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

had not availed himself of the opportunity thus given him, but had allowed the time fixed by the interlocutor for recovering the documents to expire, and he could not now by abandoning the action deprive the defender of the absolvitor to which he was entitled.

At advising—

LORD PRESIDENT—This is a matter of importance, and if we decide that the pursuer is entitled to abandon the action, considerable hardship is involved to the defenders. But if the pursuer has the right to abandon the case we cannot deprive him of that legal right merely because it involves some hardship on the defender, nor can we allow him to exercise the right under any conditions not in the statutes.

Section 61 of the Act of Sederunt of 10th July 1839 provides—"It shall be competent to the pursuer before any interlocutor of absolvitor is pronounced to enter on the record an abandonment of the cause on paying full expenses to the defender, and to bring a new action if otherwise competent."

I think the meaning of the term "interlocutor of absolvitor" is clear. It means an interlocutor which assoilzies and decerns. But the phraseology used in the section which I have just read is different from that used in the corresponding section (115) of the Act of Sederunt of 11th July 1828, for in the latter the description of the condition of the process when abandonment is competent is "before an interlocutor has been pronounced assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor." It is contended that the distinction is material, but I do not give much weight to that contention. Under the Act of 1839, equally with that of 1828, if an interlocutor is pronounced which necessarily leads to absolvitor, the pursuer has not the right to abandon. But reading the two sections as meaning the same thing, the question is, whether the interlocutor in this case necessarily leads to absolvitor. The interlocutor of 27th November does not do so, for I cannot say that an interlocutor which allows the pursuer to recover documents by diligence, the object being to enable him to prove his case, necessarily leads to absolvitor. But there is a subsequent interlocutor, and the two taken together may have the effect of necessarily leading to absolvitor. But that is not so, for the second interlocutor is only another step in allowing the pursuer to prove his case.

It is suggested that, in consequence of the pursuer not having availed himself of the diligence, it must be assumed that absolvitor will necessarily follow. I think there is a fallacy in this contention. The pursuer is not going on just because he has made up his mind to abandon. That does not bring the defender any nearer to absolvitor. I therefore do not think we can refuse to the pursuer the absolute right to abandon which the Act gives him.

The other Judges concurred.

The Court pronounced the following interlocutor;—

"The Lords having heard counsel on the minute of abandonment for the pursuers (respondents), No. 17 of process, Repel the objection to the competency of the said minute, and, in respect of the said minute of abandonment, Allow to defender (appellant) to give in accounts of expenses incurred both in the Inferior Court and this Court, so far as not already found due and paid under the interlocutor of 27th November last, and remit the said accounts when lodged to the Auditor to tax and report."

Counsel for the Pursuer—Balfour. Agent—Charles S. Taylor, S.S.C.

Counsel for the Defender—Dean of Faculty (Clark) and Rhind. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Friday, January 8.

FIRST DIVISION.

[Lord Mackenzie, Ordinary

ANDREW M'INTYRE & SON *v.* DAVID CLOW & CO.

Contract—Risk.

A contracted to put up the brickwork of certain houses on B's ground according to contract and at a specified rate of payment. After the walls were built, but before the roof was on, a severe gale blew down a portion of them. In a question who was liable for the loss, *held* (*diss* Lord Deas) that the risk was with the employer, and that he was barred from pleading breach of contract by his having failed to object to it during the progress of the work, though he was aware of it.

The pursuers of this action were brickmakers and builders in Glasgow, and in April 1873 they entered into a contract with the defenders, who were joiners and builders, also in Glasgow, to execute the brickwork of certain tenements which the latter were about to erect in Ann Street, the payment to be according to certain rates, as contained in a schedule prefixed to the contract, which was in the following terms:—"The bricks to be of the best [machine] make. The walls above 4½ inches thick to be built in three courses of stretchers to one of headers; the mortar to be composed of best lime and clean sharp sand, in the proportion of one cart unslacked lime shells to three carts sand. The whole work must be executed in the most substantial and tradesman-like manner, of the best materials, to the entire satisfaction of the proprietors, architects, and inspector. The proprietors reserve full power to make alterations and to increase, diminish, or omit portions of the work as they may think proper. The work will be measured when finished, and valued by the rates contained in this schedule, with the corresponding slump sum in letter of offer. Contractor to pay one-half expense of measurements and schedules."

The word "machine" was deleted by the offerers. The whole contract price was £632. During the progress of the work certain instalments of the price were paid to the contractors. The brickwork, with the exception of some interior partitions, was finished about the 9th December, and the bricklayers handed over the premises to the masons, who were to put on the chimney heads. This was finished on December 14, and the scaffolding was removed in order that the joiners might do their part of the work, when, on the night of December 15, a high