The other Judges concurred.

Agents for Pursuer—Mackenzie & Kermack, W.S.

Agent for Defender—William Mitchell, S.S.C.

Wednesday, June 22.

FIRST DIVISION.

WILSON *v.* LECKIE.

Bankruptcy—Proving the tenor—Casus Amissionis *—Expenses—Mandate—Slump Sum.* B purchased from C his shop, stock, outstanding debts, &c., at a slump sum. The debts were stated by C to amount to £100. They did not. *Held* (1) B was not entitled to rank on C's sequestration for the difference; (2) that it was competent to prove the tenor incidentally of a mandate authorising a payment; (3) that the *casus amissionis* and tenor were for this purpose sufficiently instructed by the deposition of the mandatory that he had received the authorisation before paying the sum, and thought he had then destroyed the document, but certainly had not returned it to the mandant; and (4) that each party should bear his own expenses throughout, as both parties had been partially successful, as the pursuer was a trustee who had to extract information from the defender, and had modified his claim on receiving it.

This was an appeal from the Sheriff-court of Lanarkshire of an action in which John Wilson, accountant in Glasgow, trustee on the sequestrated estate of Robert Crichton, tea merchant and grocer in Glasgow, was pursuer; and John Leckie, grocer in Kirk Street, Glasgow, was defender. Wilson claimed payment (1) of the sum of £220 as the price of the stock in the shop 1 Kirk Street, Glasgow, which the defender had bought from Crichton, and which was by agreement fixed by a valuation; (2) of the sum of £292, 12s. for the shop furniture, as per inventory, for outstanding debts, as per list, and the goodwill of the business. He also sought delivery of the valuation and inventory. The pursuer said he had frequently requested the defender to return the inventory and valuation, but had always been refused. The defender said that Crichton had represented the book debts as amounting to £100, and that they were all due by persons able to pay. Eventually it proved they were only worth £82, 3s. 2d., and the defender claimed a deduction of the difference, viz., £17, 16s. 8d. [10d.] This the pursuer admitted, as also that Crichton had been paid £300 to account by the pursuer, as also £5; and eventually the pursuer acquiesced in the defender's statement that the sum realised by the sale of the shop, &c., was not £512, 12s., but £465, 9s. 7d. The defender also consigned £60, 10s. 3d. as admittedly due. The summons was signeted on 7th Jan. 1868, and a proof was led on the 20th June following. The following productions were, *inter alia*, put in by the pursuer:—

"*Glasgow, 9th November* 1867.

"I have bought from Mr Robert Crichton the shop furniture as stated in book, also goodwill and outstanding debts, amounting in all to £292, 12s. sterling. Stock at valuation on Tuesday.

JOHN LECKIE.

"*N.B.*—This on condition that I get a lease of the shop or landlord's consent.

"*Glasgow, 9th November* 1867,
1 *Kirk Street, Townhead.*

"Mr John Leckie,—I hereby accept of your offer of this date for my shop, 1 Kirk Street, you paying me £292, 12s. sterling per book inventer as initialed by us. Stock on hand to be taken at value on Tuesday first. Rental and taxes payable by you from this date. ROBERT CRICHTON.

"£300 *Glasgow, 14th November* 1867.

"Received from Mr John Leckie £300 sterling, to account of stock, plant, and goodwill of business at shop Kirk Street, Townhead.

ROBERT CRICHTON.

"Mr Leckie—I. O. U. £5, sterling.

R. CRICHTON.

"Lewis & Tod, Sugar Merchants,
"76 *Wilson Street,*
"*Glasgow, 18th Nov.* 1867.

"Received from John Leckie, High Street, £70 sterling for Robert Crichton. WM. BROWN.

"Paid by Lewis & Tod. JOHN LECKIE."

Mr Lewis deponed—"I know the defender quite well. He deals with us. On the 18th November 1867 he asked us to pay Mr Brown £70 on his account. I knew that he had purchased Crichton's shop, and that this sum was to go towards payment. I paid the money and got the receipt, No. 7-6. I got repaid that advance. I got at same time that I paid the money an order by Crichton upon Leckie for £70; but, notwithstanding every search, I cannot find it, and I am certain it is lost.

"*Cross-examined*—I am not quite positive, but I believe it was an order upon Crichton I got. I cannot positively say on whom the order was drawn, nor in whose favour, but at the time I was quite satisfied it was sufficient authority for me to pay the money on Leckie's behalf to Bailie Brown. I do not know whether it was stamped or merely a letter, and I do not know in whose handwriting it was.

"*Re-examined*—I am quite certain I did not hand over that document to defender."

Crichton was also examined on the 27th October 1869 on commission, as he expected soon to leave the country; but no stress was by any of the courts laid on his evidence, as, on 11th March 1869, he was found guilty of theft, and received sixty days' imprisonment; and at last Circuit was again tried for theft, and sentenced to seven years' penal servitude. The Sheriff-Substitute (GALBRAITH) found the defender liable in (1) £12, 2s. 8d., as there was no evidence that the defender was authorised by Crichton to pay the account for which it was incurred; (2) £17, 16s. 8d. [10d.], as the amount of the debts had not been guaranteed to be £100; and (3) £70, as it had not been proved that Crichton had granted any order upon Leckie that could be sustained as a valid mandate to pay the money—Brown's evidence being insufficient to prove the tenor of the lost document; and that the mandate to pay money could only be proved by the pursuer's writ or oath.

The defender appealed, but the Sheriff (GLASSFORD BELL) adhered in the following interlocutor:—

"*Glasgow, 26th January* 1870.—Having heard parties' procurators on their respective appeals, and considered the proof, productions, and whole process, Finds, as regards the defender's appeal, that it was stated at the bar to be directed against the

Sheriff-Substitute's findings, disallowing the two items, for which credit is sought, of £17, 16s. 8d., and £70 respectively, and that the disallowance of the item of credit of £12, 2s. 8d. was acquiesced in: Finds that the item of £17, 16s. 8d. [10d.] is the difference between the sum of £100, which the defender avers was the guaranteed amount of the debts purchased by him from the bankrupt Crichton, and the sum of £82, 3s. 2d., which turned out to be the true amount of said debts: But finds it instructed by the missive offer, No. 5/1, and acceptance, No. 7/1, that the defender bought, at the lump sum of £292, 12s., Crichton's shop furniture, good-will of the business, and outstanding debts, and nothing is said in these documents as to the amount of the debts: Finds that although the book, No. 5/2, is docqueted by Crichton and the defender as containing a correct inventory of the furniture referred to in the missives, the subsequent writing at the top of a blank page of said book—'outstanding debts good £100'—is not signed or authenticated in any way, or referred to in the said missives: Therefore finds that it is not proved that the debts were sold or purchased as amounting to any specific sum: Finds that the item of £70 is a credit claimed by the defender in respect of his having paid that sum after the purchase from Crichton through the witness, Robert Lewis, to the witness, Robert Brown: But finds that unless said payment was made with Crichton's consent and authority the pursuer is not bound to recognise it: Finds that a mandate to pay money can only be proved by the mandant's writ or oath, and there is, at all events, no parole proof here of any such mandate: Finds that the defender himself does not aver, either in the closed record or in his deposition as a witness, that he received any written order from Crichton to pay the £70 to Brown, but he does state that he made the payment at the request and on behalf of Crichton, Brown being trustee under a previous sequestration of Crichton's estate, and being anxious to realise more of the money due by the defender for the creditors under that sequestration: Finds that Brown himself depones that he got an order from Crichton on the defender to pay the £70, which order he delivered to Lewis on getting the money: But finds that no such order has been produced, Lewis having sworn that after a careful search he could not discover it: Finds that Crichton himself has sworn very positively that he never granted any such order, whilst Lewis does not corroborate Brown, for although he says in his examination-in-chief that he got an order by Crichton on Leckie, he contradicts this in cross, and says, 'I am not quite positive, but I believe it was an order upon Crichton I got. I cannot positively say on whom the order was drawn, nor in whose favour,'—the probability apparently being that it was either an order by Brown on Crichton, or an order by the defender on Lewis: Finds that, in these circumstances, neither the existence nor the tenor of the alleged lost document is proved, and the defender must be held to have taken the risk upon himself, in consequence of Brown's representations, of authorising the £70 to be paid to him, for which payment the pursuer, as now in right of Crichton's creditors under the existing sequestration, is not bound to give credit: Therefore adheres to the findings appealed against by the defender, and dismisses the appeal: Finds that the pursuer's appeal was directed solely against his not being allowed full costs; but finds that he is allowed costs subject to 'slight modification' in respect of his *pluris petitio*, and there is no reason to disturb that finding: Therefore dismisses the pursuer's appeal, adheres simpliciter to the interlocutor appealed against, and decerns."

The defender appealed in regard to the second and third points.

HORN and RHIND for him.

MILLAR, Q.C., and R. V. CAMPBELL in answer.

The Court unanimously adhered upon the second point, but reversed on the third.

The LORD PRESIDENT thought it was impossible to give the defender the deduction he asked on the ground of the debts not coming up to £100. The terms of the contract were too absolute for that, and the acceptance by the defender was explicit. It was "per book inventer, as initialed by us." Nothing was said in this as to the outstanding debts. There was a reference to the book, and it was said this imported the book into the contract. But it was referred to in the acceptance as "per inventer, initialed by us." Now, there was indeed an inventory, not initialed, but signed; but it was for household furniture. And the only line in another part of the book about outstanding debts was neither initialed nor signed. In disallowing this sum therefore, the Sheriff was right. But in regard to disallowing the sum of £70, the Sheriff had gone wrong. It was a sum which the defender alleged he paid to account of his debt, not to Crichton, but to Brown, who was trustee for Crichton's creditors under a previous sequestration, and who was still charged with the duty of obtaining from Crichton funds to enable him to pay the composition for which the bankrupt was to be discharged. It was said that Brown had no right to receive, nor the defendant to pay, that sum without authority from Crichton. But, assuming that it was necessary for the defender to prove a written authority to that effect, it appeared from the proof that there had been such written authority, though it was not produced. The document had been lost, and it was said the loss and tenor of the document could not be proved incidentally. Such a course was, however, quite competent. It would have been different, of course, if the document set up had been a title on which an action was to be founded. Brown said he received £70 on 18th November 1870 from Lewis & Todd. Lewis said he paid the money. He got an order, he said, by Crichton on Leckie when he paid the sum, and while he said he was unable to find it, he distinctly said that he had not given it to the defender, which rendered proof of the loss and tenor of the document more easy than if it had been lost by the defender himself. Under cross-examination he was more vague. He said the order was on Crichton; but it was plain this was inaccurate. He, however, knew he had authority from Leckie to pay the money. This was sufficient evidence to prove the loss and tenor in defence; and Lord Deas remarked that for such a purpose one witness with corroborating circumstances was sufficient. No expenses were allowed in either Court, as the defender had refused information to the trustee, and as the pursuer had modified his claim when he did get information, and had been partially successful.

The other Judges concurred.

Agent for Pursuer—R. P. Stevenson, S.S.C.
Agent for Defender—M. Macgregor, S.S.C.