Saturday, Feb. 24.

FIRST DIVISION.

M'EWAN *v.* MIDDLETON.

Obligation--Clause—Option—Waiver. Circumstances in which held (aff. Lord Jerviswoode) that a party who had under an obligation an option which he might exercise "upon the dissolution" of a company of which he was a partner, had failed timeously to exercise it.

Counsel for Pursuer—Mr Fraser and Mr MacLean. Agent—Mr John Ross, S.S.C.
Counsel for Defender—Mr Clark and Mr Asher. Agents--Messrs Maconochie & Hare, W.S.

This is an action for payment of a sum of £760 arising out of the following circumstances:—The defender, Lewis Stirling Middleton, a calenderer in Glasgow, purchased in 1859 certain heritable subjects in Miller Street, Glasgow, at the price of £18,000, with the view of occupying them for the purposes of his trade. He thereafter entered into a contract of copartnery with the pursuer, J. T. H. M'Ewan, and on the same day let a portion of the subjects to himself and the pursuer, as trustees for the company. At the date of the purchase of the subjects they were considerably burdened with debt, and one of the bonds having been called up, another loan was obtained, for which the firm and the pursuer personally became bound, and in consideration thereof the defender granted an obligation to the pursuer, dated 13th September 1859, in which he bound and obliged himself that, in the event of the pursuer exercising an option to that effect, and requiring him "*at any time within five years from the date hereof, or upon the dissolution of our said copartnership within the said period,*" and for payment as therein expressed, to dispone and convey the subjects to and in favour of himself and the pursuer equally betwixt them *pro indiviso*. Under the contract of copartnery it was provided that in case of the death or insolvency of either of the parties during the currency thereof, the whole trade, stock, and estate should in his option fall to, and devolve upon, the surviving and solvent partner, and provision was also made, in case of difference or dispute arising, for a reference to arbiters. At Whitsunday 1862 the interest of the bonds over the property was unpaid, and the pursuer having had recourse to arbitration, the arbiter found that in the sense of the contract of copartnery the defender was insolvent, and also found that in respect the pursuer elected to take over the estate of the company, the whole trade, stock, and estate of the company had fallen and devolved upon him. The decree-arbitral was issued on 11th December 1862, and shortly thereafter the pursuer advertised the award in the newspapers, and also that the defender had ceased to have any interest in the firm, and that the whole business, assets, &c., now belonged to him. Some time after this the defender dealt with the heritable subjects as his own, and sold them for £1500 more than he had paid for them. This having come to the pursuer's knowledge, he, on the 2d March 1863, intimated to the defender that "I exercise the option under your deed of obligation to me dated 13th September 1859," and he now claims to participate in the benefit of the advantageous sale of the subjects. This claim the defender resists on the ground that he was entitled to deal with the property as his own, the pursuer not having timeously exercised the option provided for in the obligation. The dissolution was advertised by the pursuer on 18th December 1862, and he did not declare his option till 2d March 1863. The Lord Ordinary (Jerviswoode) gave effect to this plea and assoilzied the defender. The pursuer having reclaimed the Court to-day adhered.

The LORD PRESIDENT said—The circumstances of this case are peculiar, and it has been argued to us with great clearness and perspicuity. The question is, Whether the pursuer duly and timeously exercised the option which he had? It appears to me that he did not. It is very clear that the option was to be exercised at the end of five years, or upon a dissolution taking place, if it took place before the expiry of that period. In that event the dissolution was the *punctum temporis*. I don't say that the option had to be declared on the very day of the dissolution, but there was not to be unreasonable delay. The pursuer himself advertised the dissolution on 18th December 1862, and he did not exercise his option till 2d March 1863. That is a very long time. It is maintained by the pursuer that the defender on 22d January 1863 called upon him too hurriedly to exercise his option. I cannot accept this as a sufficient excuse in the circumstances of this case. In the arbitration preceding the dissolution, the value of these heritable subjects was discussed. The matter was not submitted to the arbiter, but the parties did discuss it before him, although he had no power to deal with it. The pursuer in these arbitration proceedings had said that the value of the heritable subjects was such that he never would exercise his option. I do not say this statement in another proceeding is conclusive against the pursuer in this case; but it shows that the pursuer had been, before he advertised the dissolution, considering the matter. When the dissolution took place, the matter was not new to the pursuer. In particular, when the arbiter, on 18th October 1862, issued notes of his opinion that a dissolution had taken place, the pursuer's attention was or ought to have been directed to the subject. Then, on 11th December 1862, the arbiter pronounced his final decision. It was therefore unreasonable to hold that the pursuer had down to 2d March to declare his option. On 22d January 1863, the defender's agents wrote to the pursuer—"Mr Middleton has assumed that, in accordance with his previously expressed resolution, Mr M'Ewan waived the exercise of any right he might have to demand a conveyance to the property in terms of the deed of obligation. We shall take it for granted if we do not hear from you in the course of to-morrow that in this Mr Middleton has not misunderstood Mr M'Ewan. On the footing that Mr M'Ewan has waived the right referred to, Mr Middleton has been endeavouring to make arrangements with the view of preventing loss upon the property." I think that was quite a reasonable letter. All the defender wanted to know was whether or not he had misunderstood the pursuer. That question might have been easily answered; but the pursuer takes five days to answer the letter, and then all he says is that he has been so busy with one thing and another that he has been unable to look into the matter, and that he will take his own time. All this takes place when the subjects are supposed to be of such value as not to induce the pursuer to exercise his option. I think it was not incumbent on the defender to call on the pursuer a second time. The letter of 22d January told him that in the event of not hearing to the contrary next day, the defender would assume that the option was not to be exercised; and on 28th January the defender's agents again write the pursuer that he is not now entitled to exercise the option, and that "it was with the view of preventing misunderstanding that the previous letter was written." When the pursuer received this letter stating that the defender held him excluded, he was bound at once to do something. But it is not until 2d March, when a large price is obtained for the subjects, and it becomes desirable for him to do so, that the pursuer declares his option. The obtaining of this large price was quite fortuitous, for the pursuer himself states on record that he exercised his option "in consequence of a party having a special object in view unexpectedly offering a high price for the subjects." What he now demands is a share of the surplus price, and not a conveyance of one-half of the subjects, in terms of the obligation. I think therefore that, in the whole

circumstances the pursuer has not timeously exercised his option.

Lord CURRIEHILL concurred. He was of opinion that the defender had acted throughout with great fairness and liberality. He thought that after 23d January the option was at an end, but was very clear that after 28th January it was. His Lordship also expressed doubt as to whether even on 2d March the option had been validly exercised. Under the obligation he was, on declaring his option, to pay money, whereas when he did so he asked some.

Lord DEAS, in concurring, had no doubt that their Lordships had taken the equitable view of the case, but he had a little difficulty as to the law. The letter of 22d January was written on the footing that the pursuer was entitled to some notice from the defender before he lost his option. If so, he was entitled to a reasonable time. Then on 28th January, instead of giving the pursuer a week or some such period, the defender's agents write that they hold the option at an end. If they had given him a reasonable time, their position would have been unassailable. These difficulties, however, did not justify his Lordship in arriving at an opposite conclusion.

Lord ARDMILLAN concurred with the Lord President.

ORMISTON *v.* RIDPATH, BROWN, & CO.

Reparation—Relevancy. An action of damages for raising an action, taking decree, and giving a charge thereon, the debt sued for having been previously paid, *dismissed.*

Trade Protection Societies. Observations (per Lord President) on the uses of such societies.

Counsel for Pursuer—Mr Scott, Agent—Mr Alex. Duncan, S.S.C.

Counsel for Defenders—The Solicitor-General and Mr Gifford. Agents—Messrs White-Millar & Robson, S.S.C.

The pursuer sued the defenders for damages sustained by their having raised an action against him, in which they took decree and charged him thereon, while the supposed debt, in relation to which legal proceedings had been adopted, had been truly paid. He proposed the following issue:—"Whether the defenders, on or about 12th August 1865, raised against the pursuer before Her Majesty's Justices of the Peace for the shire of Edinburgh, a complaint concluding for payment of the sum of £1, 5s. 8d. as the amount of an account due by him to them, and took decree on said complaint, and caused the pursuer to be charged upon said decree? and whether the said proceedings were taken and carried through wrongfully after payment of the said sum of £1, 5s. 8d., and through gross negligence on the part of the defenders, or others for whom they are responsible—to the loss, injury, and damage of the pursuer?"

Damages laid at £100.

The defenders objected to the issue that it did not propose to prove that they had acted maliciously. They also pleaded that the action was not relevant, and cited the case of Aitken *v.* Finlay and others, 25th Feb. 1837 (15 S. 683). The Court dismissed the action, but found no expenses due to either party.

The LORD PRESIDENT said—This is a case attended with considerable nicety. The ground of action is that the defenders had served the pursuer with a summons within a short time after he had paid the debt. It appears that the defenders were not the active parties in the matter. They had put their claim into the hands of the Scottish Trade Protection Society for recovery. The defenders are, of course, responsible for the acts of the society, and they don't say they are not. It is not disputed that this debt had been paid to the society before the summons was issued. This is said to have been a mistake. We are told that the business of this society is conducted by means of various clerks, and that the clerk who received the payment had omitted to enter it, and that thus the summons was issued notwithstanding of the payment. I have no idea that a society of this kind by subdividing their labour in this way can escape liability by saying that one of its hands does not know what its other hand is doing. It is also very clear that the pursuer has great ground to be dissatisfied in this case with the proceedings of the society, for it was negligence and carelessness on the part of the society which according to their own account led to the pursuer being summoned. I believe this society has existed for some time, and that its objects are good. Its name indicates a beneficial purpose. If well conducted the society may be of great public utility in enabling honest traders to recover claims from fraudulent debtors. But if it is carelessly and negligently conducted, if it uses its powers against persons who are not fraudulent debtors, it becomes mischievous and evil. I don't say that it is the habit of this society to act as they did here, but this case having occurred, I think it right that this caution should be given. In this case, however, I confess I feel considerable difficulty in granting any issue by reason of the circumstances that have occurred. I don't mean to say that a party who has been wrongfully sued for a debt which he has paid may not in some circumstances have a claim of damages. Some of the defences stated are quite extravagant. It is said that the pursuer is bound first to reduce the decree. That will never do. Then it is said that the pursuer should have applied for a rehearing. That is also out of the question. I give no opinion on the general question raised by the objection stated to the relevancy, but I think there were some things which the pursuer ought to have done in this case which he did not do. In the first place, he has not stated any good excuse for not going to the Court. He may have had a very good excuse, but he does not give it. His proper course was to have gone to the Court as a triumphant defender and presented his receipt, when he would have been assoilzied with costs. But further, the pursuer does not aver that the summons was issued in the knowledge that the debt was paid. It is one thing to issue a summons in forgetfulness, and another thing to do so knowing of the payment. Therefore on the whole though I think the conduct of the society not excusable, and that the defenders have stated some pleas which ought not to have been put on record, I think we ought to refuse an issue, dismiss the action, and find neither party entitled to expenses.

The other Judges concurred.

SECOND DIVISION.

INGLIS *v.* INGLIS.

Reparation—Written Slander—Relevancy—Inuendo. It is no objection to the relevancy of an action for written slander that the words used are apparently perfectly innocent, if the pursuer avers and offers to prove that they were intended to convey and did convey a calumny.

Counsel for Pursuer—Mr Gordon and Mr Gifford. Agent—Mr James Renton jun., S.S.C.

Counsel for Defender—The Solicitor-General and Mr J. T. Anderson. Agents—Messrs White-Millar & Robson, S.S.C.

This was an action of damages in respect of a circular issued by the defender to his customers in the following terms:—

"Steam Mills, Musselburgh, July 1865.

"Dear Sir,—William A. Inglis, who recently acted as agent for the sale of my flour in your district, intimates to me that he has got a number of my empty sacks into his possession, for which he demands payment, or as many of his sacks in lieu thereof. Presuming that these sacks must have come into his hands by some irregularity of some of my customers, I now beg you to be careful, when returning my sacks, to put on the full name and