Saturday, December 5.

SECOND DIVISION.

STEEL *v.* SMITH.

31 & 32 *Vict., c.* 100, *sec.* 27—*Lodging of Issues. Held* that the provision of the Court of Session Act 1868 as to the lodging of issues before the summary debate to take place in a cause, does not infer, on failure to implement the requirement of the Statute, dismissal of the action.

This was an action of damages brought by Matthew Steel, wright in Ochiltree, against Andrew Smith, secretary of the Ochiltree Gas Company, the allegation being that the defender had written to the pursuer a letter, falsely and calumniously charging him with embezzling the funds of the said Gas Company, of which the pursuer had formerly been collector. The defender pleaded that the action as laid was irrelevant, in respect that the letter was privileged, and malice was not averred.

Upon the record being closed, the case was sent to the Lord Ordinary's summary debate roll, the new Court of Session Act prescribing that the parties shall lodge such issues as they propose before the day fixed for the summary debate. The pursuer had failed to lodge his issues before that day, and at the summary debate the defender pleaded, in addition to his plea of irrelevancy, that the action should be dismissed, in respect the pursuer had failed to comply with the provision of the statute. The Lord Ordinary refused to dismiss the action on this ground, and further refused to hold the action irrelevant. The defender reclaimed.

YOUNG and CRICHTON for him.

CLARK and BLACK for pursuer.

The Court were of opinion. upon the point of form, that, although the failure to lodge issues previous to the summary debate was an irregularity to be condemned, and to be visited with a penalty in the way of expenses when the Lord Ordinary thought that proper, yet it did not go the length of entitling the defender to get the action dismissed. Upon the question of relevancy, their Lordships thought that the pursuer's averments did not disclose a case of privilege, and, therefore, that it was unnecessary to aver malice.

Agent for Pursuer—W. H. Muir, S.S.C.

Agent for Defender—L. M. Macara, W.S.

Tuesday, December 8.

FIRST DIVISION.

GOLDSTON *v.* YOUNG.

Mutual Contract—Sale of Heritage—Missives of Sale—rei interventus—locus penitentiæ—*Reparation—Alien—Title to Sue.* Action to enforce an alleged contract of sale of heritage *dismissed*, one of the missives founded on as constituting the contract being neither holograph nor tested, and there being no *rei interventus. Held* (by Lord Ormidale) that a letter of naturalization obtained after the raising of the action validated an action raised by an alien to enforce implement of a contract of sale of heritage.

On 21st February 1868 the pursuer, David Goldston, signed a letter, holograph of the defender, in these terms:—

"*Edinburgh*, 21 *Feby.* 1868,
112 *Nicolson Street.*

"Mr JOHN YOUNG,—Sir,—I hereby make offer to purchase that shop from you, No. 90 Nicolson Street, possessed by Mr Gibson, dyer, for the sum of seven hundred and ninety pounds sterling (£790), the feu to be two pounds (£2) yearly; the expense of said sale to be mutual.—Your acceptance will much oblige, (signed) D. GOLDSTON.

" DAID GOLDSTON."

On the same day the defender, Young, wrote and signed the following letter:—

"112 *Nicolson Street,*
Edinburgh, 21*st Feb.* 1868.

"Mr DAVID GOLDSTON,—Sir,—I hereby accept of your offer of seven hundred and ninety pounds sterling (£790) for that shop, No. 90 Nicolson Street, possessed by Mr Gibson, dyer, the feu to be two pounds yearly (£2); the expense of said sale to be mutual,—yours respectfully,

(signed) JOHN YOUNG."

These missives were delivered but no possession followed thereon. Goldston now sued Young for implement of the contract of sale alleged to be constitution by these missives; and, alternatively, for damages. After raising the action, Goldston, who was a native of Russia, obtained letters of naturalization, dated May 1868.

Young defended, and stated, *inter alia*, these pleas:—"(1) The pursuer has no title to insist in the present action. having been an alien when the action was instituted, or at least when the alleged cause of action arose; (3) the documents founded on not being holograph or tested, and being deficient in the necessary requirements of writs affecting heritage, the action cannot be maintained."

The Lord Ordinary (ORMIDALE), on 20th June 1868, pronounced the following interlocutor:—"Reserves the first plea in law for the defender, so far as preliminary, to be discussed with the merits: Closes the record on the revised condescendence and revised defences, Nos. 9 and 10 of process, and appoints parties' procurators to debate the cause in the summary debate roll on Wednesday next." Thereafter, on 2d July, the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary, having heard counsel for the parties on the first and third pleas in law for the defender, and having considered the argument and proceedings, Repels said first plea, and also said third plea, in so far as it was founded on as a preliminary bar to the action being proceeded with; and, under a reservation in the meantime of all questions of expenses: Appoints the case to be enrolled that parties may be heard as to the steps now to be taken in the cause.

"*Note.*—The Lord Ordinary has felt the first of the two pleas now repelled to be attended with difficulty. It depends upon the effect which falls to be given to the letter of naturalization, No. 14 of process, obtained and produced by the pursuer shortly after the action was raised, by which there has been granted to him 'all the rights and capacities of a natural born British subject,' in terms of the Act 7 & 8 Vict., cap. 68. It was maintained by the defender that this naturalization had no retro-active effect, and therefore that, as it was obtained subsequent to the date of the cause of action, as well as of its institution, it could not obviate his first plea in law.

"It rather appears to the Lord Ordinary that, having regard to the very comprehensive and unqualified terms of the letter of naturalization, as

well as of the statute in virtue of which it was granted, particularly section 6th thereof, it must be held that the personal disability to which the pursuer had been subject as an alien has been wiped off, and that he must now be dealt with in this action as if he possessed 'all the rights and capacities of a natural born British subject.' In no other view, or on any other footing, can, its thought, the words of the letter of naturalization and of the statute be given full and fair effect to.

"Some authorities cited to the Lord Ordinary on behalf of the defender, and the argument maintained by him, had reference to the denization, and not the naturalization of aliens. But betwixt those two things there is a well-recognised and established distinction. Denization, proceeding, as it does, from the Crown alone, is more limited in its operation than naturalization, which has an Act of Parliament for its authority. The distinction is stated in Blackstone (page 240 of 3d edition, by Mr M. Kerr), where it is explained that denization, which follows from the prerogative of the Crown, has in relation to inheritance no retro-active effect: 'Yet if he' (the alien) 'had been naturalized by Act of Parliament, such eldest son' (born prior to the naturalization) 'might then have inherited, for that cancels all defects, and is allowed to have a retrospective energy which simple denization has not.' And Lord Coke (Co. Lit. page 129), who is cited as an authority by Blackstone, says—'An alien naturalized to all intents and purposes is a natural born subject.' To the same effect is the authority of Bankton, by whom it is stated in his Institutes (1, 3, 42) 'that an alien may be made a denizen by the king's letters patent, whereby he will be enabled to purchase lands, and his children after born shall inherit the same; but the king cannot enable his children born abroad or before the denization to inherit, for that were to alter the law. Naturalization, which can only be by Act of Parliament, takes effect from the time of a party's birth, and puts him in the some case as a natural born subject.' Mr Erskine (3, 10, 10) says that naturalization may be defined 'a right granted to a stranger or alien by the authority of Parliament, in virtue of which he acquires the same privileges as if he had been born in the kingdom,' while letters of denization, which are granted by the Sovereign without the interposition of Parliament, 'give the grantee a right of purchasing lands and disposing of them to others, and making them descendable to such of his issue as should be born after the grant;' and the same distinction between naturalization and denization is noticed and recognised by Mr Bell in his Principles, sec. 2136.

As it is not said by the defender that anything had occurred between the date of the contract betwixt him and the pursuer, and the time when the letter of naturalization was obtained and produced, to alter or affect the state of matters as they had previously existed, the present case is not embarrassed by considerations of the nature of an intermediate bar or mid-impediment. Nor does the Lord Ordinary think that the case of *Fish* v. *Klein*, 11th March 1817 (2 Merivale's Reports, 431), a precedent to rule the present case adversely to the views already expressed as to the retrospective effect of the letter of naturalization in question. The terms of the special act of naturalization, on which the controversy turned in *Fish* v. *Klein*, were such as to prevent it being construed as having a retrospective effect, for by them it was expressly declared that the alien should be only from 'thenceforth naturalized;' and besides, the Master of the Rolls appears to have rested his judgment on the circumstances that the estate to which the dispute related, 'being out of the defendant' (the alien) 'at the time when the Act passed, and the Act itself being silent as to the conveyance in question, it was impossible to consider his alienee in any better situation as to title than the defendant himself.'

"In regard to the defender's third plea, the Lord Ordinary thinks it also ill-founded, maintained as it was as a preliminary bar to the action being further proceeded with. The pursuer's offer was no doubt not written, although subscribed by him. It was written by the defender. It seems enough, however, that the defender's acceptance of the offer, which has never yet been withdrawn, is holograph of him, and is of itself distinct enough in regard to the terms of the bargain, which, in place of repudiating, the pursuer now seeks to enforce. How far the pursuer may be able to maintain his action on its merits is a matter which, of course, has not been determined at present."

"If, as the Lord Ordinary was led to understand at the debate, the pursuer is satisfied that he can only insist on the action under the second alternative conclusion for damages, he may consider whether the proper course for him to adopt is now to lodge a minute departing from the first conclusion, and then it is presumed the next step will be for him to lodge the issue he has to propose for trying his claim of damages."

The defender reclaimed.

WATSON and J. C. SMITH for reclaimer.

CLARK and STRACHAN for respondent.

The following authorities were cited;—Blackstone (Kerr's), ii. 240; *Alexander*, 12 June 1852, 24 Sc. Jur. 522; *Shedden*, 1 Macq., 535; *Count de Wall*, 12 Eng. Jur. 145; *Johnstone*, 15 Feb. 1809, F.C.; Erskine, 3. 2. 2.; Stair, 1. 3. 8.; *Kilkerran*, M. 8440; *Fulton*, M. 8446; *Park*, M. 8449; *Muir*, M. 8457; *M'Farlane*, M. 8459; Barron, M. 8463; *Sinclair*, *ante*, v. 601.

After the case was opened for the reclaimer, the Court directed counsel to confine their argument to the third plea for the defender,

At Advising—

LORD PRESIDENT—There are two pleas which have been considered by the Lord Ordinary; one of these he has disposed of entirely by repelling it, and the other he has repelled in so far as insisted in as a preliminary bar to the action being proceeded with. It appears to me that that third plea is the one which ought first to be considered in this case, for it goes to this, that there is no concluded contract that the defender has *locus penitentiæ*, and therefore that the action cannot be insisted in. In short, that the contract founded on as having been constituted between the parties does not exist as a completed contract at all. It is obvious that, if the Court is with the defender on that plea, it is immaterial to consider the first. Indeed, the first plea cannot very well arise until it be seen if there is a contract, for the first plea is simply this—assuming there is a contract otherwise valid,—the pursuer, being an alien, cannot be a party to such a contract.

But, in disposing of the third plea, I am inclined to deal with it as a plea on the merits, for if sustained it exhausts the whole merits of the case. This is an action to enforce a contract by the alternative forms of remedy, either by performance or by damages for breach of contract, and the whole merits of the case must be involved in a plea which denies the

existence of the contract. Therefore, if we sustain this plea, it must be to the effect of assoilzing the defender from the conclusions of the action. Now the plea is this:—"The documents founded on not being holograph or tested, and being deficient in the necessary requirements of writs affecting heritage, the action cannot be maintained."

The documents are an offer by the pursuer to the defender, and a letter of acceptance by the defender to the pursuer. That letter of the defender is holograph of the defender, and signed by him. The offer by the pursuer to the defender is signed by the pursuer, but is not holograph of him—the body of the writing being in the handwriting of the defender. Now this is a case of mutual contract. It is not only so libelled in the summons, but it is impossible to represent it as anything else, for it is constituted—if constituted at all—by the offer on the one side and the acceptance on the other. The missives are mutual, and both are essential to the constitution of the contract. Therefore this case differs entirely from that class of cases referred to, where a written promise, contained in a holograph writing, to convey land at a certain price and under certain conditions, has been held enforceable, for that was held on the footing of its being not a mutual contract, but a unilateral obligation or promise. Therefore, in the present case, the question arises purely whether, when a contract for a sale of heritage purports to be by mutual missives, it is good *in nudis finibus* although one of the missives is not holograph of one of the parties, but only signed by him. I think that is not a good contract for the sale of heritage, and I think that that is well established by all the authorities. It may be, perhaps, that the defender has taken an undue advantage of the pursuer; but the law says that while the contract stands thus, while there are not tested writs or a tested writ constituting the contract, or, failing them, holograph missives or a holograph missive, there is *locus penitentiæ* to the parties—the subject-matter of the contract being heritage.

We had occasion to consider the matter recently in the case of *Sinclair* v. *Weddell*. That no doubt referred to a lease of land, but the case was essentially the same as the present, and it was after a review of all the authorities which have now been cited that we came to the conclusion embodied in our judgment.

It must be kept in view that this contract is *in nudis finibus*. There is no trace of *rei interventus*, and therefore the case, arising purely, depends upon old and well settled principles of law. I am therefore for assoilzing the defender.

Lord Deas—There are two pleas in this case which have been brought under our notice. The first is "that the pursuer has no title to insist in the present action, having been an alien when the action was instituted, or, at least, when the alleged cause of action arose." The third plea goes to bar the action on the ground that the missives founded on by the pursuer are not probative. The Lord Ordinary has, by his Interlocutor of 25th June 1868, reserved the first plea, so far as preliminary, to be discussed with the merits, and I humbly think he was right in so doing; for until it appeared, in the first place, that there was a contract binding by the law of Scotland, and, in the second place, that that contract related to the sale of heritage, the question whether the pursuer was or was not an alien did not arise. And I think it would have been better if the Lord Ordinary had followed out the principle of that interlocutor, and had dealt with this plea as a plea on the merits, which it really is. Not only is it a plea on the merits, it is the whole merits of the case. By the interlocutor now reclaimed against, the Lord Ordinary has repelled the first plea, and also the third, so far as founded on as preliminary. The form of the reclaiming note, however, permits as to go into the merits of the case, and both parties agree in thinking it to be expedient that the merits should be now disposed of. We have nothing to do therefore with the first plea for the defender; the question is as to the third plea stated by him.

Now, the missive offer by Goldston is in the handwriting of Young, and Young's acceptance is in his own handwriting. The objection taken is, that the missives are not both holograph. It cannot be disputed that, according to the general principle of our law, well fixed for upwards of a century, missives for the sale of heritage, in order to be binding, must both be probative. But it is said that in the present case there arises a personal exception against Young pleading that principle of law, in respect that the missive which is not probative is in his own handwriting; and the whole question therefore is, whether this personal exception is sufficient to get rid of the usual solemnities required in sales of land. If that personal exception is good, then many other personal exceptions must be equally good, for there is no peculiarity in this case from the writing of the improbative missive being by the hand of the defender. The case would be precisely the same if the documents were in the handwriting of neither party, but were merely signed by both. Suppose Goldston had alleged that Young had expressly assured him that the law did not require those missives to be holograph, and had offered to prove that allegation by Young's oath, could that have been listened to? Clearly not. Such personal exceptions cannot be listened to so long as the solemnities of law are to be observed. Homologation will perfect a contract though neither missive be probative, but that is a qualification well known in law; and if we were to allow a personal exception like this to be pleaded, we should be taking away from our law that certainty which is so beneficial in its operation, and, in place of resting on the well established rule that in a sale of heritage certain solemnities must be observed, we should in every case have to ask whether there was a personal exception of some kind or other, I am not aware that any such exception as has been contended for has ever been allowed in our law. and, but for the ingenious argument which has been submitted to us, I should have thought there was no doubt in the matter.

The case of *Sinclair* v. *Weddell* is important. We had occasion in that case to consider whether the pursuer had a claim of damages, and although we were desirous of allowing that claim if we could competently do so, we became satisfied that the claim was untenable, and that it was open to the parties, if they chose, to avail themselves of the *locus penitentiæ* secured to them by law.

Lord Ardmillan—The question before us arises on these two documents, which are alleged to form a mutual contract for the sale of heritage. And we have to consider these documents *in nudis finibus*, for there is nothing of the nature of *rei interventus* or homologation in the case, which must therefore be decided simply on the effect of these documents.

Now the law is well established, and has long been so, that where there has been no *rei interventus*, and documents forming a mutual contract in regard to heritage are not both probative, neither party is bound, since both must be bound or neither. That law has had effect repeatedly given to it, and recently given in the case of *Sinclair*, under circumstances not very unlike the present. A writing in regard to heritage which is neither tested nor holograph, leaves the obligation open; and if *locus penitentiæ* has not been excluded by *rei interventus* or something equivalent thereto, the party who subscribes the document is entitled to resile. In the present case there is no allegation of *rei interventus* or anything of that nature, and therefore there is no alternative. I don't disguise my opinion that the party who wrote this document called an offer, and who now pleads that it—because he wrote it, and not the offerer subscribing it—is null and void, has no equity in his plea. *Sinclair* v. *Weddell* was very similar; and I remember that it was not with any great willingness that I came to the conclusion that the objectton there taken ought to be sustained. In the end, however, I did agree in holding that we were under the necessity of refusing to give effect to the document, and in like manner I cannot see my way to sustain the document here.

Lord Kinloch—We must in this case remember the rule that we are to decide the case before us, and not another and a different. We have not before us the case of a unilateral deed, as to which the question arises whether, by delivery to the party in whose favour it is conceived, the obligation is perfected. This action is laid expressly on mutual missives; and there cannot be any doubt that both such missives must be probative, otherwise there is no probative contract; and this being a contract about heritage, the want of a probative deed implies a want of completed agreement. There is no case here of an informal deed perfected *rei interventu*. It is clear that the offer here is not probative, not being written by the party who signs it, nor tested in accordance with the usual solemnities of law. The fact that the document is written by the other party, whatever other inferences that fact may give rise to, will not suffice to make the missive a probative instrument. The case is the same as if the document were not signed at all. The mere circumstance of there being two separate bits of paper makes no difference. It is the same as if the missives constituting the contract were contained in one sheet of paper, and one of the parties had signed his particular missive, while the other had not; or as if the parties had put the agreement into one deed, signed by one of them, and not by the other. The mere transmission by the defender to the pursuer, of such an imperfect document, would not rear up the instrument into a completed contract. The question is one merely of solemnities; but it is better for the interests of justice in the long-run to adhere to our rules as to these; and I come to the same conclusion with your Lordships, that there is here no binding contract, and that, on that ground, the defender must be assoilzied from the conclusions of the summons.

Agent for Pursuer—W. B. Glen, S.S.C.

Agents for Defender—J. B. Douglas & Smith, W.S.

Wednesday, December 9.

ANSTRUTHER *v.* POLLOCK, GILMOUR, & CO., AND PORT-GLASGOW HARBOUR TRUSTEES.

(*Ante*, v, 78.)

Harbour—Property—Pro indiviso *Proprietor—Title to Sue—Possession.* Claim by a feuar to a right to form a harbour over against his feu, *repelled*, on a view (1) of his title, and (2) of his prescriptive possession. The grantee of a harbour cannot feu out his right to different parties.

John Fulton Anstruther, merchant in Port-Glasgow, and Mrs Margaret Adam or Anstruther, his wife, brought this action of declarator against the defenders, concluding for declarator "that the pursuers are entitled to form a harbour or basin on the north-west side of the subjects in Port-Glasgow, whose north-west boundary is the line indicated by the line A D on the sketch to be produced at the calling hereof, and here specially referred to, such harbour or basin not to extend more than one hundred feet beyond the said line;" or otherwise for declarator "that the pursuers and the other feuars of the aftermentioned lots and cellars, and of the rights and privileges effeiring thereto, which lots and cellars are described in the titles thereof as follows—viz. . . . are entitled to form a harbour or basin on the north-west side of the said lots and cellars; such harbour or basin not to extend more than 100 feet beyond the north-west boundary of the said lots and cellars;" and in any view, for declarator that the defender should be ordained "to take down and remove so much of the wall recently erected by them along or near the north-west boundary of the breast or passage called on said sketch "breast or passage leading from steamboat quay," as has been built *ex adverso* of the line indicated by the said line A D."

The pursuer founded on feu contracts dated in 1769, by which the magistrates and town council of Glasgow feued out to the predecessors of the pursuers certain subjects in Scarlow Street, Port-Glasgow, and on a subsequent deed whereby there was granted to the feuars "full power and liberty to make jetties or crooks beyond the said extended buildings, and breasts towards the river or firth, in order to secure the buildings from being injured by the sea, and to form a harbour or basin on the north-west side of the said lots and cellars, provided none of these buildings or erections should extend more than 50 yards beyond the north-west boundary of the said lots and cellars."

In 1864 the pursuers became proprietors in conjunct fee and liferent of one-sixth part *pro indiviso* of the subjects in question, and in 1866, in pursuance of an action of division, a conveyance was executed in their favour of a certain portion of the subjects.

After a proof the Lord Ordinary (Jerviswoode) assoilzied the defenders, principally on the ground that the assertion of their rights by the pursuers in the action was inconsistent with past prescriptive possession.

The pursuers reclaimed.

Black (Gifford with him) for reclaimers.

Clark and Lee, for respondents, were not called on.

At advising—

Lord President—The pursuer of this action is a feuar in the town of Port-Glasgow of a feu measur