the objections urged are without substance, and that the sentence must stand.

The Court therefore refused the bill of suspension.

Counsel for Complainers—Campbell Smith—Kennedy. Agent—Thomas M'Naught, S.S.C.

Counsel for Respondent—Trayner—The Hon. H. J. Moncreiff, A.-D. Agent—Crown Agent.

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# COURT OF SESSION

*Tuesday, February* 1.

## FIRST DIVISION.

[Sheriff of Edinburgh.

### THEW & COMPANY *v.* SINCLAIR & COMPANY.

*Bankrupt—Composition—Personal Objection.*

*Held* that a creditor who had declined to accept a composition offered by a debtor was not barred from insisting for the full amount of his debt by having retained in his possession for ten months a bill for the composition sent subsequently to his declinature.

This was an action for £35, 12s., being the amount due on a bill by the defenders to the pursuers. The defenders admitted that they had not paid the sum sued for, and explained that they "found it necessary to compound with their creditors, and offered a composition which was accepted by them, including the pursuers of the present action. In payment of the said composition on the pursuers' debt, the defenders through their agents on 25th July 1879 sent the pursuers a promissory-note for £8, 15s. 6d., payable by three equal instalments at four, eight, and twelve months. The pursuers duly received and retained the said bill until 27th May 1880, when it was returned to the defenders by the pursuers' agents. The pursuers failed to present the said bill when the first and second instalments became due. Had the pursuers presented the bill as they ought to have done, these instalments would have been duly paid by the defenders, who now tender payment thereof." In answer the pursuers explained "that the defenders offered a small composition, which the pursuers refused, but the pursuers offered to accept 10s. per £. This offer the defenders declined. The defenders sent a bill for the smaller composition in disregard of the pursuers' refusal to accept it, and the bill lay with the pursuers unnoticed for some time, until it was returned by pursuers' solicitor on or about 24th May 1880."

The pursuers pleaded — "(2) The pursuers having declined to agree to the composition proposed, and not having accepted the bill referred to by the defender under said composition arrangement, nor received payment thereof, but returned the same, are entitled to decree."

The defenders pleaded—"(1) The pursuers having accepted of a composition on their debt, and the defenders having been all along quite willing to pay the said composition, the pursuers are not entitled to insist on payment of their original claim."

The Sheriff-Substitute (Hallard) pronounced the following interlocutor:—"Finds that the defenders having become embarrassed in their circumstances, proposed a composition contract to their creditors: Finds that having been applied to for consent of this transaction, the pursuers expressly declined the same: Finds that notwithstanding said refusal the defenders sent to the pursuers a composition bill for £8, 15s. 6d., payable in equal instalments: Finds that said bill was sent to the pursuers on 25th July 1879, and was retained by them till 27th May 1880: Finds that by such retention of the composition bill the pursuers are barred from insisting in their original claim: Sustains the defences to that effect: Dismisses the action; reserving to the pursuers their right to insist for the composition due on their debt."

He added this note:—"This is a short point, and, it is thought, a clear one. It is quite certain that the proposed composition was expressly declined. When the composition bill came to the pursuers their duty was quite clear. They should immediately have sent it back. When their agent was made aware of the situation he at once told them to send back the bill. But it was too late. The pursuers must suffer the penalty now of not having sent it back at the first. It will not do for them to say that the bill lay beside them 'unnoticed.' They cannot hold the composition bill for ten months and then sue for their original debt in full."

The Sheriff (Davidson) adhered.

The pursuer appealed.

At advising—

Lord President—I cannot say that this case is in a satisfactory state. The action is for payment of a bill, and the action is dismissed by the Sheriff-Substitute on the footing that the pursuer has accepted a composition upon the debt, and is consequently not entitled to sue for the whole. If that had been made out in fact, the judgment would have been quite right, but as the case stands it is not made out in point of fact. We have merely the record and no admissions. It is true that the defenders aver that the composition was accepted, and their statement is quite relevant. They say that in 1879 the defenders "found it necessary to compound with their creditors, and offered a composition, which was accepted by them, including the pursuers of the present action." If that statement is true the defenders are entitled to prevail. But what do the pursuers say? They explain "that the defenders offered a small composition, which the pursuers refused, but the pursuers offered to accept 10s. per £. This offer the defenders declined. The defenders sent a bill for the smaller composition in disregard of the pursuers' refusal to accept it, and the bill lay with the pursuers unnoticed for some time, until it was returned by pursuers' solicitor on or about 24th May 1880." Now, as I understand the judgments of the Sheriffs, they proceed on this admission as sufficient for the decision of the case. This is quite clear from the terms of the Sheriff-Substitute's interlocutor—[*reads as above*]. Now, it is in this last finding that I think the fallacy or vice of the Sheriff-Substitute's interlocutor is to be found. I

cannot assent to the proposition that by the mere retention of the composition bill the pursuer is barred from insisting in his full claim. Such a doctrine would be followed by very serious consequences. The creditors are asked, not in pursuance of any trust-deed granted by the insolvent, nor even of any writing such as a minute of a meeting of creditors, but simply on the motion of the debtor himself, to accept a composition. The creditors decline, but offer to accept a larger composition; then the defender sends them a bill for a smaller composition, payable by instalments, which the pursuers neglect to return for about twelve months. Is that sufficient to bar the pursuers from insisting for the whole amount of their debt? I am certainly of opinion that it is not. Therefore, while the defence is relevant, I think that it is not proved, and what I should propose to do is to remit to the Sheriff to allow a proof.

Lord Mure and Lord Curriehill concurred.

Lord Deas and Lord Shand were absent.

The Court recalled the interlocutors complained of, and remitted to the Sheriff to allow a proof.

Counsel for Appellants (Pursuers)—M'Kechnie. Agents—J. Campbell Irons & Co., S.S.C.

Counsel for Respondents (Defenders)—Young. Agents—Millar, Robson, & Innes, S.S.C.

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*Wednesday, February 2.*

## FIRST DIVISION.

[Sheriff of Fifeshire.

## SELKIRK *v.* SIMPSON.

*Sheriff—Process—Debts Recovery Act* 1867 (30 *and* 31 *Vict. c.* 96)—*New Plea after Case Decided.*

*Held* that the defender in an action under the Debts Recovery Act 1867, who did not appear by agent, but who was in circumstances to have done so, was not entitled, after the case had been decided by the Sheriff-Substitute and appealed to the Sheriff-Depute, to have another plea added to that originally stated by him.

This was an appeal from the Debts Recovery Court of Fifeshire. The pursuer J. L. Selkirk, as executor-dative of the late Rev. G. S. Jack, St Andrews, sued the defender James Simpson for the sum of £50, "being the restricted amount of an account for board, washing, &c., for his son, and for money advanced for and on his behalf as per account produced." The account produced, in addition to board and washing, was for college fees and tradesmen's accounts. The accounts were incurred during the sessions 1872-73 and 1873-74. The summons was dated 14th June 1880. At the first calling of the case the defender pleaded "The debt is paid." The Sheriff-Substitute (Lamond) noted this plea in terms of the Debts Recovery Act, and appointed the case to be tried next Court-day. At the trial the Sheriff-Substitute granted decree with expenses, the "defender having failed to prove by competent evidence that the debt has been paid." At both diets before the Sheriff-Substitute the defender appeared personally, without the assistance of a law-agent. He, however, appealed to the Sheriff (Crichton) by his agent, the following authorities being noted on the appeal—*Murray* v. *Mackenzie*, April 21, 1869, 4 J. 394, 1 Coup. 247; *Gunn* v. *Taylor*, Sept. 20, 1873, 2 Coup. 491. The defender now sought to plead that the account sued for was prescribed.

The Sheriff dismissed the appeal, adding this note:—"At the discussion which took place before the Sheriff the defender moved that he should be allowed to add a plea that the account sued for was prescribed, and that the case should be remitted back to the Sheriff-Substitute to be proceeded with, having regard to the provisions of the Act introducing the triennial prescription. He founded on the cases noted on the appeal, which were cases under the Small Debt Act. Looking to the opinions of the Court in the case of *Cumming* v. *Spencer*, 21st Nov. 1868, 7 Macph. 156, the Sheriff is of opinion that the defender's motion cannot be granted."

The defender appealed to the Court of Session.

At advising—

Lord President—It is not very easy for a Judge sitting in this Court to place himself in the position of a Sheriff sitting in the Small Debt Court or in the Court called the Debts Recovery Court, and I daresay one's first inclination is to think that the Sheriffs go too fast and do not give sufficient indulgence to the parties. I am always inclined, whenever there is the least appearance of a litigant having been taken up too sharply, to restore him if possible to his rights; and certainly there is at first sight the appearance of undue haste here in the case of a man defending himself without legal advice. If it had appeared that the appellant was so poor a man as not to be able to afford legal advice, that would have made the case the stronger. But nothing of that sort appears here. We must assume that the appellant is a man of means, for he has sent his son to school at a considerable cost. He was surely able to employ a law-agent. But he did not choose to do so, until after the case had been decided against him; and the question is, whether there has been such injustice done that we can upset the Sheriff's judgment? I am not inclined to think that there is. If an account in the Small Debt Court appears on the face of it to be prescribed under the statute, I am of opinion that it is the duty of the judge to give effect to the objection whether it is pleaded or not, because in that Court parties are not entitled to the protection of an agent against their own ignorance of law. But that is not the case in the Debts Recovery Court, for there parties can have law-agents, and, as I said before, the appellant here was able to employ an agent. I think, therefore, he must take the consequences of his own neglect. And I am the more ready to come to this conclusion from the consideration that it appears to me that it would be very difficult to sustain the plea of prescription which the appellant now puts forward. There is one item indeed—for board and washing—which is subject to prescription, but as regards the others they appear to be small cash advances, as to which it is, to say the least, doubtful whether they are prescribed.

On the whole matter, therefore, I think that we