to Lord Bute, to be used as a mausoleum, subject to the same uses as the mausoleum which at present belongs to the family in the same churchyard, or whether, on the other hand, it is an out-and-out excambion or sale of the ground to him. I am of opinion with your Lordships that it is substantially a disposition heritably and irredeemably to the respondent of the ground in dispute; and I think this was *ultra vires* of the heritors, and that the interlocutor of the Lord Ordinary should be adhered to. There are certain reservations in the deed following upon the disposition as to the uses, and certain restrictions in regard to the use, but I see no restriction put upon any one but the Marquis of Bute. There is none put upon his heirs and successors; and in that respect there is no limitation that I can see that can take it out of the category of an heritable and irredeemable disposition to Lord Bute of the ground in question. On that ground I am of opinion that the Lord Ordinary's interlocutor is well founded.

Lord Shand—I agree with your Lordships. The argument from the bar was to a considerable extent addressed to the question whether in any circumstances it was lawful for the heritors of a parish to excamb a portion of the existing churchyard for new ground; but it appears to me that it is not necessary in this case to express any final opinion upon that general question. I rather agree with your Lordship in thinking that there may be circumstances—exceptional circumstances no doubt, but there may be circumstances—in which it would be quite competent for heritors so to act, and I take particularly such a case as your Lordship put, of a piece of ground which had been enclosed within the walls of an existing churchyard, and had been dedicated to the purposes of a churchyard, but part of which had not been used. I cannot doubt for my part that if a more convenient portion of ground on another side of the churchyard were acquired in exchange for that, the heritors would be entitled to accept that ground in exchange. In the present case I think it is sufficient that we find the particular and peculiar circumstances to which your Lordships have adverted,—that this piece of ground is in the first place in the centre of the churchyard, and second, that it has been in comparatively recent times used as a place of sepulture; and these two circumstances are of themselves to my mind quite sufficient to exclude the idea that the heritors can dispose of the property. The deed which we have before us is expressed in such terms that if the noble Marquis thought fit a year after acquiring it to dispose of this ground to somebody else, it might be in his power to do so, and I rather agree with my brother Lord Mure in thinking that even if those conditions, such as they are, that are embodied in this deed could be held to be satisfied in regard to all that could be required of Lord Bute so long as the ground was in his possession, they would not attach to his successors. But I am further of opinion that the deed is not satisfactorily expressed in any view, even as in question as to the Marquis' powers, by the use of the most ambiguous expression that the ground is to be held upon the same terms as any other mausoleum which has been erected within the said churchyard with the sanction of the heritors. I therefore agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to.

I think it right to add that I concur with your Lordship in thinking and in hoping that an arrangement may yet be made by which the desirable object of the restoration of this old chapel may be carried out with the consent of all parties. If instead of a title of property such as we have here upon somewhat ambiguous conditions, the heritors had, without objection on the part of the persons who represent those who have been buried within this ground, allocated it as a place of sepulture to the Marquis of Bute and his successors, with a power to restore the chapel and to have such burial service conducted there as may be lawfully used in the parish burial grounds in Scotland, I confess I should have thought that would probably meet with no objection, and would carry out the object which the parties had in view. Unhappily the deed has been taken in different terms, and accordingly we must, I think, sustain the objections taken to it, but if the case had been in that other position, I for my part should have had no difficulty in holding that such an arrangement was quite competent. In such circumstances I should have no difficulty in holding that any right on the part of the parishioners generally to state an objection on the ground that they might in certain circumstances require to resort to the ground in question for a burying-place would be completely met by the fact that a large addition had been made to the existing churchyard, by which the requirements of all parties for burying-places were fully satisfied. In such circumstances I should have no difficulty in holding that any right on the part of the petitioners generally to state an objection on the ground that they might in certain circumstances require to resort to the ground in question for a burying-place would be met completely by the fact that a large addition had been made to the existing churchyard by which the requirements of all parties for burying-places are fully satisfied.

Lord Deas—Upon that matter I desire entirely to reserve my opinion.

The Court adhered.

Counsel for Complainers—Trayner—Taylor Innes. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Respondents—Mackintosh—Pearson—Murray. Agents—J. & F. Anderson, W.S.

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*Friday, December 8.*

## FIRST DIVISION.

[Lord Fraser, Ordinary.

## SMITH & CO. *v.* TAYLOR, AND PATERSON, CAMERON, & CO.

*Reparation—Law Agent—Agent and Client—Liability of Agent to Third Party Injured.*

If an agent acting for a client does diligence without proper warrant, or performs any other wrongful act resulting in injury to a third party, the agent and client are conjunctly and severally liable therefor.

*Process—Issue—Debtors Act* 1880—*Bankruptcy and Cessio Act* 1881—*A.S., 11th July* 1871—*Wrongous Use of Diligence*—"*Maliciously and without Probable Cause.*"

An agent acting for a creditor charged a debtor to pay the sum contained in a decree (which had been obtained in England, but removed to Scotland under the Judgments Extension Act 1868) on an *inducice* of six days, instead of fifteen days as provided by the Act of Sederunt 11th July 1871. Payment not having been made on this inept charge, he presented a petition to the Sheriff under the Debtors Act 1880 to have the debtor ordained to execute a disposition *omnium bonorum*. *Held* that such an application for *cessio* following on an inept charge constituted a wrongous use of diligence, and that therefore in an action of damages raised by the debtor against both agent and client the pursuer was not bound to take an issue of malice and want of probable cause.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34) provides by section 6 that "in any case in which under the provisions of this Act imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment." . . .

Section 8—"Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856, or of this Act, may present a petition to the Sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed, who shall take the management and disposal of his estate for such behoof, and such process shall be taken and deemed to be a process of *cessio*. In the petition there shall be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence so far as known to the petitioner, and with the petition shall be produced evidence that the debtor is notour bankrupt."

Section 9—"On such petition being presented the following provisions shall have effect:—The Sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette* intimating that such petition has been presented, and requiring all the creditors to appear in Court on a certain day . . and the Sheriff shall further ordain the debtor to appear on the day so appointed for the compearance of the creditors in the presence of the Sheriff for public examination." . . .

The Bankruptcy and Cessio Act 1881 (44 and 45 Vict. c. 22), by section 14, is to be read and construed together with the Debtors (Scotland) Act 1880.

This was an action of damages for alleged wrongous use of diligence. The pursuers were J. B. Smith & Co., grain merchants, Leith, and James B. Smith, sole partner of that firm. The defenders were Thomas Burton Taylor, corn merchant, Sunderland (against whom arrestments had been used in order to found jurisdiction), and Paterson, Cameron, & Co., S.S.C., Edinburgh.

The pursuers in the course of business had certain transactions with the defender Taylor, and a dispute having arisen, a litigation, involving a claim by the present pursuers and counter claim by Taylor, took place between them in the Durham County Court, which ended in Taylor getting a verdict for £39, 10s. 10d., with costs. This judgment he removed to the High Court of Justice (Queen's Bench Division) under the Act 19 and 20 Vict. c. 109 (County Courts Amendment Act), sec. 49, which provides for the removal of certain judgments for sums above £20 into one of the Superior Courts. On it he obtained, on 23d January 1882, a certificate of judgment, which he thereupon had registered under the Judgments Extension Act 1868, sec. 2, in the Books of Council and Session. This registration took place on 1st February 1882. He then, through his local agents, instructed the other defenders, who were his agents in Edinburgh, to give a charge upon the registered decree.

The Act of Sederunt of 11th July 1871, passed in pursuance of the Judgments Extension Act 1868, provides by section 1 that "in the extract of a certificate of any judgment obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively, for any debt, damages, or costs, and registered in the Books of Council and Session under the powers contained in the 2d section of the said statute" (*i.e.*, The Judgments Extension Act 1868), "the *inducice* of charge shall be fifteen days, as in an extract of a decreet pronounced in the Court of Session."

The pursuers averred (Cond. IV.) that on Feb. 6, 1882, a charge of payment was served upon J. B. Smith & Co. upon an extract of the foresaid certificate of judgment, and again on 21st February a similar charge was served upon J. B. Smith. "By the foresaid charges the said J. B. Smith and J. B. Smith & Co. were required to make payment of the sum claimed by the said Thomas Burton Taylor within a period of six days respectively from the date upon which same were given, as above mentioned. The said charges, even assuming the validity of the said certificate [the certificate of judgment above referred to], were wholly unlawful, fifteen days, and not six days, being the legal *inducice* upon a well-obtained certificate of judgment of the High Court of Justice at Westminster duly registered under the Act of Sederunt of 11th July 1871 and the said Judgments Extension Act. The said charges . . . were illegal and inept, and the pursuers were in no way bound to concern themselves therewith." In answer to this averment the defender Taylor stated that he believed it to be true that such charges were given, while Paterson, Cameron, & Co. admitted that they gave general instructions to a messenger to give the pursuers a charge, but were not at the time made aware of the terms of the charges given.

The pursuer further averred—"(Cond. 5) The days of said charges having expired, the defenders, without any further application to the pursuers for payment, and without any inquiry as to the pursuers' solvency (which they well knew to be undoubted), on or about 8th March 1882 caused a petition for *cessio* to be presented in the Sheriff Court of the sheriffdom of the Lothians at Edinburgh, at the instance of the

said Thomas Burton Taylor against the pursuers, praying that pursuers be decerned to execute a disposition *omnium bonorum* for behoof of their creditors, and to have a trustee appointed, who should take the management and disposal of pursuers' estate for such behoof, and to appoint the said Thomas Burton Taylor to publish a notice in the *Edinburgh Gazette* intimating that such petition had been presented, and requiring all the creditors to appear in Court, and the pursuers to appear for public examination, and for warrant to take possession of and put under safe custody any bank-notes, money, bonds, bills, cheques, or drafts, or other moveable property belonging to or in the possession of the pursuers; and, if necessary for that purpose, to grant warrant to open lockfast places, and to search the dwelling-house and person of the pursuer the said J. B. Smith; and to make such other order and to do all the other acts as to the Court should seem proper. (Cond. 6) In support of the prayer of said petition the defenders stated, or caused it to be stated, therein that the pursuers were unable to pay their debts, and that they had become notour bankrupts by reason of insolvency concurring with the following steps of diligence—(1) The said extract registered certificate of judgment; (2) execution of the charges of payment above set forth, and expiry of the respective days without payment. The statements in question, that the pursuers were unable to pay their debts, and that they were insolvent, and that they were notour bankrupts, were each and all of them utterly false and calumnious, and were made by the defender the said T. B. Taylor, or the defenders the said Paterson, Cameron, & Co., maliciously and without probable cause. Further, the steps of diligence set forth in said petition were illegal and invalid, in respect that the charges of payment founded on in said petition were contrary to the provisions of section 1 of the Act of Sederunt of 11th July 1871, being on a six days' charge instead of on a fifteen days' charge, as before mentioned. (Cond. 7) The defenders having produced, or caused to be produced, along with the foresaid petition—(1) Extract of the said invalid certificate of judgment; (2) execution of the foresaid illegal and inept charge given the pursuers the said J. B. Smith & Co., dated 6th February 1882; and (3) execution of the foresaid illegal and inept charge given the pursuer the said J. B. Smith, on 21st February 1882—the Sheriff-Substitute, on the strength of said documents, and on the allegation by the defenders, or those for whom they are responsible, that the pursuers were insolvent and unable to pay their debts, on 8th March 1882 granted a warrant in terms of the prayer of the petition. The said warrant, which is referred to for its terms, was illegally, wrongfully, and unwarrantably obtained by the defenders. The application for said warrant was made, and the whole of the proceedings complained of were taken, recklessly and maliciously and without probable cause, by the defender the said T. B. Taylor or the defenders, the said Paterson, Cameron, & Co., and they are liable to the pursuers for any loss, injury, or damage resulting therefrom. (Cond. 8) Copies of the said petition and warrant were not served on the pursuers till the afternoon of Friday, 10th March 1882. On the same day the defenders caused a notice to be inserted in the *Edinburgh Gazette* of that date to the following effect, viz., that the foresaid petition for *cessio* had been presented to the Sheriff of the sheriffdom of the Lothians at Edinburgh under the Debtors (Scotland) Act 1880, and the Bankruptcy and Cessio (Scotland) Act 1881, at the instance of the said Thomas Burton Taylor against the defenders, praying that they be decerned to execute a disposition *omnium bonorum* for behoof of their creditors, and that a trustee should be appointed who should take the management and dispose of their estates for such behoof, and that the Sheriff-Substitute had issued a warrant upon said petition requiring all the creditors of the pursuers to appear within the Bankruptcy Court-house" at Edinburgh on 27th March for the public examination of the pursuers.

In answer to these averments the defender Taylor merely referred to the document mentioned for their terms.

The other defenders admitted the presentation of the petition for *cessio* on the 8th, which date they explained to be the thirtieth day from the date of the first charge, and the fifteenth from the date of the second. The service of the petition and the insertion of the *Gazette* notice they stated to have been two days later. They explained that prior to the presentation of the petition the pursuers had taken no notice of the charge, and made no communication to them, the first exception taken to the proceedings being subsequent to the *Gazette* notice, when, on their attention being called to the terms of the charge, they were immediately withdrawn. They averred that the statement made by them in the proceedings complained of were made in *bona fide*, and in the reasonable belief, based on the information they had, and on the pursuers' own actings, that they were true.

The pursuers averred that they had always done a large business, and had enjoyed good credit, and had never been insolvent. They averred that they had suffered great injury in their feelings and credit. Damages were laid at £2000.

The pursuers pleaded—"(1) The petition for decree of *cessio bonorum* and the resulting warrant were illegal and unwarrantable, the pursuers not having been rendered notour bankrupt under the Debtors (Scotland) Act 1880, because (1st) the charges founded on were illegal, not being on an *inducie* of fifteen days; and, *separatim*, (2d) fifteen days had not expired from the date of the said charges. (2) The pursuers not having been insolvent, the said proceedings were illegal, nimious, oppressive, and wrongful. (3) *Separatim*, the said proceedings having been taken by the defender the said T. B. Taylor, or the defenders the said Paterson, Cameron, & Co., maliciously and without probable cause, to the loss, injury, and damage of the pursuers, they are entitled to decree as concluded for. (4) The said proceedings having been wrongful and illegal, and to the loss, injury, and damage of the pursuers, they are entitled to reparation from the defenders as concluded for."

The defender Taylor pleaded that the pursuers' statements were irrelevant, and that they were unfounded in fact.

The defenders Paterson, Cameron, & Co. pleaded, *inter alia*—"(1) The allegations of the pursuers are irrelevant and insufficient to war-

rant the conclusions of the summons. (2) The proceedings in the petition for *cessio* being judicial in their nature, and the statements in support thereof having been made in *bona fide* and without malice, the defenders are entitled to absolvitor."

The Lord Ordinary (FRASER) adjusted for the trial of the cause as against the defender Taylor the following issues:—"(1) Whether on or about the 8th day of March 1882 the defender Thomas Burton Taylor, wrongfully, *maliciously, and without probable cause,* presented, or caused to be presented, in the Sheriff Court of the sheriffdom of the Lothians at Edinburgh, a petition praying that the pursuers the said J. B. Smith & Co. be decerned to execute a disposition *omnium bonorum* for behoof of their creditors, and having obtained the Sheriff's warrant thereon, published, or caused to be published, a notice of said petition in the Edinburgh Gazette to the pursuers' loss, injury, and damage? Damages laid at £500. (2) Whether on or about the 8th day of March 1882 the defender Thomas Burton Taylor, wrongfully, *maliciously, and without probable cause,* presented, or caused to be presented, in the Sheriff Court of the sheriffdom of the Lothians at Edinburgh, a petition praying that the pursuers the said J. B. Smith & Co., and the pursuer the said J. B. Smith, be decerned to execute a disposition *omnium bonorum* for behoof of their creditors, and having obtained the Sheriff's warrant thereon, published, or caused to be published, a notice of said petition in the Edinburgh Gazette, to the loss, injury, and damage of the said J. B. Smith? Damages laid at £500."

The words printed in italics were not in the issues as proposed by the pursuers, but were inserted by the Lord Ordinary.

As regarded Paterson, Cameron, & Co., his Lordship sustained their plea-in-law that the action was irrelevant as against them, and found them entitled to expenses.

"*Opinion.*—There is no averment in this record to justify the action as against the law-agents who happened to be employed by their client to conduct the proceedings complained of. The client is responsible for the agents' proceedings, and for the blunder that was committed by the messenger or officer who gave the charge, but no action lies directly at the instance of the party injured against the agents for any damage which the pursuers may have suffered. The client is liable in damages to the third party injured, but not the agent who carried out his orders. If the client be found liable he may have his right of recourse or relief against his agent, but to this extent, and no more, is the agent liable.

"As regards the other defender Taylor, the Lord Ordinary cannot hold this to be the same case as that of *Kinnes* v. *Adam & Sons*, March 8, 1882, 19 Scot. Law Rep. 478, where the First Division held an action irrelevant in which damages were claimed for having applied for and obtained sequestration under the Bankruptcy Acts, which was afterwards, upon a technical objection to the oath of the petitioning creditor, recalled. There was no averment that the proceedings were taken maliciously and without probable cause, but merely that they were wrongful, illegal, and unwarrantable. In the present case Taylor applied to the Sheriff for a decree ordaining the pursuers to execute a disposition *omnium bonorum*, and to have a trustee appointed to take the management of their estate, and to publish a notice in the *Gazette* requiring creditors to appear; also warrant was granted ordaining the pursuers to appear for public examination. This proceeded upon a narrative that the pursuers had become notour bankrupts, and this, by reason of the defender Taylor having obtained a judgment against the pursuers in the High Court of Justice at Westminster, and of the execution of charges thereon, as set forth in the record. Now, Taylor was not warranted in making such a statement. The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 6, enacts that 'in any case in which under the provisions of this Act imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment.' The present case was one where imprisonment was incompetent. But then there was no duly executed charge. The Act of Sederunt of 11th July 1871, section 1, provides 'that in the extract of a certificate of any judgment obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer, at Westminster or Dublin respectively, for any debt, damages, or costs, and registered in the Books of Council and Session, under the powers conferred by the second section of the said statute, the *inducia* of charge shall be fifteen days, as in an extract of a decreet pronounced by the Court of Session.' The charge that was given to the pursuers was not upon fifteen days, but upon six, and the case is the same therefore as if no charge at all had been given. The pursuers lay bye and took no exception to the charge, and gave no hint to Taylor of the discovery of the blunder. They allowed him to proceed as if the whole steps taken had been in due and regular form, and it was only after he had applied to the Sheriff, under the 8th section of 43 and 44 Vict. cap. 34, for a decree ordaining the pursuers to execute a disposition *omnium bonorum* that they made known the blunder they had discovered.

"There is an averment in the record that the defenders' proceedings were malicious and without probable cause, thus distinguishing the case from that of *Kinnes*, and making the action relevant. These words, however, must be inserted in the issue."

The pursuers reclaimed against the Lord Ordinary's interlocutor dismissing the action so far as laid against Paterson, Cameron, & Co. They also moved the Court to vary the issue allowed by the Lord Ordinary against Taylor by the omission of the words "maliciously and without probable cause." They moved the Court to approve of two issues as against each of the defenders, one applicable to J. B. Smith & Co., the other to J. B. Smith as an individual. The issues proposed as against Paterson, Cameron, & Co. were precisely similar to those proposed as against the defender Taylor.

Argued for pursuers — The defenders had used a very stringent diligence, calculated to do very serious injury to any mercantile business, and had blundered it, and for that they were responsible. They had done so without inquiry as to the pursuers' solvency. The three questions for the determination of the Court were (1) The liability of Paterson, Cameron,

& Co.; (2) Whether the pursuers were bound to disclose to the defenders the blunder which had occurred, assuming them to have discovered it? (3) Must the issue contain the words "maliciously and without probable cause?" Taking the last of these points first, the case was one of wrongous use of diligence, and in such case no such words ought to be put in the issue. The process of *cessio* introduced by the Act of 1880 was a diligence and not a judicial proceeding. It was not a case of proceeding *in foro contentioso*, but a case in which the party against whom the application was made had in the first instance no opportunity of opposing the diligence, and the judge on *ex parte* statement granted the warrant applied for. In this respect it was like a landlord's sequestration, or a *meditatio fugæ* warrant, or a process caption. This distinguished the present from the case of *Kinnes* referred to by the Lord Ordinary, which was the case of a judicial proceeding *in foro contentioso*, being a case of mercantile sequestration in which the debtor may from the first moment appear and object to the sequestration being granted—*Wolthekker*, 1 Macph. 211; *Gibb*, 11 Macph. 705 (Lord Cowan's opinion). As to the first question, the liability of the defenders Paterson, Cameron, & Co., the case against them was one of a positive wrongful act done to the pursuers by them, and the Lord Ordinary had applied the rule applicable to mere omission. In such a case a third party cannot sue the agent, because he has no contract with him. But this was a case of delict, and the wrongdoer's agent and client were liable conjunctly and severally—*Pearson*, 11 Sh. 1008; *Carne*, 13 D. 1253; *Inglis*, 23 D. 1240. As to the second, and only remaining question. The pursuers were not bound to give notice of the blunder. That was at best only a ground of mitigation of damages (*Gibb*, *supra*), but not a relevant ground of objection to an issue being allowed in the terms proposed. The pursuers were not bound in law to take any notice of proceedings which were totally inept. As a matter of fact, however, it would be proved that the pursuers had taken notice of the error—*Bell* v. *Gunn*, 1859, 21 D. 1008, founded on by the other side, was not hostile to the pursuers.

Other authorities on the question of agents' liability—*Lorain*, M. 13,949; *Stewart*, M. 13,989; *Cowan*, 11 S. 999; *Wilson*, 1846, 9 D. 379; *Strang*, 1849, 11 D. 379; *Robertson*, 23 D. (H. of L.) 8, and 33 Jur. 691; *Inglis*, 1861, 23 D. 1240; *Watt*, 1868, 8 Macph. (H. of L.) 77; *Henderson*, 1871, 10 Macph. 104; Begg on Law Agents, 296, 301; Addison on Torts, 5th ed., 211; *Johnson*, 1871, L.R. 329, 40 L.J. Ex. 201; Story on Agency, cap. xii. secs. 308-9.

Argued for defender Taylor—The question was not whether a petition craving to have a debtor ordained to execute a *cessio* was a diligence at some stage, but at what stage it becomes one? In its initiatory stage it was a judicial proceeding. No doubt it was a proceeding in the debtor's absence, but the Judge was directed by section 9, sub-sec. 3, to make "such order as the justice of the case requires." The charge was indeed irregular, but the objection was technical. The proceedings were of the nature of an action. Even though an unfounded statement had been made, that was a case analogous to a case of damages for judicial slander, in which malice and want of probable cause must be averred—*Bell* v. *Gunn*, June 21, 1859, 21 D. 1008; *Ormiston* v. *Redpath, Brown, & Co.*, Feb. 24, 1868, 4 Macph. 488.

Argued for defenders Paterson, Cameron, & Co.—This was a case where a technical error had occurred in a judicial proceeding to recover a just debt. The validity of the claim had been indeed established by decree of the English Courts. A law-agent in the circumstances of those defenders was bound to carry out his instructions in good faith, and no further bound. It would need wilful wrong or gross negligence to render him liable. The maxim *culpa tenet suos auctores tantum* protected him. *Bell* v. *Gunn*, *supra* cited, was clearly in point. At all events, the pursuers should have given notice of the irregularity, and not have lain bye as they had done. *Vigilantibus non dormientibus jura subveniunt.*

At advising—

Lord President—In this case the Lord Ordinary has sustained the first plea-in-law for the defenders Paterson, Cameron, & Co., and dismissed the action as regards them, while as regards the defender Taylor he has adjusted an issue in which it is put upon the pursuer to prove malice and want of probable cause. I regret that I cannot agree with the Lord Ordinary on either point. On the first point, the relevancy of the action as against Paterson, Cameron, & Co., I do not know that it was ever held that where the injury founded on is the wrongous use of diligence, the agent who makes the blunder by which the injury is suffered is not answerable for it as well as the client. Indeed, there are many cases in which he has been held answerable in such circumstances to a third party. The record here discloses a case of that kind. The pursuer says that he is a grain merchant in Leith, doing a good business, and having always been in good credit; and then he alleges that the defender Taylor and his agent having obtained a verdict and decree against him in England for £39, 10s., and having brought that decree into Scotland to be enforced under the Judgments Extension Act, proceeded to give his firm a charge on the 6th February 1882 on the said certificate of judgment, and again on 21st February 1882 to give a similar charge to him as an individual. "By the foresaid charges," he goes on to say, "the said J. B. Smith and J. B. Smith & Company were required to make payment of the sum claimed by the said Thomas Burton Taylor within a period of six days respectively from the date upon which same were given, as above mentioned. The said charges, even assuming the validity of the said certificate, were wholly unlawful, fifteen days, and not six days, being the legal *inducia* upon a well-obtained certificate of judgment of the High Court of Justice at Westminster." Then the condescendence goes on to explain—[*His Lordship here quoted Conds. V. and VI., which are above quoted*]. The pursuer says further in condescendence 8:—"Copies of the said petition and warrant were not served on the pursuers till the afternoon of Friday, 10th March 1882. On the same day the defenders caused a notice to be inserted in the *Edinburgh Gazette* of that date to the following effect, viz., that the foresaid petition for *cessio* had been presented to the Sheriff of the sheriffdom of the Lothians at Edinburgh, under The Debtors (Scotland) Act 1880, and The

Bankruptcy and Cessio (Scotland) Act 1881, at the instance of the said Thomas Burton Taylor against the defenders, praying that they be decerned to execute a disposition *omnium bonorum* for behoof of their creditors." Now, it appears to me that the defenders, both client and agent, were in giving the charge using diligence, for a charge to pay is the first step of diligence. And if it had not been for the Act of 1880, which abolishes imprisonment for debt and introduces the process of *cessio*, for which the defenders presented the petition, the usual step would have been to poind the goods or imprison the person of the present pursuer, and it was only because the imprisonment for debt was abolished that the other course was followed. In lieu of imprisonment for debt a creditor is now entitled to petition for *cessio*, and the defenders here carried out their charge in the manner provided as a substitute for imprisonment. This is therefore a case of wrongous use of diligence—a diligence which by having been by a blunder used on six days' charge instead of on fifteen days is invalid and inept. The consequence is that all that followed upon it is invalid, and that therefore all the subsequent proceedings constituted a wrong to the pursuer obviously calculated greatly to injure him both in character and in credit. Now, this is a kind of case in which it is, as I think, settled that the agent as well as the client is liable in damages, and I therefore think that the action is relevant against Paterson, Cameron, & Co.

On the second question—whether malice and want of probable cause must be put into the issue—I think that the Lord Ordinary has been misled by the case of *Kinnes*. That case was of an entirely different character. In it there was an application for sequestration at the instance of a creditor against his debtor, and the debtor appeared and objected to the petition being granted on the ground that the affidavit was defective, in respect it did not set out, as required by the Bankruptcy Statutes, that the creditor held no other security for his debt than was specified in the affidavit. The Sheriff thought the objection bad and granted sequestration, but this Court on a petition for recal held that the objection was good, and the sequestration was recalled. The debtor then raised an action of damages against the creditor for wrongous use of diligence. In that case we were all of opinion that it was necessary for the pursuer to allege and prove malice and want of probable cause, for we held the petition for sequestration to have been a judicial proceeding and nothing else. But we at the same time all guarded ourselves against going further than was necessary for the purpose of that case, and I myself said—"Any person is entitled to apply for the sequestration of a debtor who is indebted to him to a certain extent, and who has within a certain period previously been made notour bankrupt, and here the defenders did no more. If there were an allegation that the debt was fictitious, or that the evidence of notour bankruptcy was fictitious, I could understand such a case as is here attempted to be made." Now, what have we here? An application for *cessio* presented against this pursuer for which there was no foundation, because there was no notour bankruptcy which is an essential condition of that diligence. Instead of the steps necessary to constitute notour bankruptcy, there had only been a charge on six days instead of on fifteen days. That is just the sort of case I wished to save in the case of *Kinnes*. Where a creditor goes on with proceedings against his debtor as being notour bankrupt when he is not so, an allegation of malice and want of probable cause is not necessary. It is quite sufficient for a pursuer in these circumstances to put into the issues the question whether it was done wrongfully.

As to these issues themselves, it is not necessary that I should say much. I think the pursuer does not need to propose one issue in his own name and the other in that of his firm, for he is the sole partner of his firm, and he will be quite entitled to recover under one issue any damages that may be found due to him. I propose therefore that we should allow one issue against each of the defenders.

I am for recalling the interlocutor of the Lord Ordinary, and adjusting issues such as are proposed by the pursuer.

Lord Deas—I confess I have had a good deal of difficulty and consideration as to this case. I have had no doubt that there was a relevant case against Taylor, and I think that with regard to him it is not necessary to aver malice and want of probable cause. But I have had much difficulty in holding that there is a relevant case against Paterson, Cameron, & Co., though I do not think it necessary or expedient to explain in detail the nature of that difficulty. My difficulty with regard to this case as directed against the agents has been whether there ought not to be inserted in the issue with regard to them the words "maliciously and without probable cause." I do not wish to be understood as saying that with regard to the question of what is the issue appropriate to a case of wrongous use of diligence there is any difference of opinion between your Lordships and myself, but my difficulty has been that I find it here averred that Paterson, Cameron, & Co. knew the pursuers to be solvent and fully able to pay their debts. I should, on the whole, have been better satisfied had your Lordships held that as against the agents it was necessary to put in issue malice and want of probable cause. At the same time, looking to the whole case and the strong proceedings taken by the agents, I do not feel myself justified in differing from the rest of the Court.

Lord Mure—I am of the same opinion on both points with your Lordship in the chair, and I cannot say I have had much difficulty in coming to that conclusion. On the first question—that of the relevancy of the action as regards the agents—it is to be noticed that the charge is that they directed proceedings to be taken against the pursuer by way of diligence without any warrant, and that they proceeded on a charge of six days instead of on fifteen days. Without that charge there could have been no proceedings of the nature which afterwards took place, and that charge was bad. That is distinctly set forth by the pursuer in articles 6 and 7 of his condescendence. That, it is now admitted, was a wrong proceeding, for Paterson, Cameron, & Co. say in their defences—"On the attention of the defenders being called to the terms of the charge

the same were immediately withdrawn." That being so, I think it is quite settled that when an agent acts in this way he is responsible in damages to the person thereby injured. Since the cases of *Stewart*, M. 13,989, and *Anderson*, M. 13,949, which were followed by the case of *Pearson*, 11 S. 1008, it has been, I think, settled that in a case of diligence proceeding on an entirely bad warrant the agent who uses the diligence is liable.

With regard to the other point, as to the form of the issue, the case of *Kinnes* has been referred to. The whole proceedings in that case were proceedings *in foro contentioso*, and the debtor was admittedly notour bankrupt. If it had been a case of false allegation of notour bankruptcy, the issue might have been quite different. In this case the use of diligence on a warrant entirely bad, and directed by both Taylor and his agents, is the thing complained of, and therefore I think the issue ought to put the question whether the act complained of was done wrongfully, and not whether it was done maliciously and without probable cause.

Lord Shand—I agree with your Lordship in the chair, and with Lord Mure.

The pursuer brings this action against both Taylor and Paterson, Cameron, & Co., who acted as his agents, on the statement that they were both wrongdoers—that Taylor authorised, and Paterson, Cameron, & Co. carried out the proceedings complained of.

I do not understand that Taylor objects to the granting of an issue against him. He only objects to the terms in which the issues have been approved of by the Lord Ordinary. On the other hand, Paterson, Cameron, & Co. have raised the question whether there is any liability against them at all. Now, they made the application to the Sheriff, and got the warrant to advertise the presentment of the petition, and they ordered the advertisement which virtually informed the public that the pursuers were notour bankrupt and ought to be ordained to execute a disposition *omnium bonorum* for behoof of their creditors. After full consideration of the case I am of opinion that Paterson, Cameron, & Co., as well as Taylor, are responsible for these proceedings. In the case of a claim of damages for assault it would be no answer on the part of the person committing the assault that he did so as agent and at the request of someone else. In the case of a letter of an injurious nature, affecting the character or credit of a person who claims damages in consequence, though the writer avowedly acted as agent for another, it could not be disputed that the writer as well as the principal, if he authorised the letter, would be liable in damages. So also I think if an agent, acting for a client, orders the execution of a diligence without any proper warrant, or performs any other wrongful act, resulting in injury to a third party, the agent as well as his client is responsible for the injury done. The acts here complained of are the presenting of the petition praying that the pursuers should be decerned to execute a disposition *omnium bonorum*, obtaining a warrant in terms of the statute, and publishing a notice which in effect represented the pursuers to be bankrupt. It is true that it is usual, and indeed generally necessary, that in the use of diligence, and in carrying out such proceedings as are here complained of, an agent should be employed. That circumstance does not appear to me to affect the claim of a third party for an injury done to him through the direct acts of the agent, either in the use of diligence ordered by the agent, who had no proper warrant for doing so, or in taking proceedings part of which is the issuing of a public notice of alleged bankruptcy. I am unable to distinguish the case on that account from the case I have put of an agent, as such, writing an injurious or libellous letter. A peculiarity of this case is that it is not merely one of diligence. To some extent, no doubt, it is a case of judicial proceedings adopted by Taylor through the agency of the other defenders—judicial proceedings, however, which when carried out to their close result in diligence; but then it appears that at the outset of these proceedings, and as the foundation for them, there was a statement made which was unfounded in fact, but which enabled the defenders to obtain the warrant or order the publication of which is complained of, and that the defenders directly caused the publication to be made by which the injury was caused.

The Lord Ordinary says—"The client is responsible for the agents' proceedings and for the blunder that was committed by the messenger or officer who gave the charge, but no action lies directly at the instance of the party injured against the agents for any damage which the pursuers may have suffered. The client is liable in damages to the third party injured, but not the agent who carried out his orders." For the reasons I have stated, I am unable to agree with that statement of the law. It appears to me that the agent is responsible to the person injured, because he was the person by whose means the injury was directly caused, and I think this view is borne out by the authorities cited in Smith on Reparation, pp. 128–29, and Begg on Law-Agents, p. 296.

On the second question—whether the words "maliciously and without probable cause ought to be inserted in the issue,"—I agree with your Lordship. I think the word "wrongfully" is the term proper for the issue. It appears to me that there is a clear distinction between this case and that of *Kinnes*. I am reported in that case, after dwelling strongly on the circumstance that the pursuer's sole objection to the proceedings was founded on a technicality, to have said—"It would make all the difference if the case were one such as your Lordship has referred to, of a trumped-up claim by one who was not truly a creditor, or a statement of notour bankruptcy unfounded in fact, and known to be so." Now, in this case what is complained of is no mere technical objection. The defenders by the petition presented by them represented to the Sheriff that the pursuers were notour bankrupt, whereas they were not so. The defenders, no doubt, had a good decree against the pursuers, but no expired charge—at least no expired charge to which any legal effect could be given. They had admittedly no ground for saying the pursuers were notour bankrupt, and no ground for publishing a notice to the effect that the pursuers were bankrupt; and in these circumstances I think the pursuers are not bound to put malice and want of probable cause in the issue.

The Court altered the interlocutor of the Lord

Ordinary, and adjusted the following issues for the trial of the cause:—"(1) Whether on or about the 8th day of March 1882 the defender Thomas Burton Taylor wrongfully presented, or caused to be presented, in the Sheriff Court of the sheriffdom of the Lothians at Edinburgh, a petition praying that the pursuers the said J. B. Smith & Company, and pursuer J. B. Smith, be decerned to execute a disposition *omnium bonorum* for behoof of their creditors, and having obtained the Sheriff's warrant thereon, published, or caused to be published, a notice of said petition in the *Edinburgh Gazette*, to the pursuers' loss, injury, and damage.—Damages laid at £1000. (2) Whether on or about the 8th day of March 1882 the defenders Paterson, Cameron, & Company wrongfully presented, or caused to be presented, in the Sheriff Court of the sheriffdom of the Lothians at Edinburgh a petition praying that the pursuers the said J. B. Smith & Company, and pursuer J. B. Smith, be decerned to execute a disposition *omnium bonorum* for behoof of their creditors, and having obtained the Sheriff's warrant thereon, published, or caused to be published, a notice of said petition in the *Edinburgh Gazette*, to the pursuers' loss, injury, and damage.—Damages laid at £1000."

Counsel for Pursuer—J. P. B. Robertson—Armour. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defender Taylor—Graham Murray. Agents—Paterson, Cameron, & Co., W.S.

Counsel for Defenders Paterson, Cameron, & Co. — Trayner — Darling. Agents — Horne & Lyell, W.S.

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*Friday, December 8.*

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

### DUNCAN *v.* BROWN AND MANN.

*Teinds—Locality—Over and Under Paying Heritors—Effect of Decree of Reduction of Final Locality.*

By an interim scheme of locality in 1862 for allocating an augmentation awarded in 1859, a proportion of augmentation was laid on the lands of D., which had previously paid no stipend, and a certain other proportion on the lands of B. and M. In consequence of an objection being sustained to this scheme, on the ground that D.'s teinds were college teinds, by a new scheme, approved as final in 1874, D.'s teinds were exempted from payment of stipend and a further burden laid on those of B. and M. The last-mentioned scheme, along with two earlier ones of 1806 and 1822 respectively, were, at the instance of B. and M. and certain other heritors, set aside by decree of reduction in 1878, by which the scheme of 1874 was ordained to stand as an interim rule of payment till a new scheme of locality should be furnished. A rectified scheme was at length approved as final in 1879, commencing with crop and year 1878 and in time coming. D., as an over-paying heritor, then raised an action against B. and M., as under-paying heritors, for repetition of a sum of money as over-payments of stipend made by him for the period between 1859 and 1874. *Held* (*rev.* Lord Ordinary—*diss.* Lord Young) that the decree of reduction having fixed the inauguration of the new scheme of locality at a date posterior to that when the reduced locality had come into force, could only operate prospectively from that date so as to affect future payments only, and not retrospectively so as to affect past payments; and consequently that the final locality of 1874 was the rule of payment of stipend for the period to which it was made applicable; and that the pursuer's claim was in the circumstances well founded.

*Observations* (*per* Lord Justice-Clerk) on the practice of the Teind Court in the process of reduction of localities.

This action was raised by John Duncan of Parkhill, in the county of Forfar, against Mrs Brown, widow of Alexander Brown, farmer, Sunnyside, Montrose, and Miss C. J. Mann, residing at Hillside in the same county. The facts of the case are summarised by the Lord Ordinary as follows:—"This action is brought by one of the heritors of the parish of Montrose against two of the other heritors, to recover a sum of £94, 19s. 6d. which is said to be the amount due by the defenders to the pursuer in respect of over-payments of stipend. By an interim scheme, dated 20th June 1862, for allocating an augmentation awarded on 23d May 1859, a proportion of the augmentation amounting to 13 b. 1 f. 2 p. 2⅜ l. of meal, the like amount of barley, and £4, 16s. in money, was allocated on the teinds of the pursuer's lands, which had previously paid no stipend; and the defenders' lands, which already paid of old stipend 2 bolls 3 firlots and half a lippy of meal, and 3 bolls 1 firlot and 1¼ lippy of barley, were burdened in addition with 2 firlots 3 pecks 3⅜ lippies meal, the like amount of barley, and 5s. 3½d. of the augmentation. The interim scheme was objected to by the Principal and Professors of St Mary's College, in so far as it allocated the teinds of the pursuer's lands for stipend, on the ground that these were college teinds; the objections were sustained; and by a scheme approved as a final scheme on 13th March 1874 the pursuer's teinds were exempted and a further burden was laid upon the defenders' teinds. It follows that if the rights of parties are still to be regulated by the last-mentioned scheme, the pursuer was an over-paying heritor, and the defenders were under-paying heritors for the period between 1859 and 1874, during which the stipend was paid in accordance with the scheme of 1862. But it appears that the amounts allocated on the defenders and certain other heritors by the final scheme of 1874, and also by two previous localities of stipend awarded in 1806 and 1822, were in excess of the true liability; and all these localities were accordingly set aside by decree of reduction, obtained on 8th December 1878, in an action at the instance of the heritors in question against the minister, titulars, and the remaining heritors of the parish. The ground of reduction was that the decrees of locality sought to be set aside were 'erroneous' and *ultra vires*, inasmuch as the lands of the defenders and other heritors