Saturday, March 8.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

MACVEAN *v.* MACLEAN.

Process—Parole Proof—"Before Answer."

Held that parole proof might competently be allowed to explain and supply omissions in certain documents in process, but that it could not be admitted to prove any discharge thereof.

This case came up by reclaiming note against the Lord Ordinary's interlocutor, of date 22d February 1873. The interlocutor was as follows:—"The Lord Ordinary having heard counsel, before answer allows the parties a proof of their respective averments, and appoints the defenders to take the lead in the proof: Grants diligence to both parties for citing witnesses, and appoints the proof to be led before the Lord Ordinary on Tuesday, 11th March next, at half-past 10 o'clock forenoon"

Mr Maclean on 28th March 1868 granted to the pursuer two promissory-notes for £500 each, and for one year paid interest thereon. The pursuer is tenant of the farm of Sallachan, the property of the defender, under a lease dated 20th January 1870, and when the two promissory notes were granted he was tenant under a previous lease, the natural termination of which was at Whitsunday 1872. The defender stated that a short time before the second lease was executed the pursuer proposed that a new lease, on the same terms as that then existing, should be granted, and that in consideration of the cancelment of the debt of £1000 due by the defender. This proposal the defender asserts the pursuer agreed to, and the lease of 20th January 1870 was the result of the arrangement. It was also averred that soon after the execution of the lease Mr Maclean wrote to Mr Macvean requesting the return of the two promissory-notes, and that the following letter was received in reply:—

"Private. *Sallachan, Saturday evening.*

"Dear Ardgour—In looking through my papers to-day I find that all documents I have of any consequence are lying in the bank safe, amongst others your promissory-notes for £1000, and if you have any doubts of my integrity had better keep the lease until I give you a sufficient guarantee that I'll never claim the above. I called up this evening, but could not find you.—I have the honour to be, your obedient servant,

DOND. MACVEAN.

"Alex. Maclean, Esq., Ardgour."

On the other hand, the pursuer, the tenant, averred that this letter had no connection whatever with the existing lease of January 1870, but had reference to a negotiation for a lease which took place in the year 1869, under which the tenant was only to pay a rent of £300 a-year, giving up all claim upon the promissory notes. The tenant averred that after this negotiation had proceeded a certain length, doubts were stated as to the legality of the transaction in consequence of the defender being an heir of entail (grassums being under the entail prohibited), and that this negotiation in consequence fell through, and the letter above quoted, which had been written in reference to it, and it alone, remained with the landlord, and was brought forward as part of the transaction connected with the lease of January 1870, with which it had nothing to do. The case turned upon the question whether parole evidence was competent in order to prove the averments made by the landlord. The tenant admitted that it was competent to prove by parole what was the meaning of the words, "Saturday evening," but that it was not competent to prove by parole any of the other allegations of the landlord, and that the only competent mode of proof of payment or discharge of the promissory notes in the hands of the pursuer was the pursuer's writ or oath. The competency of proving by parole what was the meaning of "Saturday evening" arose from the words being clearly ambiguous, and there being no other means of explaining them in order to show whether they had reference to the transaction of 1869 or 1870.

At advising—

LORD COWAN—This is a case of some delicacy, but I have no doubt as regards the proof, and I have come to the opinion that the interlocutor of the Lord Ordinary should be affirmed. There have been before the Court a great variety of similar cases, and in the case of *Haldane* v. *Speirs* (10 Macph. 557, 9 Scot. Law Rep. 317) it was held that where a writing has passed between two parties indicating the payment of money by one to the other, and is in the possession of one party who founds upon it, a general proof of the whole circumstances has always been allowed; and the peculiarity in *Haldane's* case was this, that the indorsation of a cheque could not be held as the foundation of parole proof. No doubt, when a writing has passed it can only be met with entire success by a written discharge. The pursuer in this case has written to the defender in the following terms—(*his Lordship quoted the letter referred to above*). We have here no date, merely the words "Saturday evening." The date therefore is in doubt, but there is an indication that in certain circumstances the lease was not to be given until the debt had been cancelled. It has been argued that we should confine the parole proof to ascertaining the date of this letter, but I do not think so; and as we are to have parole proof as to one matter, we should have it also as to the whole circumstances of granting the letter, and so forth. The correspondence sets forth an admission by Mr Maclean which really requires to be cleared up. There are also other points with regard to the dates of these various letters which might throw light on the whole facts, and lead to the discovery and expiscation of much that is obscure. The course the Court should, in my opinion, adopt, is to have such parole proof before answer, and thereby we should in no way be pursuing any but the usual rules followed in the matter of evidence.

LORD BENHOLME—It occurs to me that the date of the letter of "Saturday evening" may be all that is necessary to elucidate this matter. For we may be able to say with certainty, when we know the date of this letter, whether it refers to the lease under which Macvean now holds his farm, or to the lease which he avers was previously proposed but not completed. If, then, it turns out that this date is sufficient, I do not think that further proof should be allowed, and, in any event, the parole proof should be restricted to what is necessary to obtain the effect of the written documents.

While I throw out those doubts, I will not dissent from your Lordships.

LORD NEAVES—Generally, I concur in the opinion expressed by Lord Cowan. I am, however, for a proof, but without the words "before answer." I don't justify a proof before answer as to the competency.

In adhering to the interlocutor of the Lord Ordinary I should wish that these words were omitted; at least in so far as these words are concerned I do not adhere. The fault in this case is not on one side, but on both, and the question resolves itself into what that letter precisely meant. This document must be explained by the acts of the writer, and for the purpose of ascertaining what was the "Saturday evening," and what was "the lease" referred to, we must go to external evidence.

LORD JUSTICE-CLERK—I sympathise with Lord Benholme in the doubts which he has expressed, and I shall therefore notice one or two points in the case.

Macvean holds two promissory-notes, which are documents of debt, and are said to be discharged. Now, if the proposal is to prove that discharge by parole, that is utterly incompetent, and cannot be entertained for a moment. But I do not understand that the proposal goes that length, but merely to admit such evidence as is necessary to explain the written documents. That I think is quite competent, for there are many cases of this sort in which parole proof before answer has been allowed; for example, when there has been suspicion of fraud, or when the written evidence has required to be cleared up. This is a case of the latter sort, and I think that the proposed proof is competent.

But I object entirely to the words "before answer" being omitted. For if we omitted these words we would simply be allowing parole proof of discharge, which, as I have already said, is utterly incompetent. The words, "before answer," in this case, are simply to show that the parole proof is not admitted as proving discharge. The words are applicable to cases in which the competency of the proof, as well as to cases in which the relevancy of the action, is the question reserved.

In regard to the proof to be allowed, I think that evidence to supply omissions,—as, for example, the date of the letter dated "Saturday evening," and to show what the effect of the letters and other writings really is, is perfectly competent, and should be allowed.

I therefore agree with your Lordships that we should adhere to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Fraser. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defender—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, March 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEWART & SONS *v.* CURRIE.

Contract—Mora.

Circumstances in which *held*—(1) that the defender was not entitled under his contract to reject part of the goods consigned to him; (2) that he was in any view barred by *mora*.

This case came up on appeal from the interlocutor of the Sheriff-Principal (GLASSFORD BELL), dated 30th July 1872, and was at the instance of John Stewart & Sons, seedsmen, Dundee, against John Currie, nurseryman, Lanark, for £138, 12s., for gooseberry bushes and other plants supplied, conform to account from 30th October 1871 till 13th January 1872. The dispute in the case had reference to the goods not having been furnished by the pursuers according to order. The defender pleaded that (1) the sum sued for not being due, the action was premature; and (2) that the judicial referee having reported on the dispute, and the goods having been sold and the proceeds consigned, and the defender having offered to consign the balance admitted to be due by him in the process previous to the closing of the record, the action should be dismissed. Further (on the merits), that the bushes being disconform to order, and timeous notice of the same having been given to the pursuers, he was entitled to absolvitor. The Sheriff-Substitute (DYCE) sustained the preliminary pleas and dismissed the action, reserving to the defender all competent claims for loss and damage on account of alleged breach of contract. On appeal, the Sheriff-Depute (BELL) recalled this decision, repelled the whole of the defences, and decerned against the defender for the sum of £107, 10s. 10d. consigned by him in the hands of the Clerk of Court. The important finding in the interlocutor is as follows:—"Finds that, if the case required to be decided upon that allegation, it would be necessary to allow before answer some proof, as parties are not at one on the facts; but finds that there is no occasion to go into the inquiry, in respect that the defender is barred (1) by *mora*, and (2) by the manner in which he dealt with the plants from now insisting in his objection to them: Finds that it was not till two months after their delivery to said defender that he, for the first time, by his letter, No. 13/10, of date 30th December 1871, took any exception to them, and he did not then offer, in respect of the alleged inferiority of some, to return the whole, but only those that were challenged, or to keep them at half-price: Finds that it is no sufficient excuse for the delay in challenging that the party to whom the defender had sold the plants did not require to use them for two months, and did not discover their character sooner, the alleged defect not being latent, but discoverable at once on inspection by any person of skill; neither was the defender entitled to pick and choose, but was bound to reject the whole goods or none, whereas he has kept and used by far the larger quantity."

Authorities—*Barbridge & Co.* v. *Sturrock*, 10 S. 520; *Chapman* v. *Couston, Thomson, & Co.*, March 10, 1871, 8 Scot. Law Rep. 415, aff. 9 Scot. Law Rep. 664, 43 Jurist, 326, 9 Macph. 675; *M'Cormick*, June 5, 1869, 7 Macph. 854.

At advising—

LORD JUSTICE-CLERK—It appears to me that in this case the appellant has entirely lost his remedy. It is quite true that originally he ordered the goods supplied to be planted out, and his position might have been much better had the contract rested on the letter of 12th October. That letter is as follows:—

"10,000 Warringtons.
5,000 Whitesmiths.
5,000 Sulphurs.
1,000 Glenton Green.
5,000 Black currants.
200 Standard Victoria plums.