Saturday, July 6.

FIRST DIVISION.

COCHRAN *v.* DUNLOP.

Process—Reduction—Satisfying Production.

Circumstances in which, in an action of reduction, where the defenders pleaded *inter alia* that the action was incompetent and irrelevant, and that they were not bound to satisfy the production of any of the writs called for, the Court appointed the defenders to satisfy the production, and reserved consideration of the relevancy and competency, to be discussed along with the merits.

This was an action at the instance of James Cochran, Barcosh, Beith, against Gabriel Dunlop, cattle-dealer, Stewarton, and Patrick Dunlop, auctioneer, Altonhill, near Kilmaurs, for reduction of an award and relative account, and also of certain interlocutors in the Sheriff-court. The action was brought under the following circumstances. In December 1869 the pursuer raised an action in the Sheriff-court at Kilmarnock against the defender Gabriel Dunlop, for the sum of £100, 10s. 5d., in terms of account appended to the summons.

In this action the defender stated the following defence, namely,—£42, the last item in the account, was denied. The rest of the account, amounting to £58, 10s., was admitted, but it was pleaded that there fell to be deducted from that sum the price of four cows sold by the defender to the pursuer in June 1866, at £28; and that he had further paid £20 to account, thus leaving due a balance of £10, 10s., which the defender averred he had all along been willing to pay, and then consigned. Having closed the record, the Sheriff-Substitute allowed a proof, but before the commencement of the proof the parties entered into a joint minute, which is dated the 9th March 1870, and was signed by pursuer and defender. By said minute the parties agreed that the first items of the account sued for, and the defences thereagainst, should be referred to Mr Patrick Dunlop, auctioneer, Altonhill, Kilmaurs, with power to examine the defender; call both parties and witnesses before him and dispose of the question of expenses. As to the remaining item of the account, for £42, evidence was led before the said Sheriff-Substitute. The said Patrick Dunlop accepted the reference, and had various meetings with the parties, at which the questions submitted to his determination were duly explained. On the 22d July 1870, he pronounced the following award:—"Having heard both parties on this case, and examined the papers and accounts relative thereto, I find that the four first items in the account sued for are admitted by the defender, amounting to £58 10 0

I am also satisfied that the defender, in payment of that sum, paid in cash, 6th January 1865, . £20 0 0

Sold to the pursuer four cows, valued, at June 1866, . . . 28 0 0

And one cow, June 1866, bought on commission for and delivered to pursuer, 9 10 0

57 10 0

Balance due by defender, £1 0 0

I am further of opinion that the expenses connected with the above items should be paid by the pursuer and defender in equal portions."

Then, on the 5th October 1870, the Sheriff-Substitute pronounced an interlocutor, in which, on a review of the record, proof, productions, and whole process, he found, in terms of the foregoing award, that there was a sum of £1 sterling due to the pursuer by the defender under the first four items of the account appended to the summons, and that the costs of the reference were to be paid by the pursuer and defender in equal portions; found, as regarded the remaining item of £42, under date the 6th of December 1866, in the account sued for, the pursuer had failed to prove that the four fat cows in question were sold by the defender, or by any person employed by him, or for whom he was responsible; therefore assoilzied the defender from the conclusion of the action; found the pursuer liable in expenses; allowed the defender to give in an account, and remitted the same, when lodged, to the auditor to tax and report, and decerned.

The Sheriff-Substitute thereafter pronounced the following interlocutor:—

"*Kilmarnock, 5th January* 1871.—The Sheriff-Substitute having resumed consideration of the process, with the Auditor's report on the amount of taxed expenses, and having heard parties' procurators thereon, sustains the defenders' objections to said report. Finds the conclusions of the action being upwards of £100, the taxation must proceed upon the highest scale allowed by the table of fees. Therefore decerns against the pursuer for £14, 16s. 9d. sterling of taxed expenses."

The pursuer then raised this action of reduction of the award and interlocutors above mentioned, and which also called for production of the award, with relative account and interlocutor of the Sheriff. The pursuer pleaded, *inter alia*, that "the said award and relative statement of account were null and reducible in respect they are *ultra vires compromissi*," that they were "altogether false and erroneous, pronounced under essential error as to the true state of the accounts between the parties and the meaning of the reference, and without due inquiry, and therefore ought to be reduced and set aside." In support of these pleas the pursuer averred that the defender, having admitted the items in the account sued for, amounting to £58, 10s., the only question submitted to the referree related to the two sums of £28 and £20, for which the defender claimed credit. That the statement of the defender that the £28 was the price of four cows, sold in June 1866, and unpaid, was untrue. That as to the other £20, no particulars were given, no receipt was produced, and no reason assigned for the defender being entitled to credit therefor; and further, that the said arbiter was not entitled to allow any deduction to the defender for the sum of £9, 10s. which was disputed by the pursuer, was not claimed in the defences, and was not embraced in the said reference. In respect to the interlocutors of the Sheriff-Substitute, the pursuer pleaded that they were "null and reducible in respect they were founded upon and gave effect to an award which was itself null, and were pronounced in absence of the pursuer."

The defender pleaded, *inter alia*, that "the pursuer had stated no relevant or tenable grounds of reduction; that as the interlocutors sought to be reduced were pronounced *in foro*, and in an existing process, they were final, and not subject to

review;" and their 8th plea of law (mentioned in Lord Ordinary's interlocutor) was that "the defenders were not bound to satisfy the production of any of the writs called for, and the action should be dismissed, with expenses."

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

"*Edinburgh, 11th June* 1872.—The Lord Ordinary having heard counsel and made avizandum, and having considered the record and whole process, repels the 8th plea in law for the defenders, and, under reservation of the remaining preliminary pleas to be discussed along with the merits, appoints the defenders to satisfy the production within the next eight days."

The defenders reclaimed.

The SOLICITOR-GENERAL and MONCRIEFF, for them, cited *Shedden* v. *Patrick*, March 11, 1852, 14 D. 721, and *Ramsay* v. *Bruce*, Nov. 30, 1849, 12 D. 243.

WATSON and GUTHRIE SMITH, for the pursuer, were not called upon.

The Court unanimously adhered to the Lord Ordinary's interlocutor.

Agents for the Pursuer—Muir & Fleming, S.S.C.
Agents for the Defender—M'Ewan & Carment, W.S.

Saturday, July 6.

MYLES *v.* AULD & GUILD.

Bankruptcy—Bankruptcy (Scotland) Act, 1856—*Trustee—Creditor—Assignation of Securities.*

A was sequestrated in September 1870, B was appointed trustee in the sequestration, and a creditor C lodged a claim, in which, *inter alia*, certain securities were specified and valued. In November 1870 C realised these securities, and some months afterwards B demanded a conveyance or assignation of the securities under the 65th section of the Bankruptcy Act, 1856. C refused; and in September 1871 B presented a petition to the Court to compel C to assign or convey the securities to him. The Court refused the petition, and *held* that, under section 65 of the Bankruptcy Act of 1856, the trustee is bound to demand the assignation or conveyance in due time, and that, if he fails to do so, the creditor is entitled to realise.

In September 1870 the estates of Mr James Henderson junior, accountant, Dundee, were sequestrated; and Mr David Myles, accountant, Dundee, was elected and confirmed trustee in the sequestration. In September 1871 the said David Myles presented a petition to the Sheriff of Glasgow, setting forth that Messrs Auld & Guild, accountants there, had claimed in the sequestration upon a debt due to them by the bankrupt, amounting to £3169, 16s. 4d., but that, in respect of their holding sixty £10 ordinary shares of the Caledonian Railway Company, belonging to the sequestrated estate, in security of their debt, they valued the security at £147, and after deducting that sum, claimed to be ranked in order to draw a dividend for the balance of their debt—viz., £3022, 16s. 4d., and were duly ranked as creditors for that sum. That the trustee subsequently called upon Messrs Auld & Guild to grant a conveyance or assignation of the security above mentioned, but that they declined to do so; and the trustee therefore craved the Sheriff to ordain them to do so, and that at the expense of the estate, in terms of the 65th section of the Bankruptcy Act.

The defence for Messrs Auld & Guild was:—"At and prior to the sequestration of James Henderson, the defenders had acted as his stockbrokers in Glasgow; and, as they were largely in advance for some weeks before his stoppage, they, for their own protection, and according to the practice of the Glasgow Stock Exchange, when a party is unable to pay for and take up shares, got the sixty £10 shares of the Caledonian Railway now in dispute transferred to their own (defenders') name. Being in their name, the defenders were entitled, according to the rules of the said Exchange, to sell and transfer them, and were liable for all calls made thereon.

"The valuation of said shares made in the claim at £2, 9s. was at that date their *bona fide* market value, but they slowly improved, and have done so ever since. A call was made of £1, 8s. in November 1870, which the defenders were not disposed to pay, and so add to their loss or advances on Henderson's transactions; and accordingly the defenders sold them in the market on 14th November 1870 at £2, 18s. (the purchaser to pay the call), the security having thus realised £174 instead of £147, the amount at which it was valued in the claim.

"The pursuer, as trustee, did not demand an assignation until he found the security was increasing in value, nor did he offer to relieve the defenders of the calls. The price now proposed to be paid is not a payment out of the first of the common fund of the estate, nor have the creditors in this instance been ranked in order to draw a dividend, as it is well known to the pursuer that no dividend can or will be paid out of the estate.

"The defenders are and have all along been willing to credit the estate with the difference between £174 and £147, being the increased value got out of the security, and even assuming that the pursuer was entitled to make the demand for an assignation in February last, not having timeously followed it up, he could only now claim the value as at 4th February (£250), and not a transfer of the shares, which at their current market price are now worth £327."

The Sheriff-Substitute (GALBRAITH) assoilzied the defenders from the conclusions of the summons, and annexed the following Note to his interlocutor:—

"*Note.*—There can be no doubt that the statement of law set forth in the petition is a correct statement, and that had the petitioner timeously made the demand now made, he might have succeeded. But to give effect to the prayer of the petition now would amount substantially to this, that when a creditor valued his security, the trustee was entitled to hold off and play fast and loose, selecting his own time for requiring an assignation of the security, or when the subjects happened to be of greater value in the market. It is very plain that the defenders, Messrs Auld & Guild, who are largely creditors of the bankrupt, were entitled, apart altogether from any rule of the Stock Exchange, but according to the rules of common fair dealing, to protect themselves by realising these shares, if realised in a fair market, and there is no suggestion or statement on the other side that they were not so sold. That being so, it follows that they are entitled to debit themselves, as against their credit on the estate, with the difference between £174 and £147. It would be to the