LORDS DEAS, ARDMILLAN, and MURE concurred.

The Court pronounced the following interlocutor:—

"Find that pursuer's (appellant's) account sued for is admitted by the defenders (respondents) with the exception of £1, 10s. 7½d.; Find that the pursuer agreed to abate the said £1, 10s. 7½d. from his account, and rendered his account to the defenders bearing the said deduction on the face of it: Find that the articles contained in the defenders' contra account were furnished by the defenders to the pursuer: Find that it is not established in evidence that the said account is overcharged: Therefore refuse the appeal, and decern; find the appellant liable in expenses; Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Agents for Pursuer—Fyfe, Miller, Fyffe, & Ireland, S.S.C.

Agents for Defenders—Miller, Allardice, Robson, & Innes, W.S.

Friday, December 11.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

M'LAREN *v.* BRADLY.

Prescription—Act 1579, *c.* 83—*Cash advances.*

A sued B for the balance of an account, partly for articles furnished to B, and partly for cash advanced to redeem goods which B had pledged. A averred that he had applied the sum paid to account by B for payment of the goods furnished, which were the items in the account of earliest date, and that the balance sued for was entirely due for cash advances.

Held (1) that A was entitled to apply the payment to the items first incurred; and (2) that the Statute of 1579, c. 83, did not apply.

This was an action brought by John Fisher M'Laren, writer in Glasgow, against Mrs Morrison or Lacy or Bradly, and her husband, Henry Bradly, for payment of £30, 5s. 6d., "being the balance of an account due by the defenders to the pursuer as assignee or indorsee of Messrs James Muirhead & Sons, jewellers in Glasgow, conform to account and assignation or indorsation thereon in favour of the pursuer."

The pursuer averred that James Muirhead & Sons had sold goods and advanced cash to Mrs Bradly and done work for her prior to her marriage with Mr Bradly, and conform to account commencing 25th July and ending 4th November 1869. As shown by this account, the goods and work amounted to £175, 17s. 6d., and the cash advanced to £38, 6s. 0d. In payment of this debt James Muirhead & Sons admitted that they had received in cash and goods the sum of £184, which they had applied to payment of the goods and work in the first place, being the items in the account of the earliest date, thus leaving owing the sum of £30, 5s. 6d. sued for, being the balance of the said cash advances.

The defender admitted that James Muirhead & Sons had received goods and cash to the amount of £184, but otherwise denied the pursuer's averments.

The defenders pleaded, *inter alia*,—"(1) No title to sue, the assignation or mandate founded on not being stamped conform to law. (2) Prescription. (3) The pursuer's averments can only be proved by writ or oath."

The Lord Ordinary (MACKENZIE) pronounced this interlocutor:—

"*Edinburgh, 30th October* 1874.—The Lord Ordinary having heard counsel for the parties, and considered the Closed Record and process, repels the First Plea in Law for the defenders: Finds that the provisions of the Statute 1579, c. 83, apply to the furnishings of goods and to the work charged for in the account libelled on: *Quoad ultra* allows the parties a proof of their respective averments in terms of 'The Evidence (Scotland) Act 1866,' and appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed."

The pursuer appealed.

At advising—

LORD PRESIDENT—In this case the summons concludes "for payment of £30, 5s. 6d. sterling, being the balance of an account due by the defenders to the pursuer as assignee or indorsee of Messrs James Muirhead & Sons, watchmakers and jewellers in Glasgow, conform to account and assignation or indorsation thereon in favour of the pursuer, to be produced at the calling hereof, with the legal interest thereof from the 31st December 1869 until payment."

The account consists of a variety of items, partly for goods furnished and partly for cash advanced.

In the first article of the condescendence the pursuer says—"The defenders, the said Henry Bradly and Mrs Annie Camphell Morrison, or Lacy, or Bradly, are due and owing to the pursuer as assignee or indorsee of Messrs James Muirhead & Sons, watchmakers and jewellers in Glasgow, the sum of £30, 5s. 6d., being the balance of an account for goods sold to and for work done by them for the said Mrs Annie Campbell Morrison, or Lacy, or Bradly, and for cash advanced for and on her account, all prior to her marriage with the said Henry Bradly, and conform to account commencing 25th June 1869, and ending 4th November 1869, having thereon stamped draft or order of payment in favour of the pursuer, or order on demand, dated 27th March 1874. The goods and work amount, as shown by said account, to £175, 19s. 6d., and the cash advanced to £38, 6s., and these amount together to £214, 5s. 6d."

In article 3 of the condescendence it is alleged —"The said James Muirhead & Sons received in cash and in goods from or on account of the female defender altogether the sum of £184, as specified in the items to credit appended to said account; and applying these credit items towards payment of the goods and work in the first place, there is left due and owing the sum of £30, 5s. 6d. of the said cash advances, with interest thereon from 31st December 1869, at the rate of five per centum per annum till payment."

The answer to that is—"Admitted that Muirhead & Sons received the cash and goods here mentioned."

The question is whether the statute of 1579 applies to the claim as stated. I am of opinion that it does not. The items for cash transactions do

not fall under the triennial prescription, but in this case the items are partly such as would fall under the triennial prescription, and are only partly cash transactions. Cash advances, as I have already said, are exempt from this prescription. This was decided with reference to a writer's account in the case of *Kerr* v. *The Magistrates of Kirkwall*, 15th June 1827, 5 S. 802; and in several other cases. Now the pursuer or his authors having received £184 from the defenders, partly in cash advances and partly in goods, credited the defenders with that amount, and so credited it that these payments were employed to extinguish certain debts—viz., debts for goods furnished. Thus all the items for goods furnished are extinguished, and there is only a sum of £30, 5s. 6d. for cash transactions outstanding, and this is the only sum sued for.

I do not think there is any doubt that when payment was made the pursuers were entitled to apply it to the items first incurred. This, I think, was decided in the case of *Lang* v. *Brown*, 2d Dec. 1859, 22 D. 113;

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the three first pleas in law for the defender should be repelled.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Repel the first, second, and third pleas in law for the defenders, and remit to the Lord Ordinary to allow the pursuer a proof in common form."

Counsel for Pursuer—V. Campbell. Agent—John Latta, S.S.C.

Counsel for the Defenders—Rhind. Agent—James Y. Pullar, S.S.C.

Thursday, December 16.

FIRST DIVISION.

[Lord Gifford, Ordinary.

BETHUNE *v.* MORGAN.

Landlord and Tenant—Lease—Executor, Liability of.

Question whether, upon the death of a tenant under a current arable lease, his executor was liable for the obligations contained in the lease, which the heir-at-law had refused to take up, or for damages for breach thereof.

Res judicata.

Circumstances in which *held* that the matter in dispute was *res judicata*.

Res judicata.

Held that it did not prevent a question being *res judicata* that in the case founded on in support of the plea the judgment was the sustaining of a defence, whereas the case in which the plea was stated was brought by the defender in the former action to give practical effect to the principle involved by way of direct action, the question in both cases being identical.

This was an action at the instance of Sir John Trotter Bethune of Kilconquhar, against William Morgan, farmer, Coates, for payment of £935, 12s. 5d., in the following circumstances:—

The defender was executor-dative of his brother, the deceased Thomas Morgan, who was tenant of the farms of North and South Cassingray, the property of the pursuer, under a nineteen years' lease, commencing at Martinmas 1858. The destination in the said lease was to Thomas Morgan "and his heirs," all assignees, legal and voluntary, being expressly excluded. The said Thomas Morgan, on the other hand, bound and obliged himself, "and his heirs, executors, and representatives whomsoever, to make payment to the said Sir John Trotter Bethune," &c., "yearly, of the sum of £850 sterling," &c. Thomas Morgan died on 9th November 1871 unmarried and intestate; and the defender, his executor-dative, entered upon the possession and management of the farms, and continued therein until Martinmas 1873, when he removed. The defender averred that he took the management of the farms only to protect his deceased brother's moveable estate, the heir-at-law, James Peattie Morgan, Captain in the Royal Artillery, having refused to take up the lease. The defender further averred that he remained in the management of the farms until Martinmas 1873 only because the pursuer would not let him out until the Court decided in an action of declarator that he was entitled to leave the farms before the end of the lease. The action of declarator here referred to was raised in the Court of Session, on 6th July 1872, against the present pursuer at the instance of Captain James Peattie Morgan and the present defender for the purpose of having it found and declared, *inter alia*, that (first) the said James Peattie Morgan, as heir-at-law to his late brother Thomas Morgan, was not bound to implement the contract of lease above mentioned; (second) that the said William Morgan junior, as executor of the said Thomas Morgan, or in any other character, was not bound to implement the said contract of lease, or to run out the said contract; and (third) that the said William Morgan junior, as executor foresaid, was entitled to realize the crop, stocking, and other moveable estate left by the said Thomas Morgan upon the farms of North and South Cassingray, and to sell the same by public auction at the term of Martinmas 1872, or at the first term of Martinmas thereafter that might first occur not less than twenty days from the date of final decree in the action, or to remove the same, always reserving the defender's right of hypothec; as also to vacate the said farms at the said term of Martinmas as if the said lease had come to its natural termination.

On 14th February 1875 the Lord Ordinary (SHAND) pronounced an interlocutor in the action of declarator, finding, *inter alia*, "that Thomas Morgan left no heritage except his right to the lease: that, on 16th November 1871, the said James Peattie Morgan, heir-at-law of the said Thomas Morgan, intimated to the landlord that he would not take up the lease, and that the said James Peattie Morgan was not bound to implement the said contract. As regards William Morgan junior (the present defender), the said interlocutor found (*first*) 'that, having completed a title as executor of his late brother, the said Thomas Morgan, and having in that character intromitted with his brother's moveable estate, he is liable, as his brother's executor, for the fulfilment of the obligations contained in said lease, or otherwise in damages for breach thereof; (*second*)