the 8th and 9th of Victoria is quite a novelty. It was well known in Scotland long before then, and indeed had grown up with the whole system of our poor-law. It would have been strange had it been otherwise. For when the impotent poor are to be maintained, it is as necessary to provide them with a house to live in as with food and clothing. As regards the question of expediency, whether in a good many cases the poorhouse test should not be applied, we are not entitled to express an opinion. The question before us is not one of propriety of administration, but of pure law—Is any one of the legal poor entitled to refuse to go to the poorhouse and insist for out-door relief? And to that question I have no hesitation in giving the answer, that it is in all cases a legal tender of relief to offer admission to the poorhouse. I think the case of Mackay is strictly in point. It is true that what I now say was not formally decided in that case, but it was assumed throughout the opinions of the Judges.

It has been said that the workhouse was intended, under the provisions of 8 and 9 Vict., only for a certain class of poor persons. That is to me quite a new proposition. What class of poor would be entitled to relief and not fall within the description of the class in the 60th section, I am at a loss to know. Who are the poor who are not "friendless, impotent poor?" None are entitled to relief who are not "impotent" in the sense of being unable to support themselves, and "friendless" in the sense of having no friends able and willing to support them.

On the whole, I agree with the view of the case taken by the Sheriff.

Lord COWAN—Whether the offer to receive the applicant into the poorhouse was a legal tender of relief is one question, and whether the relief offered was adequate and suitable, is another and totally different question. The first is for this Court to decide, but as regards the second, the remedy is an application to the Board of Supervision. On the question of legality in this case, I have do doubt. The specialty founded on is that the applicant is a married man. Now, that may be very important in the question of propriety of offering the poorhouse, but it is of no moment in the question of legality. For once it is held that the offer of the poorhouse is a legal tender of relief, the fact of the applicant being married or unmarried is quite immaterial.

Another objection has been stated—viz., that the poorhouse, admission to which was offered, was a combination poorhouse, and that the building was outwith the parish to which the pauper belonged. But that is no answer to the offer, for the statute authorises parishes to combine and erect a common poorhouse, which, once erected, must be dealt with exactly on the same footing as if it were actually situated within each of the parishes to which the paupers sent to it belong.

Lord BENHOLME—I concur, and wish only to add, that in the case of Watson, the poorhouse offered to the applicant was not a union poorhouse to which the parish of the applicant's settlement belonged, but the applicant was there sent to a foreign union under an arrangement which had received the sanction of the Board of Supervision. It was this specialty which alone created the difficulty in that case. I agree with the opinions of the Judges who decided it, which are very strong. Here the pauper is offered admission to a union poorhouse to which his parish belongs, which is assumed as a clear case in Watson. The present case is one of no doubt.

Lord NEAVES—The description of "aged and other friendless impotent poor" just means all sorts of poor. "Impotent" means impotent so that they cannot maintain themselves, and friendless means that there are no other persons willing and able to support them. "Friendless" cannot mean that there is no one to look after them, although unable to maintain them, for that construction is negatived by the case of Watson. Both according to the spirit of the law and the terms of the 60th section, I think the case is clear.

Agent for Advocator—J. D. Bruce, S.S.C.

Agents for Respondent—Mackenzie, Innes, & Logan, W.S.

Tuesday, Jan. 22.

SECOND DIVISION.

BELL *v.* SIMPSONS.

Reparation—Relevancy. An action of damages at the instance of one mineral lessee against another, on the ground of encroachment on coal seams, held relevant, although the pursuer had renounced his lease.

In this case, which is an action of damages at the instance of Robert Bell, coalmaster at Wishaw, against the defenders, who were tenants of Mr Houldsworth, of Coltness, on the ground of encroachment on two coal seams which the pursuer leased from Lord Belhaven, the Court to-day, affirming a judgment of Lord Barcaple, held the action relevant. It was alleged by the defenders that the pursuer had executed a renunciation of his lease, and it was contended that he had no interest to maintain the action; but the Court held that a renunciation of the lease did not imply renunciation of claims of damages arising during the subsistence of the lease. The Lord Justice-Clerk took occasion to observe, in answer to an argument maintained for the defenders, that, according to the law of Scotland, a person had a right of action wherever he alleged a legal wrong, and that he, in consequence of said wrong, had sustained damage. The amount of damages to which he might be found entitled did not in any way affect the relevancy of the action.

Counsel for Pursuer—Mr Young and Mr Gifford. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders—Mr Thomson. Agent—Alexander Morison, S.S.C.

Wednesday, Jan. 23.

FIRST DIVISION.

SHEPHERD AND CO. *v.* BARTHOLOMEW AND CO.

Proof—Bill—Writ or Oath—Pro ut de jure. Circumstances which, being disclosed by the pursuers on record, held sufficient to entitle the defenders to a proof *pro ut de jure*, that bills sued for had been superseded and extinguished.

The question raised in this case was whether averments by the defenders, that certain bills accepted by them and now sued for by the pursuers, had been superseded and extinguished by other bills, subsequently accepted by them, were proveable *pro ut de jure*, or only by writ or oath of the pursuers.

The pursuers are merchants in Manchester, and in December 1864 they sold to Mr R. O. Cogan, cotton to the extent of £18,362, 10s. 9d. Of this

sum there was paid in cash at the time £4250, leaving a balance of £14,112, 10s. 9d. Mr Cogan was a partner of the two Glasgow houses of John Bartholomew & Co. and John and Robert Cogan, and was in the habit of making purchases of cotton for both; bills for the price being drawn upon the two firms in certain proportions. Accordingly, bills were drawn for the said sum of £14,112, 10s. 9d., to the extent of £8000 odds on Bartholomew & Co., and £5000 odds on Cogans. These bills were all accepted, and fell due in March and April 1865, but were not then retired. After some correspondence the pursuers drew fresh bills for the price of the cotton, the proportions this time being different—viz., Bartholomew & Co. accepted one bill for £4173, 14s. 11d., and Cogans several bills, amounting together to £9993, 9s. 6d. The old bills were, however, retained by the pursuers on the footing, as they said, of giving them an additional security for the payment of the original debt. The defenders, on the other hand, maintained that the old bills were cancelled and superseded by the new ones, and that the uniform practice betwixt the parties was not to give up the old or superseded bills "till the account or transactions were finally closed," there being the utmost confidence betwixt them.

In April 1865 the Bartholomews and the Cogans both stopped payments. The former settled with their creditors for a composition of 13s. in the pound, and the latter for one of 6s. 8d. The pursuers have received payment of these dividends, and they now sue for payment of two of the old bills accepted by the defenders, whose averments, they plead, can only be proved by writ or oath.

The Lord Ordinary (Jerviswoode) held that the parties were entitled to a proof *pro ut de jure* of their respective averments, and he appointed the proof to take place before himself. He added the following

"*Note.*—The Lord Ordinary has considered the record in this case and the debate which took place before him, in relation mainly to the proof which may be here competent, with a view to the ascertainment of the character of the claims of the pursuers under the bills on which the conclusions of the summons are rested.

"The Lord Ordinary adopts fully the statement of Lord Neaves, in his Lordship's note in the case of York v. Gossman, July 5, 1861, to the effect that 'the general rule is clear that an accepted bill must be presumed to have been granted, and to be held for value; and the further rule that this presumption can only be redargued by writ or oath is all but inflexible.'

"The rule, however, is not altogether absolute, as the judgment of the Court affirming that of the Lord Ordinary in the case of York just referred to, and the previous case of Burns *v.* Burns, July 20, 1841, 3 D. 1273, suffice to prove. And if this be so, it humbly appears to the Lord Ordinary that the case with which he has now to deal is one within the exception from, rather than under, the general rule. He draws this conclusion from a consideration of the nature, so far as at present disclosed, of the apparently complicated transactions between the parties in relation to which the bills sued on were drawn and accepted. Whether or not the Lord Ordinary is right in appointing the proof, which he has allowed to proceed before himself, under the recent statute, is a matter of minor consideration, compared with that of the question of the competency of the inquiry otherwise than by writ or by reference to oath."

The pursuers reclaimed.

SOLICITOR-GENERAL and LANCASTER argued (1)—What was intended to be pleaded by the defenders was novation, but such a case was not relevantly averred; (2) even if it were, it can only be proved by writ or oath.

YOUNG and GIFFORD supported the Lord Ordinary's judgment.

At advising,

The LORD PRESIDENT—This case is somewhat peculiar. The course and nature of the transactions between the parties is stated pretty fully on the record. The pursuers had been in the habit of furnishing cotton to Messrs Cogan, and invoicing it to them; and Messrs Bartholomew were in point of form purchasers from the Cogans. It appears that bills were in use to be granted for the price of the cotton, and that these were accepted both by the Bartholomews and by the Cogans. It does not appear that there was any fixed proportion in regard to the amounts for which the two firms respectively accepted bills. Indeed there is a statement by the pursuers that this matter was left very much to their discretion, and the pursuers did not know how much of the cotton each firm got. This last transaction was for about £14,000. It appears it was first settled for by three bills accepted by Bartholomews, and two accepted by Cogans—the former amounting to about £9000, and the latter to about £5000. These fell due and were not paid. Fresh bills were then drawn by the pursuers, one on Bartholomews for £4000 odds, and other two on Cogans for nearly £10,000. In this way there was transferred to the Cogans the larger amount of the debt, and the smaller was laid on the Bartholomews. I don't know under what arrangement that was done, but so it was, and the original bills remained in the possession of the pursuers. In the meantime both Cogans and Bartholomews stopped payment. The pursuers ranked as creditors and received payment of dividends, reserving, as they say, their right to claim on the old bills. They then raise the present action, in which they state that the two bills sued for had been granted, and conclude for "payment of £4085, 1s. 9d., being the price of cotton bought by the defenders from the pursuers, and for which two bills were drawn by the pursuers upon and accepted by the defenders," &c. They do not conclude for payment of the sum under deduction of any dividend they had received from Cogans although it appears that they had received such dividends. That shows, in the first place, that this is not simply and purely an action for payment of two bills, because it is an action for the price of goods for which no doubt bills were granted; and the statements of the pursuers themselves showed that part of the price of the cotton so sued for had been extinguished by payment of the dividends received by them. The practical aim of the action, however, is to receive full payment after deducting the dividends received. That itself implied some inquiry into the proceedings that had taken place and the transactions between the parties. I think, in order to get at the whole matter, it is competent to allow a proof before answer as to the transactions of the parties and as to the footing on which the old bills remained in the possession of the pursuers. I think these are important matters to have before us in considering the question of law raised, and as it will still be possible for us, after the proof before answer is led, to hold that the rule of law contended for by the pursuers is applicable to the circumstances of this case, I think the proof should be allowed to go on.

Lord CURRIEHILL—The principles of law in.

volved in this question are of the very greatest importance. If there had been a charge given on these bills and this were a suspension of it, or if this action had been laid on the bills alone, or if the pursuers had made no admissions in regard to the defenders' statements, I am very clear that the rule of law as to writ or oath would apply, and I would enforce it, however suspicious I might be of the pursuers' case. The rule, however, does not apply under all circumstances. In the case of Burns it was held not to apply. One judge in that case said that he so held, because, if the man's oath were taken to-morrow, he would not believe one word he said. I do not consider that a sound principle. But I concur with the principle laid down by Lord Fullerton in that case—"that where a pursuer does not and cannot rest entirely on the general presumption that value was paid in cash, but states value to have been given in a particular way, the truth of these statements may competently be tested by their extrinsic consistency with each other on the admitted facts of the case." In the present action the pursuers begin by stating what the value consisted of. Indeed, it is an action for the price of goods sold and delivered, but I only consider this important on account of its being a judicial statement by the pursuers themselves of the value given. But then, in their condescendence they go farther, and state that the goods were furnished on the order of a different party from the defenders, and also delivered to that different party. The pursuers' own statements, therefore, put the case in an unusual position, calling for inquiry. There was no question here as to the constitution of the debt; the only question was as to its subsistence. The defenders say that the pursuers' statement is, that after the bills became due they accepted bills by other parties, these being the parties to whom the goods were sold and delivered, and that the second set was in lieu of their bills and superseded them. The pursuers reply that the statement they have made has this qualification, that the old bills were retained as an additional security. Now, that qualification may be disproved by any kind of evidence. I think that is the position in which this case stands. The question to be inquired into is—On what footing were the bills retained? I think the *onus* is on the defenders. I also agree with your Lordship that the fact that this action is for payment of the full sum, not giving credit for the large dividends obtained, is of itself a good reason for adhering to this interlocutor.

Lord DEAS—There is one thing as to which I have no doubt—namely, that although this summons sets forth that it is for payment of the price of goods as contained in certain bills, that does not exclude the pursuers from standing on the law of evidence applicable to bills of exchange. I think that was the right way of libelling, and indeed the only safe way, because it might turn out that the bills were not good, were not properly stamped, or were prescribed. It is a different matter altogether when you come to the pursuers' detailed statements. I think a pursuer may by his statements exclude himself from pleading the strict rules of evidence. I don't think it expedient at present to direct the attention of the parties to the vital points of this case. This proof is allowed before answer, and I see no incompetency in that; it is a matter of propriety and discretion. I think this may very probably turn out to be a case in which the parties don't really dispute about facts so as to raise this point of law. It may also turn out that this is not the right action to attain the object which the pursuers have in view. But I concur, as the proof is before answer.

Lord ARDMILLAN also concurred, observing that the pursuers had stated enough in their own case to show that this was not a question of negativing value, but one where the case was so opened as to make it safe and just that there should be a proof before answer.

Adhere, with expenses.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agents for Defenders—Maconochie & Hare, W.S.

Wednesday, Jan. 23.

OUTER HOUSE.

(Before Lord Ormidale.)

M'CULLOCH BROTHERS AND BANNERMAN *v.* GRIEVE AND OTHERS.

Shipping—Overload—Deck Cargo—Culpa—Perils of the Sea. Circumstances in which held that, by the overload of a vessel and taking a deck cargo, a cargo of wheat had been materially damaged, and owner found liable to the shipper in respect he was in fault, and had not proved his defence of "perils of the sea" to the extent of excluding liability.

The pursuers in this action are M'Culloch Brothers, merchants in Montreal, and David Bannerman, corn factor in Glasgow, their mandatory; and the defenders are the registered owners of the ship or vessel called the Sir John Moore, of Glasgow. The summons concludes for £1286, 8s. 5d., which the pursuers say is the amount of damage done to a cargo of wheat which they shipped at Montreal in that vessel in the month of August 1864, which damage was caused by the overloading of the vessel and her carrying a deck cargo. A long trial took place before Lord Ormidale lately, and from the facts then disclosed in evidence, it appeared that the Sir John Moore, having taken a cargo of wheat at Montreal in August 1864, proceeded to Quebec, where she filled up with deals in her 'tween decks, and over and above that load took a deck cargo of deals. She left Quebec on the 29th of August. In the course of the voyage the vessel experienced unusually tempestuous weather, her quarter-galleries being carried away, and much water being made. On arrival of the vessel in Liverpool, in the end of September, it was found that out of a cargo of 19,000 bushels of wheat, 17,000 had been more or less damaged. The pursuers then brought this action against the owners of the ship, alleging that the damage had been caused by the overload of the ship and the deck cargo, which caused the ship to strain, thereby opening up the seams and covering ways, hull, and topsides, by which the water got into the hold and injured the wheat. They also said that the deals, which were put in at Quebec in the between decks, were saturated by rain, and that the planking of this deck had been left defective, which enabled the wetness from the deals to get access to the wheat. In defence the defenders pleaded the act of God and the perils of the sea. They said that their vessel was not overloaded; that a deck cargo was not an unusual, and was quite a lawful thing; and that all the damage had been caused by the stormy weather which the ship encountered on her voyage across the Atlantic. In the course of the proof, which