

sums of money which have become due since he has been in prison. He contends that having suffered the imprisonment to which he was rendered liable by statute, he is not liable to be incarcerated again for the same cause, and on the mere words of the statute there at first appears to be good ground for his argument. But there is another aspect of the case, and that is, if a person who is liable to pay aliment for seven or ten years is to be imprisoned for the first term, and after that is to be free from all claims upon him for aliment, the effect would be that the section about imprisonment for aliment would become nugatory altogether. And this view becomes strengthened when we see that the other exception from the general rule that the statute allows is in allowing imprisonment for not paying the taxes due to Her Majesty. It cannot be contended that because a man was imprisoned for not paying his taxes one year, he cannot be imprisoned for not paying his taxes due for another year, and aliment, like a tax, is a constantly recurring obligation. I cannot help thinking that the Legislature in making these exceptions intended that the prisoner should be liable to be imprisoned for twelve months for each term of aliment as it fell due, for if it were otherwise it would have been undoubtedly a serious matter, and would nullify the continuing decree for aliment. It is said, on the other hand, that if a man can be imprisoned in this manner, that it amounts to perpetual imprisonment, but in that case the remedy for the prisoner, if he is an honest debtor, is to sue out a *cessio*. I therefore think we should refuse the note of suspension.

LORD MURE—I think the Lord Ordinary made a mistake in holding that when the pursuer holds a decree for aliment for seven or ten years in the common form, the defender cannot be imprisoned for more than twelve months altogether upon it. I cannot think this is a case that comes under the statute. The second warrant is issued for the second year's debt, whereas what the defender was imprisoned for before was the first year's debt; these are not the same thing, and therefore I think the note ought to be refused.

LORD SHAND—While the Legislature provided by a recent statute that imprisonment for debt should be abolished in Scotland, it reserved to certain creditors their rights of arrestment and imprisonment for "taxes, fines, or penalties due to Her Majesty, and sums decerned for aliment." In making this provision they were really following an example set them ten years before in the statute for the limitation of the arrestment of wages. Under the concluding words of section 4 it is contended that if a person is imprisoned for one year's aliment, and has undergone imprisonment, he cannot undergo any more; but the answer to that is that each year's aliment is a different debt; to read it otherwise would lead to very grave results, especially in cases where the Court has granted decrees of separation and aliment, where the husband has to pay aliment for the whole term of his wife's life; each term forms a new debt, and on each term he is liable to be imprisoned for the new debt.

LORD DEAS was absent.

The Lords recalled the Lord Ordinary's inter-

locutor, and remitted to his Lordship to refuse the bill.

Counsel for Suspender—Sym. Agent—J. H. Jameson, W.S.

Counsel for Respondent—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Saturday, December 10.

SECOND DIVISION.

[Sheriff of Forfar.]

GRANT v. FLEMING.

Sheriff—Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. cap. 96)—"Merchants' Accounts"—Triennial Prescription Act 1579, cap. 83.

In an action brought under the Debts Recovery Act for the amount of disbursements made more than three years previously by the pursuer in discharging a cargo on the defender's mandate, the Court *repelled* pleas (1) to the effect that the debt fell under the expression "*Merchants' Accounts*" as used in the Triennial Prescription Act of 1579, and was therefore prescribed; and (2)—*dub.* Lord Young—that if the Act of 1579 did not apply, then neither did the Debts Recovery Act.

David Grant, potato merchant, Dundee, presented a petition in the Sheriff Court of Forfar against Alexander Gilruth Fleming, Manager of the Scottish Banking Company, Dundee, for the purpose of having him ordained to make payment of the sum of £46, 8s. 8d. sterling, as the amount of disbursements made by the pursuer on his account in discharging a cargo of potatoes.

The defender pleaded—“(1) Prescription. (2) If it was held that triennial prescription did not apply, action was incompetent in the Debts Recovery Court. (3) On the merits, no employment—the pursuer's brother John Grant, now deceased, being the party employed with the work, and he having been settled with.”

After a proof the Sheriff-Substitute (**CHEYNE**) found in fact—“(1) That in the end of the year 1877 the defender, who was then a bank-agent in Dundee, imported a cargo of potatoes, consisting of 148 tons or thereby, in a ship called the '*Olympus*;' (2) that at the defender's request, the pursuer, who was a potato merchant in Dundee, and a customer of defender's bank, and to whom the defender had rendered some friendly services, agreed to see to the discharging, storing, and dressing of said cargo; (3) that in carrying out said agreement, and in connection with said cargo, the pursuer made disbursements amounting to £40, 8s. 8d., which sum included no charge for personal trouble; and (4) that no part of said disbursements had been repaid to the pursuer by the defender: Found in law, on these facts, that the defender was liable in the amount of said disbursements, and three years' interest (amounting to £6) thereon: Therefore decerned against the defender for payment to the pursuer of the sum sued for, being £46, 8s. 8d. sterling, and for the further sum of £6, 8s. 1d. sterling of expenses," &c.

He added this note:—"The case of *Saddler v. M'Lean*, 1794, M. 11,119, and other cases cited

in Dickson on Evid., section 487, are sufficient authorities for holding the plea founded on the triennial prescription inapplicable here, where the claim arises out of the contract of mandate. With regard to the plea that the action is not competently brought under the forms of the Debts Recovery Act, more doubt may be felt; but, on the whole, looking to the opinions delivered in the case of *Sandys v. Lowden & Rowe*, 1874, 2 R. (Just. Cas.) 7, and remembering that the Act is to be liberally construed, I have come to the conclusion that I ought to refuse to sustain it."

Upon the merits his Lordship was of opinion that the pursuer's claim was just.

The defender appealed, and argued—The account sued for was three years and eight months old at the raising of the action. It was struck at, then, by the Triennial Prescription Act of 1879, cap. 83, which ordained that "all actions of debt for housemaids, men's ordinars, servants' fees, merchants' compts, and other the like debts that are not founded upon written obligations, be pursued within three years, otherwise the creditor shall have no action except he either prove by writ or oath of his party." But (2) if it was held that triennial prescription did not apply, the action was incompetent under the Debts Recovery Act 1867.

The pursuer replied—(1) The Act of 1879 only struck at accounts as between merchant and customer, or employer and employee. No accounts arising out of the contracts of mandate or *negotiorum gestio* were considered to be among "the like debts" to accounts by a merchant against his customer—Dickson on Evidence, section 487; *Drummond v. Stewart*, February 19, 1740, M. 11,103; *Saddler v. McLean*, November 18, 1794, M. 11,119; *Donaldson v. Ewing*, December 10, 1819, Hume's Decisions 481. (2) The action was competently brought under the Act of 1867, on the authority of *Sandys v. Lowden & Rowe*, November 26, 1874, 2 R. 7 (Just. Ca.).

At advising—

LORD JUSTICE-CLERK—I am not inclined to interfere with the Sheriff's judgment here. He heard all the witnesses in the case on the merits, and we cannot distrust his decision on this part of the case. Then on the two preliminary points the defender has pleaded—(1) that the action is cut off by the triennial prescription; and (2) that the form of action is incompetent under the Debts Recovery Act. In regard to this latter point, no doubt obscure enough, questions may arise under the statute if we go strictly to work, but it is obvious that the intention of the statute is that it should apply to small accounts arising amongst dealers in the ordinary way, and its purpose is to give a cheap remedy for their recovery, and I do not think it was in the least intended to limit it to such debts as would have fallen under the Triennial Prescription Act of 1879. This is the interpretation which was given of the statute in the case of *Sandys v. Lowden & Rowe*, referred to in the Sheriff's note, and I think he is right in adopting it here. In regard to the first point, applying the ordinary rules, where the claim arises out of the contract of mandate, the plea of triennial prescription, in my opinion, cannot be competently pleaded. In conclusion, I would merely add, that I do not

think the statutes of 1879 and 1867 run on the same lines, the latter being much wider in its terms.

LORD YOUNG—I am of the same opinion. The Debts Recovery Act of 1867 is certainly oddly enough expressed, and has been copied from the language used in the Act of 1879. The class of debts which can be sued for under it are "housemaids, men's ordinars, servants' fees, merchants, accounts, and other the like debts." This language, which might have been perfectly intelligible in 1879, reads oddly enough in 1867. The defender here says in the present action, which is brought after a lapse of three years, if the debt falls within the words as used in the Act of 1879, then it is prescribed under that Act; if, on the other hand, it does not fall under those words, it cannot be sued for under the Act of 1867, and the action is incompetent. Now, rightly or wrongly (I assume rightly), it has been decided in the Court of Justiciary that the words, or some of them, had a different meaning in the two Acts, although they have been copied from the one into the other. Lord Neaves says—"Some of the language certainly appears to be provincial, or, as I should rather say, peculiar to Scotland. But the words 'merchants' accounts' are not. I think it is safer in construing an imperial Act, unless the contrary is expressed, to read words in their present and prevalent meaning, in so far as they have had a meaning. It is different with words unintelligible to English ears. But the words 'merchants' accounts' are perfectly intelligible as English words, though in a wider sense than what is generally held to be their sense in the Scotch Act of 1879." Well, that blunts the point of one of the defender's pleas, and I do not doubt that the Act of 1867 is applicable, and that the action may be competently brought under it. I have some difficulty about the Act of 1879, though I have no desire to dissent from the judgment now to be pronounced, as I think it right that this case should take an end. But I should have felt it my duty to dissent but for the view which your Lordship has adopted—that the Sheriff here, on evidence which we think reasonably supported, has decided that the sum concluded for is composed of advances under the defender's mandate, and there is authority for holding that the Act of 1879 is inapplicable to such. Putting it in this way I do not dissent. On the more general view, I do not think a writer would get rid of the Act of 1879 by limiting his account to outlays. I do not mean large sums advanced, but to deeds and writings copied by his clerks, and to payments to porters, and other charges of the same kind.

But guarding myself against sanctioning the inapplicability of the Act of 1879 to cases of that sort, and limiting my views to this, that the Sheriff has, on evidence which we must consider sufficient, held that there were outlays made substantially under the mandate of the defender, I think the action should take an end, and I do not dissent.

LORD CRAIGHELL—I agree in thinking we should dismiss this appeal. There are three defences presented in this case, viz—First, the triennial prescription; Second, the incompetency of procedure under the Debts Recovery Act; and Third, on the merits it is urged that the party

employed to do the work was John Grant, who had been paid for all expenses incurred. Now, as regards the first defence, I do not think that the triennial prescription operates here. There are two kinds of charges which are not affected by the statute:—1st, charges for money laid out on mandate—The Sheriff has cited one amongst other cases which go to establish this; and 2nd, charges made for what are simple cash advances. This latter point has been well recognised for some time, and if I am not mistaken in my recollection, it has been held in dealing with writers' accounts that where cash advances are not connected with particular charges for work done, they may be separated from these items and from the operation of the Act, and even where the items in a business account are things incident to cash advances, they follow the latter as accessory to principal even though of their own nature they would fall under the triennial prescription. The Sheriff, I repeat, has found here that the claim arises out of a contract of mandate, and therefore that thereby the operation of the triennial prescription is excluded, and I in that view concur with him.

The Lords therefore dismissed the appeal, and affirmed the judgment.

Counsel for Appellant—G. Smith—Rhind.
Agent—Robert Menzies, S.S.C.

Counsel for Respondent—M'Kechnie—Kennedy.
Agent—John Macpherson, W.S.

Saturday, December 10.

FIRST DIVISION.

HALDANE (JUDICIAL FACTOR ON THE GIRVAN AND PORTPATRICK JUNCTION RAILWAY COMPANY) v. RUSHTON AND OTHERS.

(*Ante*, March 18, 1881, vol. xviii., p. 711, 8 R. 669.)

Judicial Factor—Railway—Special Powers—Application to Parliament for Sale of Line—Where Majority of Creditors and Shareholders do not concur with Factor—Act 30 and 31 Vict. cap. 126, sec. 4.

It is competent for the Court to grant authority to a judicial factor, appointed on the undertaking of a railway company under 30 and 31 Vict. cap. 126, sec. 4, to apply to Parliament for power to sell the line.

In the case of a railway company whose ordinary stock amounted to £250,000, there was debenture debt to the extent of £207,000, besides other debt of over £100,000. The interest on the debentures, many of which were past due, was three years in arrears, and amounted to £10,300 annually. The revenue had never been able to meet the annual working expenditure, although the deficit had been gradually diminishing, until the half-year ending August 1881, when there was a surplus in favour of revenue of £35. A judicial factor had been appointed on the undertaking of the company under 30 and 31 Vict. cap. 126, sec. 4, and he applied to the Court for authority to apply to Parliament

for power to sell the line. Of the £207,000 debenture creditors, £68,000 worth approved of the factor's proposal, £46,000 were for refusing, and the remainder were either for delay or expressed no opinion at all. The other creditors were, by a majority, and the shareholders were unanimously, against adopting the factor's proposal. In the circumstances the Court granted the authority craved, finding the expenses of the application to be made to Parliament to be a proper charge in the factory.

The Judicial Factor on the Girvan and Portpatrick Junction Railway Company presented this minute in the note for special powers formerly lodged by him, reported *ante*, July 19, 1881, vol. xviii., p. 711. In the minute he stated—“That since this note was last before their Lordships he had advertised the undertaking of the Girvan and Portpatrick Junction Railway Company for sale, and had endeavoured to obtain a purchaser or purchasers therefor. That after various negotiations he received an offer from the Glasgow and South-Western Railway, who proposed to purchase the undertaking for £100,000. That the judicial factor declined this offer as being inadequate. That thereafter the judicial factor obtained an offer of £200,000 for the said undertaking, with whole rights and privileges and appurtenances thereof. The judicial factor considers it to be in the interest of all parties that this offer should be accepted, and he has accordingly accepted it, subject to the approval of their Lordships, and his being able to obtain the necessary Parliamentary sanction.”

He therefore craved the Court “to resume consideration of his note for special powers, to approve of the course which the judicial factor has taken, and authorise him to apply to Parliament for authority to promote a bill in Parliament for giving effect to the said sale.”

Messrs Rushton and Cross, creditors of the company, upon whose petition the factor had been appointed, lodged answers, in which they stated—“The cost of construction of the said railway was about £500,000, and since its construction it has been kept in good working order by the Glasgow and South-Western Railway out of the earnings of the line. The said price of £200,000 is altogether an inadequate price for the line. It will, moreover, prove insufficient to pay the debenture-holders and preferable creditors. The Glasgow and South-Western Railway Company has for some years been working the said line under a working agreement with the directors. A new agreement had been arranged with the said company, which was much more favourable to the Girvan Company; but the judicial factor refused his sanction thereto, and at present the line is being worked by the Glasgow and South-Western Company under the old agreement from month to month. The traffic on the said line has been gradually developing, and the receipts show a steady increase. The report by the directors for the half-year to 31st August 1881 shows that after paying all working expenses there was sufficient to meet the interest for the half-year payable to the Portpatrick Railway Company for joint use of the Stranraer section of their line, and leaving a balance at the credit of the company. The respondents understand that the directors of the Girvan and Port-