those presents which may not have been implemented by them.'

"The practice standing thus, I think a marked distinction has been observed between feu-rights and contracts of ground-annual on the one hand and leases on the other, although I fully appreciate the argument that in some respects a contract of ground-annual resembles a contract of lease more than it resembles a feu-right. I think that the balance of consideration is in favour of giving an irritant clause in a contract of ground-annual the same effect as it would receive in a contract of feu.

"I therefore think that the defenders must be assoilzied because the pursuers have elected to irritate the contract and regained and sold the lands. I agree with the pursuers that the defenders have no concern with the price which the pursuers obtained for the forfeited subjects. But on the other hand they have chosen their remedy and must be content with it, and it is satisfactory to know that they have fully repaid themselves."

Counsel for the Pursuers—D.-F. Balfour, Q.C.—Ure. Agents — Campbell & Smith, S.S.C.

Counsel for the Defenders—Asher, Q.C.—Kennedy. Agent—Alexander Campbell.

Wednesday, February 17.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THORNELOE *v.* M'DONALD & COMPANY.

Contract—Breach of Contract—Compensation—Defence.

T. entered into a contract with M. & Company to supply them with watches to the value of £849 at certain specified prices, the watches to be delivered as they were ready, and paid by bills at four months from delivery. After a number of watches had been delivered in terms of the contract, T. wrote on 26th November 1889, intimating that he would no longer supply watches at the agreed-on prices. On 30th November T. sent M. & Company bills for the price of watches delivered prior to 26th November, but M. & Company refused to accept these bills in consequence of the intimation contained in T.'s letter of the 26th, and they met an action at his instance for the price of the watches with a counter-claim of damage on account of the pursuer's refusal to go on with the contract. *Held* (1) that the pursuer's threat that he would not go on with the contract did not justify the defenders in refusing to pay for goods delivered under the contract; and (2) that their refusal was a breach of contract which excluded any claim of damages on their part against the pursuer.

This was an action brought in the Sheriff Court at Glasgow by Richard Thorneloe, wholesale watch manufacturer, Coventry, against M'Donald & Company, 68 Trongate, Glasgow, for payment of £67, 17s. 6d., as the price of watches supplied by the pursuer to the defenders on 14th, 16th, and 23d November 1889.

In answer to the pursuer's claim the defenders stated—"In consequence of representations made by pursuer and Mr Pearson, his agent in Glasgow, that if a large order was given he could deliver watches more quickly and more regularly than in smaller quantities, and that pursuer anticipated an advance in price, the defenders gave an order, in December 1888 and January 1889, to Mr Pearson, the agent in Glasgow, to make and supply watches at the prices then fixed, to the value of £848, and which watches were to be delivered as they were ready, and paid by bills at four months from delivery, with power always to the defenders to delay delivery on intimating same to pursuer." They admitted that the watches which were the subject of the action had been delivered to them, but averred that they had been delivered under the contract above set forth; and that on November 5, 1889, the defender had by letter intimated to them that he would deliver no more watches at the contract prices, and had thus violated the contract, with the result that they had suffered loss to the amount of £204.

The pursuer denied that the defenders had power under the contract to delay delivery of the watches, or that he had broken the contract. He explained that the defenders had declined to accept delivery of watches forwarded in terms of the contract; that while declining to cancel the orders he had endeavoured to meet the defenders' convenience, but that they had delayed deliveries to such an extent that, owing to a material rise in wages and the cost of manufacture, it had ultimately become impossible for him to continue to supply watches at the old prices.

Proof was allowed. It appeared that on 4th February 1889 the defenders wrote to the pursuer—"Please send no more watches at present until we get our stock reduced." . . . The pursuer, however, was unwilling to delay delivering the watches, because wages were rising, and the cost of manufacture increasing, and on 16th March he forwarded a parcel of watches of the value of £43. These watches the defender at first declined to accept, but ultimately accepted on the pursuer's refusal to take them back. After the month of March the pursuer, in consequence of the defenders' unwillingness to accept them, forwarded the watches much more slowly.

On 24th April the defenders wrote—"Please send no watches of any kind until we write requesting you to send them. If you cannot hold over the order given to Mr Pearson, at the former prices, and send them as we ask for them, please cancel all orders, and we will give the orders as we require them, at the advanced price of 1s. on each watch."

On the following day the pursuer replied—"I cannot cancel orders (as desired), . . . the goods are ordered, and I cannot hold them over without an advance, and, in which case, we must have the terms defined; but in saying this much I do not relinquish my position, but do so without prejudice to it, but I never have been other than most desirous to work in the most harmonious manner with yon, but all goods held over the end of May I must have an advance of 1s. for per watch, which by your note you are evidently of opinion I am entitled to."

The defenders wrote several times in October and on 4th November pressing the pursuer to deliver the watches more quickly.

On 5th November the pursuer wrote—"I wish you had taken my advice and had a stock of every class made up while they were cheap, for we cannot now make any more at old prices; in fact we have been losing on the goods supplied, and you are the only person we have supplied at your prices, which was owing to quantity you took, but even for quantity we cannot make without an advance."

On 18th November the defenders wrote—"We must insist on your executing the order you have on hand at the original prices." . . .

On 14th, 16th, and 23rd November the pursuer forwarded the watches which were the subject of this action at the prices fixed in the contract, and they were accepted by the defenders.

On 26th November the pursuer wrote—" . . . We cannot longer sell at a loss as we have been doing the whole of this last 12 months. . . . Therefore it is either an advance or no goods." . . .

On 30th November the pursuer forwarded bills for the price of the watches delivered on 14th, 16th, and 23rd November, but the defenders declined to accept them on account of the pursuer's refusal to go on delivering watches at the original prices, and the pursuer accordingly raised this action to compel the defenders to pay for these watches.

The parole evidence bearing on the question whether the defenders had under the contract a power to delay delivery of the watches was conflicting.

On 26th January 1891 the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:—"Finds that in December and January 1888-9 the defenders ordered of the pursuer, through the pursuer's agent in Glasgow, watches to the amount of £849 or thereby: Finds that although there was mention of an expected advance in the cost of making watches, it was not expressed in the order or acceptance that the defenders were to pay a higher price in the event of that advance taking place, and that subsequently, when the question was raised in March and April, the pursuer departed from his claim for an increased price, and agreed to the old price at which the orders had been given: Finds that it is not proved that both parties agreed that the defenders should have the option of delaying the deliveries of the watches which the pursuer was manufacturing as the convenience of their trade might require; but finds that the pursuer, from February or March until August, did, to accommodate the defenders, delay the delivery of his watches: Finds that the pursuer in November and December 1889 refused to deliver the watches remaining undelivered except at an advanced price, and thus made a breach of the terms of the contract, as he had ultimately acknowledged it: Finds that at the same time the defenders were *in mora* in paying or accepting bills for the watches delivered, and so made a breach of contract: Finds that both parties being in default there is no sufficient ground for finding damages due to or by either; Finds that the pursuer has delivered the watches condescended on, the price of which is still unpaid: Therefore decerns as craved: Finds no expenses due."

The defenders having appealed, the Sheriff (BERRY) on 28th October 1891 pronounced this interlocutor:—"Adheres to the interlocutor appealed against in so far as it finds that the defenders ordered of the pursuer, through the pursuer's agent, watches to the amount therein stated: Finds it not proved that both parties agreed that the defenders should have the option of delaying the deliveries of the watches which the pursuer was manufacturing as the convenience of their trade required, but finds that the pursuer did, to accommodate the defenders, delay the delivery of his watches: Finds that the pursuer in the latter part of 1889 refused to deliver the watches remaining undelivered except at an advanced price: Finds that the pursuer has delivered the watches condescended on, the price of which is still unpaid, and decerns against the defenders as craved: *Quoad ultra* recals said interlocutor: Finds the defenders liable in expenses, including those of the appeal," &c.

The defenders appealed to the First Division.

At advising—

LORD PRESIDENT—It has been remarked by the counsel on both sides that there has been considerable vacillation and shifting of ground on the part of both the parties to this contract. But I confess to thinking that there is sufficiently solid ground for believing that the contract subsisted and was so far implemented by the delivery of watches down to the 23rd of November. That I think is sufficiently clear from the evidence of Mr Thorneloe himself, so I am disposed to hold that watches were delivered in fulfilment of the contract down to the termination of the deliveries.

It is necessary then to consider which party is in breach of the contract, and in regard to this question I find matters stand thus — On 26th November the pursuer wrote to the defenders intimating his intention to raise the price of the watches. This intimation may more properly be described as a threat to break the contract,

than as an actual breach of it, but the defenders unfortunately for themselves, never asked for further fulfilment of the contract, but took up the position that they were entitled, in consequence of the pursuer's letter, to refuse to accept certain bills for payment of the watches already delivered to them. What their duty was under the contract we find from their own averment. They say that "the watches were to be delivered as they were ready, and paid by bills at four months from delivery." It was therefore the duty of the defenders to accept the bills in payment of the watches already delivered to them. This they absolutely refused to do on 30th November 1889. This was a bad position in law, because whether the pursuer was going in the future to implement the contract or not, it was the defenders' duty to accept bills for the goods already delivered. They ought to have sent back the bills accepted, and intimated that they held the pursuer to his contract and would claim damages if he did not go on delivering watches. It appears to me that the position taken up by the defenders in refusing to accept the bills would deprive them of all right to claim damages for breach of contract, even supposing such breach to have already occurred, instead of, as was really the case, being only threatened. I think this is a sufficient ground of judgment for the disposal of the case. It is substantially in accordance with the decision of the Sheriff, and leads to an affirmance of the judgment of the Court below.

LORD ADAM concurred.

LORD M'LAREN — It is rather singular that no memorandum was kept of the contract in question, seeing that watches were ordered to the amount of £849, which seems a large order for the kind of business done by the defenders. But it appears to be sufficiently established that the watches were supplied at an exceptionally low figure because the order was a large one, and the defenders agreed to take delivery as soon as the watches could be got ready. The defenders are not in a very favourable position, because while this was the nature of the contract, and they were getting a considerable benefit from the low prices at which the watches were being supplied, they began early in the contract to try and back out of the condition binding them to take the watches as fast as they could be delivered.

The pursuer, on the other hand, while insisting that the contract must remain in force, seems to some extent to have been willing to meet the defenders' wish that the deliveries should be delayed, only asking that a slight addition should be made to the price.

The contract came to an end on 26th November, and the question is, which party is responsible for that? There is no doubt that the defenders got watches for which they have not paid, but they say that they were entitled to refuse payment because the pursuer had refused to go on with the contract. I think no man can come into Court affirming and disaffirming a contract to which he is a party. If he affirms it and claims damages for a breach of it, he must, as a condition of succeeding in that claim, have himself fulfilled all the conditions of the contract. In the case of a contract of sale he must pay for goods delivered to him under the contract as a condition of putting himself in the right and enabling him to claim damages for a breach of the contract. I agree that the defenders have by their refusal to pay for the goods delivered to them disentitled themselves to claim damages from the pursuer as in other circumstances they might have done.

LORD KINNEAR—I am of the same opinion. We must, I think, take it that down to the 23rd of November there was no breach of contract, because whatever inference might have been drawn from the previous conduct of the parties or from their correspondence, it is common ground that a parcel of watches was delivered and accepted on the 23rd of November, and the result of the evidence is that these watches were so delivered and accepted under the contract. If that be so, the defenders were bound, when called upon, to grant their acceptances for the price of the watches delivered to them. They refused to do so, and this refusal was plainly a breach of the contract, if it was not justified by some previous breach on the part of the defenders. But it is said that between 23rd November, the date of the last delivery of watches, and 30th November, when the defenders refused to accept the bills, the pursuer had committed a breach of contract. I think Mr Clyde stated the law quite accurately when he said that where a party who is suing for payment of the price of goods delivered, is himself in breach of the contract under which he professed to sue, the claim may be met by a counter-claim for damages on account of the breach of contract. There is in that case no conflict between a liquid and an illiquid claim, because there can be no liquid claim under a contract if the contract has not been performed. But it is essential to the validity of the defence that there should have been a previous breach of contract by the pursuer; and I agree that his letter of the 26th of November did not amount to a breach which would relieve the defenders of their obligation to pay for goods already delivered and retained by them. The pursuer was not called upon to do anything in performance of his contract between the 26th and the 30th, and if there was no actual breach a mere intimation or threat on the part of manufacturer that he would not deliver more goods on the same terms does not justify the merchants in refusing to pay for goods already accepted by them under the contract. I agree that the Sheriff's judgment should be affirmed.

The Court pronounced this interlocutor:—

"Find in fact that at and prior to 23rd November 1889 the pursuer sold and delivered to the defenders certain watches at prices amounting *in cumulo* to the sum of £67, 17s. 6d., which sum has not been paid; that the said watches were delivered under a contract by which it was provided that the watches were to be paid by bills at four months from delivery; that on or about 30th November 1889 bills were forwarded to the defenders to be accepted for the said watches, and that the defenders refused to accept the said bills: Find in law that the defenders having broken the said contract, are not entitled to claim damages for the non-fulfilment of the contract by the pursuer alleged by them: Find in fact that the defenders have failed to prove the said non-fulfilment: Find in law that the pursuer is entitled to the price of the said watches: Therefore dismiss the appeal: Affirm the interlocutors of the Sheriff-Substitute and the Sheriff dated 26th January and 28th October 1891 respectively, and decern: Find the appellant liable in expenses in this Court," &c.

Counsel for Pursuer — Aitken. Agent —Alexander Morison, S.S.C.

Counsel for Defenders—Jameson—Clyde. Agents—J. & A. Hastie, Solicitors.

Saturday, February 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BRUCE *v.* LEISK.

Reparation—Slander—Malice—Privilege—Statement regarding Candidate for Town Council by One Elector to Another.

A candidate for election to the Town Council of Glasgow brought an action of damages for slander against an elector, who, as he averred, had stated to other electors prior to the election "that he had been bankrupt as a grocer, that he had made a very bad failure—meaning thereby that it was a dishonest and disreputable failure,—and that his creditors had received only eighteenpence in the pound, and that he was in consequence an unsuitable person to represent the electors in the Council of Glasgow."

Held (1) that it was a jury question whether the words used bore the innuendo sought to be put upon them, but (2) that the record disclosed a case of privilege, and, as malice had not been averred, the action fell to be *dismissed.*

In October 1891 John Wilson Bruce, accountant, residing at 27 Lacrosse Terrace, Hillhead, Glasgow, brought an action of damages for £1500 against David D. Leisk, warehouseman, residing at 15 Belmont Crescent, Hillhead, Glasgow, on the ground of slander.

The pursuer averred that by the City of Glasgow Act 1891 the burgh of Hillhead was annexed to the city of Glasgow, and upon 1st November 1891 would become the 22nd ward of that city; that at a public meeting of inhabitants of the burgh, held on 6th October 1891, he had been nominated for election as a councillor for the city of Glasgow; that the defender, as a ratepayer, had taken considerable interest in the election of police commissioners for the burgh, and in the question of annexation; that he had opposed the pursuer in various elections of police commissioners, and at the meeting of the 6th October had opposed his nomination. Condescendence 4 stated —"In particular, the defender, in order to influence votes against the nomination of the pursuer, and also against his election, and to injure his credit, reputation, and feelings, has since the date of said meeting—namely, during the month of October—stated at various places within the said burgh, to various ratepayers therein, that the pursuer had been bankrupt as a grocer, that he had made a very bad failure—meaning thereby that it was a dishonest and disreputable failure—and that his creditors had received only one shilling and sixpence per pound, and that the pursuer was in consequence an unsuitable person to represent the electors in the Council of Glasgow, or used other words of similar meaning and effect." The pursuer then gave two particular occasions on which these statements had been made by the defender to two other ratepayers. He further averred that (Cond. 6) "These statements are absolutely false and calumnious, and were intended to injure and have injured the pursuer in his reputation and feelings, both as a public and private individual, and as a professional man in the said city of Glasgow, and particularly said statements were intended to prejudice, and did prejudice, the candidature of the pursuer as a councillor for the said twenty-second ward of the extended city of Glasgow, and have influenced a number of electors who would otherwise have been friendly to and supported the candidature of the pursuer, and the pursuer will be put to the expense of a contest, which otherwise he avers would have been avoided, in respect that only the requisite number of representatives would have been nominated at said public meeting of ratepayers. Said statements have further grievously hurt pursuer's feelings, and have tarnished his reputation as an honest and upright citizen, and as a professional accountant in the said city of Glasgow."

The defender pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (3) *Separatim*—the statements complained of being privileged, the defender is entitled to absolvitor."

The pursuer proposed the following issues for the trial of the cause:—(1) Whether on or about Thursday, the 15th day of October 1891, in or near Buchanan Street, Glasgow,