

APPENDIX.

PART I.

REPARATION.

1776. *August 8.* SCOTLANDS *against* THOMSON.

No. 1.

THIS case, mentioned under this title, No. 21. p. 13934, where a clergyman was found liable in damages for defamatory language used in the pulpit, will be found at large in APPENDIX, PART I. *voce* DELINQUENCY, No. 3.

1805. *November 15.* MACLEAN *against* GRANT.

No. 2.

ANN MACLEAN was, by her father's settlement, entitled to a provision of £300 out of his estate, to which her brother Colonel Maclean of Kinlochaline succeeded. To make this claim effectual, she employed Nathaniel Grant, writer in Edinburgh, who undertook the business, and promised to take the necessary steps to render the debt effectual against the estate of Kinlochaline.

In what circumstances an agent is liable in damages for mismanaging the business of his client.

The estate of Colonel Maclean consisted of four lots. Two of these stood feudally vested by sasine in his person, and two were still *in hereditate jacente* of his father. A number of adjudications were led against these estates by different creditors.

In leading the adjudication for Mrs. Maclean's debt, Mr. Grant included the whole four lots of the estate, but did not use a special charge to connect the common debtor with the two lots which were not feudally vested in his person; and his adjudication was conjoined with one posterior to the first effectual adjudication, contrary to the directions of the 33d Geo. III. Cap. 74.

The common agent in the ranking of Kinlochaline's property, objected to this adjudication, as well as to various other adjudications on the estate which

No. 2. had been managed in the same way by different agents, *1st*, That it was conjoined with an adjudication posterior to the first one. *2d*, That no special charge was given, so that at all events the adjudication would only rank on two of the lots of the estate.

These objections were sustained; and the consequence was, that Mrs. Maclean received no part of her provision. But the agents for several other creditors who had fallen into the same error with Mr. Grant, immediately on discovering the mistake, raised new adjudications, in which all the requisite forms were observed, and thereby secured to their clients payment out of the estate. This, however, was not done by Mr. Grant.

Mrs. Maclean being thus disappointed, raised an action of damages against Mr. Grant, concluding, that he should be found liable to her for such a sum as she might have drawn, if the diligence used in her name had been regularly led. The Lord Ordinary reported the cause; and the pursuer

Pleaded: When a person applies to a man, regularly established in the practice of a profession, for the assistance of his professional skill, he is entitled to rely upon having his business managed with ordinary attention and ability. No man is authorised to hold himself out to the public, as qualified to exercise a particular profession, if he has not sufficient knowledge of it to conduct its ordinary operations; and if loss arise to his employers, either from want of ordinary skill, or want of ordinary attention, he must be liable in damages. To authorise such an action, it is not necessary to prove *mala fides*; it is sufficient to shew culpable ignorance, or inattention; Wood against Fullarton, November 29th, 1710, No. 47. p. 13960; Rae, July 29th, 1741, No. 49. p. 13963; Goldie against Macdonald, January 4th, 1757, No. 64. p. 3527; Tod against Thomson, February 22d, 1793, (not reported.)

The only question, therefore, in such cases, is, whether the unskilfulness or neglect be so gross, as to warrant an award of damages. It is clear, that if the diligence, executed in the pursuer's name, had been regular, there were funds belonging to the estate of the common debtor, out of which she might have recovered payment. It was entirely owing to the error of the defender; *1st*, in neglecting the special charge; *2dly*, in conjoining the adjudications, that the pursuer did not obtain payment of her debt. These mistakes were of such a kind, as to be wholly unpardonable in a man of business; and the neglect was the more inexcusable, because the defender saw that many of the agents for the other creditors, upon discovering the mistake they had fallen into, had led new adjudications, which it was his duty likewise to have done.

It is vain to say, that the neglect of the special charge of itself produced no bad consequences, since the adjudication was inept, in consequence of the error in the conjunction. No man is entitled to plead a second error, to evade the damages resulting from the first.

Answered: An action of damages against a man of business, only lies, if the practitioner has been guilty either of gross inattention to the interest of his

client, or of direct disobedience to his instructions. An agent is not to be subjected in damages, merely because the business which he was employed to conduct has failed of success, owing to an error in judgment, more especially when the point was difficult, and the error common to him with many skilful and experienced practitioners. If a man of business were held to warrant the consequences of every opinion which he gives to his client, the responsibility would be so great, as to prevent altogether the exercise of the profession; Grant against Macleay, January 1791, (not reported.)

The errors in this case were committed, not by the defender singly, but by the agents of a great proportion of the creditors. The error in conjoining the adjudication with one subsequent to the first effectual adjudication, arose in the interpretation of an act of Parliament, passed recently before the transaction in question, and may be excused, when it is considered that the decision sustaining the objection under the act of Parliament was by no means unanimous. Nor can the pursuer claim any damages on account of the neglect of the special charge, because she can qualify no loss on that account, as the objection under the act of Parliament would have excluded her claim, even though a special charge had been used.

The Lords (18th May 1804) “repel the defences, so far as regards the omission to lead a second adjudication upon a special charge for attaching lots 3. and 4; find the defender liable in the damage which has arisen to the pursuer from that neglect; remit to the Lord Ordinary to ascertain the amount, and assoilzie *quoad ultra*.”

Against this interlocutor, Mr. Grant presented a reclaiming petition, in which he again insisted in his general argument; and pleaded further, That a special charge was not necessary to attach these two lots of the estate, because Colonel Maclean had a personal right to these two lots, in virtue of a deed of entail executed by his father, which vested the fee of this property in his person, and which had been recorded in his father's lifetime.

To which it was replied by the pursuer, *1st*, That the fact alleged did not supersede the necessity of a special charge; and, *2dly*, That even if it did, he was to blame in not bringing forward this plea, so as to have secured payment to his clients, and that the recent discovery of it, when it suited his own interest to urge the circumstance as a defence, shews how carelessly he attended to the interest of the pursuer.

Upon advising Mr. Grant's reclaiming petition, with answers, the Court (11th December 1804) altered the interlocutor, sustained the defences, and assoilzied the defender.

To which interlocutor they afterwards adhered by a considerable majority, upon advising a reclaiming petition for the pursuer, with answers.

The general doctrine of the responsibility of a man of business, for error arising from gross ignorance or wilful negligence, was recognized by all their

No. 1: Lordships. The difference of opinion in this case regarded entirely the degree of blame to be attached to the defender, which a majority of the Court ultimately thought not to be of such an extent as to subject him in damages.

Lord Ordinary, *Woodhouselee*.
Alt. *L' Amy*.

Act. *Bell, Jeffrey*.
Agent, *Party*.

Agent, *D. Maclean, W. S.*
Clerk, *Ferrier*.

J.

Fac. Coll. No. 220. p. 495.