

marriage-contract signed. Returned to Aberdeen in evening." What does that mean if the contract was not truly executed? To my mind it is not short of absurdity to hold that it was not. The entry of the marriage immediately follows in the memorandum-book—"22d September.—Left at 12-23 for Stonehaven. Married at 2-30 P.M. to Miss Helen Louisa Smith at Bank House." The execution of the marriage-contract, then, is proved by evidence that carries full conviction to my mind.

As to the question of the *casus amissionis*, I am humbly of opinion that that deed does not require a special *casus amissionis* to be established in order that its tenor may be proved. We are quite familiar with the passage from Erskine's Institutes quoted by Lord Shand, which is to the effect that there are two kinds of deeds, of which one requires a special *casus amissionis*, and one does not. I think this deed is one of the class which does not require the allegation of a special *casus amissionis*. In the first place, it is a mutual deed, and it cannot be affirmed as a general proposition that a mutual agreement requires proof of a special *casus amissionis*. I can understand the argument which seems to have been urged in the old case to which we were referred, that though a document be an antenuptial contract everything in it may be unilateral, and therefore the husband may destroy it at pleasure. This deed contains one important thing, even though there were nothing else in it—the renunciation by the wife of her legal rights. The husband might place very great value on that. There were five children of a former marriage alive, and the husband had their interests in view, and that acceptance by the wife of the provision in lieu of her legal rights was most important to these children. I think it plain that that was in view in the acceptance of that arrangement. The husband was acting for those children in inserting that clause. Everybody knows how such a clause accepting provisions in lieu of legal rights affects the division of the personal estate when there are children of a former marriage. These children may claim their legal rights at their father's death, and these rights may be very different in amount if the widow has renounced hers. I think that here the husband stipulated this acceptance of a special provision by the widow for the benefit of these children. It does not follow from that that he was entitled to take the benefit of it away. If the husband and wife had concurred in the destruction of the deed there would have been a more favourable case for the argument addressed to us. But I doubt the wife's power jointly to destroy it. The husband would have been entitled to object to the destruction in consequence of the existence of the clause which affected the children of the former marriage. I do not think therefore that this is a unilateral deed which resembles a bill or a bond. I think, on the contrary, that the passage cited from Erskine is against that, and that according to the doctrine of that passage proof of a special *casus amissionis* is not necessary.

But supposing that we recognise, as we must do, the authority of the case of *Donald* in 1774, I do not think that it would be safe to draw it into a precedent in a case where there is a substantial difference. I have read the session papers in that case, and there seems to me to be a substantial difference between it and the

present. The husband there was believed to have destroyed the deed for the purpose of giving the wife her legal provisions. In this case before us the husband has expressed a wish to make his wife's position better, but what alteration he wished made we do not know. There has been nothing to satisfy me that the alteration he wished made was to give her the whole share in his estate which she would have had but for the marriage-contract. If we hold that, the effect will be to make a will for him which he never made for himself. In the case of *Donald* it was not only proved that the husband wished to destroy the contract, but also that he directed it to be destroyed. There is no proof here of that fact. If there had been, then that case would have been on all fours with this, and narrow and ticklish—to use a common expression—as the case might have been, I would have been for following the case of *Donald*. But I think the cases are not the same. There seems to me to be a sufficient distinction to prevent us from applying the rule of *Donald's* case to this case. My difficulty in concurring with your Lordships is, I must say, much increased by the difference of opinion which exists as to the execution of the deed. That circumstance is the whole foundation for the application of *Donald's* case.

This interlocutor was pronounced:—

"Having advised the cause with the proof, find that the pursuer has not libelled or proved a sufficient *casus amissionis*: Therefore sustain the defences, and assoilzie the defender."

Counsel for Pursuers—Mackintosh—Jameson.
Agents—Henry & Scott, S.S.C.

Counsel for Defender—Gloag—Low. Agents—Davidson & Syme, W.S.

Friday, June 2.

FIRST DIVISION.

[Sheriff of Ross, &c.

MORRISON v. CREAR.

Process—Debts Recovery (Scotland) Act 1867—
Running Account—Action Raised before Term
of Payment of Debt Sued for.

It is incompetent to raise action or to do diligence on a debt which is not yet due unless the debtor is *vergens ad inopiam*.

In a complaint under the Debts Recovery (Scotland) Act 1867, where the period of credit which was to be allowed to the defender upon a running account had not expired, held that it was incompetent to sue for the amount of the account, which was a debt not yet prestable, or to do diligence on the ground of such a debt, unless by alleging that the debtor was *vergens ad inopiam*, and using diligence on the dependence of the action.

Opinion (per Lord Shand) that the action would have been competent if either the prayer for decree had been qualified by such words as "the date being first come and bygone," so that no operative decree could have

been pronounced until the debt was really due, or the pursuer had averred and proved that by out-running his credit with regard to the major part of the account, the defender had forfeited his right to the specified credit for the remainder of it.

The case of *M'Brice v. Williams*, 18 Scot. Law Rep. 609, explained.

William Crear, timber merchant, Thurso, brought a complaint under the Debts Recovery (Scotland) Act 1867, against John Morrison, contractor, Scourie, concluding for payment of £47, 15s. 7d., the amount of an account for goods sold and delivered to the defender, for which he delayed to make payment. It appeared from the evidence that on the 29th March 1880 the pursuer had written to the defender in the following terms:—“In all our future transactions four months credit will be given to you on a running account.” The last entry in the account sued for was dated 25th November 1881, while the complaint bore the date of 1st February 1882. It also appeared that on the dependence of the action the pursuer had executed an arrestment of the defender's goods and effects.

The defender pleaded that payment of the account sued for was not exigible until the expiry of four months from the 25th November 1881, this being the period of credit allowed to him by the pursuer.

The pursuer denied that the period of credit claimed was allowed to the defender. On the 24th February 1882 the Sheriff-Substitute issued an interlocutor in which he found, *inter alia*, “That the term of credit agreed on has not been given to the defender with reference to the current account now sued for: Finds in law that the pursuer, in the face of his own letter, is not entitled to sue for the account libelled on until after the expiry of the credit allowed by him to the defender: Finds, therefore, that the action at this stage is premature; dismisses the same, with expenses to the defender; and decerns.”

The following note was appended to his interlocutor—“The Sheriff-Substitute might have preferred continuing this case until after the 25th March next, the date when the four months' credit claimed by the defender would undoubtedly be at an end; but he feels that to act thus, and to keep the case in existence, would be imposing a great hardship on the defender, inasmuch as on the dependence of the action the pursuer has already executed an arrestment of the defender's goods and effects. It may thus be that the defender has been shut out from the very funds with which he intended to discharge the account sued for, whenever the term of credit relied on had expired. He has made out his right to that term of credit by a letter under the pursuer's own hand, and the pursuer is not entitled to curtail the advantages as to credit therein given by arresting the defender's goods and effects during the currency of the credit. To get rid of that arrestment is thus a most important matter for the defender; and this result will follow the dismissal of the action which the defender has, by the establishment of his right to four months' credit, shown to have been brought into Court with undue precipitation.”

The pursuer appealed to the Sheriff-Depute (MACKINTOSH), who on the 11th March issued the following interlocutor and note:—“The

Sheriff having considered the pursuer's appeal and whole proceedings, Recalls the finding in law contained in the Sheriff-Substitute's interlocutor, and with reference to the findings in fact therein, and to the documents produced, and pleas of parties, finds that the defender was at the date of the complaint liable to pay to the pursuer the first portion of the account sued for, amounting to £5, 5s. 7d., and was also liable to make payment of the balance of the said account now admitted by the defender, being £41, 15s. 5d., not later than 25th March 1882. Finds that it was not incompetent to bring the present action when the same was brought, but that the prayer of the complaint ought to have been qualified, and any decree under it must be qualified, by postponing the period of payment as regards the second portion of the account to the said 25th March 1882: Finds that it is now unnecessary to distinguish between the two portions of the account as regards the period of payment, and in respect that the indebtedness of the defender is not disputed, and that there is also no dispute as to the amount due; decerns and ordains the defender to make payment to the pursuer of the sum of £47, 1s. sterling, but supersedes extract of this decree until 25th March current.

“Note.—The Sheriff thinks the Sheriff-Substitute has proceeded somewhat too strictly in this matter. He thinks the action competent enough, both in itself and as a foundation for arrestments in security. If the complaint had expressed the period of payment as at 25th March, there could not, the Sheriff thinks, have been any question, and as it is, the case is simply one where the decree asked requires to be qualified. The defender, however, was entitled to resist the decree asked, and is therefore entitled to an award of expenses; but as there was no tender of the £5, 5s. 7d. which was certainly due at the date of the complaint, and as the defender appears to have contended for a dismissal of the action, the Sheriff has modified the expenses to one-half of the taxed amount.”

The defender reclaimed, and argued that the decree pronounced by the Sheriff-Depute was incompetent under the Debts Recovery (Scotland) Act of 1867, in respect that it altered the findings in fact pronounced by the Sheriff-Substitute. That by sec. 10 of this Act, where neither party has required the Sheriff to take a note of the evidence, an appeal is incompetent against his findings of fact. Four months' credit was to be given on a “running account.” The account is to be taken as a whole. The ground of action against the defender is that he refuses to pay that which is due, but the pursuer by asking payment before the time is breaking his contract.

Authorities cited—Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. cap. 96), secs. 8, 9, 10, 13, 18; Bell's Com. i. 325 and 714, ii. 68 and 69; Erskine, iii. 6.

Argued for the respondent—The agreement between the parties was a mutual contract; in return for the four months' delay the account was to be paid when rendered. A contract of this kind was not perpetual, it cannot apply to future transactions. There was *mora* on the part of the appellant after 26th July.

Authorities cited—Bell's Prin., sec. 46; *Turnbull v. M'Lean*, March 5, 1874, 1 R. 730; *Dove v. Henderson*, January 11, 1865, 3 Macph. 339;

Fraser v. M'Intosh, December 19, 1867, 6 Macph. 170; *M'Bride v. Williams & Company*, June 28, 1881, 18 Scot. Law Rep. 609.

At advising—

LORD PRESIDENT—This action originated under the Debts Recovery Act, and the complainer sets out that the defender is owing to him the sum of £47, 15s. 7d. sterling, being the amount of an account for goods sold and delivered by the pursuer to the defender conform to account produced, commencing 16th February 1881 and ending 28th November 1881, which the said defender refuses or delays to pay, and therefore that payment to the complainer must be decreed for. The defender answers this claim by denying that the period of credit allowed to him has expired, and therefore that the action is premature. That period is found in a letter of the 29th March 1880, in which the words occur—"In all our future transactions four months' credit will be given you on a running account;" and when we turn to the account which is annexed to the complaint we find that it precisely answers the description of a running account. No doubt there are not a great many dates in it, but that fact does not deprive it of the character of a running account, and the bulk of the account is stated under date November 25th 1881. Now, the complaint was raised on 1st February 1882, so that the four months' credit had certainly not elapsed at the date of the raising of the action. It seems to be thought by the Sheriff that the raising of an action for a debt before the term of payment has arrived may be defended on the principle that judgment may be deferred till after the period of credit has expired. With that view I do not agree. It seems to me that when a party raises an action for the payment of an account before the debt is due the action is premature, and falls to be dismissed. Any other rule would be most dangerous. In this case arrestments were used on the dependence of the action, and the effect of such arrestments in the position in which the parties stand might be most disastrous, and I am afraid that not even an emerging claim of damages would be any compensation to the defender for the loss thereby arising to him. In short, I do not think that anyone can raise an action or execute diligence on a debt which is not yet due unless the debtor is *vergens ad inopiam*. If an action were raised before the debt was due, with the allegation that the debtor was *vergens ad inopiam*, and diligence were done on the dependence, that might be sustained. But nothing short of that would justify a premature demand, and therefore I take the view expressed by the Sheriff-Substitute.

This case would not have presented any difficulty if the defender's counsel had not referred us to a case of *M'Bride v. Williams & Co.* which was decided in the Second Division, and shortly reported in the Scottish Law Reporter. As there stated, it seems certainly to lead to judgment in the other direction; but in such cases it is essential to know the circumstances before allowing them to settle a rule of law like this, and I took occasion to ask the Lord Justice-Clerk what the circumstances of that case were. His information prevents the possibility of regarding it as an authority here. It was an action for the price of goods furnished to the master of a vessel which

was about to sail for a foreign port. The total amount was about £30. The action was raised about two or three months after the goods had been delivered to the vessel, and while she was on her voyage. It was stated that the action was premature, because it was the custom amongst traders not to demand payment till the vessel had completed her return voyage. Now, that allegation was not admitted, and before judgment parties renounced probation, so that the fact on which the plea was founded was not proved. That case cannot therefore have any effect on my judgment here. I think, therefore, that the present action was premature, and should have been dismissed at once.

LORDS DEAS and MURE concurred.

LORD SHAND—It is quite competent for a debtor to stipulate with his creditor for the payment of an account with funds which are not at the time in his hands, but which he counts upon having under his control before the time of credit expires. If, however, the creditor is to be entitled to forestall the time of payment and to use diligence as for a debt already due, great hardship must necessarily ensue; and accordingly any action brought before the time agreed upon expires falls to be dismissed as incompetent. The law as laid down in the institutional writers permits in special circumstances arrestments to be used on the dependence of the action, on an averment being made that the debtor is *vergens ad inopiam*, and in the present case if the prayer for decree had been qualified by words which are quite common in cases in this Court, "the date being first come and bygone," so that no operative decree could have been pronounced until the debt was really due, then I think that the action would have been competent.

There is another ground which might have warranted this action. In the accounts there are distinct sets of items which are said to have fallen due before the action was raised. Now, had the case been that the debtor had so outrun his credit with regard to the greater part of this account as to have forfeited his right to the specified credit for the remainder of it, and had that appeared in the note of pleas-in-law, then that question would have been remitted to proof, and if the Sheriff had been satisfied that such was the case, then I doubt whether the defender could have successfully pleaded that the action was incompetent. But there is nowhere in the pleadings an averment that the defender is *vergens ad inopiam*, or that a qualified decree only was desired, nor is there an averment that the defender had refused to pay a large part of the account when pressed to do so. In these circumstances I have no difficulty in concurring in the decision which your Lordship has pronounced.

The Lords recalled the interlocutor of the Sheriff, and, for the reasons stated in the interlocutor and note of the Sheriff-Substitute, remitted to the Sheriff-Substitute to dismiss the action.

Counsel for Appellant—Kennedy. Agent—D. Lister Shand, W.S.

Counsel for Respondent—Jameson—M'Lennan. Agents—Boyd, Macdonald, & Jameson, W.S.