deadlock, the Court allowed no expenses to either party against the trust or *inter se.*

Agent for Petitioner—M. Macgregor, S.S.C.
Agent for Respondents—John Galletly, S.S.C.

Saturday, December 4.

SECOND DIVISION.

MACLEAN & HOPE *v.* THOMAS.

Delivery of Goods—Inability to account for—Consumption—Alleged Contract of Sale—Adoption—Debts Recovery Act. Circumstances in which *held* that a quantity of guano sent to a farmer by mistake for another article, and allowed to remain in his premises, and for which he could not afterwards account, was presumably used on the farm, but was not proved to have been thus used with the farmer's knowledge so as to hold him liable on the ground of adoption of an alleged sale of it.

Expenses. Circumstances in which party found successful in the cause allowed only one half of the expenses of the whole action.

The appellants, Messrs Maclean & Hope, seed merchants, Edinburgh, brought an action in the Sheriff-court of Fifeshire, under the Debts Recovery Act, against the respondent, James Thomas, farmer, Forthar, concluding for payment of the price of certain guano alleged to have been sold by them to him. The respondent denied liability, and explained that the guano had been sent to him by mistake; that he had rejected it, and intimated his rejection of it, but that the appellants had never taken it away; and that it had lain in a shed on his farm for a long time; and that he did not now know what had become of it.

After a proof, the Sheriff-substitute (TAYLOR) found that the appellants had failed to prove either that the guano had been ordered or used by the respondent.

The Sheriff (MACKENZIE) adhered.

The appellants having appealed to the Court, lodged a minute craving additional proof, and offering to prove by the evidence of certain former servants of the respondent that the guano had been used with his knowledge upon his farms. On payment of £10, 10s. of expenses, the Court allowed the additional proof asked, and remitted the cause back to the Sheriff-court. After the evidence prepared by the appellants had been led, the Sheriff-substitute and Sheriff again assoilzied the respondent, holding that the averments in the minute had not been proved.

The Sheriff added the following note to his judgment:—"The guano in question was brought to the defender's farm of Forthar in April 1867 by William Mackie, his foreman, and Christopher Pratt, one of his ploughmen, and put into an open cart-shed. It was in that shed on 21st August 1867, when the defender wrote the letter of that date to Mr Tait, that it lay there at his risk and charge, and that its removal was requested. Christopher Pratt depones that when he left Forthar at Martinmas 1867 the said guano was in the shed; and James Pratt, then a farm-servant, and now the foreman of the defender, states that he last saw it, he thinks, in the cart-shed in May 1868; that he never saw it touched; that he was absent from the last Wednesday of May until the middle of July 1868, and that he paid no attention as to whether the guano was in the shed on his return or not. John Simpson, the pursuers' traveller, states that he met the pursuer at Ceres Market in June 1868, and spoke to him about the guano at the pursuers' request, and that 'the defender said he did not know anything at all about it, and that he had no guano about him.' The cart-shed was open, and without a gate. It was undergoing repair, and it was situated near the public road passing Forthar. It would thus appear that the guano had been removed from the defender's premises before this meeting at Ceres Market in June 1868, that is between April and July 1868.

"John M'Queen and Charles Falconer, two farm-servants formerly in the defender's employment, depone, that by order of William Mackie, the defender's foreman, and in presence of the defender, they removed the said guano from the cart-shed to the defender's lockfast guano store early one morning in June or July 1868, when the potatoes were being furrowed up; that they took it out of the bags and pounded and riddled it, that part of it was sent in fifteen bags to the defender's farm of Orkey, and that the remainder of it was used at Forthar. But the evidence of these two witnesses is open to grave suspicion, for the reasons stated in the note to the interlocutor under appeal, and it is negatived by the evidence of David Smith and John Pratt, two of the defender's farm-servants, who, they say, assisted them in the removal of the guano, and also by the evidence of William Mackie and of the defender. Further, M'Queen and Falconer do not concur in various particulars.

"John M'Queen depones that at the usual hour for commencing work, viz., four o'clock in the morning, Charles Falconer, David Smith, and John Pratt assisted him in removing and riddling the guano, and in putting it into bags; that John Pratt swept up the last part of it, and that after they had breakfasted they put fifteen bags of it into a cart, which was driven by David Smith to the defender's farm of Orkey. He further states that there was no other guano or nitrate of soda put that season into the shed, but only a waggon of salt. Falconer's statement is, that it was he and M'Queen who carried the guano to the store, took it out of the bags, pounded it, and refilled the bags; that 'David Smith was going about, but there was only M'Queen and I carrying up the guano;' and that 'John Pratt came afterwards and swept up the remainder, and brought it to the store.' Falconer also states that they were engaged at it about two hours, and that it was before breakfast they loaded the cart; while M'Queen says that Falconer and Smith were engaged the whole forenoon at the riddling.

"John Pratt does not corroborate M'Queen and Falconer. He depones that he remembers the guano having been brought by Mackie and his brother Christopher Pratt, and put into the cart-shed; that he does not remember seeing Falconer, Smith, and M'Queen carrying guano from the shed to the store in 1868; and that he does not remember sweeping up any guano in the cart-shed, but that he swept up some nitrate of soda. He further states that he never saw David Smith carting guano from Forthar to Orkey.

"David Smith expressly contradicts M'Queen and Falconer. He denies having taken or having seen any guano taken from Forthar to Orkey in 1868. He states that there were three kinds of guano lying in the cart-shed, and some salt, in the spring of 1868; that he was employed with Fal-

coner and M'Queen three mornings in the spring of 1868, when planting potatoes and sowing turnips, in carrying guano, by Mackie's orders, from the shed to the guano store; and that these three mornings did not follow one another, but that there were intervals between them. He also depones that he thinks 'there was some guano left in the shed, and about the middle of the shed, after I had carried the bags as aforesaid. I cannot say how much. I cannot say what became of it.' He also depones that he never saw guano sown on potatoes at Forthar at the time that the potatoes were furrowed up. That there were different kinds of guano in the cart-shed in the spring of 1868 is also proved by James Pratt.

"Both M'Queen and Falconer say that it was William Mackie, the foreman, who gave them the order to remove the guano to the store and riddle it, and send part of it to Orkey, and that the defender was in front of the store while they were filling the cart. The defender, with reference to this, depones as follows:—'I did not, in spring or summer of last year, see a cart at my guano store at Forthar filled with guano to be sent to Orkey, and I never ordered a cart to be loaded and sent to Orkey with guano at that time, or know that it was done.' When formerly examined, he deponed that he did not know what became of the guano, and that none of it was used by his orders, or with his knowledge. William Mackie, the foreman, who is said by M'Queen and Falconer to have ordered them to remove and use the guano, deponed, when examined at the first diet of proof—'I don't know what became of that stuff. I don't think it was at Forthar the last time I was there. I took no charge of it. I left Forthar at Martinmas last. I can't say when I last saw the said bags of manure. They were not in the shed at Martinmas last. I did not help to remove them from it, nor see them removed, nor tell any one to remove them. There were repairs made at the shed. I don't know that any of said manure was put on defender's land. The bags were all tied when I got them, and I did not loose them.'

"The Sheriff, after repeated consideration of the proof, is of opinion that the evidence of David Smith, John Pratt, James Pratt, William Mackie, and of the defender, negatives that of John M'Queen and Charles Falconer, and that the pursuers have failed to prove that their guano was used by the defender, or applied to his farms of Forthar and Orkey, or either of them."

Maclean & Hope appealed.

Gifford for them.

D. F. Gordon and Balfour in answer.

At advising—

Lord Justice-Clerk—The last time this case was before your Lordships the pursuers undertook to prove, what they had not previously attempted to establish, that the guano in question was used on the defender's farms with his knowledge. Your Lordships allowed them a proof in terms of their minute, and we have had an additional argument on that proof.

In considering its import and effect we must attend to the nature of the action. The summons libels a contract of sale of the guano in dispute at a specific price, with interest from the date of the contract. It is doubtful whether any other claim in regard to this transaction could have been maintained under the Debts Recovery Act.

Now it is perfectly certain that the guano did not come into the possession of the defender on the footing of a sale. It is admitted that it was sent to the defender by mistake, nitrate having been the article ordered. It is also certain that the guano was repudiated as soon as received, and that it remained in the defender's premises against his will. The pursuers took no steps to vindicate it for more than a year, during the whole of which time it remained their property and at their risk.

If Maclean & Hope had brought an action for restitution of their property, the defender would have been bound to restore or to have accounted in some reasonable way for his having ceased to possess. What his duty of custody might have been, or what counter claims he might have preferred, I need not enquire. But this is not an action for restitution, but on the allegation of a sale. Undoubtedly, although the contract was not one of sale originally, it might have become so by the defender adopting it and using the guano on that footing; although a case of that kind is presented unfavourably at such a distance of time. The question is, whether the pursuers have made out such a case?

I am not disposed to think with the Sheriff and the Sheriff-substitute, that the witnesses M'Queen and Falconer in the substance of their evidence are guilty of perversion of truth. I should in such a case attach much weight to the opinion of the Judge who heard the witnesses examined, but the impression left on my mind is, that although they may have exaggerated the details, the substance of their evidence is accurate. In the first place, it cannot be doubted that the guano was removed from the shed to the store. The defender himself says that the shed was repaired in the year 1868, and the guano must have been removed then, and this is corroborated by all the witnesses, although they differ as to the time of the year. In the next place, it is perfectly certain that none of the guano remained in the store when the pursuer's traveller was there in June or July 1868—for the defender himself said so. Pilfering to some small extent may have taken place, but certainly not to anything like the whole amount, and as no other suggestion is made to account for its disappearance, it must reasonably be presumed that it was used on the farms.

But, even assuming all this to be true, it does not come up to the case which the pursuers undertook to establish. There is no evidence that the defender himself was cognisant of the use which was made of the guano, and certainly none that he used it on the footing of adopting the sale. At the same time, the defender's conduct and evidence has been far from satisfactory. He was not bound to retain possession of the guano; he might after notice to Maclean & Hope have removed it from his premises, but he was certainly bound to know more about it than he has chosen to admit.

The judgment, therefore, which I should propose is, that we should adhere to the judgment of the Sheriff and the Sheriff-substitute, and dismiss the appeal, and find the defender entitled to expenses, but in the circumstances that we should modify them to one-half.

The other Judges concurred.

Agent for Appellants—P. S. Beveridge, S.S.C.

Agents for Respondent—Hill, Reid & Drummond, W.S.