SUMMER SESSION, 1881.

COURT OF JUSTICIARY.

Wednesday, April 27.

GLASGOW SPRING CIRCUIT.

(Before the Lord Justice-Clerk.)

THE LORD ADVOCATE *v.* TURNER, SEYMOUR, AND MUIR.

Justiciary Cases—Evidence—Separation of Trials where One of Several Panels pleads Guilty.

Remarks per Lord Justice-Clerk on the separation of trials of several panels charged in the same indictment, in order that one who has pleaded guilty may be called as a witness in exculpation at the trial of the others.

On 27th April 1881 Robert Turner, Edward Seymour, and Alexander Muir were placed at the bar of the Circuit Court of Justiciary at Glasgow on two charges of theft by housebreaking.

On the diet being called, Turner pleaded not guilty, while Seymour and Muir pleaded guilty as libelled.

ARMOUR for the panel Turner moved for the separation of the trials, in order that he might call as witnesses in exculpation the panels Seymour and Muir.

LORD JUSTICE-CLERK—Have you any special ground?

ARMOUR—Seymour and Muir exculpate Turner. They say he was not with them on any of the occasions libelled.

The Advocate-Depute (MACKAY) consented to the course proposed.

LORD JUSTICE-CLERK—This kind of motion for the separation of trials has been very rarely granted by the Court. It generally requires some specification of peculiar circumstances to render it necessary or desirable. In this case the Advocate Depute offers no objection, and for my own part I have always had a strong opinion that injustice may be done by refusing motions of this kind; and I do not see that any evil substantially can arise from it. On the present occasion I shall grant the motion, and the trial, therefore, of Turner will be taken separately from that of the others. Seymour and Muir will be removed from the dock, but will, of course, remain in custody.

After evidence had been led for the prosecution, Armour intimated that he did not intend to call Seymour and Muir as witnesses. He then addressed the jury, contending that the charges against Turner had not been proved. The jury found Turner guilty as libelled, and Seymour and Muir were replaced in the dock beside him.

The LORD JUSTICE-CLERK sentenced Turner to seven and Seymour to five years' penal servitude, and Muir to fifteen months' imprisonment.

Counsel for the Queen's Advocate—Mackay, A.-D.—Johnston. Agent—P.-F. for Glasgow.

Counsel for the Panels—Armour. Agents—M. Downie, Writer, Airdrie, and John Hodgart Writer, Paisley.

COURT OF SESSION.

Thursday, May 12.

FIRST DIVISION.

[Lord Rutherfurd Clark.

LARGUE *v.* URQUHART AND OTHERS.

Written Agreement—Construction—Parole Proof.

It is incompetent to qualify the terms of an agreement complete in itself by evidence of prior communings.

On 6th and 10th February 1877 the pursuer raised two actions against the defender Urquhart as trustee and executor of the deceased Alexander Brown for payment of certain sums of money, and on the 3d March and 10th March respectively decrees passed in absence as concluded for. On the dependence of each of the actions the pursuer used inhibition, whereby he affected certain heritable subjects in Tannery Street and Victoria Place, Banff, belonging to the estate of the deceased Alexander Brown. He also on 8th October 1877 raised, and on 9th October 1877 executed, a summons of adjudication against William Urquhart, following upon the decrees and inhibitions, which summons was called in Court on 23d October 1877.

The defender Adamson had acted as agent for William Brown—the father of Alexander Brown—and thereafter for Alexander Brown, and he

had got possession of the title-deeds of the heritable subjects above mentioned. After the death of the latter he acted as agent for the defender Urquhart in his capacity as trustee and executor of Alexander Brown.

According to the averment of the pursuer, which was not admitted by the defenders, "at the time the inhibitions were used, Mr Adamson alleged that there was a balance due to him on his cash accounts with the estate of the late William Brown and Alexander Brown, besides the business account for his agency, and he contended that he had a claim of hypothec over the titles, and that in respect thereof the debt due to him at the time of the inhibitions was preferable to the pursuer's. Soon after the pursuer raised the summons of adjudication, and in the month of October or November 1877 it was arranged and agreed between Mr John Allan, solicitor, Banff, acting on behalf of the pursuer, and Mr Adamson, acting for himself as an individual and for the defender William Urquhart, that the said properties situated in Tannery Street and Victoria Place should be sold, and the proceeds applied in payment, first, of Mr Adamson's preferable claim at the date of the inhibitions, and second, the pursuer's debt, and that on this arrangement being carried out the pursuer would discharge the inhibitions. The properties were accordingly advertised to be sold on 7th December 1877." This sale was not carried out.

On 25th January 1878 the said William Urquhart raised an action of reduction of the decree second above mentioned, in which a record was made up and a proof allowed. A short time before the day fixed for the proof, and on or about 22d June 1878, the defender Mr Adamson met the pursuer and his agent Mr Allan at Banff, and after various communings an agreement contained in the following letters was entered into—"*Banff*, 29*th June* 1878.—Dear Sirs (Reduction, *Urquhart* v. *Largue*)—With reference to our recent communings about this case, I am authorised by my client to say that on the defender consenting to allow decree to pass in this reduction without expenses to either party, he, as executor of the late Mr A. Brown, will grant his acknowledgment of and obligation for £126, 2s. 4d., with interest at 5 per cent. from 2d March 1877, and for £7, 18s. 10d. and 15s. 3d. with interest from 17th March 1877, and also that he will retain out of the late Mr A. Brown's estate and pay to you a sum not exceeding £35 for expenses in the reduction, for which he has Mrs Imlah's authority. These sums to be paid on the realisation of the late Mr A. Brown's estates in Ceylon, and Mr Largue in the meantime to withdraw the inhibitions and adjudication used by him against the sale of the properties in Banff, in order that the same may be sold. The proceeds of these properties, after meeting my preferable claim, will be applied in the liquidation of Mr Largue's claim.—Yours truly, JOHN ADAMSON. Messrs Allan & Soutar, Solicitors, Banff." "*Banff*, 29*th June* 1878.—Dear Sir,—(Reduction, *Urquhart* v. *Largue*),—We are in receipt of your letter of this date, containing terms on which it is proposed by the pursuer to have this case settled. On behalf of Mr Largue we agree to these terms, and we will accordingly advise Mr Morison that the case is settled.—Yours, &c., ALLAN & SOUTAR.—John Adamson, Esq., Solicitor, Banff."

On 20th July 1878 the defender William Urquhart granted to the pursuer a letter of obligation in the following terms: "The Rev. James Largue, Fordyce Academy, 20th July 1878. Sir,—In pursuance of the agreement for the settlement of the litigation between us, I, as executor of the late Alexander Brown of Ceylon, oblige myself, on the realisation of his estates in Ceylon, to pay to you the following sums of money, *videlicet*,—the sum of one hundred and twenty-six pounds two shillings and fourpence, with interest at five per cent. since second March eighteen hundred and seventy-seven till paid; the sum of seven pounds eighteen shillings and tenpence, and fifteen shillings and threepence, with interest at five per cent. from seventeenth March eighteen hundred and seventy-seven till paid; and also the sum of thirty-five pounds sterling, without any interest being exigible thereon. The proceeds of the sale of certain heritable subjects in Banff, which belonged to the late Alexander Brown, and which are now to be sold, are, after paying certain preferable claims of Mr John Adamson, solicitor, Banff, to be applied in liquidation *pro tanto* of Mr Largue's claim. In witness whereof," &c.

A joint minute giving effect to the arrangement was lodged in the action of reduction on 29th July 1878, and of the same date the Lord Ordinary interponed his authority thereto.

During the year 1878 some correspondence took place between the pursuer's and defender's agents with regard to the carrying out of the arrangement—the subjects being sold and the prices uplifted by Mr Adamson. So far as the present question is concerned it is enough to say that an account of his intromissions, which Mr Adamson produced showing no balance wherewith to satisfy the pursuer's claim, was impugned by the pursuer as being erroneous in principle, and not warranted by the terms of the agreement of 29th June, as it contained deductions made in respect of charges subsequent to the inhibition and unconnected with the question between parties. He accordingly brought this action of count, reckoning, and payment.

Before the accounting was proceeded with a preliminary question as to the meaning and construction of the letters above quoted was raised.

On 11th January 1881 the Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having considered the cause, Finds that according to the sound construction of the letters of 29th June 1878 the defenders are entitled to charge against the proceeds of the subjects mentioned on record such preferable claims as were possessed by the defender Adamson as at 29th June 1878, and with this finding appoints the case to be put to the roll for further procedure: Allows the pursuer to reclaim against this interlocutor."

He added this note—"The pursuer contended that the letters of 29th June 1878 were to be read as meaning that the defender Adamson was not entitled to state any preferable claims after the date of the inhibition which the pursuer had used. On the other hand, the defenders maintained that Adamson's preferable claims were to be stated up to the date of the letters. Both parties desired the Lord Ordinary to decide this question *ante omnia*.

"In the opinion of the Lord Ordinary the defenders are in the right. He cannot construe the letters as amounting to a waiver or discharge of any preferable claims competent to Adamson. The defenders do not claim any preference by reason of the letters. They only contend that such preferable claims as then existed are to be satisfied *primo loco* out of the proceeds of the subjects which were sold. This is no more than an assertion of their legal rights, which, as the Lord Ordinary thinks, have been in no way impaired by the letters above mentioned."

The pursuer reclaimed, and argued that the defender was precluded by the terms of the letter from stating any preferable claim after the date of the inhibition, and that apart altogether from the agreement he could not claim a right of hypothec over title-deeds for law expenses incurred subsequently to the date of the inhibition. He argued further that he was entitled to a proof in support of his contention that the agreement referred to the claim of Mr Adamson as it stood at the date of the inhibition.

At advising—

Lord President—There may be some important questions between the parties raised in the accounting in this action, but with these we have at present nothing to do.

An agreement was come to by the parties by two letters of date 29th June 1878. The pursuer's counsel represented that those letters were merely a memorandum of an agreement already made, but that is quite an inadmissible representation. In expression, as well as substance, they are in themselves a complete agreement, consisting, as in the ordinary case, of two missives—the one containing an offer, and the other an acceptance of that offer. Further, on the faith of these letters the parties have made a judicial transaction. In July 1878 a minute was lodged expressing the settlement of a case then proceeding.

It states that the case had been "settled extrajudicially in terms of letter from Mr John Adamson, solicitor, Banff, the pursuer's agent, to Messrs Allan & Soutar, solicitors, Banff, the defender's agents, and answers thereto, both dated 29th June 1878. They accordingly craved the Lord Ordinary to interpone authority to this minute, and to decern in terms of the conclusions of the summons, and to find neither party entitled to expenses."

Here, then, is a judicial transaction given effect to by a judgment of the Court, and to say that that is not a complete and concluded agreement is altogether impossible. If it is to be a concluded agreement, what is there to be proved? What is proposed to be investigated is what is stated in condescendence 4, viz., that there was a verbal proposal that the subjects should be sold on certain conditions. It being merely a verbal proposal, it naturally led to a misunderstanding, and therefore the sale which was to follow fell through, and until these letters were written both parties were absolutely free. In the case of an agreement as complete as this it is against all the rules of law to go back and investigate prior communings. What, then, is the meaning of these letters? The pursuer says that it is, that whatever preferable claims Mr Adamson had prior to the date of the inhibition were to remain good, but that if he had acquired any since they were not to be held good, but were by form of the agreement to be waived. I can see nothing in the letters suggesting such a construction. I quite agree with the Lord Ordinary that Mr Adamson gave up no preferable claims that were possessed by him as at 29th June 1878. The Lord Ordinary has not decided that he possessed any at all, even before, and still less after, the inhibition. The nature and amount of the claims remain for settlement in the accounting which is to follow.

Lord Deas—As your Lordship has said, the interlocutor reclaimed against has decided nothing except that preference of Mr Adamson's claims is to be considered as at the date of these letters. He has not decided that Mr Adamson has any such, but if he has, he does not restrict them to those before the date of the inhibition. All the details are just as open as before the Lord Ordinary's interlocutor. The parties have erred in coming here before their time.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuer—Guthrie Smith—Keir. Agent—Alex. Morison, S.S.C.

Counsel for Defenders—Trayner—Jameson. Agents—Scott Moncreiff & Traill, W.S.

Friday, May 13.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MULLEN *v.* WHITE.

Husband and Wife—Wife's Præpositura—*Husband's Liability for Malicious Act of his Wife—Reparation—Wrongous Apprehension and Incarceration.*

In an action of damages for wrongous apprehension and incarceration the pursuer averred that the complaint on which she was charged proceeded on information given by the wife of the defender, "acting for him and with his authority," and "in the course of the management of his business, and within the scope and in accordance with the mandate or authority under which she was appointed to act as his representative;" further, that though he had been absent when the information was given and the apprehension was made, he entirely approved of and adopted the statements, and approved of the accusation being persisted in. *Held* that these statements were irrelevant.

This was an action for £500 in name of damages and *solatium*. The pursuer Mary Mullen had been a saleswoman in the service of the defender John White, a pawnbroker and salesman in Edinburgh. On 9th October 1880 she was apprehended on a charge of theft, in so far as it having been her duty to enter in a sale-book belonging to the defender a correct note of the price of the goods she sold, she had on the 4th October entered in that book a sum of 18s. as the price of certain goods sold by her instead of the sum of £1, which in reality she had received as the price