

the teinds of these lands are therefore liable in stipend, and remit to the Clerk to rectify the locality in accordance with this interlocutor: Find the objector, the minister, liable in expenses to the respondents, the Magistrates and Council of the burgh of Rutherglen, and find him entitled to expenses against Wardrop's Trustees. *Quoad ultra*, in the question between the minister and John Pinkerton: Find no expenses due to or by either party: Allow accounts of these expenses now found due to be given in, and remit the same when lodged to the Auditor to tax the same and to report."

Counsel for the Minister—Gloag. Agent—George Burn, W.S.

Counsel for Wardrop's Trustees and Others—Balfour and Alison. Agents—W. & J. Cook, W.S.
Teind Clerk.

COURT OF SESSION.

Tuesday, December 15.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

BERTRAM & CO. v. STEWART'S TRUSTEES AND SCOTT.

Proof—Prescription, Triennial—Oath of Party—Reference—Competency.

In a question whether a prescribed account was resting owing, a reference was proposed to the oath of the party to whom the goods (wine and spirits supplied to a hotel-keeper) had been furnished, and to his manager. *Held* that the reference was incompetent.

This was an action as the instance of Messrs John H. Bertram & Co., wine merchants in Leith, against the Trustees of the deceased William Stewart, hotel-keeper, Edinburgh, and also against George Scott, hotel-keeper, Portobello. The summons concluded against all the defenders for payment of £8, 6s. 9d., and against Stewart's Trustees for payment of the further sum of £62, 4s. 3d.

The defender George Scott, and the deceased William Stewart for some time previously to the death of the latter, carried on business as hotel-keepers in the Crown Hotel, Edinburgh, under the firm of Scott & Stewart, of which they were sole partners. After the death of Stewart, Scott continued to carry on the said partnership concern for the joint behoof of himself and the other defenders, as trustees of Mr Stewart, until about the beginning of December 1869. At that date the co-partnership was formally dissolved; and thereafter, for a considerable time, the business of the hotel was carried on by Scott, as manager for the other defenders.

The pursuers averred that during the subsistence of the firm of Scott & Stewart they furnished to them porter and brandy to the amount of £8, 6s. 9d., being the sum first concluded for in the summons; and that, after the dissolution of the copartnership, on the order of Mr Scott, they furnished to the hotel, between 3d December 1869 and 5th March 1870, goods to the amount of £62,

4s. 3d., being the second amount concluded for in the summons.

The defenders pleaded, *inter alia*, prescription.

On 18th July 1874, the Lord Ordinary (GIFFORD) pronounced an interlocutor sustaining the plea of prescription.

The pursuers put in the following minute of reference to the oath of the defenders:—"TRAYNER, for the pursuers, referred and hereby refers the whole cause to the oath of the defenders, including the oath of the said George Scott as manager for the other defenders.—In respect whereof, &c.—JOHN A. BERTRAM & CO. JOHN TRAYNER."

The Lord Ordinary (CURRIEHILL) pronounced this interlocutor:—"4th December 1874.—The Lord Ordinary having heard parties' procurators on the Minute of Reference to the oaths of the defenders—Sustains the same, so far as made to the Trustees of the deceased William Stewart, and appoints them to appear and depone accordingly, and answer all pertinent interrogations: *Quoad ultra* refuses to sustain the reference, and grants leave to the pursuers to reclaim against this interlocutor."

The pursuers reclaimed.

Authorities cited—*Dickson v. Ross*, 9 S. 125; *Dickson on Evidence*, § 1573; *Hunter v. Dunn*, Hume, 584; *Cromer v. Duke of Gordon*, 20 Jan. 1830, 8 S. 353; *Mackay v. Ure*, 7 March 1849, 11 D. 972; *Smith v. Falconer*, 17 Feb. 1831, 9 S. 474; *Patterson v. Robertson*, 9 D. 226; *Ersk. iii.* 5, 9 ix. 2. 10; *Mein v. Towers*, 11 July 1829, 7 S. 902; *Ferrier v. Graham*, 10 Feb. 1831, 9 S. 419; *Borthwick*, 16 S. 1136; *Adam v. M'Lauchlan*, 9 D. 560; *Guthrie*, M. 12,485; *Gilmour*, M. 1242.

At advising—

LORD PRESIDENT—The account sued for in this case consists of two parts, the first part amounting to £8, 6s. 9d., which is for porter and brandy furnished to Scott and Stewart, hotel-keepers in the Crown Hotel, Edinburgh. In regard to that portion of the account, the defenders in the action are, first, Mr Scott, the surviving partner of the firm of Scott & Stewart, and secondly, the trustees of the other partner. In regard to the second portion of the account, amounting to £62, 4s. 3d., the defenders are the trustees of Mr Stewart, and that portion of the account is alleged to have been incurred by them. But it is said that during the currency of that account Scott was manager of the hotel.

It is pleaded that the accounts have undergone the triennial prescription, and, by interlocutor of 18th July 1874, Lord Gifford sustained this defence. The pursuer then put in a reference to oath in these terms—(reads *ut supra*).

The Lord Ordinary, by the interlocutor reclaimed against, sustained the reference "so far as made to the trustees of the deceased William Stewart." I do not think that that is a correct interlocutor, or that it can stand, for it sustains a reference which has not been made. The reference proposed is to the oath of the whole defenders, and a reference to the oath of the defenders, excluding Mr Scott, is a different matter, and till such a reference is made we cannot sustain it.

We must keep in view the precise terms of the statute of 1679. All actions must be pursued within three years, "otherwise the creditor shall have no action, except he either prove by writ or by oath of his party."

The question is, whether a reference to the oath, not of the creditor, but of the manager, is competent. In answering this question we must be guided by the precise and peremptory provisions of the statute. It says that reference may be made to the oath of the party, and to no one else. So we cannot sustain the reference in the terms here proposed.

LORD DEAS—I concur that the reference to the oath of the party alone is competent, and that we cannot sustain a reference to the oath of the manager. It does not, however, follow that when the question arises upon the oath in reference, the matter is still confined to the oath of parties. Other evidence may be let in to explain the oath. This judgment only goes to negative the reference.

LORDS ARDMILLAN and MURE concurred.

The pursuers put in a Minute of Reference to the oath of the defenders, excluding the oath of the said John Scott.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming-note for the pursuers John A. Bertram & Company against Lord Curriehill's interlocutor, dated 4th December 1874, Recal the said interlocutor; sustain the reference contained in the minute No. 10 of process; find the defenders entitled to expenses since the date of the said interlocutor reclaimed against; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Pursuer—Trayner. Agent—Patrick S. Beveridge, S.S.C.

Counsel for Defenders—Dean of Faculty (Clark) and Rhind. Agents—Ferguson & Junner, W.S.

Thursday, December 17.

SECOND DIVISION.

[Lord Mure, Ordinary.]

PETRIE v. FORSYTH.

Contract—Sale—Offer—Acceptance.

Terms of letters of offer and acceptance held to amount to unconditional sale.

Contract—Sale—Prior Purchaser—Bona fides.

Held that where it was within the knowledge of the second purchaser that prior negotiations had been entered into with a view to a sale, he was bound to make enquiry before concluding his purchase, and that not having done so, he must be deemed to be in *mala fide*.

Observations (*per curiam*) that without defining absolutely what would be requisite to set aside the second sale, there must at all events be adequate knowledge on the part of the second purchaser and failure on his part to put himself into communication with the first purchaser, and generally that his position must be such as to forbid his disregarding rights acquired under the first sale.

The pursuer was the nephew of the defender Euphemia Forsyth. Miss Forsyth was 86 years of

age, and resided till the month of December 1872 in New Elgin, being attended to by the pursuer, his wife, and family.

On 28th August 1872 Miss Forsyth executed in favour of the pursuer a deed of gift in the following terms—“This is to certify that all and whole the property in New Elgin, which I purchased from George Petrie, presently residing there, and now belonging to me, shall at my death belong to William Petrie, my nephew, and son of the said George Petrie; and if I shall sell or dispose of the said property during my lifetime, I shall be liable in payment to the said William Petrie of the sum of eighty pounds sterling (£80), immediately thereafter, as the price payable to him thereof. I grant this in payment of services bestowed upon me by him, his wife, and family; and I also convey to him the part of the house he now occupies free of rent and taxes during my lifetime.”

The pursuer, in the belief that this deed was a good conveyance, or obligation to convey, and occupation of debt, continued in the possession and occupation of that part of the subjects of which he was to enjoy the liferent from the date of the said deed till 4th February 1873, when he received from Mr Robert Young, solicitor, Elgin, Miss Forsyth's law-agent, a letter making inquiry what claim he had to the subjects. To this letter the pursuer made no reply, but he forwarded it along with the deed of gift to the defender Stewart, who had written the above deed of gift, and had subsequently removed to Edinburgh, and who employed Mr David Lister Shand, W.S., Edinburgh, to act in the matter for the pursuer.

Mr Young, shortly after the date of the said letter, advertised the whole of the subjects for sale, whereupon Mr Shand wrote a letter, dated 5th March 1873, informing him of the existence of said deed, and stating the claims the pursuer had to the subjects, and requesting him in selling the property to keep these claims in view; and particularly, to reserve the pursuer's liferent of the portion of the house occupied by him. Some correspondence passed between Mr Shand and Messrs Grigor & Young as to the nature and legal import and effect of the deed of gift; and in order to avoid all disputes, the pursuer proposed that he should purchase the subjects from the defender Miss Forsyth; and certain letters or missives thereafter passed between Mr Shand and Messrs Grigor & Young, whereby the subjects were purchased by the pursuer at the price of £55, payable when the disposition thereof should be delivered to the pursuer, and the term of entry to be Whitsunday 1873.

After several letters had passed between the parties, Mr Shand wrote Messrs Grigor & Young, on 6th May 1873, offering to purchase the subjects at the price of £40, and to discharge his claims against Miss Forsyth, she giving a complete title to the subjects and the expense of the disposition, including the stamp duty, and revising fee being borne mutually. To this letter Messrs Grigor & Young replied on 16th May 1873, with copy letter from Miss Forsyth to them, dated 14th May 1873, declining to take £40 for the subjects, and offering to sell for £60, “the expense of the disposition to be borne mutually, and the cash to be paid immediately on the deed being executed.” To this letter Mr Shand, on behalf of the pursuer, replied on 19th May 1873, “The sum which your client asks appears large, but to me: her views my client