cient to entitle him to sue. Before serving, an heir must clear off other competing titles. Here the competing title could be cleared off in no other way than by this action. A mere discharge of the security would not have been enough. The disposition being apparently absolute, a reconveyance of the subjects was necessary. I am for adhering.

Lord Deas—I concur. It is necessary to keep in view the particular nature of the action. The pursuer says he is entitled to a re-conveyance of certain subjects. He produces his retour before the case comes into the roll in the Outer-House, and the whole objection is, that it should have been produced before the formal calling of the cause. I do not wish to say he could have gone on with the action without service. It would be difficult to say that—because a person in the pursuer's circumstances wishing a re-conveyance must connect himself with the party in right of whom he is entitled to re-conveyance. But in fact he *has* produced a service, and the whole question is, Has he been too late? This is not a question of legal principle. It is merely a technical point which must depend on authority. But the defender has been unable to cite any decision to the effect that production of service in a case like this is necessary before the calling.

There is a good deal of analogy between this case and cases of removing where the landlord's title is allowed to be produced *cum processu*. The last case of this in the books was *Mackintosh* v. *Munro*, 23d Nov. 1854, 17 D. 99, where, in delivering his opinion Lord Robertson says:—"If production of his (the landlord's) infeftment before the calling be sufficient, why not production before decree? All that the tenant has to look to is, that he is not removed by a party who has not a sufficient title. That right is equally satisfied by production of the title before decree."

Lord Ardmillan—I am glad we are not called on to decide the broader question whether the pursuer could have gone on with this action without producing his service. That would have been a point of considerable difficulty. On the narrower question before us, I concur with your Lordships.

Agent for Pursuer—L. Mackersy, W.S.
Agent for Defenders—James Webster, S.S.C.

Tuesday, July 14.

HINSHAW AND CO *v.* FLEMING, REID, AND CO.

Agreement—Sale—Price. By written memorandum of agreement, A agreed to take back from B so much as remained in B's hands of a certain quantity of yarn A had previously sold to him, and in place thereof B ordered from A a larger quantity of yarn, of a more expensive kind; the difference to be paid at a certain specified rate. An action brought by B to recover from A the price of the yarn so agreed to be taken back, *dismissed* as irrelevant.

In 1866 the pursuers purchased from the defenders a quantity of a certain kind of yarn. On 21st June 1867 the defenders agreed to take back from the pursuers the amount of that yarn then remaining in the pursuers' hands, and in place thereof to furnish them a greater amount of another kind of yarn at a specified price. The memorandum of agreement was as follows:—"Greenock, 21st June 1867.—Messrs Fleming, Reid & Company agree to take back what we have of 30 L hank yarn, abou 6000 gross, at price invoiced; and we order, in place thereof, about 10,000 gross B quality, spool, to sample last submitted. For each gross of spool up to the quantity of hank returned we pay 17s. 3d., and for balance we pay 15s. 6d. (fifteen and six), common colours; yarns to be delivered and to take date as our last orders of July 22 and August 10, 1866.—(Signed) W. Hinshaw & Co." The acceptance by the defenders, which was of same date, was without qualification, being as follows:—"21st June 1867.—We accept your order as contained in yours of 21st instant. (Signed) Fleming, Reid & Co."

Thereafter there arose a misunderstanding between the parties respecting the dates of delivery of the 10,000 gross spool yarn, in consequence of which instructions as to the dyeing of the yarn were not timeously given to the defenders, and they were thus prevented (they allege), through the fault of the pursuers, from implementing the agreement. The pursuers, stating that they held the 6000 gross yarn (which by the agreement the defenders agreed to take back), at the order of the defenders, and thus were ready to perform their part of the contract, raised this action against the defenders, concluding for £4690, 5s. sterling, the total price of the 6000 gross yarn the defenders had agreed to take back, calculating at the price at which it had been invoiced to them by the defenders.

The following issue was proposed:—

"It being admitted that the pursuers ordered from the defenders 6000 gross L 30s. hank yarn at the price of 15s. 1½d. per gross, and 2500 gross of the same yarn at 15s. 6d. per gross; and that the said quantities of yarn were thereafter invoiced to the pursuers by the defenders at various dates at and prior to 20th January 1867, and that the said price was paid by the pursuers to the defenders,—

"Whether, in terms of the offer or memorandum No. 30 of process, and acceptance thereof, No. 10 of process, dated 21st June 1867, the defenders agreed to take from the pursuers the whole of the said 30 L hank yarn which the pursuers had—about 6000 gross—at the prices at which said yarn had been invoiced to the pursuers by the defenders; whether the pursuers, in implement of said agreement, have delivered or duly offered to deliver to the defenders 6140 or thereby gross of said yarn; and whether the defenders are due and resting owing to the pursuers the sum of £4690, 5s., or any part thereof, being the price at which said yarn was invoiced to the pursuers, with interest from the 21st June 1867?"

The Lord Ordinary reported on the issue with this note:—

"The defenders object to the issue that, as it is now framed, the pursuers do not put in issue a proper contract of sale, in consistency with the way in which the action is libelled, and with the terms of the issue originally proposed. It does not occur to the Lord Ordinary that this is a substantial objection. The contract set forth in the summons is of a special and anomalous kind, to which the terms of the issue appear to be quite appropriate.

"The defenders, however, take a more fundamental objection to the issue, which resolves into a plea against the relevancy of the action. They say that the contract averred in the summons, and in the second article of the condescendence added on revisal, is a complex transaction in regard to the defenders receiving back goods formerly sold

and invoiced to the pursuers, and to other goods which the pursuers then ordered from the defenders. There is no inconsistency between the original statement of the contract in the summons and the statement added on revisal, which merely sets forth the evidence.

"The Lord Ordinary does not think the action irrelevant, or that the pursuers can be refused an issue of the kind they ask. There was undoubtedly a complex transaction, and if the defenders had delivered the new yarns then ordered, or any part of them, without payment, the pursuers' claim would naturally, perhaps necessarily, have been for payment of a balance on account. But as the matter stands, the defenders not having delivered, or now offering delivery of the new yarns, and the pursuers making no demand on that ground, the pursuers appear to be entitled to sue for the amount to be paid to them for the yarns, which it was agreed were to be taken back at the invoice price which they had paid for them. It does not seem to affect this question whether the sum sued for is looked upon as price due to the pursuers as in a proper sale, or as the return of the price of goods received back under a special contract to that effect. The defenders may have a defence upon the other branch of the contract, and their averment that they have been prevented implementing it by the fault of pursuers. It is right to say that the Lord Ordinary originally felt some difficulty as to the shape in which the pursuers' demand is made; but, on consideration, he has come to the conclusion now indicated.

"The defenders further maintain that the action should have been for damages for breach of contract. But, if the view of the case now stated by the Lord Ordinary be correct, there seems to be no room for this contention. The law of Scotland is, that 'where the goods have been already delivered the seller may have a personal action for the price,' and, 'where the goods are not yet delivered the seller may raise action for the price, proffering delivery of the goods.'—1 Bell's Com., 443. In the present case, the pursuers state that the larger part of the goods are in the defenders' possession. The law of England seems to be different where the goods are undelivered, and the property is not transferred to the purchaser, (Addison on Contracts, 5th edit., 1057) but that is a distinction which has not been recognised in Scotland. It can make no difference in this respect, that the demand is not for money due properly as the price of goods sold by the pursuers, but as the return of the price paid by them for goods which the defenders have agreed to receive back."

CLARK and WATSON for pursuers.

DEAN OF FACULTY and BURNET for defenders.

At advising—

LORD PRESIDENT—The facts stated by the pursuers on record are simply these. They had bought from the defenders 6000 gross of hank yarn, when a new contract was entered into, and reduced to writing, by which the defenders agreed to take back so much thereof as still remained in the pursuers' hands, and the pursuers ordered in place thereof 10,000 gross spool yarn. Now, there are some words in this contract that we may not know the meaning of, but the general meaning is quite clear. The defenders were to take back a certain quantity of one kind of yarn, and were to give in return a larger quantity of another kind, and the pursuers were to pay for the excess at a specified rate. This is the whole contract. Now, what do the pursuers allege? They say (cond. 3)—"At the date of the said contract the pursuers had on hand of yarns of the description referred to in the contract the following quantities, *videlicet*—2500 gross worsted yarn, which had been invoiced to them by the defenders at 15s. 6d. per gross, or in all £1937, 10s.; and 3640 gross, which had been invoiced to them by the defenders at the price of 15s. 1½d. per gross, or £2752, 15s., the total price of which two quantities, at said prices, amounted to £4690, 5s. sterling. Of these yarns, 4740 gross are in the possession of the defenders in their works at Greenock. The remainder thereof have repeatedly been tendered to the defenders, but they have declined to receive them, and the pursuers have accordingly, after notice to the defenders, stored 1236 gross thereof at Messrs Cameron, M'Millan, & Company's stores at Glasgow, for account of the defenders. The remaining 164 gross are at the pursuers' works in Glasgow, and they have repeatedly offered, and are still willing to return the same to the defenders." And (cond. 4)—"The foresaid sum of £4690, 5s. sterling became due and exigible by the defenders to the pursuers under the foresaid contract on the 21st day of June 1867, and the pursuers have since frequently desired and required the defenders to make payment thereof, but they refuse to pay the same. The said sum, with interest from the date aforesaid, is still due and resting-owing by the defenders to the pursuers." There are two pleas in law for the pursuers, in which they plead that they are entitled to said sum of money as the contract price of the yarn the defenders so agreed to take back. Now, it is impossible to say the pursuers are justified in insisting in these pleas. Under the contract of 21st June 1867, the pursuers could never have claim for payment of a sum of money either as price or anything else. They might claim damages for breach of contract. I cannot think the pursuer has good grounds for an action such as he has brought, or that he is entitled to this issue. Further, it is to be remarked that the pursuers have not stated on record that they ever paid the price of the original 6000 gross, nor have they alleged failure on the part of the defenders to deliver the difference between the quantity agreed to be taken back and the larger quantity ordered in place thereof. But the ground I should wish to assign for my judgment is—there is a claim here for a sum of money under a contract under which no sum of money can be claimed.

LORD DEAS—The contract in question is not an agreement for either sale or resale, but an agreement that certain goods shall be given back and taken back, and certain other goods furnished in return. The result is that the price of the goods taken back is to be set off against the goods furnished.

An action might easily have been framed for breach of contract, but that has not been done. There is no allegation that the defenders are to blame for the transaction not being carried out, nor are damages asked. I have no hesitation in saying the summons is not one on which to try the question.

LORD ARDMILLAN—In the contract there is no obligation undertaken by the defenders to repay the price of what they take back, but simply to take back. Whether the pursuers could not gather out of this record materials for an action of damages for breach of contract is another matter. I am always extremely reluctant that an action should be thrown out of Court. But I think this is not

an action that can be sustained either as an action for payment of a price, or for damages for breach of contract.

Interlocutor finding the action not relevantly laid, and dismissing it accordingly.

Agents for Pursuers—Murdoch, Boyd, & Co., S.S.C.
Agent for Defenders—William Mason, S.S.C.

Tuesday, July 14.

STIELLS *v.* HOLMES.

Bankrupt—Bill—Law-Agent—Presumption—Writ or Oath. Possession of a bill by an indorsee is *prima facie* evidence of his being creditor for the amount unpaid; and there is no presumption that where the indorsee is the agent of the acceptor he holds the bill as such agent.

This was an appeal against a deliverance of the Sheriff-substitute of Renfrewshire, in the sequestration of Archibald Watson, saddler in Johnstone. Holmes, agent at Johnstone for the Union Bank, had for some years acted as law-agent for the bankrupt. In the sequestration he claimed on six bills. The first of these was drawn by him upon, and accepted by, the bankrupt. The other five bills were drawn by other parties upon, and accepted by, the bankrupt, and had been discounted with the Union Bank, who indorsed them to Holmes. On these five bills there appeared markings of payment to account, and Holmes now claimed the balance due after these partial payments. The trustee admitted the claim. J. & W. Stiell, creditors, appealed, alleging that Holmes and the bankrupt had various monetary transactions, but no account was ever adjusted between them, and that on a just accounting it would be found that no such sum as that claimed by Holmes was really due to him; and that the bills in question came into Holmes' possession solely as agent for the Union Bank, and did not instruct any advances on the bankrupt's account.

The Sheriff-substitute (Cowan) pronounced an interlocutor in which, after certain findings of fact, he found in law that Holmes was holder of the bills; that there was a presumption that they were paid by him as law-agent of Watson, and that in so doing he was acting in accordance with the practice between him and the bankrupt; that any objection to Holmes' claim could only be established by his writ or oath; and continued the case for the appellant to lodge a minute of reference to the claimant's oath.

J. & W. Stiell appealed.

Maclean for appellants.

Balfour, for respondent, was not called on.

At advising—

Lord President—I am satisfied as to the result arrived at by the Sheriff-substitute, although I am not quite sure of the means by which he has arrived at it. The claim by Mr Holmes is laid on six bills; and, as regards the first, that for £416, 15s., there is no question. As regards the others, he claims only certain balances due on these bills, because it appears that various sums had been paid to account by the bankrupt. The history of the matter seems to have been this:—That bills were drawn by Muirhead and others on Watson, the bankrupt, and accepted by him. The drawers discounted these bills with the Union Bank. The Union Bank indorsed the bills to "John Holmes, Esq., or order, for value in account with the Union Bank of Scotland." It is said that this is the way in which the Bank usually indorse bills which they send to their agents for collection, and that Mr Holmes is agent for the Bank at Johnstone. There is nothing in this, however, to limit the title of Mr Holmes as indorsee. His legal title is absolute, and is conceived in the usual terms; and we know nothing about the arrangement he may have with the Bank as regards bills. All that we see is, that by the indorsation he, *qua* indorsee, becomes a creditor in the bills. To take the case of one, which illustrates them all: Mr Holmes marks three payments on the back of a bill for £187 odds, but this still leaves a balance of some £60, which, with interest, brings out the exact sum he claims on that bill. The only evidence of any payment having been made at all is the evidence afforded by these markings on the back made by the holder. But possession of a bill by Mr Holmes as indorsee is *prima facie* evidence of his being the creditor for the balance remaining unpaid; and the only answer made to this is, that Mr Holmes held the joint character of agent for the Bank and law-agent for Watson; and there is said to be a presumption of law that a person holding a bill in these circumstances holds for behoof of the debtor in the bill, the acceptor, and as his agent. I know of no law for that presumption, and none of the cases we were referred to countenance such a presumption. The true state of the matter is that which lies at the bottom of his claim, viz., that to the extent to which it is admitted that these bills have not been paid, the claim of Mr Holmes as indorsee is a good claim for the balance unpaid.

The other Judges concurred—Lord Ardmillan remarking, that it would be a most serious thing for law-agents if, as contended for the appellants, there was a legal presumption that all sums disbursed by them on account of clients were furnished by the clients, and that such a presumption could only be overcome by the client's writ or oath.

The Court allowed the appellants to lodge a minute of reference to oath, and found them liable in expenses.

Agent for Appellants—John Galletty, S.S.C.
Agent for Respondent—A. Kirk Mackie, S.S.C.

Tuesday, July 14.

LONDON STEAM COLLIER AND COAL COMPANY *v.* WINGATE AND CO.

Expenses—Witnesses—Counsel. Where witnesses had been precognosed in England, *held* that same fees must be charged as if the precognitions had been conducted in Scotland, and the higher fees usual in England *disallowed.* Expenses of precognoscing and bringing from England witnesses who were not examined in the cause *disallowed.* Expense of employing English counsel to attend on examination of havers in London *disallowed. Question:* Whether two senior and one junior, or one senior and two junior counsel should have been employed? referred to the judge who tried the cause. *Question*—Whether the expense of witnesses coming from England should be calculated on the footing that they travel by day only?

The pursuer objected to the Auditor's findings in regard to the following items:—(1) As to