LORD NEAVES—Generally, I concur in the opinion expressed by Lord Cowan. I am, however, for a proof, but without the words "before answer." I don't justify a proof before answer as to the competency.

In adhering to the interlocutor of the Lord Ordinary I should wish that these words were omitted; at least in so far as these words are concerned I do not adhere. The fault in this case is not on one side, but on both, and the question resolves itself into what that letter precisely meant. This document must be explained by the acts of the writer, and for the purpose of ascertaining what was the "Saturday evening," and what was "the lease" referred to, we must go to external evidence.

LORD JUSTICE-CLERK—I sympathise with Lord Benholme in the doubts which he has expressed, and I shall therefore notice one or two points in the case.

Macvean holds two promissory-notes, which are documents of debt, and are said to be discharged. Now, if the proposal is to prove that discharge by parole, that is utterly incompetent, and cannot be entertained for a moment. But I do not understand that the proposal goes that length, but merely to admit such evidence as is necessary to explain the written documents. That I think is quite competent, for there are many cases of this sort in which parole proof before answer has been allowed; for example, when there has been suspicion of fraud, or when the written evidence has required to be cleared up. This is a case of the latter sort, and I think that the proposed proof is competent.

But I object entirely to the words "before answer" being omitted. For if we omitted these words we would simply be allowing parole proof of discharge, which, as I have already said, is utterly incompetent. The words, "before answer," in this case, are simply to show that the parole proof is not admitted as proving discharge. The words are applicable to cases in which the competency of the proof, as well as to cases in which the relevancy of the action, is the question reserved.

In regard to the proof to be allowed, I think that evidence to supply omissions,—as, for example, the date of the letter dated "Saturday evening," and to show what the effect of the letters and other writings really is, is perfectly competent, and should be allowed.

I therefore agree with your Lordships that we should adhere to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Fraser. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defender—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, March 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEWART & SONS *v.* CURRIE.

Contract—Mora.

Circumstances in which *held*—(1) that the defender was not entitled under his contract to reject part of the goods consigned to him; (2) that he was in any view barred by *mora*.

This case came up on appeal from the interlocutor of the Sheriff-Principal (GLASSFORD BELL), dated 30th July 1872, and was at the instance of John Stewart & Sons, seedsmen, Dundee, against John Currie, nurseryman, Lanark, for £138, 12s., for gooseberry bushes and other plants supplied, conform to account from 30th October 1871 till 13th January 1872. The dispute in the case had reference to the goods not having been furnished by the pursuers according to order. The defender pleaded that (1) the sum sued for not being due, the action was premature; and (2) that the judicial referee having reported on the dispute, and the goods having been sold and the proceeds consigned, and the defender having offered to consign the balance admitted to be due by him in the process previous to the closing of the record, the action should be dismissed. Further (on the merits), that the bushes being disconform to order, and timeous notice of the same having been given to the pursuers, he was entitled to absolvitor. The Sheriff-Substitute (DYCE) sustained the preliminary pleas and dismissed the action, reserving to the defender all competent claims for loss and damage on account of alleged breach of contract. On appeal, the Sheriff-Depute (BELL) recalled this decision, repelled the whole of the defences, and decerned against the defender for the sum of £107, 10s. 10d. consigned by him in the hands of the Clerk of Court. The important finding in the interlocutor is as follows:—"Finds that, if the case required to be decided upon that allegation, it would be necessary to allow before answer some proof, as parties are not at one on the facts; but finds that there is no occasion to go into the inquiry, in respect that the defender is barred (1) by *mora*, and (2) by the manner in which he dealt with the plants from now insisting in his objection to them: Finds that it was not till two months after their delivery to said defender that he, for the first time, by his letter, No. 13/10, of date 30th December 1871, took any exception to them, and he did not then offer, in respect of the alleged inferiority of some, to return the whole, but only those that were challenged, or to keep them at half-price: Finds that it is no sufficient excuse for the delay in challenging that the party to whom the defender had sold the plants did not require to use them for two months, and did not discover their character sooner, the alleged defect not being latent, but discoverable at once on inspection by any person of skill; neither was the defender entitled to pick and choose, but was bound to reject the whole goods or none, whereas he has kept and used by far the larger quantity."

Authorities—*Barbridge & Co.* v. *Sturrock*, 10 S. 520; *Chapman* v. *Couston, Thomson, & Co.*, March 10, 1871, 8 Scot. Law Rep. 415, aff. 9 Scot. Law Rep. 664, 43 Jurist, 326, 9 Macph. 675; *M'Cormick*, June 5, 1869, 7 Macph. 854.

At advising—

LORD JUSTICE-CLERK—It appears to me that in this case the appellant has entirely lost his remedy. It is quite true that originally he ordered the goods supplied to be planted out, and his position might have been much better had the contract rested on the letter of 12th October. That letter is as follows:—

"10,000 Warringtons.
5,000 Whitesmiths.
5,000 Sulphurs.
1,000 Glenton Green.
5,000 Black currants.
200 Standard Victoria plums.

"The above is my order in the meantime. I would like them forward not later than the 23d current, as Mr Scott leaves for the winter, and would like to see the most of them planted before he leaves. Terms, cash within a month; and you must be as good to me as you can.

JOHN CURRIE.

"*P.S.*—Send me catalogue as soon as possible. I will want a great many tea-scented roses."

But this was not the position of matters, for on 30th October we have this other letter:—

"Enclosed is invoice of gooseberries sent per rail; we run short of Warringtons. To-morrow or next day we will send 1000 Whitesmiths, 2000 Warringtons, 1550 Glenton Green, which will make up the 21,000. Those sent are all named in bundles, except most of the bundles of Sulphurs, which are without name. The Ironmonger and Golden Lion we sent to make up, which you will like. The plants are fine 1, 2, and 3 years, as you agreed to when here.

JOHN STEWART & SONS."

Plants of 1, 2, and 3 years old are thus mentioned by the pursuers, and it is not until December 30th that any objections are made by Mr Currie, although there were frequent letters passing between them in the interval. After the reply of Messrs Stewart, refusing to take back the plants, there is nothing whatever said about returning them. Whether the plants were agreeable to contract or not, I do not think the pursuers were bound after so long an interval to take them back; the defender was barred by *mora*. On the whole, I am for sustaining the interlocutor of the Sheriff.

LORD COWAN—There are in the Sheriff's interlocutor two passages which I think quite sufficiently dispose of this case—(*His Lordship here quoted the passages in the interlocutor above referred to*). Mr Currie had agreed to take plants 1, 2, and 3 years old, and he consequently was bound to take plants assorted in this way. He says he is only bound to take those of three years old, but that is not so, and he may not, as the Sheriff says, "pick and choose"—taking the more valuable plants and sending back those of one year's growth only,—those which had a much smaller marketable value. On these grounds I concur in your Lordship's view.

LORDS BENHOLME and NEAVES concurred.

Counsel for Appellant—Millar, Q.C., and Reid. Agent—W. B. Glen, S.S.C.

Counsel for Respondents — Solicitor-General (Clark), Q.C., and Darling. Agents—Lindsay, Paterson, & Hall, W.S.

Saturday, March 8.

SECOND DIVISION.

PETITION—RUSSELL AND MANDATORY.

(*Ante*, p. 170.)

Petition—Custody of child.

A father and his mandatory, (he being in America) having petitioned the Court to order custody of his child to be given to his sister, prayer of the petition granted.

This was a petition presented by James Russell, and his mandatory Mr J. L. Lang, Writer, Glasgow. The petitioner is now in America, and he asked that the custody of his child, who has for some time back been living in family in Glasgow with the respondents—Mary and Annie Hill—should be given over to his sister, Mrs Elizabeth Russell or Morrison, who is also living in Glasgow. He stated that he left his child with his sister on his departure for America, and that he believed her to be perfectly qualified to undertake the child's guardianship, but that shortly after his departure the respondents took the child from his sister, on a false representation that they were authorised by him to do so. The Misses Hill, who were sisters of the petitioner's deceased wife, stated in answer that an arrangement was made in the hearing of the petitioner, before he went to America, that they should undertake the guardianship of their sister's child, and that they had accordingly kept and clothed it since his departure. For this expenditure no arrangement was made as to remuneration. They had become much attached to the child, and they alleged that the present petition was the result of ill-will which the petitioner conceived to the defenders from other circumstances, and not of a desire for the good or welfare of the child. In any circumstances, they urged that they were entitled to be repaid or have sufficient security for the repayment of the sums disbursed by them before delivering up the child.

At advising:—

LORD COWAN—I have no doubt whatever about this petition. It is an application by a father for the custody of his child, now six years of age. The father is entitled to use his own discretion and judge of the treatment of the child. Had the two ladies, the Misses Hill, come forward and stated grounds as to character, or circumstances in regard to the person to whom the child was to be entrusted, the case might have been altered, but we have here no allegation of any kind whatever against Mrs Morrison as not being a proper person to whom the custody should be given. Again, had the father been of generally dissolute habits, there might have occasion for the Court to interefere. It is not so however here, and the fact of Mr Russell being in America does not alter matters, he having duly entrusted Mr Lang with a mandate, and directed that his sister should have the custody.

LORD NEAVES—The father avers that the child is unjustly and cruelly detained from him, but he makes no charge of bad treatment by the aunts. The idea that the Law of Scotland deprives a man of his *patria potestas* because he goes abroad is quite untenable; nor will the Court in any way lend its aid to coerce the father.

LORDS JUSTICE-CLERK and BENHOLME concurred.

The Court unanimously granted the prayer of the petition.

Counsel for the Petitioner—Watson and J. L. Lang. Agents—Muir & Fleming, S.S.C.

Counsel for the Respondents—Fraser and Rhind. Agents—Drummond & Mackenzie, S.S.C.