and Darling. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Respondent — Solicitor-General (Watson) and Mackintosh. Agents—Webster & Will, W.S.

Friday, January 8.

SECOND DIVISION.

CHAPMAN *v.* BALFOUR.

Mandatory—Expenses—Auditor's Report.

An action having been brought by Chapman, who resided in England, against the trustees of Lloyd, of whom Balfour was one, on a bill for £800, Chapman was sisted as mandatory. The defence was that the bill had been obtained by fraud. The trial was fixed for the 22d of July, on which day the mandataries lodged a minute in process withdrawing from acting as mandataries, and the pursuer did not appear, nor was any new mandator sisted. The jury was impanelled, and returned a verdict for the defender. When the Auditor's report came to be approved of, Chapman moved that the expenses of the jury and witnesses, and of applying the verdict, be disallowed as against him. *Held* that these items formed valid charges against the mandataries, on the ground that they were the natural sequence of what was in motion at the time the mandataries lodged the minute of withdrawal.

Case cited—*Martin*, 5 S. 783.

Friday, January 8.

FIRST DIVISION.

[Sheriff Court of Fifeshire.

KERMACK *v.* KERMACK.

(*Ante*, p. 105.)

Process—Abandonment—Competency—A. S., 11th July 1828, § 115,—*A. S., 10th July* 1839, § 61.

In a case in which the long negative prescription was said to have been interrupted by payments of interest upon the debt, the Court held that proof *prout de jure* was incompetent, but as it was alleged that receipts for the payments of interest were extant, they allowed the pursuers to lodge a specification of any documents which they desired to recover by diligence. The specification having been lodged, the Court granted commission and diligence for recovery thereof, the commission to be reported on a fixed day. The pursuers allowed that day to go past without executing the diligence, and then put in a minute abandoning the action. *Held* that it was competent for them to do so, no interlocutors of absolvitor, or necessarily leading thereto, having been pronounced.

A. S., 10th July 1839, § 61.

Opinion—That the words "interlocutor of absolvitor" in the 61st section of the Act of Sederunt of 10th July 1839 included an interlocutor necessarily leading to absolvitor.

In this appeal, which is reported *ante*, p. 105, the defender pleaded the long negative prescription, while the pursuers averred interruption thereof by payments of interest upon the debt. The Sheriff-Substitute, and the Sheriff on appeal, allowed the pursuers a proof *prout de jure* of their averments as to payment of interest, and to the defender a conjunct probation.

On appeal to the Court of Session the First Division pronounced, on 27th November 1874, the following interlocutor:—"The Lords having heard counsel on the appeal, record, and proceedings, recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated the 5th May and 25th and 30th June 1874: Find the proof allowed by these interlocutors to be incompetent, but allow the pursuers (respondents) to lodge a specification of any documents which they desire to recover by diligence."

On 16th December the Court pronounced this further interlocutor:—"The Lords having considered the specification of writings and documents for the respondents, No. 16 of process, and heard counsel thereon, disallow articles 1 and 3 of the said specification; grant diligence at the instance of the respondents against havers for recovery of the documents mentioned in the 2d article, as amended, of the said specification, and grant commission to Henry Johnston, Esq., Advocate, Edinburgh, to examine the havers, and receive their exhibits or make excerpts therefrom, to be reported by the second sederunt day in January next."

The diligence was not executed and the pursuer now proposed to put in a minute abandoning the action, which was opposed by the defender upon the ground that the interlocutor of 27th November, or at all events that interlocutor when taken in connection with that of December 16, was an interlocutor of absolviter within the meaning of the Act of Sederunt of 10th July 1839, and that it was therefore competent for the defender to abandon the action.

The pursuer argued—(1) This case was under the Act of Sederunt 1839, and not under that of 1828. The provisions of these two Acts differed, for while the latter made it competent to abandon an action before an interlocutor had been pronounced "assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor," the former made it competent for the pursuer to abandon before any "interlocutor of absolvitor is pronounced,"—clearly meaning an interlocutor which assoilzies the defender and decerns. The interlocutor in this case did not do so. (2) Even if the Act of Sederunt of 1828 applied, this interlocutor was not one leading necessarily to absolvitor, but merely limiting the kind of proof. The time fixed by interlocutor for recovering the documents had undoubtedly expired, but the Court might have granted an extension of the time.

The defender argued—The provisions of the Act of Sederunt of 10th July 1839, sec. 61, and of Act of Sedurunt of 11th July 1828, sec. 118, must be read as meaning the same thing, viz., that it was incompetent to abandon an action after an interlocutor had been pronounced which necessarily led to absolvitor. Such an interlocutor had been pronounced here, for the judgment of the Court was practically this, that unless the pursuer could prove his allegations by writ the defender was entitled to absolvitor. But the pursuer