although he had supplied him with ample funds. He had now employed another agent.

The respondent opposed the motion, as the delays on the part of the pursuer had been numerous, and in any event asked that the pursuer should be found liable in substantial expenses.

Authorities—*Trs. of the Free Tron Church* v. *Morrison*, 13 Scot. Law Rep. 384; *Anderson* v. *Garson*, Dec. 16, 1875, 3 R. 254; *Arthur* v. *Bell*, June 16, 1861, 4 Macph. 841.

At advising—

Lord President—There is no doubt there has been a good deal of improper delay on the part of the pursuer in this case, but how far the pursuer is personally answerable, and how far this is attributable to the misconduct of his agent, it is not easy to determine. My impression from what I have heard is that the blame lies with the agent. The interlocutor against which the pursuer seeks to be reponed was pronounced in consequence of his failure to appear at the diet of proof, and that was a default of a serious kind.

It is impossible to entertain the proposition that the pursuer should be reponed except on very serious conditions as to expenses, and while I am not prepared in the circumstances to say that the reclaiming note should be refused altogether, I think that the pursuer must pay in full the expenses to which the defender has been put by his default. We are not in a position to determine how much these expenses are, and I think we should leave that to the Lord Ordinary to determine.

An apparent difficulty has been presented to us by the fact that the defender has already proceeded to have his account of expenses taxed, and has obtained decree, and that that interlocutor has not been brought under review. I desire to make two observations upon this point. The first is that we cannot touch that decree; and, in the second place, that that being so, I think we ought to dispose of this matter as if no such decree existed. Of course if the defender gives a charge upon the decree of 20th July, the payment of the expenses now to be found due by the Lord Ordinary as the condition of reponing the pursuer, if made, will be a payment to account of the £90 for which decree has already been obtained. But at present I give no opinion as to whether that decree can be suspended or not.

What I propose to do is to repone the pursuer against this decree by default on payment to the defender of the expense occasioned to him thereby, and to remit to the Lord Ordinary to ascertain the sum of expenses.

Lord Deas—This a very delicate question, but considering the very special circumstances of the case I am disposed to concur with your Lordship. I agree in thinking that the delay has lain with the agent and not with the party. It would be hard to apply with a strong hand a universal rule where the agent has failed and the client has never had an opportunity of knowing the state of matters and getting his agent to take up the case. This is not a precedent for any other case. It is a very favourable case for a party desiring to be reponed, and it is quite right that the Lord Ordinary should fix the amount of expense which the pursuer must pay.

Lord Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Andrew Morrison, pursuer, against Lord Young's interlocutor of 5th July 1876, remit to the Lord Ordinary to repone the pursuer against the decree contained in the said interlocutor reclaimed against, on payment of the expenses occasioned to the defenders by the pursuer's default."

Counsel for Pursuer — M'Kechnie. Agents —J. & A. Hastie, S.S.C.

Counsel for Defenders—Henderson. Agents —Waddell & M'Intosh, W.S.

Wednesday, October 18.

FIRST DIVISION.

[Lord Young, Ordinary.

BUCHANAN *v.* WEIR.

Process—Caution—Expenses.

In an action of partnership accounting decree was given by the Lord Ordinary against the defender, which if it became final would have the effect of rendering him insolvent. On his presenting a reclaiming note, *held* that the circumstances did not warrant the Court in ordaining him to find caution for expenses.

This was an action of accounting, in which Alexander Weir, manufacturer, Ayr, was pursuer, and Moses Buchanan, commission agent, Glasgow, was defender. The matters in dispute had arisen out of a number of cash transactions—bills and promissory notes, &c.—which had passed between the two, and after a remit to an accountant to examine the accounts and vouchers the Lord Ordinary pronounced decree against the defender for £1510. The defender reclaimed against this judgment, and when the reclaiming note was called in the Single Bills the pursuer moved that the defender be ordained to find caution, on the ground that he was insolvent (*cf. Maxwell* v. *Maxwell*, 3d March 1874, 9 D. 797).

The defender admitted that the effect of the decree of the Lord Ordinary if it became final would be to render him insolvent, but, on the other hand, if that interlocutor was recalled, and judgment given in terms of his pleas-in-law, he would not be insolvent.

At advising—

Lord President—I understand that if the defender had been successful in this action, and had obtained judgment in terms of his pleas-in-law, he would not be insolvent, and that is not contradicted. His position now is that he is provisionally insolvent. It is a peculiar case, and I am not aware that upon that ground we have ever ordained a defender to find caution. The circumstance that the question at issue is one of a partnership accounting is material. Such questions are generally difficult, and require a great deal of trouble to extricate, and judges frequently differ upon them. It must not be taken for granted in the discussion of this motion that

the interlocutor of the Lord Ordinary is right. I think this is a weak case for ordaining a defender to find caution, and that the motion must be refused.

LORD DEAS and LORD MURE concurred.

Counsel for Pursuer — Scott. Agent — John Galletly, S.S.C.

Counsel for Defender—C. J. Guthrie. Agents —Boyd, Macdonald, & Lowson, S.S.C.

Tuesday, October 25.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COLIN DUNLOP & CO. *v.* MEIKLEM.

Title to Sue—Lease—Burden of Proof.

Circumstances in which *held* that a sub-tenant in a yearly lease could not, in a petition for ejection, impugn the title of the principal tenant, his author, although it was not proved that the latter had continued in possession of the subjects beyond the year of lease.

*Lease—Notice to quit—*Rei interventus.

Where a tenant received an irregular notice to quit before Martinmas—circumstances in which *held* that the irregularity of the notice had been cured by his subsequent actings, and warrant to eject granted.

This was an appeal in a petition presented in the Sheriff Court of Lanarkshire, at the instance of Colin Dunlop & Co., coal and iron masters, Quarter Iron Works, near Hamilton, against James Meiklem, miller, residing at Newhouse Farm, Hamilton. The petitioners set forth that they were principal tenants of Thinacre Mill, with house, garden, and about 10 acres of land, and that they had let these subjects to Meiklem, the respondent, as sub-tenant for a year from Martinmas 1874 as to the land, and from Whitsunday 1875 as to the mill, houses, and garden; and that on 30th September 1875 they had intimated verbally to the respondent that the lease would not be renewed, and that the respondent said at that time that he would remove at the end of the year's lease. Further, the petitioners averred that a warning to remove was delivered by an officer of Court to the respondent, and that they had let the subject to a new tenant, Stewart, with entry to the land at Martinmas 1875, and to the mill, house, &c., at Whitsunday 1876. Stewart had manured the land and ploughed it, and had also worked the garden. The petitioners accordingly craved warrant summarily to eject Meiklem.

The respondent took a preliminary objection to the pursuers' title, whom he alleged, "if principal tenants, had not paid their principal rents;" and upon the merits *inter alia* denied—(1) the pursuers' principal tenancy, (2) the verbal notice of 30th September, (3) his own sub-lease from Dunlop & Co., (4) the alleged entry of Stewart, which Meiklem explained had been attempted but successfully resisted. Further, the respondent explained that he and his ancestors had occupied the land, mill, and house, &c. under the Dukes of Hamilton since 1709, and referred to certain disputes as to the water of the mill. In conclusion, the respondent stated that in 1874 the petitioners' manager alleged they had become tenants of the premises, and held the defender as their sub-tenant on same terms as he held under the Duke of Hamilton. That they sent him notice of 2d October too late, irregularly, and illegally. That a day or two after its receipt their manager called on defender, who, referring to the document, expressly asked if he was to flit at Martinmas 1875, and got for answer, "No, just work awa'."

In the Sheriff Court the Sheriff-Substitute (SPENS) found that the warning given was inept, and that it was unnecessary to consider the other defences, and dismissed the action. And in the note appended to this interlocutor he said that the warning was bad upon three grounds—(1) It should have been given forty days before Whitsunday 1875; (2) the notice was for Martinmas for both houses and lands, whereas in any view the removal from the houses should have been Whitsunday 1876; (3) the notice was not 40 but only 39 clear days before Martinmas. The Sheriff-Substitute also held that tacit relocation emerged at Whitsunday 1875, no warning being then given.

The petitioner appealed to the Sheriff-Depute (DICKSON) who allowed a proof before answer, which was taken before the Sheriff-Substitute on 10th July 1876. The result of the proof was substantially to sustain the averments of the petitioners.

The Sheriff-Substitute, on 18th July 1876, found that the petitioners had failed to prove their title to sue, and sustained that defence; further found it unnecessary to pronounce other findings.

Messrs Dunlop & Co. appealed, and the Sheriff adhered, adding the following note:—

"*Note.*—The defender challenges the pursuers' title as principal tenants for the period after the lease which he took from them terminated, viz., after Martinmas 1875 and Whitsunday 1876, as to the lands and mill, &c., respectively. It lay on the pursuers to prove their title so challenged, but they have not done so. The case is not within the principle urged for the pursuers, that a tenant may not challenge the title of the party from whom he has his lease, for the defender's lease was only up to the terms above mentioned; while the question is as to the pursuers' title after these terms.

"It is with considerable regret that the Sheriff has found himself obliged to sustain this technical defence; for there seems to be no real doubt that the pursuers are still principal tenants in the mill and land in question. It appears to have been through mere oversight that they have not proved their tenancy.

"The foregoing judgment precludes the Sheriff from entering into the other questions which were debated before him on the footing of his differing from the Sheriff-Substitute upon the question of title."

The petitioners appealed against this interlocutor to the Second Division of the Court of Session.

Argued for the appellants—First, on the question of title—It is not in Meiklem's mouth to