a decree of removing was passed on juratory caution.

The respondent had in March 1869 raised a summons of removing in the Sheriff-court of Stirlingshire against the complainer, concluding for his removal at the term of Whitsunday 1869 as a yearly tenant from a cottage, with a byre, stable, and yard and an acre and half of ground for a cow's grass, held by him of the respondent. Notwithstanding the provision contained in the A. S. of 10th July 1839, § 34, the complainer was not ordained to find caution for violent profits. Eleven months after the raising of the summons the Sheriff-Substitute decerned in the removing, and thereafter the Sheriff adhered to the judgment of his Substitute. The present note of suspension and interdict prayed for suspension of a threatened charge on the said decree without caution or consignation.

It is provided by the A. S. of 14th December 1756, § 6, that in the suspension of a decreet or process of removing "the complainer shall be obliged to find sufficient caution, not only for implement of what shall be decerned on the advocation or suspension upon discussing thereof, but also for damage and expense in case the same shall be found due." The complainer declined to amend his note to the effect of offering caution, but stated his readiness to find juratory caution, and he lodged an inventory of his effects, the alleged value of which as appeared therefrom was £70, 5s. 6d. sterling.

The Lord Ordinary (MACKENZIE) held, that as there was no specialty to take the case out of the ordinary rule, the juratory caution offered was not "sufficient," and that therefore the note must be refused.

The complainer reclaimed.

MILLAR, Q.C., and MAIR, for the reclaimer, maintained that, there being a valid and duly stamped lease in his favour, and the case being exceptional and special, he was entitled to have the note passed on juratory caution. The lease was as follows, viz., "Mugdock, 9th August 1867. I, John Weir, do hereby to let James Logan a house and stables and byre garden, £9, 10s., for a lease of to the end of my lease, I, John Weir." There was thus a specification of the subjects, a rent, and a definite ish. And certain repairs had been executed on the premises on the faith of the lease. The specialty of the case consisted in this, that both in the suspension and in the pleadings in the Inferior Court the respondent stated that the signature to the document was not his signature; while it was stated for the complainer in his condescendence in the Inferior Court that it had been reported that the respondent went about saying he was drunk when he signed the lease, and to meet this alleged statement of the respondent the complainer averred minutely the circumstances in which the lease was signed and the parties present at the time. In answer to this the respondent had replied "irrelevant and denied," but without adding any counter statement. All this, the complainer urged, made the case a peculiar one, and entitled him to the benefit of juratory caution.

SHAND and BRAND, for the respondent, replied that the lease was quite insufficient, in respect (1) it contained no specification of rent, the figures £9, 10s. being interlined, and, as they stood, unintelligible; (2) the lease contained no mention of the acre and half of ground occupied by the complainer, and that acre was distinct from the "garden" mentioned; therefore, the subjects occupied being different from the subjects described, these were not identified in the missive, and consequently that document was bad in law. With regard to the alleged specialty, it had no existence. The signature being denied, the respondent could not say in what circumstances, or when, or by whom, it was signed, and could not meet the detailed averment of the circumstances attending the signature in any other way than by a denial. The case of *Marshall* v. *Gartshore*, 28th May 1850, 12 D. 946 afforded a good illustration of a special case, but the present was not attended with any of the like peculiarities, and therefore the complainer must be ordained to find ordinary caution.

At advising—

The LORD PRESIDENT held that every question as to the meaning of the words "sufficient caution" in the A. S. of 14th December 1756 was of delicacy and importance, and that he would be sorry to lessen the stringency of the rule, but he agreed with the Judges in *Marshall's* case in saying that cases may occur where juratory caution would be "sufficient caution." In the present case he was impressed with its specialties. The complainer had produced a document said to be holograph giving a lease of the subjects in question, and if that document had been admitted it would have afforded a good defence to the process of removing. On the other hand, the respondent might say it was not his writing, and such was his case. But the complainer not only states specifically in his pleadings in the Inferior Court the object for which it was granted, but that it was signed in presence of more than one witness; and then there is this other element, that the complainer offers to prove that the respondent had stated that he was tipsy when he signed the document. If all these statements by the complainer had been met *seriatim* by the respondent the case would have been in a different position, but his answer is a mere evasion. For example, he does not say whether the statement as to his being drunk is true. His whole answer is "irrelevant and denied." The truth may be with the complainer. The validity of the document is not to be determined at present. It would, in the circumstances, be harsh and unreasonable to refuse to pass the note on juratory caution.

The other Judges concurred.

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

Agents for Respondent—Morton, Whitehead & Greig, W.S.

Wednesday, July 20.

CUTHBERTSON *v.* LOWES.

Contract—Market Value—Nullity—Pactum Illicitum—*Payment—Sale.* Potatoes having been sold by the Scotch acre, the purchaser took delivery, but refused payment of the stipulated price on the ground that the contract was by statute null. *Held*, though the Court could not enforce the contract, it could give decree for the market value.

On 20th September 1869, the pursuer sold two fields of potatoes on his farm of Greendykes, in Haddingtonshire, to the defender. The price agreed to be paid by the defender to the pursuer

was £24 per Scotch acre; but it was also agreed that if any more than that price was given for potatoes in East Lothian after the 20th September 1869, the defender was to pay the same, or such higher price, to the pursuer. It was also stipulated by the agreement that the defender was to begin lifting the potatoes on 21st September 1869, and to have the whole taken away by 30th October. The defender lifted and removed all the potatoes with the exception of two quantities, which he sold to the pursuer, and with which he was credited. The pursuer alleged that between the 20th September and the 30th October 1869, potatoes were sold in East Lothian for prices ranging from £30 to £35 per Scotch acre, and in some cases for even higher prices; and that therefore the defender was bound to pay him at the rate of £35 per Scotch acre, but he was willing to accept the rate of £32, 10s. The pursuer further stated that there were 32½ Scotch or 40¾ Imperial acres or thereby of potatoes in the two fields on the farm of Greendykes, in which the potatoes were; and that therefore the price of the potatoes so sold to the defender at £32, 10s. per Scotch acre, or £40, 15s. per Imperial acre, amounted to the sum of £1056, 5s. As, however, he had received from the defender, at different times, to account, the sum of £600, and £53, 8s. 6d., for the two quantities of potatoes sold by the defender to him, and these sums being deducted from the sum of £1056, 5s., there remained the sum of £402, 16s. 6d. due by the defender to him, with the legal interest thereon. The pursuer maintained alternatively that, irrespective of the agreement or contract of sale, the market price or value of the potatoes belonging to him, and sold and delivered to the defender, was more than the sum of £1056, 5s., and after deducting the sums of £653, 8s. 6d., the balance due, and resting owing, by the defender to the pursuer would amount to more than the sum of £402, 16s. 6d. concluded for. The defender founded, in reply, on the statutes 5 George IV. cap. 74; 6 George IV. cap. 12; and 5 and 6 William IV. c. 63, by which all local or customary measures were abolished, and all contracts by any such measures were declared null and void; and thereon maintained the following pleas in law:—"The contract between the pursuer and the defender for the sale of the potatoes libelled on having been made by local or customary measure, and not by imperial measure, in contravention of the said statutes, or one or other of them, the same is null and void, and cannot be enforced to any extent or effect whatever. The defender is not liable for the market price or value of the said potatoes, in respect that he received and took delivery thereof under and in implement of the said illegal contract; and that he did not enter into any contract of sale with the pursuer under which he became or is bound to pay such market price or value. The defender also pleaded, assuming the said contract to be effectual, the defender is not liable under it for more than the price specified therein, no higher price having been paid in East Lothian for potatoes lifted and carried away during the same time. Assuming the defender to be liable for the market price or value of the said potatoes, he is only liable therefor as at the date of the said contract, when the delivery and the removal commenced."

The Lord Ordinary (JERVISWOODE) found for the defenders in the following interlocutor:—"The Lord Ordinary having heard counsel, and made avizandum, and considered the debate and whole process, Finds that, in the month of September 1869, the defender agreed with the pursuer to purchase from the latter the potatoes in two fields on the farm of Greendykes, then occupied by the pursuer, at the price of £24 per Scotch acre, with a farther provision to the effect that, in a certain contingency, he would give more for the potatoes: Finds it admitted, on the part of the defender, that he uplifted and removed the foresaid potatoes from the said farm, and that he has since disposed of the same: Finds that the defender has not made payment to the pursuer of the foresaid stated price of the potatoes, and maintains, in the present process, that in respect of the provisions of the statutes set forth in the 7th statement of facts, and referred to in the second plea in law on his behalf, the contract under which he purchased the potatoes cannot be enforced by the pursuer: Finds, as matter of law, that the said contract having been entered into in the terms aforesaid, is struck at by the provisions of the foresaid statutes, and cannot be enforced as such by the pursuer in this action; but finds that the defender was not entitled to retain possession of the said potatoes otherwise than subject to liability to account to the pursuer for the just value thereof as at the date or dates when he removed the same from the fields then in the possession of the pursuer, and in which they were grown; and with reference to the preceding findings, Appoints the cause to be enrolled, so that parties may be heard as to the course of further procedure in the cause; reserving meanwhile the matter of expenses.

"*Note.*—The terms of the statutes founded on by the defender, and the application of their provisions to such a matter as that with which the Lord Ordinary is here called upon to deal, are strongly illustrated by the case of *Alexander* v. *M'Gregor*, June 24, 1845, 7 D. 915; and, indeed, the enactments themselves are so framed as to leave, in the Lord Ordinary's opinion, no room for doubt as to their stringent character; but it is not less clear that, while, as the Lord Ordinary thinks, the original contract cannot be here enforced, the defender is bound to pay a just value for the potatoes as at the date or dates when he removed them from the ground. That, in the Lord Ordinary's view, is a matter for proof, and it does not appear to him that he is called upon now to specify any special mode of ascertaining such value otherwise than by a proof."

The defenders reclaimed.

MARSHALL and STRACHAN for them.

WATSON and JOHNSTONE in answer.

The Court adhered.

This was not a case like those where by statute forfeiture was imposed as a penalty—where even though the one party suffered a severe loss, the other party was not allowed to gain, for that which was forfeited did not remain with him, but enured to the Queen. Here the statute struck at both parties. It declared the contract null, not because it was a *turpis causa*, but because it was contrary to public policy. It was true enough that *in turpi causa* the maxim held true *melior est conditio possidentis quam prohibentis;* but this was not a pact so illicit that the Court could not look at it. What the Court could not do was, it could not enforce the contract. But to refrain from taking any notice of it, so as to let the defenders retain the potatoes without paying for them, would amount to a gross injustice. The Court could, therefore, entertain the alternative plea of the pursuer, and decern

against the pursuer for the market value of the potatoes. The Lord Ordinary's interlocutor right, and should be adhered to.

Agents for Pursuer—Scott, Bruce & Glover, W.S.

Agent for Defender—J. S. Mack, S.S.C.

Wednesday, July 20.

NISBET *v.* NISBET.

Separation—Aliment—Custody of Child—Pupil. The income of a man who had been judicially separated from his wife for adultery was estimated at £309 from his business and £71 from property. The Court fixed the amount of aliment at £80 per annum, and gave the father the custody of a pupil son 13 years of age.

In this case of separation and aliment (reported *ante*, vol. vii, p. 591), the Court remitted to Mr Carfrae to report the amount of the defender's income.

Mr Carfrae reported as follows:—

"The reporter having examined the books of the defender, and taken all other requisite means of satisfying himself as to the amount of his income from all sources, begs to report to the Court that in his opinion the sum of Three hundred and eighty pounds sterling (£380) is a fair average amount of the yearly income of the said defender.

"Humbly reported by

"ROBERT CARFRAE.

"*Edinburgh*, 77 *George Street*,

"16*th July* 1870.

"Of the above Three hundred and eighty pounds sterling, the sum of Three hundred and nine pounds sterling is from business, and Seventy-one pounds sterling from property. R. C."

The Court fixed the amount of aliment at £80 per annum, and gave the custody of the boy of 13 years of age, to the father.

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

Agent for Defender—Robert Mure, S.S.C.

Wednesday, July 20.

SECOND DIVISION.

WEIR *v.* OTTO AND OTHERS.

Inhibition—Declarator—Recal—Competency. Held that in an action of declarator containing no conclusion for payment of a pecuniary claim, or implement of any other obligation, inhibition could not be competently used.

This was a petition at the instance of Alexander Weir, joiner, Sanquhar, for the recal of an inhibition. The petition contained the following statements:—"The petitioner is proprietor of certain heritable subjects in the burgh of Sanquhar, and that the said subjects immediately adjoin certain other heritable subjects belonging in liferent and fee respectively to Mrs Susan Barker or Otto, residing at Newark, near Sanquhar; Mrs Margaret Crichton Otto or Barker, wife of David Barker, residing at Woodlands, in the parish of Terregles and stewartry of Kirkcudbright; and John Barker, eldest son of the said David Barker and Margaret Crichton Otto or Barker.

"That a dispute having, in the year 1861, arisen between the petitioner and these parties as to the boundary between their respective properties, the boundary line was settled by arbitration to the satisfaction of both parties; and upon the line of boundary so fixed, the petitioner, at the sight of the arbiters, erected a wooden fence, which continued to be the march between the two properties until the month of May 1869, when the said David Barker, as acting for the said Mrs Susan Barker and others, illegally removed the fence erected by the petitioner as aforesaid, and erected another fence, which encroached to a considerable extent upon the petitioner's property. The said David Barker at the same time pulled down a portion of a small building which the petitioner was in the course of erecting on his own property, within his side of the fence which had bounded the two properties for years previously as aforesaid.

"That the petitioner then presented a petition to the Sheriff of the county of Dumfries for interdict against the said David Barker encroaching upon the petitioner's property, and to have him ordained to remove the fence illegally erected by him, and to restore the former fence and the petitioner's building to their former condition. The Sheriff-principal, after proof led by both parties of this date, decerned against the said David Barker in terms of the petition, and found him liable to the petitioner in expenses.

"That the said David Barker has appealed the said judgment to your Lordships for review, and an action of declarator has also been raised before your Lordships, at the instance of the said Mrs Susan Barker and others, against the petitioner and Janet Currie, another adjoining proprietor, for the purpose of settling the disputed boundary. To this action the petitioner, as the only defender interested in the question, lodged defences of this date."

After setting forth the conclusions of the action of declarator, the petition further states:—"That, in virtue of a warrant contained in the said summons of declarator, the pursuers used inhibition against the petitioner, and execution thereof being dated the 4th day of June 1870, and recorded along with the summons and execution in the General Register of Inhibitions at Edinburgh the 7th day of June 1870.

"That the conclusions of the said summons of declarator are not of such a nature as to form a competent or legal ground for inhibition, there being no conclusion for payment of a pecuniary claim, or implement of any other obligation, as the ground of action in security of which inhibition could competently be used. That the said inhibition was therefore incompetent and illegal, and, even if competent, was, in the circumstances otherwise of the case, nimious and oppressive. It is humbly submitted, therefore, that the inhibition ought at once to be recalled without caution."

Answers were lodged to the petition, and, *inter alia*, the following statements were made:—"The petitioner, who is by trade a joiner, has little or no business, and he is not possessed of any means or property other than the subjects in Sanquhar referred to in the proceedings. The respondents had reason to believe, from circumstances that came to their knowledge, that the petitioner intended to divest himself of this property, which is the only source the respondents had to look to for meeting any expenses which may be awarded to them in the action above mentioned. The respondents therefore deemed it necessary for their protection to use inhibition against the petitioner,