of the proceedings. But, besides these, there is a third reason, sufficient in itself to support the practice, and that is, that if there was not a mandate produced, something which would validly bind the party himself, we might have the party coming back and repudiating what had been done for him and in his name. Even though his agent may be properly authorised and instructed, there may arise in any case circumstances in which something requires to be done, some step taken, which the agent could not take of his own hand, and without authority from his principal. If we had no formal binding mandate, we might have a case carried through all its stages here, and even taken to the House of Lords, and yet the party might come back and disclaim in the end all that had been done for him. Even supposing, therefore, the case were entirely open, I should have had no difficulty in deciding it upon principle. It is quite true that some little doubt has been thrown upon the practice by the remarks made in the case of *Elder*. But I think they arose from mere recollection of a certain laxity of practice which had crept in, and were made without much consideration, and without any discussion on the subject, or reference to authority.

Lords Ardmillan and Kinloch concurred.

Lord President—I come to the same conclusion, in accordance with the decision in the cases of *Dempster* and *Bonny*, which I hold to be binding on me in this question.

The Court accordingly refused the appeal.

Agent for Appellant and Defender—John A. Gillespie, S.S.C.

Agents for Respondents and Pursuers—Horne, Horne, & Lyell, W.S.

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*Wednesday, November 22.*

## SECOND DIVISION.

### FRIER *v.* EARL OF HADDINGTON.

*Landlord and Tenant—Lease.* A landlord agreed that if his tenant should put up certain water pipes he would pay him "their value at the end of the lease." *Held* that this did not mean the cost of the pipes, but their value to the landlord or an incoming tenant at the end of the lease.

This was an action by R. S. Frier against the Earl of Haddington, concluding for certain sums, amounting in all to £186, 4s. 8d., as due under a lease of a farm entered into between the father of the pursuer and the late George Baillie of Jerviswoode, the father of the defender. This lease was entered into by a holograph letter by the landlord, which contained the following provision:—"If you" (the late Thomas Frier) "lay pipes for bringing water to the house and steam-mill, you are to be paid their value at the end of the lease." The 5th article of the condescendence, referred to in the Lord Ordinary's note, was as follows—"Various communications took place between the pursuer's father and the late Earl as to the mode of getting water. In or about the year 1854, the late Earl of Haddington, with the view of saving, if possible, the expense of bringing water from Fans Hill, a portion of the farm which had been fixed on by his Lordship and the late Mr Frier as the place from which it would require to be brought, instructed the late Mr Frier, before going on with the work, to endeavour to get water by digging and boring at the steading at East Fans. A considerable amount of work was done and paid for by the pursuer's father under these instructions. His Lordship specially undertook liability for the whole expense connected with the digging and boring. He repeatedly visited the steading while the digging and boring were going on, and ultimately, on finding that these operations were not likely to be successful, instructed the late Mr Frier to abandon the operations and get water from Fans Hill. The sum of £19, 4s. was expended in men's wages alone (exclusive of cartages and horse labour) in connection with the attempt to procure water at the steading."

The Lord Ordinary (Mure) pronounced the following interlocutor—"Finds that the allegations relative to the late Earl of Haddington having undertaken to pay the expense connected with the digging and boring for water, referred to in the fifth article of the condescendence, can only be proved by writ or oath; *quoad ultra*, and before answer, allows both parties a proof of their averments, and to each a conjunct probation, and appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—Having regard to the nature of the demand made in the fifth article of the condescendence, and to the time which had elapsed since the obligation is alleged to have been undertaken, and to the fact that the parties to it are both now deceased, the Lord Ordinary does not think it would be proper to allow it to be proved otherwise than by writ or oath.

"The abstract plea to title was not insisted on at the debate. And as regards the sums sued for, other than that claimed in the fifth article of the condescendence, the Lord Ordinary does not consider that he would be warranted, at this stage of the cause, in laying down any restriction either as to the mode or extent of the proof; because as regards the pipes parties are at issue, not only as to whether their value is to be taken as at the date when they were laid, or at the expiry of the lease, but also as to what their value was at the latter period; and as a proof will, in any view, require to be gone into on that point, the Lord Ordinary thinks it better to abstain at present from pronouncing any judgment as to the precise period at which the value is to be taken; while as regards the damage alleged to have been done by rabbits during the last year of the lease, the Lord Ordinary, as at present advised, can see no actual irrelevancy in that claim as laid, more especially in a case where the fact that some damage might have been done, of a description for which the landlord might be liable, is scarcely disputed in the letter founded on in the 12th article of the condescendence."

The defender reclaimed.

Watson and Balfour, for him, argued that the Lord Ordinary should have construed the deed before sending the case to proof.

Solicitor-General (Clark) and Campbell Smith for the respondent.

At advising—

Lord Justice-Clerk—We should now decide whether the lease settles the claim of the tenant to the value of the pipes at the end of the lease. The word "value" means value to the landlord at the end of the lease. The other construction would imply that the landlord was to pay the price of new pipes after they had been used for

twenty years. The tenant had the control of laying them down, and all the benefit during the lease, and he can only recover their value to the landlord at the end of the lease.

LORD COWAN—It is indispensable that we should construe the lease before sending it to a valuator. The meaning is not that the tenant should get the cost of the pipes, but their value to the landlord or an incoming tenant at the end of the lease. I should also say that I do not think this the value merely as old lead. If the tenant elected to lay pipes in order to bring water into the house, he was to be entitled to recover their value as they stood at the end of the lease. It may be that alternative views may arise on the estimate. The Lord Ordinary has overlooked the fact that the lease requires construction.

LORD BENHOLME concurred.

LORD NEAVES—I am of the same opinion. I concur with the Lord Justice-Clerk and Lord Cowan, that the intention was not that the pipes should be taken away to an old iron shop and sold. They were an *opus manufactum* which the tenant was entitled to make, and which was fairly and properly made. The benefit thereby arising is the thing to be valued, and if there has been no deterioration in the pipes the tenant will get the full value.

Agent for Pursuer—Thomas Spalding, W.S.
Agents for Defender—W. H. & W. J. Sands, W.S.

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*Thursday, November* 23.

## FIRST DIVISION.

M'GEORGE, COWAN & GALLOWAY *v.* STEELE.

*Retention—Relevancy.* A vague averment, that the pursuers had failed to restore certain letters entrusted to them, *held* not to constitute a relevant defence in an action for payment of a business account.

This was an action for payment of certain business accounts.

The defender stated that he was, and had been all along, willing to pay the accounts (with a trifling exception), as the same might be taxed, and upon the pursuers restoring to him certain letters and documents which he averred had been entrusted by him to their care.

With regard to these letters, the pursuers, who are writers in Glasgow, averred that they had been produced by them under diligence, and had formed part of the process in the action for which the accounts had been incurred; that they had been borrowed by the opposite agent; that they, the pursuers, had instructed their Edinburgh correspondents to adopt proceedings to enforce delivery, but after some steps had been taken, the defender intimated that he would not hold himself responsible for the expense, and that they accordingly ceased to carry out the proceedings they had commenced.

The answer of the defender to this averment was—"Admitted that the letters were handed by him to the pursuers in the course of his employment of them, and with reference to the matters upon which they were employed as his agents. The defender does not know what afterwards became of them; and does not admit the statements here made. Explained that the defender has lately repeatedly required the pursuers to restore the said documents, but they have failed and declined, and now decline, to do so."

He pleaded—"(1) The pursuers are not entitled to demand payment from the defender of the amount of their accounts against him while they refuse to deliver up the letters and documents belonging to him with which they had been entrusted on his behalf, and the defender should therefore be assoilzied. (2) The defender having offered, and been all along and being now willing, to pay to the pursuers the amount of their accounts as taxed, upon receiving back from them his said letters and documents, the present action was unnecessary, and ought to be dismissed, and the pursuers found liable in expenses."

The Lord Ordinary (JERVISWOODE) found "that the averments set forth on the part of the defender on the record, and on which the first and second pleas in law on his behalf are rested, are not relevant in defence against the conclusions of the present action."

The defender reclaimed, and shortly after consigned the sum claimed.

SOLICITOR-GENERAL and MACLEAN for him.

The LORD ADVOCATE and GLOAG, for the pursuers, were not called on.

Defender's counsel having taken time to consider whether they should amend the record, so as to make their averments more specific, declined to do so.

The Court observed that the defender's statements did not approach to relevancy.

Adhere, with expenses.

Agent for Pursuers—William Ellis, W.S.
Agent for Defender—Alexander Morison, S.S.C.

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*Friday, November* 24.

BRITISH LINEN COMPANY *v.* STEWART AND OTHERS.

BRITISH LINEN COMPANY *v.* DAVIDSON AND OTHERS.

*Process—Remit* ob contingentiam—*Leading Cause*—48 *Geo. III*, 151, § 9—*A. S. 24th Dec.* 1838, § 6. In any remit *ob contingentiam*, under 48 Geo. III, c. 151, § 9, as the weekly Outer-House Roll of New Causes having been discontinued in terms of the Court of Session Act, 1868; and consequently the A.S. 24th Dec. 1838 being no longer applicable to the circumstances,—*Held* (after consultation with the whole Judges) that the time at which a cause comes before a Lord Ordinary, in the sense of that Act and the Act of Sederunt, must now be held to be the calling of the cause, and the cause first called must be held the leading cause.

John Stewart brought a multiplepoinding, in name of the British Linen Co. as nominal raisers, against himself and William Davidson, as defenders and claimants. A week after this summons was signeted and served, William Davidson brought another multiplepoinding, with conclusions for exoneration, in name of the British Linen Co., and of himself and other parties, against John Stewart, himself, and others, as claimants. Both actions related to two sums of £206, 12s. 7d. and £52, 15s. 2d., deposited