ROBINSON *v.* MORTON.

Reparation — Breach of Contract — Sale—Condition. Held that a pursuer of an action of damages for failure to implement a contract of sale of lambs had not proved his case, he having averred that he was to be entitled to take delivery before 22d August, and the defender, who alleged that delivery was to be taken four days earlier, having in the interval sold the lambs to another.

Counsel for Pursuer—Mr Mair. Agent—Mr David Forsyth, S.S.C.

Counsel for Defender—Mr Guthrie Smith. Agents—Messrs Mackenzie, Innes, & Logan, W.S.

This was an advocation from Lanarkshire of an action at the instance of Richard Robinson, cattle and sheep dealer, residing at Arkholm, in the county of Lancaster, and Robert Boreland, farmer in Auchincairn, in the parish of Closeburn, in the county of Dumfries, his mandatory, against Thomas Morton, farmer at Nether Abington, in the parish of Crawfordjohn.

The summons concluded for £60, as damages sustained by the pursuer through the defender's failure to deliver 300 or thereby lambs, which the pursuer's mandatory Boreland had purchased for the pursuer from the defender at 16s. 6d. per head, and which lambs at the time of the sale were to be lifted or removed and taken delivery of by the pursuer within or during the week of the Lanark lamb fair, beginning on 18th and ending on 22d August 1863. The defence was that no such contract, in the terms stated in the summons, was entered into; and in particular it was denied that the time specified in the summons for the pursuer taking delivery of the lambs was correct, but it was admitted that there was a bargain entered into about the lambs, but that it was finally understood and stipulated that delivery of them was to be taken at latest on Tuesday the 18th of August.

The Sheriff-Substitute (Dyce), after evidence had been led, found it proved that Tuesday the 18th August inclusive was finally arranged as the last day within which delivery was to be taken; that on 17th August the pursuer Robinson wrote to the defender stating that he would lift the lambs on Friday morning (21st); and that before weaning the lambs the defender, on 18th August, wrote to the pursuer in reply, intimating that having broken his bargain he (Robinson) could not have the lambs. He found in point of law that the 18th August being the last day stipulated in the contract for taking delivery of the lambs, and the pursuer having failed to lift them within the stipulated limits, the contract was no longer binding on the defender, and that he was entitled subsequent to the said 18th August to refuse delivery, and to dispose of the lambs in dispute in any manner and to whomsoever he pleased. He therefore sustained the defences and assoilzied the defender.

The Sheriff (Alison) altered this interlocutor and found that, *tota re perspecta*, the pursuer had established his case, although the evidence was very contradictory, and that he was entitled to damages for breach of bargain. These damages he assessed at £15, for which decerned against the defender.

This judgment having been advocated, the Court to-day unanimously reversed the Sheriff's interlocutor, and returned to that of the Sheriff-Substitute assoilzieing the defender.

The LORD PRESIDENT said—This case comes to a short point. There is no doubt the parties met on 6th August and bargained for the defender's stock of lambs. It was not a bargain for a specific number, but for his whole stock after three score had been shot out. That is quite a common bargain. The purchaser was to take delivery at the farm of the seller. The price was fixed at 16s. 6d. a head There was some difficulty about adjusting the time for taking delivery. It was proposed by Mr Boreland, acting for the pursuer, that he was to take delivery any time during the fair week. The defender insisted that delivery should be taken in the week preceding. A Mr Vassie suggested that delivery should be taken on or before 18th August. It is clear that the defender did not object to this. The question is whether he also agreed that delivery might be taken any time during the week of the fair. I think there is not sufficient evidence that he agreed to extend the time farther than the 18th August. The action is laid upon the statement that he did. The pursuer making that allegation required to establish it, as it was the basis of his demand for damages. I think the defender had good reasons for being pretty strict in the stipulation he made. It was a serious matter for him to run the risk of not selling his lambs at the then ensuing Carlisle fair. It does appear that the price of lambs afterwards improved a little, but I don't think the defender made much by the subsequent sale of them, for although some of them were sold for more than 16s. 6d. a head, others were sold for considerably less. I am therefore for assoilzieing the defender.

The other Judges concurred.

Saturday, March 31.

FOULDS *v.* STEWART.

Bankruptcy—Trustee. A creditor on a sequestrated estate, whose claim has not been ranked, is not entitled to charge the trustee for payment.

Counsel for Suspender—Mr Watson. Agents—Messrs Graham & Johnston, W.S.

Counsel for Charger—Mr Thoms. Agent—Mr W. Officer, S.S.C.

This is a suspension by a trustee on a sequestrated estate of a charge for £1000 given to him by a creditor claiming to be ranked on that estate, but whose claim had not been admitted or ranked. The ground of suspension was that such a charge was incompetent while the claim was being disposed of under the bankruptcy statute. The Lord Ordinary (Mure) suspended the charge with expenses, because the effect of allowing the charger to proceed with his diligence might be to put him in a position to secure a preference over the other creditors to which he was not entitled

The Court to-day, after hearing counsel for the charger, adhered.

SUTHERLAND *v.* M'BEATH.

Property — Conterminous Tenants—Onus probandi. In an interdict by one of two tenants under the same landlord against the other entering upon a piece of ground claimed by both, held that as the farms had each been taken under known names and with recognised boundaries, the *onus* of proving any alteration of the boundaries lay on the defender alleging it, and, as he had failed to prove his allegation, interdict granted.

Counsel for Advocator—Mr John Millar. Agent—Mr James Bell, S.S.C.

Counsel for Respondent—Mr Francis W. Clark. Agent—Mr David Forsyth, S.S.C.

This was a case where one of two conterminous tenants holding under the same landlord sought to have the other interdicted from entering upon and cropping upwards of thirty acres of ground, which he alleged formed part of his farm. The defence was that the ground in question had been let to the defender as part of his tenement. Interdict was granted by the Sheriff-Substitute, and his judgment was affirmed by the Sheriff. The defender advocated, but the Court adhered, the principle of the judgment being that when a farm is taken under a name by which it was previously well known and had recognised boundaries, the *onus* of showing that these boundaries had been altered or modified lies on the party founding on such alleged alterations. In the present case the advocator was held to have entirely failed in this respect.