

He did not anticipate that they would meet with any real difficulty in working out these rules. He concluded by intimating that the Election Judges had in view, either that afternoon or next day, to issue additional general rules for regulating these election trials.

The Court then pronounced an interlocutor to the following effect:—"Find that the motion made to Lord Cowan to dismiss this petition was not competently made, and that no competent deliverance could be pronounced by his lordship on the merits: Find that any such motion could only be competently made to the Court—meaning thereby this Division of the Court, to which this petition was presented: And, having considered the note for Mr James Johnston Grieve, and heard parties thereon, refuse the said note without prejudice to any appointment or order which the Judges on the rota, or the Judge selected from the rota to try this election petition, may make with a view to the better trial or disposal of this petition."

The Court allowed the expenses proper to the application made to the Second Division, but disallowed other expenses.

Agents for Petitioner—Graham & Johnston, W.S.

Agents for Respondent—Duncan, Dewar & Black, W.S.

Thursday, January 7.

## COURT OF LORDS ORDINARY.

MURRAY v. BERNARD.

(*Et e contra.*)

*Commission Agent—Business Books—Recovery of Outstanding Debts—Interim Possession—Inversion of Possession—6 Geo. IV., c. 120, sec. 42—A. S., 10th July 1839, sec. 130, 146.* A party who for some years acted as agent for a trading firm, was furnished by them with ledger and other books for entry of sales, &c., it being stipulated *inter alia* that the books should remain the property of the firm. The agent ceasing to act for the firm, pleaded a right to retain the books until all the outstanding debts had been recovered. *Held* that the firm, as having the greatest interest in the books, were entitled to recover them. A petition for immediate delivery of the books pending a result of an advocacy of the original petition for delivery, *dismissed*.

In the spring of 1860 James Murray, agent, Jamaica Street, Glasgow, entered into an agreement with J. & J. Bernard, brewers, Edinburgh, to become sole agent for them in Glasgow and certain other places. By the eighth article of the agreement it was provided, that "The said James Murray shall be furnished by the said Thomas & James Bernard with a proper set of books, consisting of ledger, cash, cask, and order books, into which all entries connected with this agency shall be regularly made; and the said books shall belong to and remain the property of the said Thomas & James Bernard." It was further provided that, notwithstanding the acceptance by Murray of bills drawn upon him by T. & J. Bernard, the right of property in the accounts of the customers was to remain with T. & J. Bernard, Murray having the right of collecting and recovering outstanding accounts, except only in the event of

his failing to return the bills, or of his death, bankruptcy, or insolvency.

Murray was furnished with books, and acted as agent for the respondents until April 1867. The respondents then presented a petition in the Sheriff-court of Glasgow, stating that Murray had ceased to act as their agent, and that they had appointed another agent, Macgregor, in his place; that it was indispensable that Macgregor should have possession of their books and papers to enable him to conduct the business, that they had applied to Murray for the books, undertaking to give him all reasonable access to them for any lawful purpose, but he declined either to give up the books or to allow access to them. They accordingly craved delivery of the books, they giving Murray such access to them as he might require.

Murray contended that he was entitled to retain the books in question until the outstanding debts had been fully recovered, and an accounting had taken place between him and the petitioners. He alleged that during the continuance of the agreement he had, with consent of the petitioners, conducted a separate business of his own, the transactions of which were recorded in the same set of books, with the knowledge and consent of the petitioners. Meantime he was willing to give access to the books.

The Sheriff-substitute (GALBRAITH), after a proof, held that there was no evidence that, on termination of his agency, Murray was bound to deliver up the books to enable the petitioners to keep together the business he had formed for them; that possession of them was indispensable in order that he might collect the outstanding debts for which he had become responsible; that he had no authority so to use the books as to give him a right of property in them; but that the petitioners, although the property of the books was in them, were not entitled to delivery of them until the purposes of the agreement were carried out.

The Sheriff (BELL) recalled, and held that the books having been all along the property of the petitioners, and there being no stipulation in the articles of agreement that Murray was to have a right of retention of the books for any purpose after his agency had ceased, the petitioners were entitled to reclaim possession of them when that event happened, the more especially as they could not carry on their business satisfactorily, either by themselves or by a new agent, without these books, and as they offered to give Murray access to the books at all reasonable times, until the accounts contracted through him were collected.

Murray advocated.

Pending the advocacy, T. & J. Bernard presented a petition to the Sheriff, setting forth the statute 6 Geo. IV., c. 120, sec. 42, which enacts "That in all advocations of interlocutors pronounced by Sheriffs, it shall be competent to the Inferior Judge to regulate, in the meantime, on the application of either party, all matters regarding interim possession, having due regard to the manner in which the mutual interests of the parties may be affected in the final decision of the cause." That by sections 130 and 146 of the Act of Sederunt of 10th July 1839, it is likewise made competent to the Sheriff to regulate all matters respecting interim possession, as aforesaid. And craving the Sheriff to ordain the respondent to deliver up to the petitioners the business books belonging to them, before enumerated, or such of them as your Lordship may consider the petitioners are entitled

to immediate delivery of, pending the result of the said advocacy."

The Sheriff-substitute dismissed the petition, as craving an inversion of the state of possession. The Sheriff adhered, pronouncing this interlocutor:—"Finds, that whilst the petition narrates the Statute and Act of Sederunt by which it is made competent for Sheriffs in all advocations of interlocutors pronounced by them, to regulate all matters regarding interim possession, it does not pray generally that the Sheriff shall so regulate, but concludes only that the respondent be decerned and ordained to deliver up to the petitioner the business books pending the result of the advocacy, the right to the possession of which books forms the subject of the original action to be adjudicated on in said advocacy: Finds, that to grant such conclusion would be to enforce in the meantime the decision which has been advocated, and such immediate inversion or transference of possession would be more than what can be fairly understood to be meant by the regulating of interim possession: Finds that it was stated for the petitioner at the debate, that if the Sheriff took the above view, he (the petitioner) would be content with an order on the defender to place the books in neutral custody; but finds that there is no such conclusion, either primary or alternative, in the petition, and as the defender has consequently not had an opportunity of meeting it in the closed record, it cannot be competently entertained incidentally under the present application:—Therefore adheres to the interlocutor appealed against, and dismisses the appeal, but this under reservation of the petitioner's right to present a new petition, with a different conclusion or conclusions regarding the regulation of interim possession."

T. & J. Bernard advocated.

The two advocations were discussed together.

BALFOUR for Murray.

ASHER for T. & J. Bernard.

The Court adhered in both advocations, holding in the first advocacy that the agents merely had possession of, and not property in, the books in question, and that the employers, as having the greater interest in the books, were entitled to recover them for the purposes of their business; but holding in the second advocacy that the petition for immediate delivery had been rightly dismissed.

Agents for T. & J. Bernard—Morton, Whitehead, & Greig, W.S.

Agents for Murray—G. and H. Cairns, W.S.

*Tuesday, January 12.*

#### DRUMMOND v. HUNTER.

*Advocation—Competency—Value of Cause.* An action concluded for payment of two sum of £6 each, being two half-year's rents, from Whitsunday 1866 to Whitsunday 1867, of certain premises, due under a lease for five years from Whitsunday 1866; the pursuer reserving his claim for future rents. The defender pleaded abandonment of the lease. Advocation of the action held competent, although the sum concluded for was only £12, the real question between the parties being whether there was a subsisting obligation under the lease.

*Landlord and Tenant—Abandonment of Lease—Dammum fatale.* Circumstances in which held that where a tradesman had taken a lease of

premises for the purposes of his trade, and the premises were much injured by fire a short time before the term of entry, the lessee was not bound to go on with the lease.

Andrew Drummond brought an action in the Sheriff-court at Glasgow against J. & H. Hunter, paper-rulers, concluding for payment of—"First, the sum of £6 sterling, being the half-year's rent which became due and payable by the defenders to the pursuer at the term of Martinmas 1866, for the half-year immediately preceding, of certain premises belonging to the pursuer, situated at 74 Argyll Street, Glasgow, and let by him to the said T. & H. Hunter for the period of five years from and after the term of Whitsunday 1866, under and in terms of a lease entered into betwixt the pursuer on the one part, and the said T. & H. Hunter on the other part, dated the 21st day of September 1865, in which the said premises are described as situated at No. 74 Argyll Street, Glasgow, and then in the possession of the said T. & H. Hunter; by which lease the said T. & H. Hunter bound themselves to make payment to the pursuer of the sum of £12 sterling of yearly rent or tack-duty for the said premises, payable the said rent half-yearly at the terms of Whitsunday and Martinmas, by equal portions: *Second*, Of the sum of £6 sterling, being the half-year's rent which became due and payable by the defenders to the pursuer at the term of Whitsunday 1867, for the half-year immediately preceding, of the premises above mentioned, let by the pursuer to the said T. & H. Hunter under and in terms of the foresaid lease, reserving to the pursuer his claim against the said defenders for the future rents to become due under the said lease, with interest at the rate of £5 per centum per annum on the said respective sums from the respective dates on which they became due and payable till payment."

The defence was, that "the premises in question were totally or at least substantially destroyed by fire, upon or about the 5th day of May last, before the defenders obtained possession under the lease founded on; and the defenders having thereupon duly intimated to the pursuer that they abandoned the lease, he acquiesced in said abandonment, and subsequently used and let the premises (when rebuilt), and otherwise acted accordingly, on the faith of which the defenders entered into other business engagements."

After a proof, the Sheriff-substitute (GALBRAITH) assolizied the defenders, holding that they were entitled to abandon the lease, and that no rent was due.

On appeal, Sheriff (BELL) adhered, pronouncing this interlocutor:—"Finds that from the nature of the contract of lease, warrandice is implied on the landlord's part that the subject let shall be effectual to the tenant at and from and after the period at which the lease is to commence; and if, by accidental circumstances, or a *dammum fatale*, for the occurrence of which no blame is imputable, the subject is wholly or substantially destroyed and rendered ineffectual for the purposes for which it was let, the landlord, on the one hand, is not bound to rebuild, and the tenant or intending tenant, on the other, is entitled to abandon the lease: Finds that it was proved in the present case that the accidental fire which occurred on 5th May 1866 in the premises forming the subject of the lease, rendered said premises altogether untenable at the date of entry to said lease, viz., Whitsunday 1866; and although the pursuer proceeded to repair the damage which