fender against the interlocutor of 15th May last, with the record, proof, and whole process, in respect the defender has failed to prove that the bill in question was granted without consideration, dismisses the appeal, affirms the interlocutor appealed against, and decerns."

The defender appealed.

At advising—

LORD PRESIDENT—The Sheriff and Sheriff-Substitute are both right, but I do not agree with their grounds of judgment. According to our law want of onerosity is not always a good defence. Suppose there had been none here, and David Humphrey had simply given the bill to the pursuer, her claim to it would have been just as good. The Sheriff-Substitute was wrong in allowing the pursuer a proof. She wanted none. She was entitled to recover; and the same error runs through the whole of his interlocutor, namely, that she had to prove that she gave consideration for the bill. That is not the law of Scotland, and his reference to English cases shows how he was wrong. The law of England is quite different, and it is on this that the Sheriff-Substitute founds his judgment. Even if the defender had proved what he alleges it would have been of no use to him. Though I do not agree in the grounds of the Sheriffs' judgment, I do in the result at which they have arrived. As regards the question of expenses, when an executor conducts a litigation reasonably, he ought not to be made liable if he fails, but here I think the defences are most unreasonable, the allegations as to fraud and facility being such as the defender must have known to be untrue.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 15th May 1874, and 29th June 1874: Find that the deceased David Humphrey, of whom the defender (appellant) is executor-dative, accepted the bill sued on for £50, drawn on him by the pursuer (respondent): Find that it is not alleged that the said bill was ever retired by the said David Humphrey, or the said sum of £50 paid by him: Find that the defender has failed to prove that the said bill was obtained from the said deceased by fraud or misrepresentation or undue influence; therefore repel the defences, and decern against the defender in terms of the conclusions of the summons; Find the defender liable personally in expenses to the pursuer, both in the Inferior Court and this Court, reserving to him his relief against the free executry estate, if any: Allow accounts of these expenses to be given in, and remit the same, when lodged, to the Auditor to tax, and report."

Counsel for the Pursuer—Lorimer. Agent—John Auld, W.S.

Counsel for the Defender—Mair. Agent—Wm. Officer, S.S.C.

Saturday, November 21.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

JAMES CRUICKSHANK *v.* JOHN PARK AND OTHERS.

Multiplepoinding—Double Distress.

The outgoing tenant of a farm assigned the crop on the ground to the incoming tenant at a certain rate to be paid to the landlord, who, after deducting his rent, was to hand over the balance to the outgoing tenant. A creditor of the latter arrested the money in the hands of the incoming tenant. *Held* that there was double distress, and that the landlord was entitled to raise a multiplepoinding.

John Park, the incoming tenant, and Mr and Mrs Watson, outgoing tenants, of the farm of Tillykeira, Lonmay, entered into the following agreement:—"It is agreed that the incoming tenant shall duly harvest the growing grain crop of 1873, now in the ground, and that the quantity of the same shall be estimated by proving from the stock, by men mutually chosen, who will have power to allow the incoming tenant a sufficient remuneration for harvesting, to be deducted from the price: It is further agreed that the incoming tenant pay over the price of the said crop to the proprietor, Mr Milne of Craigellie, or his factor, say 15s. per quarter to account at Martinmas 1873, and the rest when the fiars are struck; the said proprietor or his factor being bound to pay over the same to the outgoing tenants above-named, after deducting the rent due for crop 1873." The sum payable was £140, and this was arrested in the hands of Park, the nominal raiser. Mr Milne, the landlord of the farm, and real raiser, raised an action of multiplepoinding, which was defended by the arrester Cruickshank, on the ground that there was no double distress. The Sheriff-Substitute sustained this plea, and, on appeal, the Sheriff pronounced the following interlocutor:—

"*Edinburgh, 2d July* 1874.—The Sheriff having considered the Reclaiming Petition for the real raiser in support of his appeal against the interlocutor of 8th May last, with the answers thereto, record, and whole process, dismisses the appeal; affirms the interlocutor appealed against, and decerns, but varies the finding as to expenses as follows,—Finds no expenses due to or by the arrester Cruickshank, but finds the other claimants entitled to expenses from the real raiser, of which allows an account to be given in, and remits the same, when lodged, to the auditor for taxation.

"*Note.*—The Sheriff regrets to be obliged to throw out this action on a technical ground, but it is impossible to arrest the objection stated to the competency of the process by the claimants A B Watson and Mrs Watson. In 1873 these persons were leaving the farm of Tillykeira. The crop on the lands was their property, and by agreement, dated 5th August 1873, they assigned it over to Park, the incoming tenant, on condition that he should pay the value thereof to the proprietor, Mr Milne, or his factor, who again was taken bound to pay over the same to the granters of the deed, after deducting the rent due for crop 1873. Mr Park thus held the crop as trustee for the landlord, and the subsequent arrestment used in his hands by Cruickshank, as a creditor of the

Watsons, attached nothing. Nor does the circumstance that the landlord, after getting the money and paying himself, will hold the reversion for behoof of the Watsons, or any person in their right, constitute double distress. In no view, therefore, is there anything to warrant a multiplepoinding, and the judgment of the Sheriff-Substitute dismissing the action is right. No expenses have been given to the arrester, because his arrestment, although obliging the real raiser to call him as a party, is utterly inept; and, properly speaking, he has no *locus standi* in the case at all."

Cruickshank appealed.

Authorities—*Scott* v. *Drysdale*, May 22, 1827, 5 S. 689; *M'Target* v. *M'Target*, May 12, 1829, 7 S. 591; *Miller* v. *Ure*, June 23, 1838, 16 S. 1204.

At advising—

Lord President—The question which we have to decide here is, whether a multiplepoinding is competent or not. The Sheriff-Substitute and the Sheriff have found that it is not, on the ground that there is no double distress. Now the fund *in medio* is the price of the out-going tenants' crop, which is due by the in-coming tenant as purchaser to the out-going tenant as seller, and the arresting creditor lays claim to this sum on the one hand, and on the other hand there is the landlord, who claims the whole fund. Now it is difficult to understand what is double distress if this is not. The landlord's right rests on an agreement between the in-coming and out-going tenants, and it appears to me that there are two questions, 1st, Whether the landlord can found on the agreement at all; and 2dly, Whether the agreement is a good one? To say that there is no double distress seems to me impossible, and the multiplepoinding is therefore competent. It is much to be regretted that the action was ever brought at all, but certainly there is a question in it, and the Sheriff has assumed that the arrester has created no *nexus* over any fund—which is just the question on the merits which has to be tried. I am for recalling the Sheriff's interlocutor and sending the case back to him.

Lord Deas—The Sheriff-Substitute was right in giving no reason for his decision, for the reasons which the Sheriff gives are all in favour of an opposite conclusion. If it turns out that there was no necessity for a multiplepoinding, the party causing it, and not the fund, will have to pay. It is a question whether the landlord, who is not a party to the agreement, may not have a *jus quæsitum*. Then as to the arrestment, if Mr Reid's view were carried out there would be no need for it at all; but of course when we get upon the merits it may turn out that there were circumstances which made it necessary. Meantime, I strongly advise the parties to consider whether they cannot come to some arrangement.

Lord Ardmillan—I am strongly of the same opinion, and, especially, I concur in Lord Deas' last remark. It seems to me that there is a prospect here which would not be pleasant to most people, at least to those who dislike litigation. There really is no question which could not be settled in half-an-hour by the parties themselves. We cannot, however, enter into the merits at present, and we must sustain the competency of the action.

Lord Mure—I agree with your Lordships in regretting the litigation which has taken place, but on the question of competency I entertain no doubt. One party is claiming the whole fund, and another half of it,—a clearer case of double distress I never saw.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute, of date 22d May, and of the Sheriff, of date 2d July 1874: Repel the objections to the competency of the action, and remit to the Sheriff to proceed further in the cause; Find the respondent John Henderson Milne entitled to expenses in this Court; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellants—J. A. Reid. Agent—David H. Wilson, S.S.C.

Counsel for Respondent—Mackintosh and Keir. Agent—

Tuesday, November 24.

FIRST DIVISION.

[Lord Young, Ordinary.

HARRISONS *v.* ANDERSTON FOUNDRY CO.

Patent—Jury trial.

In a case of suspension and interdict against an infringement of patent, the respondent averred prior use, and stated on record a number of letters patent, and of places where the prior use was said to have taken place. Issues were ordered, and the complainer asked for more specific information of (1) the passages in the various letters patent, and (2) the places where prior use took place. *Held* that if such information had been given it must have been by amendment of record, but that the complainer was not entitled to ask for it.

The pursuers in this case raised an action against the defenders on the ground of infringement of patent. Issues were ordered, and at adjustment the pursuers asked for further specification of (1) former patents; (2) prior use. Lord Young reported the case, and issued the following interlocutor:—

"*Edinburgh*, 16*th November* 1874.—The Lord Ordinary having heard counsel for the parties on the issues proposed for the trial of the cause, reports the same, and the whole case, to the First Division of the Court, and grants warrant to enrol in the rolls of the Inner House.

"*Note.*—I have taken the exceptional course of reporting the case at this stage in the special circumstances which I shall briefly explain, and with a view to promote the reasonable desire of the parties to have the case tried at the ensuing sittings of the First Division of the Court.

"The suspenders complain of an infringement of a patent, and seek by interdict to restrain the respondents from continuing the alleged infringement. The respondents impugn the validity of the patent on the grounds,—1st, that the patentees are not the first and true inventors; 2d, prior use; and 3d, inutility. The issue proposed by the complainers is in common form, and was not ob-