account consists of a variety of items, partly for goods furnished and partly for cash advanced.

In the first article of the condescendence the pursuer says—“The defenders, the said Henry Bradley and Mrs Annie Campbell Morrison, or Lacy, or Bradley, are due and owing to the pursuer as assignee or indorsee of Messrs James Muirhead & Sons, watchmakers and jewellers in Glasgow, the sum of £30, 5s. 6d., being the balance of an account for goods sold to and for work done by them for the said Mrs Annie Campbell Morrison, or Lacy, or Bradley, and for cash advanced for and on her account, all prior to her marriage with the said Henry Bradley, and conform to account commencing 25th June 1869, and ending 4th November 1869, having thereon stamped draft or order of payment in favour of the pursuer, or order on demand, dated 27th March 1874. The goods and work amount, as shown by said account, to £175, 19s. 6d., and the cash advanced to £38, 6s., and these amount together to £214, 5s. 6d.”

In article 3 of the condescendence it is alleged—“The said James Muirhead & Sons received in cash and in goods from or on account of the female defender altogether the sum of £184, as specified in the items to credit appended to said account; and applying these credit items towards payment of the goods and work in the first place, there is left due and owing the sum of £30, 5s. 6d. of the said cash advances, with interest thereon from 31st December 1869, at the rate of five per centum per annum till payment.”

The answer to that is—“Admitted that Muirhead & Sons received the cash and goods here mentioned.”

The question is whether the statute of 1579 applies to the claim as stated. I am of opinion that it does not. The items for cash transactions do