the condescendence that the mare was at and prior to the date of sale disconform to warranty, as she was labouring under a severe cold, and was not a good feeder, and that the defender knew this. Now, there is not a word of evidence in support of this allegation that the mare was a bad feeder while she was in the defender's stables. She had only been in his possession four or five days when the pursuer purchased her, and there is an entire want of evidence that during that time she did not feed well, while there are several witnesses who speak to her being fresh and quite up to her work while she was in the defender's possession.

There is a good deal of evidence about the mare having been clipped by the defender after she came into his hands upon the 29th of December 1883, but it does not appear to me that the cold which subsequently showed itself can be attributed to this clipping, or that she was in any way the worse of it. One circumstance, however, is quite clear, and that is, that she began to cough upon the evening of the Saturday on which she was removed to the pursuer's stables, and that she continued to cough down to the date of her death upon the 17th January.

Now, a mere cough is not, according to the authorities, unsoundness, yet a cough may entitle a purchaser to return a horse if it should render the animal unfit for use. There are numerous authorities cited by Youatt in his treatise on "The Horse" in support of the doctrine that a purchaser would in such circumstances be entitled to return the horse, or to put it into neutral custody.

It could not be said that during the time this mare was in the pursuer's stables she was fit for use, and the defender could not reasonably have refused to take her back had she been returned to him. That was not the course which the pursuer followed; he continued to treat her himself, and it was not until shortly before the death that a veterinary surgeon was called in; and accordingly the question comes to be, whether in these circumstances he can now recover the price of the mare from the defender?

But not only did the pursuer not return the mare to the defender when he found her suffering from cold and unfit for work, but he proceeded to deal with her as his own property, and had her tail docked by his servant Young. Looking to the condition in which, according to the pursuer, the mare was at this time, his treatment of her in docking her tail was rash, I might almost say foolish. He, no doubt, tries to make out that docking is a simple matter, but one of his own witnesses, Brock, the veterinary surgeon, says that occasionally lockjaw sets in after the operation, and Pollock, one of the witnesses for the defender, considered the docking most injudicious, looking to the condition of the animal at the time.

Upon the whole matter, and looking to the actings of the pursuer, I think that the Sheriffs have taken the proper view of this case, and that the pursuer is not entitled to recover the price of the mare from the defender.

I am therefore for affirming the interlocutor appealed against.

The LORD PRESIDENT, LORD MURE, and LORD ADAM concurred.

The Court found that the pursuer had failed to prove any breach of warranty, therefore refused the appeal.

Counsel for Pursuer—Guthrie Smith—Lang. Agents—John Gill, S.S.C.

Counsel for Defender—Mackintosh—Murray. Agent—J. Stewart Gellatly, S.S.C.

Friday, March 13.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

BRITISH LINEN COMPANY *v.* HAY & ROBERTSON AND BROWN (G. W. RAINEY, KNOX, & COMPANY'S TRUSTEE).

Bill—Assignation—Acceptance Payable at Bank—Bankers' Lien—Specific Appropriation.

Where the customer of a bank accepts a bill as payable at the bank, such acceptance is a mandate to the banker to pay it out of the funds at the customer's credit, and the presentation of the bill constitutes intimation of the assignation.

A trader accepted a bill for valuable consideration, payable at the bank where he had his account, and before it came due advised the bank of fact. He had funds more than sufficient to meet the bill when the holder presented it, but the banker refused to pay it because of the liability of the customer to him in respect of other bills not matured. Thereafter the customer became insolvent and executed a trust for creditors. In a question between the trustee, who claimed the proceeds of the bill on behalf of the general creditors, and the holder of the bill, *held* that the acceptance payable at the bank, and the subsequent presentation, operated an intimated assignation, and that the holder of the bill was therefore entitled to its contents.

Messrs G. W. Rainey, Knox, & Company, linen manufacturers, Glasgow, of which firm G. W. Rainey was sole partner, had in the beginning of May 1884 an account-current with the British Linen Company at Glasgow.

On 3d May 1884 there was at the credit of the account £519, 0s. 7d. On that day the bank received from G. W. Rainey, Knox, & Company a memorandum (according to the usual custom of the firm when their trade bills payable at the bank were about to fall due) as follows— "Please debit our account with undernoted acceptances due at your office—5th, John Boath jun. & Co., £345, 12s. 4d.; 7th, Hay & Robertson, £186, 3s. 0d."

The latter of these bills had been drawn by Hay & Robertson on G. W. Rainey, Knox, & Company on 4th March 1884, accepted by them payable to the British Linen Company's office in Glasgow, and was payable on 7th May.

On 6th May the former bill (Boath jun. & Co.) was presented at and paid by the bank. On the same day G. W. Rainey, Knox, & Company, by an ordinary "paid-in slip," paid in to the credit of their account at the bank £321, leaving a balance at their credit on that day of £494, 8s. 3d.

On the forenoon of 7th May the bank-agent came to know that G. W. Rainey, Knox, & Company were in difficulties, and were probably about to suspend payment. At that time G. W. Rainey, Knox, & Company were liable to the bank as last indorsers of bills which the bank had discounted to the amount of £2575, 12s. 4d. The agent decided to stop their account, and retain the balance of £494, 8s. 3d. which was at the credit of the account until the last of these bills should mature and be met. He therefore stopped further operations on the account. Accordingly when later in the same day the bill for £186, 3s., payable to Hay & Robertson, was presented, the bank refused payment of it, and returned it to the Commercial Bank, through which it had been presented.

On 24th May 1884 G. W. Rainey, the sole partner of G. W. Rainey, Knox, & Company, granted a trust-deed for behoof of his creditors in favour of William Brown, C.A.

On 16th June 1884 Hay & Robertson brought an action against the bank for £186, 3s., in respect that funds to that extent had been specifically appropriated in the hands of the bank for payment of the said bill at and prior to the date of presentment, and, *separatim*, that funds to that extent had been validly assigned to them by presentment of the bill in terms of the acceptance. The bank lodged defences to that action, pleading, *inter alia*, that as bankers they had a lien over the funds of the said G. W. Rainey, Knox, & Company, who on or before the 7th of May 1884 were insolvent, and had subsequently granted a trust-deed for behoof of creditors, and were entitled to retain the balance at the credit of that firm's account-current until the said bills (the last of which was to mature on 4th October 1884) discounted by them had matured and been paid, and that there having been no specific appropriation of funds in their hands, or at least none such as they were bound to recognise in a question with themselves, they were entitled to be assoilzied. They explained that any question as to the effect of presentation of the bill as a transfer of the funds of G. W. Rainey, Knox, & Company in their hands was one between that firm's trustee and Hay & Robertson. The record in the action was closed on 19th July 1884, and the case sent to Procedure Roll.

Thereafter the bills on which G. W. Rainey, Knox, & Company were liable as last indorsers were all duly met.

This was a multiplepoinding raised by the bank against Brown, as trustee for the creditors of G. W. Rainey, Knox, & Company, and Hay & Robertson, to have it determined that the bank were only liable in once and single payment of £494, 8s. 3d. standing at the credit of G. W. Rainey, Knox, & Company in their account-current as at 7th May 1884.

Brown claimed, as trustee for the whole creditors of G. W. Rainey, Knox, & Company, the whole fund *in medio* as part of the firm's assets, for distribution among the body of their creditors, on the following grounds—"(1) There was no specific appropriation of the funds *in medio*, or any part thereof, in the hands of the pursuers and real raisers to meet Messrs Hay & Robertson's draft upon G. W. Rainey, Knox, & Company for £186, 3s. (2) The bill for £186, 3s., drawn by Hay & Robertson, not being drawn upon the pursuers and real raisers, did not on presentation to them operate an assignation of the fund *in medio*, or any part thereof, in favour of the holders of said bill. (3) The debit slip addressed by G. W. Rainey, Knox, & Company to the pursuers and real raisers on 3d May 1884 did not operate as an assignation in favour of the holders of the bills therein mentioned of the fund *in medio*, or any part thereof."

Hay & Robertson claimed the fund to the extent of £186, 3s., with interest from 7th May 1884. Their condescendence in the action against the bank was held as their claim. Their grounds of claim as there stated were—(1) that the bank held funds to the amount of the bill, which were specially appropriated thereto at and prior to the date of presentment; (2) that funds to the amount of the bill having been specially paid to and held by the bank for their (the claimants') behoof at and prior to the maturity of the bill, the bank were barred from setting up any lien or retention over the said funds, and were bound to pay them to the claimants; and (3), *separatim*, that the funds held by the bank to the amount of the bill having been validly assigned to them they were entitled to payment thereof.

The Lord Ordinary (KINNEAR) ranked and preferred Hay & Robertson on the fund *in medio* to the extent of £186, 3s., with interest according to their claim, and found the trustee (Brown) liable to them in expenses.

"*Opinion.*—There is no specific appropriation in this case which can exclude the banker's lien. That is a right which cannot be excluded except by agreement, express or implied, with the banker, and there is nothing in the circumstances from which such an agreement can be inferred. It may undoubtedly be inferred from the acceptance of money or securities which are put into the banker's hands with an intimation that they are destined to some special purpose inconsistent with his right to retain. But there was no such intimation with reference to the moneys which were paid in from time to time to the account in question. It is true that a sum of £321 was paid in and placed to the credit of the account on the 6th of May after the bank had had notice that an acceptance for £186 would be due on the 7th. But it was paid in generally to the credit of the account, and with no intimation that any portion of it was specially appropriated to meet the acceptance.

"But I do not think it necessary for the success of Messrs Hay & Robertson's claim to show that the money was specifically appropriated as between the bank and their customers, Messrs Rainey, Knox, & Company. The claimants held an acceptance of Rainey, Knox, & Company for value, which was marked payable at the office of the British Linen Company in Glasgow. The bill was payable on the 7th of May, and on the 3d the acceptors had transmitted to the bank a memorandum, according to what is stated to have been their usual custom when trade bills payable at the bank were about to fall due, in these terms, 'Please debit our account with undernoted acceptances due at your office,' one of the acceptances so noted being that to Messrs Hay & Robertson, due on the 7th. I think it clear that in these circumstances, the bank having sufficient assets of the acceptor in their hands, and having received no countermand, were just as much

bound to honour the acceptance as they would have been bound to honour a cheque drawn by the acceptors on the same account. I believe it to be in accordance with the custom of bankers both in Scotland and England to honour acceptances in such circumstances (and I should be disposed to hold that it was their duty to do so) even without special directions as to each particular bill, because the meaning of marking a bill as payable at a certain bank is perfectly well known. It is an intimation to the payee that the acceptor has funds at the office in question, and an authority to the bank to pay. It was so held in *Kymer* v. *Lawrie*, 18 L.J., Q.B. 218, and English decisions upon such a question, although they may not be technically binding, are of the highest authority. But it is unnecessary to determine what the duty of the bank might have been in the absence of specific direction, because it is stated by the bank, and their statement is adopted by the competing claimant, that they were specially advised by the acceptor that the bill would fall due at their office in Glasgow, and that this was in accordance with the usual course of dealing between them and their customer when trade bills payable at their office were about to fall due.

"It follows that the acceptance, in the terms in which it was conceived, was a mandate, and being for value, an irrevocable mandate, to the bank to pay, or, in other words, it was an assignation duly intimated by presentation of the bill for payment.

"The bank declined to pay when the bill was presented in the exercise of their right to retain in security of bills which they had discounted, and upon which the acceptors were liable as last indorsers, and for the present purpose it may be assumed that they were entitled to retain upon that ground. It is not necessary to determine absolutely that they were so entitled, for that question may depend upon circumstances, and it does not arise for decision in this competition. But assuming that they were right, the result was that the bills for which they retained were duly met, and they have still assets of Rainey, Knox, & Company available to meet the acceptance.

"In these circumstances the competition arises between Hay & Robertson and the other claimant Mr Brown, who founds upon a trust-deed in his favour for behoof of creditors executed on the 24th of May. Messrs Hay & Robertson are not parties to the trust, and it is not suggested that the acceptance is challengeable as an illegal preference. It follows that if the acceptance operated as an assignation Hay & Robertson must be preferred.

"I have already indicated my opinion on that question, and I may add that the ground in law upon which a bill operates as an assignation of the funds of the drawer in the hands of the drawee appears to me to be equally applicable to such a case as the present. The true ground is explained by Lord Rutherfurd in the case of *Watt* v. *Pinkie*, 16 D. 279, where it was held that bills which were not properly drawn or duly negotiated so as to justify diligence were still good as assignations, and preferable to subsequent arrestments. Lord Rutherfurd says—'The bill passes the fund, because it is an irrevocable order or mandate to pay, addressed to parties who have a fund of the drawer in hand, and if they had such a fund when the document was presented to them it operates as an assignment, for they hold the fund no longer for the drawer, but they hold it for the payee alone;' and his Lordship goes on to point out that 'where, in England, a bill cannot be sued on as a bill of exchange, yet when intimated it operates as an assignment of the fund, and that stands on a clear principle, because, being for value, it is an irrevocable mandate, and the party holding the fund stands in the position of trustee for the party in whose favour that mandate is addressed.' In such a case as the present the mandate is in a different form, but it is just as clear in effect, and as obligatory, as if it had been in the form of a draft.

"I am aware of the case of *M'Leod* v. *Crichton*, M. 16,469, where the Court would appear to have held that a banker has no authority to honour an acceptance payable at his bank. I do not think this is in accordance with the law, or with the custom of bankers as now understood. But the present case is distinguishable, inasmuch as the bank had received a specific direction to pay, and it is not in my opinion doubtful that, subject to their right to retain, they were bound to comply with that direction."

Brown reclaimed, and argued—There was no specific appropriation to exclude the banker's view, and the Lord Ordinary had mistaken the effect of such a document as the one in question. He had applied the law applicable to a bill of exchange to what was not one—*De Bergareche* v. *Pillia*, April 18, 1826, 3 Brougham's Rep. 476. The acceptance had not even the effect of an authority to pay, and at most it merely fixed the place of presentment, and was subject to the death of the party, and revocable to the date of execution. The Lord Ordinary's view of what was decided in *Kymer* v. *Lawrie and Others*, May 3, 1849, 18 L.J., Q.B. 218, was only an inference from the decision It was not the point decided. Where a bill is accepted payable at a banker's, though money have been remitted by the acceptor to the banker for the express purpose of fixing the bill, the banker is not liable to the holder in an action for money had and received, unless he have assented to hold the money for the purpose for which it was remitted—Byles on Bills, 13th ed., p. 183. The bank then was a mere agent having authority, but being under no obligation to pay—*Walker's Trustees* v. *M'Kealay*, July 1, 1879, 6 R. 1132; *Williams* v. *Everett and Others*, November 25, 1811, 14 East. 581; *Yates* v. *Bell*, June 6, 1820, 3 Barnewell & Alderson's Rep. 643; *British Linen Company Bank* v. *Carruthers & Ferguson*, June 6, 1883, 10 R. 923; *Waterston* v. *City of Glasgow Bank*, February 6, 1874, 1 R. 470. But further, the document was struck at by the Act 1696, c. 55, notour bankruptcy having taken place on the 14th May. The only exception is in favour of payments in cash, and there never was any such payment.

Hay & Robertson replied—There was specific appropriation which secured their right in the sum contained in the document—2 Bell's Com., M'Laren's ed., p. 13. The bank admitted that it was their custom to honour acceptances in such circumstances without even special directions as to each particular bill, and

the meaning of marking a bill as this was that it should be an intimation to the payee that the acceptor had funds at the office in question, and was just an authority to the bank to pay. The case of *Kymer* must rule here. There was authority to pay, and failure would render the bank liable in damages to the customer. When the bill was presented, then the acceptance and order concurred, and the matter was made irrevocable.

There were no averments on record as to the effect of the bankrupt laws on the question between the parties. Counsel for the reclaimer stated that he did not desire to amend his record, and renounced probation on this matter.

At advising—

LORD YOUNG—I agree with the Lord Ordinary in thinking that there was here no specific appropriation which excluded the banker's lien. It follows, I think clearly, that in the petitory action against the bank the pursuers (Hay & Robertson) were in the wrong and the bank in the right, for the purpose and only possible effect of the action, the bank being the only defender called, was to challenge the lien which, if it existed, was then in force, and which accordingly is the only defence stated, except that the customer, who, *ultra* the lien which the bank defended for itself, was the only party interested, ought to be called. The lien of the bank ceased in October, and the record in the action was closed on summons and defence in July. The interest of the bank being thus at an end, and the only party interested, viz., the customer, or his trustee, not being a party to the action, the bank very properly raised a multiplepoinding. The Lord Ordinary, to save time and expense, allowed the summons in Hay & Robertson's action against the bank to stand for their claim in the multiplepoinding. It is, I must say, an unsatisfactory claim, as being mainly, if not exclusively, devoted to the question of lien, which had disappeared before the multiplepoinding was brought. I am disposed nevertheless to acquiesce in the course sanctioned by the Lord Ordinary, and to view the summons against the bank as a claim in competition with the bank's customer, or—the same thing as I regard it—with his voluntary trustee.

The competition between Hay & Robertson and the bank, depending on the question whether or not there was specific appropriation effectual to include the bank's lien—which was the only competition presented by the earlier action—being thus at an end, we have to consider the competition between Hay & Robertson and their debtor G. W. Rainey, or rather his voluntary trustee. And on this head I must begin by observing that the counsel for the respondent in this reclaiming-note informed us that he did not desire to amend the record, declined to move for a proof, and renounced probation, a resolution the propriety and prudence of which I do not doubt for a moment. The consequence is that we have no concern with the bankrupt law, or the rules of equitable distribution of insolvent estates. There is, so far as I can see, nothing to place this voluntary trustee in a different position from the truster himself in this competition with a creditor of the truster, who has not acceded to the trust. The general rule undoubtedly is, that a debtor does not, by the execution of a voluntary trust, affect the rights or remedies of his creditors, who do not choose to affect themselves by acceding to the trust. A voluntary trustee has or may have under the trust conveyance all the truster's right, but he has no other, and any right which is superior to the truster's is superior to his. I must, therefore, regard the question here presented exactly as I should have done if the parties to it, *i.e.*, the competitors before us, had been the payee and holder of the bill on the one hand, and the acceptor on the other. Bankruptcy or insolvency of a character to bring in the rules and equities of the bankrupt laws might have made a vast difference, but there is, as I have observed, no such case before us with the record as it stands and probation renounced.

Now, I am of opinion with the Lord Ordinary that the acceptance of a bill payable at a banker's is authority to the banker to pay the bill to the extent of the balance at the acceptor's credit when the bill is presented for payment, and that it is the banker's duty, in the sense of legal obligation to his customer (the acceptor) to act on the authority and pay accordingly. No doubt the authority proceeds from the customer, and the consequent duty is to the customer, but it does not follow that the authority and duty thus created have existence only as between the banker and the customer. The authority which raises the duty is delivered for value to the payee or holder of the bill, and the duty (or legal obligation) is prestable to him, and I again agree with the Lord Ordinary in thinking that a legal relation is thus created between the banker on whom the duty or legal obligation is imposed, and the bill holder in whose favour it is imposed, and to whom it is prestable. I have already said with sufficient distinctness that the customer cannot thus defeat any right of the banker as in a question with himself. He certainly cannot thus defeat the Bankrupt Laws, or the equities which govern the distribution of insolvent estates. But in these considerations, apart as they are here entirely, I am unable to see any ground for question or difficulty. That the acceptor of the bill or his voluntary trustee should be permitted to forbid the willing banker to perform his duty, *i.e.*, to fulfil his legal obligation to the bill holder presenting the document on which the obligation stands, and which he received for value from the party proposing to forbid the fulfilment of it, is a proposition to which I could not assent. I think the case is altogether analogous to that of the drawee of a bill drawn on a payee who has in his possession funds equal to the amount of the bill. There is of course, in the absence of acceptance, no document of debt, and no other relation between the payee and the drawer than the law implies from the facts. But from the facts the law implies a virtual assignation—and the facts are no other than a duty of the drawee to the drawer to accept and pay—the duty standing on the bill delivered for value to the payee. This virtual assignation has been held good against third parties holding express assignation of subsequent date, or who have of subsequent date used diligence. The idea that the acceptor of the bill, the virtual cedent or his voluntary trustee, could claim in preference to the virtual assignee (the

payee of the bill) probably never occurred.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Brown—Mackintosh—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Hay & Robertson—R. V. Campbell. Agent—R. W. Wallace, W.S.

Saturday, March 14.

SECOND DIVISION.

[Sheriff Substitute of the Lothians.

SCOTT *v.* JOHNSTON.

Reparation—Issue—Judicial Slander—Privilege—Counter Issue.

A person brought against the law-agent of a person who had presented a petition for *cessio* against him an action of damages, alleging that the defender had in the Sheriff Court, and in the Sheriff's absence, falsely, maliciously, and injuriously, and in the hearing of certain persons, used words concerning him, representing that he had been guilty of an offence under the Debtors Act 1880. He denied these averments, and stated that he had only asked questions pertinent to the cause and to his duty, but did not set forth on record that at the time the words complained of were used the pursuer was under examination in the *cessio* process, and that the question was asked by him in the course of the action. The Court *allowed* the pursuer an issue, and *refused* to allow a counter issue of privilege, but *observed* that if circumstances showing a case of privilege appeared at the trial the Judge would direct the jury accordingly.

Process—Action by Undischarged Bankrupt—Caution for Expenses.

In an action of reparation for slander by a person against whom decree of *cessio bonorum* had been pronounced, and who had not obtained his discharge, the Court *refused* to order him to find caution for expenses.

Patrick Turnbull, Liquidator of the Money Order Bank, Limited, presented a petition for *cessio bonorum* in the Sheriff Court of Edinburgh, against James Gibson Scott. Under an order of the Sheriff-Substitute, pronounced in the process on him to do so, Scott in December 1883 lodged a state of his affairs.

At the diet held for Scott's examination on 24th December 1884 he was examined by Robert Fleming Johnston, W.S., of the firm of Richardson & Johnston, W.S., law-agents for the liquidator.

Scott thereafter raised against Johnston the present action of damages for slander. He averred that the defender on the date above mentioned, in the Sheriff Court Buildings, Edinburgh, in the presence of several persons, and in particular of David Walker, 1 Bellevue Terrace, Edinburgh, and others whose names can be ascertained, "falsely, maliciously, and injuriously used," with reference to the state of affairs, the following words, or others of like meaning, of and concerning him, pursuer—"Are you aware of the consequences under the statute of lodging a state of affairs such as you have done?"

To this averment the defender answered—"The deposition is referred to; and it is explained that defender asked no questions except such as were pertinent to the cause and in the line of his duty."

Walker was the shorthand writer who had been present to take down the examination.

The pursuer's further averments and the defender's answers were as follows—"(Cond. 3) The said words used by the defender were so used when no Court was present, and in the absence of any Sheriff, Sheriff-Substitute, Commissioner, or other Judge, or of any official of Court of any kind; and said words so used, falsely, maliciously, and injuriously represented, and were intended to represent, that the pursuer in lodging said state of affairs had been guilty of a crime and offence under the provisions of the Debtors (Scotland) Act 1880, and the Acts therein referred to, or one or other of them. (Ans. 3) The proceedings are referred to. *Quoad ultra* denied. (Cond. 4) The import of said words was reported in the *Scotsman* and other newspapers of the 25th December 1883; and from the defender using said words, and from said reports thereof, and otherwise, the pursuer has suffered great annoyance, loss of character and credit, and has been greatly damaged in his business and reputation, and has been hurt in his feelings. (Ans. 4) Denied."

The pursuer pleaded that the words libelled having been used falsely, maliciously, and injuriously regarding him, he was entitled to damages.

The defender pleaded—"(1) The pursuer's statements being irrelevant, the defender ought to be assoilzied with expenses. (2) The statement complained of having been made in the course of judicial proceedings, the defender was privileged in making the same, and is not liable in damages."

The Sheriff-Substitute (RUTHERFURD), on the ground that the pursuer offered to prove that the state lodged by him was an honest and full disclosure of his affairs, and that the defender acted maliciously, in the legal sense of the term, by putting the question recklessly and in total disregard of the consequences which the insinuation conveyed might entail on the pursuer, repelled the defender's first plea-in-law and allowed a proof.

The pursuer appealed to the Court of Session for jury trial, and argued his case in person.

He lodged the following issue—"Whether, on or about the 24th day of December 1883, and within the Sheriff Court Buildings, Edinburgh, the defender did, in the presence and hearing of Mr David Walker, Bellevue Terrace, Edinburgh, and others, and one or more of them, say to, of and concerning the pursuer,—'Are you aware of the consequences under the statute of lodging a state of affairs such as you have done?'—referring to a state of affairs dated 18th December 1883, lodged by the pursuer in the hands of the Clerk of Court in compliance with an order of