It is often a matter of some difficulty and nicety to determine in what cases damages are claimable in respect of the wrongful or unwarrantable use of judicial proceedings, and in what cases the *bona fides* of the party or the possession of reasonable grounds will form a sufficient defence to him who has used or adopted the judicial proceedings, although he may ultimately be found not to have been right in doing so.

Some of the cases may be regarded as having been settled by a course of decisions. Thus, in general no action of damages will lie against a pursuer who has raised and carried on a groundless action which has ultimately been dismissed or from which the defender has ultimately been assoilzied. The only damages which can in general be claimed against a party who has brought and carried on an action which has ultimately been found groundless both in law and equity are the expenses of process, which the unsuccessful pursuer must pay to the defenders. The costs of suit are the damages for bringing a groundless claim.

But where the pursuer of a claim which is ultimately repelled has used diligence of any kind upon the dependence, such as arrestment or inhibition, or where he has resorted to other steps pending the final ascertainment of his rights, such as arresting his supposed debtor as in *meditatione fugæ*, or asking and obtaining interdict *ad interim* against some act the legality of which depends upon the question involved in the litigation, and where such pursuer using such interim or precautionary diligence is ultimately found to be in the wrong, questions of much difficulty arise, in some of which I do not think any absolute and unbending rule can be said to have been fixed.

In the case of simple arrestment on the dependence, indeed, I think it may be held as fixed that the pursuer of an action who uses arrestments on the dependence and subsequently fails in his claim, will not be liable in damages for wrongous arrestment, even although by such diligence he detains a ship, or causes serious injury to the defenders, unless the defenders put in issue that the arrestment complained of "was used maliciously and without probable cause." See *Volthekker* v. *Northern Agricultural Co.*, 20th December 1862, 1 Macph. 211.

But the case of arrestment is specially distinguished from other cases in which the pursuer of a claim which is ultimately held to be groundless applies for and uses some special diligence or precautionary remedy which is not given as a matter of absolute right, and which he cannot use at his own hand, but for which he requires a special warrant, which may or may not be granted.

The present case of interim interdict pending the decision of a question of right falls under this last category, and I agree with your Lordship that the general rule is that such interdict is granted *periculo petentis*, and that if loss or injury is caused thereby the party who is in the wrong in applying for it will in general be answerable for the loss occasioned thereby. In some cases of interdict this is quite clear. Thus in *Miller* v. *Hunter*, 3 Macph. 740, where a landlord wrongfully interdicted his tenant from taking a waygoing crop from 100 acres, and the effect of this was not only to deprive the tenant of the crop from the 100 acres to which by his lease he was entitled, but also to give the landlord or the incoming tenant the benefit of 100 acres fallow or green crop to which the landlord was not entitled, it was held without difficulty that the interdicting landlord must compensate the tenant for the loss he had sustained.

It is true that it is not in every case of an interdict which may ultimately be recalled that damages are due by the party interdicting. The case of the Dunoon Ferry—*Moir* v. *Hunter*, 11 S. 30—and one or two similar cases, I think may be explained on the principle that in these cases the interdict was really of the nature of a possessory judgment, containing the possession or exclusive possession which had been lawfully had on a habile title for seven years or more; and although the question of right was finally decided otherwise, still the possessory judgment at the time it was pronounced was right, and the interdict which enforced it could not be said to be at the time it was granted a wrongous interdict. No doubt it was recalled when in the process of declarator or in other process the ultimate question of right was decided, but still the possessory judgment was the proper and just judgment at the time when it was pronounced.

I think the present case falls under the general rule, and not under the exception. There was here nothing of the nature of a possessory judgment, or a possessory right warranting the interdict, and, as the Court have found, affirming the judgment of the Sheriff Principal, that the interdict ought not to have been granted, I think the Lord Ordinary is right in granting the usual issue of damages.

LORD JUSTICE-CLERK—I entirely concur in the exposition of the law as given by your Lordships, and have nothing to add except that the result of our opinion is that we approve of the issue for the trial of the cause as adjusted by the Lord Ordinary. What may be the position of the case at the trial is quite another matter.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders (Reclaimers) Lord Advocate (Watson)—Guthrie Smith. Agents—Irons & Roberts, S.S.C.

Wednesday, December 12.

FIRST DIVISION.

THOMSON AND OTHERS (CRAWFORD'S TRUSTEES), PETITIONERS.

Writ—Registration—Production for Approval by Court where Deed ordered by them to be executed.

A petition was presented for the purpose of obtaining the sanction of the Court to a scheme for working a trust that could not be worked in conformity with the directions of the original trust-deed, and after certain procedure the Court appointed the trustees to lodge in process a deed in conformity with certain directions given by them. The trus-

tees *per incuriam* recorded the deed in place of producing it. They then presented a note asking for approval of the extract deed, but the Court *held* that the original deed must be produced, as it was necessary that they should not only see what its terms were, but also that it was duly executed and that there were no erasures, and they accordingly ordered that the Deputy Keeper of the Records, or one of his clerks, should attend and exhibit it.

Counsel for Petitioner—Kinnear. Agents—Murray, Beith, & Murray, W.S.

Thursday, December 13.

FIRST DIVISION.

COWAN, OFFICIAL LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY, PETITIONER—GOWANS' CASE.

Public Company—Responsibility of Directors.

Terms of an undertaking by directors of a limited company, (in issuing the remaining unsubscribed-for portion of their capital stock to the public) to double their own holdings of stock—which were *held* to be conditional on the total amount of remaining stock being subscribed for, and to import no obligation against them in the event, which happened, of that condition not being purified.

This was a petition by Mr Cowan, C.A., official liquidator of the Edinburgh Theatre Company (Limited) to settle a list of contributories. The question at issue arose with Mr Gowans, who was a large shareholder of the company, and also a creditor, as contractor for the company's buildings. Among other objections taken by Mr Gowans to the list of contributories proposed by the liquidator was this, viz., that the directors had bound themselves to double their original holdings of stock, and that the official liquidator had failed to give effect to this obligation on the part of the directors.

The alleged undertaking was said to be contained in various minutes of meetings of directors, a circular to the shareholders of the company, and a statement issued by the directors to the public. All these documents had reference to the conditions under which the directors proposed to issue to the public that part of their capital stock not originally issued. They sent in the first place a private circular and statement of their position to the shareholders of the company, that they might have an opportunity of themselves subscribing for the remainder of the stock, or inducing their friends to do so. They afterwards issued the statement to the public, with this announcement at the head of it, and printed in italics—"No shares will be allotted until the whole remaining stock has been applied for." The circular and statement both announced that the directors had resolved to double their original holdings of stock. The terms of the circulars and of the minutes of meetings of directors are quoted at length in the opinion of the Lord President. The required amount was not subscribed, and accordingly no additional shares were issued.

The contention of Mr Gowans was that the directors had intended, and had induced the public to believe that they intended, to double their holdings. The directors answered that their undertaking was plainly conditional, depending on whether or not the rest of the capital was subscribed. Till it was there was no liability upon them.

At advising—

LORD PRESIDENT—The question here is raised by a gentleman who stands in the position of being both a member of the company and a creditor, and his objection to the list of contributories is—"That it does not give effect to an agreement and undertaking on the part of the directors of the company as individuals, whereby they agreed and undertook to take each of them additional shares in the company, so as to double the amounts of their respective holdings." He avers that this agreement was "duly made at a meeting or meetings of directors, held shortly prior to 3d April 1876, and the same was embodied in and intimated to the shareholders and the public by a circular or prospectus issued by the directors, dated 3d April 1876;" and to that he has added in argument that this resolution was embodied in a minute of the directors, dated 10th April 1876.

In the outset of his argument Mr Gowans' counsel attached most importance to this last consideration, but it is obvious that so far from this being the constitution of an undertaking by the directors, it refers to that undertaking as something that has gone before, and for its terms we must therefore refer to the documents by which it was constituted. The minute of 10th April says—"The meeting resolved that as the financial success of the undertaking depends entirely on its completion, and as that cannot be accomplished unless the whole remaining capital stock be now applied for, the directors, besides each subscribing for at least as much more stock as they originally held, will each make this week a personal application to his own friends and acquaintances to take shares." But as regards their undertaking to double their own interest in the company, that is plainly referred to in the resolution as a thing already undertaken. Now, the first document that it is necessary to refer to in order to see what the undertaking was, is a private circular by the directors, dated 29th March 1876, which is said to have been sent to the existing shareholders of the company only. Of that I think there is sufficient evidence in the body of the circular. The shareholders' attention is called to a statement which the directors propose to issue, and in this statement the directors say that they are to show their confidence in the undertaking by doubling their original holdings of stock. But they say they are desirous to know before they issue that statement "what additional capital the other shareholders are prepared to subscribe in the event of sufficient capital being otherwise got for the completion of the undertaking." This statement was afterwards issued in conformity with a minute by the directors, dated 3th April 1876, which bears—"The financial statement by the directors having been adjusted, it was ordered to be issued."