by M'Lellan, the genuineness of which the pursuer admits. This fact therefore that 10,762 dollars or £2205, 7s. 2d. were actually paid by the defender on account of the pursuer's claim to M'Lellan is thus instructed *scripto*. And the case does not end here on the written evidence. For on the 6th of January 1864 M'Lellan writes to the pursuer that it gave him pleasure to advise that he had succeeded in arranging his claim with the defender for the 376 bales of cotton, and that the defender had paid him the sum above stated, "which amount," he adds, "I have placed at your credit."

To understand this statement it has to be kept in view that at this very date the pursuer was indebted to M'Lellan in a larger sum than the amount which he here acknowledges to have received from the defender. Hence it is that M'Lellan writes the pursuer that the large payment made to him by the defender was placed to the pursuer's credit—the debt due to M'Lellan by him being by means of that payment *pro tanto* extinguished. Then it is all important to observe the terms in which the pursuer wrote both to M'Lellan and to the defender upon receiving this intimation of the £2205 having been paid by the defender to M'Lellan. For supposing that his authority to settle with the defender was understood by the pursuer to have been withdrawn, it was to be expected that he would have repudiated the payment entirely, and not have recognised it as he did to be a payment good and effectual to discharge the debt which he owed to M'Lellan.

His letter acknowledging receipt of the intimation from M'Lellan as to the payment having been made is dated 1st February 1854, and in this letter he says—"*So far as this amount is concerned* I am entirely willing you should receive the amount of £2367, 3s., and send me your receipt in full—that being the amount I collected for the drafts you handed me when I came through, up to my last." It is impossible to understand this in any other sense than that the payment made by the defender was to be a good payment so far as the debt due to M'Lellan by the pursuer, although the letter undoubtedly intimates that more should have been obtained from the defender in the settlement of the joint-adventure transaction. Then what does the pursuer write to the defender himself on the same day? He intimates that M'Lellan had informed him of the payment made to him by the defender on his account, without one word to the effect that M'Lellan had acted unauthorisedly in receiving that payment. All he says is—"If you pay to M'Lellan the amount of £2367, 3s., I shall gladly allow that amount accompanied with his receipt in full"—*i.e.*, his (M'Lellan's) discharge of the debt owing to him by pursuer, and he adds that the defender would then be owing him on this transaction £1410, 7s. 10d., and $7428, 90c. I cannot understand this passage to mean that in addition to the £2205 already paid to M'Lellan another sum of £2367 was to be paid him, and still a balance to remain due by defender to pursuer to the extent stated. Any such view would bring up the claim of the pursuer, including the partial payment of £1961, 18s. 4d. credited in the summons as received in June 1863, to an amount far exceeding what the pursuer ever stated to be the amount of his debt. The true and only just interpretation of the passage is, that in addition to what he had already paid to M'Lellan, he should pay him as much as would make up what he held to be the debt he owed M'Lellan—viz., £2367, 3s., and get M'Lellan's discharge of his (the pursuer's) debt in full in respect of that payment, and he would gladly allow that amount. And what is this but a recognition and adoption of the payment of £2205 made to M'Lellan as at least a good partial payment of which the pursuer was to reap the benefit as *pro tanto* extinction of his own debt to M'Lellan. And here I must observe that throughout the whole evidence the pursuer has not attempted to show how his accounts stand with M'Lellan, or to disprove the statements made in his own letters of 1st February 1864, that he owed M'Lellan £2367 at the very time that this payment was made by the defender to M'Lellan. Upon the evidence, therefore, the result must be, were the verdict of the jury to stand, that while the defender is refused credit for this payment of £2205, the pursuer must get the full benefit of it as a payment on his account with which M'Lellan has credited him. Had there been room to view the whole transaction between the defender and M'Lellan as a fictitious or fraudulent scheme or device by which the pursuer was defrauded of this amount, the result would have been different, but the pursuer has not attempted to establish anything of that kind, and the evidence, documentary and parole, bearing on this matter forbids any such view of the transaction.

Having arrived at this conclusion on the question of the effect of the payment as operating at last partial satisfaction of the pursuer's claim, this is sufficient to support the defender's motion for a new trial. It is not necessary to consider the effect of the payment in the other aspect of it—that is, as operating a discharge of the pursuer's claim for damages in respect of alleged breach of contract in the sale of the ninety-six bales elsewhere than at Liverpool or Havannah. The jury having ignored the payment entirely by their verdict, its effect in the light now under consideration could not have been before them; and it is therefore needless, and would be wrong to enter into any discussion on the point. It will, no doubt, be brought forward at a new trial. And in like manner it is unnecessary to express any opinion on the question whether the evidence was such as to justify the jury in holding that a breach of contract had been proved, and that part of the second issue is introductory to the demand for damages in respect of such breach, while it must be for the consideration of the jury whether such claim had not been settled under the transaction between the defender and M'Lellan at the time when the payment of £2205 was made.

On the whole, therefore, and without entering farther into the case. I am of opinion that the verdict should be set aside, and a new trial granted, at least upon the pursuer's issues.

The pursuers were found entitled to the expenses of discussing the exceptions, but all other expenses were reserved.

JURY TRIAL.

(Before Lord Jerviswoode.)

GARDNER *v.* M'GAGHANS.

Reparation—Malicious Apprehension—Slander. In an action for malicious apprehension and slander, verdict for the pursuer.

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

Counsel for Defenders—Mr Alexander Moncrieff and Mr W. A. Brown. Agent—Mr James Bell, S.S.C.

In this case John Gardner, joiner, residing in Home Street, Edinburgh, was pursuer, and Mrs Mary Reilly or Keddie, residing in No. 17 Spittal Street, Edinburgh, now wife of Michael M'Gaghan, labourer, there, and the said Michael M'Gaghan for his interest, were defenders.

The issues sent to the jury were in the following terms:—

"1. Whether, on or about Monday the 24th of July 1865, and in or near the female defender's house in Spittal Street, Edinburgh, the female defender, maliciously and without probable cause, apprehended, or caused the pursuer to be apprehended, and thence conveyed to the Fountainbridge station of the Edinburgh City Police—to the loss, injury, and damage of the pursuer?

"2. Whether, on or about the 24th day of July 1865, and on the way between the female defender's house in Spittal Street and the Fountainbridge station of the Edinburgh City Police, the female defender did falsely and calumniously, in the

hearing of Mrs M'Gregor, wife of Donald M'Gregor, residing in Spittal Street, Edinburgh, say that the pursuer had stolen her late husband's watch, or did falsely and calumniously utter words to that effect of and concerning the pursuer—to the loss, injury, and damage of the pursuer?"

Damages were laid at £250.

The jury, after three hours' enclosure, returned a verdict by 11 to 1 for the pursuer—damages, £10.

Wednesday, March 7.

FIRST DIVISION.

ANTERMONY COAL CO. *v.* BRUCE AND OTHERS (*ante*, p. 170.)

Process—Mandatory. In an action at the instance of a company with a descriptive firm, and its two partners, one of whom was in Australia, held (aff. Lord Barcaple) that the absent partner was not bound to sist a mandatory.

Title to Sue. Question whether a company with a descriptive firm can sue an action without the authority of all its partners or at least three of them.

Counsel for Pursuers—Mr Gordon and Mr Lamond. Agent—Mr Wm. Burness, S.S.C.

Counsel for Defender—The Solicitor-General and Mr Alex. Moncrieff. Agents — Messrs Lindsay & Paterson, W.S.

The pursuers of this action are "the Antermony Coal Company, Antermony, Dumbartonshire, and Auston & Company, coalmasters at Hamilton and Glasgow, and Walter Wingate, coalmaster at Shirva, in the county of Dumbarton, at present in Australia, or elsewhere furth of Scotland, being the individual partners of the said firm of the Antermony Coal Company." The defenders are "Walter Wingate & Company, coal masters at Shirva aforesaid, and the said Walter Wingate, and George Cadell Bruce, civil engineer in Edinburgh, the individual partners of that firm." The defender Bruce, who alone appeared to defend, moved that the pursuer Walter Wingate should be ordained to sist a mandatory. The Lord Ordinary (Barcaple) refused the motion.

The defender reclaimed, and argued—An action at the instance of a company with a descriptive firm is not competent unless at least three of the partners are parties to it. In this case one of the two partners, Mr Wingate, is in Australia. There are no means of knowing, except by production of a mandate, whether he has authorised the action, and without his authority the action cannot proceed. For all that appears on record, the interest of Mr Wingate in the company may be greater than that of Austin & Co. If it be the fact that Mr Wingate's address is unknown to the other pursuers, that circumstance may raise a special case which the Court will provide for by appointing a judicial factor or otherwise, for the purpose of enabling the company to recover its debts.

Answered for the pursuers — The Lord Ordinary has already by an interlocutor, now final, repelled the defender's plea of no title to sue. This motion is just a repetition of that plea. There is here, besides the company, a solvent partner in this country, responsible for the expenses and the proper conduct of the action. It is not in these circumstances necessary that the other partner should sist a mandatory.

The Court to-day adhered. The fact that Walter Wingate was abroad appeared on the face of the summons. The motion for a mandatory was a motion in the cause. It was not a plea against title. If the objection of want of authority was within any of the pleas it was within the first, which has been repelled. But if it had been intended to raise the objection to title, which had been argued, there should have been a distinct statement on record that Wingate had not authorised the action. As to the motion otherwise the Court thought that looking to the circumstances, it was not a case where a mandate was necessary. There was a partner in this country whose solvency was not questioned.

SECOND DIVISION.

HERITORS OF CARRIDEN *v.* DUGUID AND OTHERS.

Churchyard. Are all the heritors in a rural parish entitled to take part in the custody and management of the churchyard?

Counsel for Complainers—The Solicitor-General and Mr Cook. Agents—Messrs Duncan & Dewar, W.S.

Counsel for Respondents—Mr Black. Agent—Mr Thomas Paddon, S.S.C.

This is an action of suspension and interdict at the instance of the heritors of Carriden. The note of suspension concludes with the following prayer:—

"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents, and all others, from molesting or interfering with the complainers in the management and custody of the old churchyard of the said parish of Carriden, by forcing the gate of the said churchyard, or otherwise effecting a violent entrance into the same, opening graves, and erecting or constructing headstones or other monuments or memorials of dead or living persons within or upon the ground of the said churchyard, without the leave of, or license granted by, the complainers or their predecessors, the heritors of the said parish, or by any other fact or deed inconsistent with the legal rights of the complainers as managers and custodiers of the said churchyard, or to do otherwise in the premises as to your Lordships shall seem proper."

After narrating the history of the closing of the old church and churchyard of Carriden, and the opening of a new church and burial-ground in 1776, and the rights of sepulture that had been granted by the heritors in the old churchyard as proprietors of it in consideration of a small sum of money paid by the parties applying for burial places to the kirk-session, and the steps taken to shut up the old churchyard, the heritors go on to state:—

"Until recently no attempt was made to interfere with the regulation and management of the old churchyard by the complainers in terms of the above resolution, but for some months back a disposition has been evinced by certain parties in the parish, and amongst others by the respondents, James and John Duguid and Andrew Waldie, to oust the complainers altogether from the management of the old churchyard, and to assert a right of property in the ground of the same to the exclusion of the complainers, and in some instances this had led to unseemly and violent and illegal acts upon the part of the said respondents and others.

"In particular, in the month of March last (1864), application was made to the beadle to give the key of the churchyard gate for the avowed purpose of exhuming and of reinterring in the old churchyard the body of an infant child of a person named Balmer, which had previously been interred in the new churchyard, Balmer having no right of burial in the old churchyard. The beadle, after consulting the Rev. Mr Smith, the minister of the parish, having declined to give the key for the said purpose, a disorderly crowd of persons actually exhumed the body of the said child, and having forced or otherwise obtained an entrance to the ground of the old churchyard, they reinterred the child in a burial place in that churchyard in which a person of the name of Ramage, who was said to be the maternal grandfather of the said child, claims a right of burial, but in which neither Ramage nor Balmer