body of whom he knew nothing to his patients as a medical adviser in whom they might have confidence, because he had undertaken to introduce to them a gentleman in whom he had perfect confidence himself. That seems to me sufficient to show the personal character of this agreement. It can make no difference that he is not asked to recommend a stranger to the old patients until after the lapse of thirteen years, and the introduction by others of two successive assignees. I agree with your Lordship that in following out the various clauses of the agreement they all have a personal character tending in the same direction. But the most material clause for that purpose appears to me to be that which I have mentioned. I am therefore of opinion that the Sheriff's interlocutor should be affirmed.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff appealed against.

Counsel for the Pursuer (Appellant)—Wilson, K.C. — D. Anderson. Agents — Fraser & Davidson, W.S.

Counsel for the Defender (Respondent)—Morison, K.C.—Macmillan. Agent—W. J. Forrester, Solicitor.

Wednesday, December 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CLARK *v.* BEATTIE AND OTHERS.

Reparation—Wrongous Use of Diligence—Small Debt (Scotland) Act 1837 (1 *Vict. c.* 41), *secs.* 16 *and* 30.

B raised a Small Debt action against C, and employed N, a sheriff officer, to serve it. The summons was never really served upon C, but was served at the house of his mother, in which he did not reside. The execution of the service was filled up as if the summons had been duly served. A decree was obtained in absence, which was extracted by B, and in virtue of it an arrestment was lodged by N in the hands of C's employers. C thereupon applied for and obtained a rehearing of the case, with the result that the decree was recalled. C then brought an action of damages against B, and also against N, for wrongous use of diligence.

Held (1) that as the decree had been set aside, it and the diligence proceeding thereon were not protected by the Small Debt Act, section 30; (2) that the diligence was wrongous, and B liable in damages; but (3), *following Scott* v. *Banks*, 1628, M. 6016, that N, the sheriff officer, was not liable, as there was nothing in the decree to show it was taken in absence or was invalid.

The Small Debt (Scotland) Act 1837 (1 Vict. c. 41), sec. 16, provides regulations for the rehearing of cases where a decree has been pronounced in absence.

Section 30 enacts—"No decree given by any sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution other than provided by this Act, either on account of any omission or irregularity or informality in the citation or proceedings, or on the merits, or any ground or reason what ever."

Malcolm Clark, tinplate worker, residing at 8 Henrietta Street, Scotstoun, Glasgow, raised an action against Andrew Beattie, draper, 11 Great Wellington Street, Glasgow, Thomas Nisbet, sheriff officer, 3 Henrietta Street, Partick, and John Bennett and Robert Hunter, cautioners for and with the said Thomas Nisbet as a sheriff officer, for damages in respect of wrongous use of diligence.

The pursuer averred—"(Cond. 2) In or about May 1907 the defender Beattie instructed the defender Nisbet to take out a Small Debt summons in the Small Debt Court, Glasgow, at the instance of the defender Beattie against pursuer's mother, pursuer, and pursuer's brother Archibald Clark, jointly and severally or severally, concluding for payment of £7, 1s. 6½d., being balance of an account alleged to be due by pursuer and his mother and brother to Beattie, and a summons was accordingly taken out by the defender Nisbet or his servant for whom he is responsible. Pursuer is not liable for said account or any part thereof. (Cond. 3) In said Small Debt summons the pursuer and his mother and brother were designed as 'all residing at 769 Dumbarton Road, Partick,' but pursuer was not residing there and never had resided there, which was well known to the defender Beattie and the defender Nisbet at the time the said Small Debt summons was served. (Cond. 4) Acting on the instructions of the defender Beattie, the defender Nisbet, or his servant, for whom he is responsible, pretended to serve said summons on the pursuer by leaving a copy thereof at the house of pursuer's mother at 769 Dumbarton Road, Partick, well knowing that pursuer did not reside there. Pursuer's mother explained that pursuer was not residing there, and never had resided there, and refused to take the service copy of said summons for pursuer, but notwithstanding this explanation and his own knowledge, the defender Nisbet, or his said servant, maliciously persisted in leaving said copy summons, and it was actually left by the sheriff officer on a table at pursuer's mother's house as aforesaid. The said copy never reached pursuer, and he had no knowledge of the proceedings until the arrestment after condescended on was effected. . . . (Cond. 5) Thereafter the defender Nisbet or his said servant filled up the execution of service on said summons in common form and returned the summons to Court. The case was called in the Small Debt Court at Glasgow on 30th May 1907, when decree passed in absence against pursuer's

mother, pursuer, and pursuer's brother, jointly and severally. (Cond. 6) The defender Beattie afterwards extracted said decree, and in or about December 1907 maliciously instructed the defender Nisbet to lodge an arrestment in the hands of pursuer's employers Messrs Mechan & Sons, Limited, Scotstoun. This was maliciously done by the defender Nisbet on 27th December 1907, and a portion of pursuer's wage amounting to £1, 14s. 9d. was attached. The schedule of arrestment is produced herewith. On 6th January 1908 the defender Beattie, without warrant from the Court or the consent of pursuer, uplifted the said sum of £1, 14s. 9d., being the amount attached by said arrestment, and endorsed a receipt therefor on the back of said schedule. (Cond. 7) The deduction from his wage of the sum arrested was the first intimation pursuer had of the proceedings before condescended on, and he at once took steps to have the decree in absence rescinded. He sisted said decree against him, and on 22nd January the Sheriff of Lanarkshire recalled said decree and assoilzied pursuer from the conclusions of the action, with expenses to the pursuer in this action, all in terms of extract decree of absolvitor herewith produced. (Cond. 8) As a result of said arrestment pursuer suffered great injury to his feelings, and loss of reputation in the eyes of his employers and fellow-workers and others, who naturally concluded that pursuer was insolvent and unable to meet his debts. Pursuer has applied to defenders Beattie and Nisbet for *solatium* and damages, but they refuse to compensate him, and the present action has been rendered necessary."

The pursuer pleaded, *inter alia*—"(1) The pursuer not having been indebted to the defender Beattie in the sum sued for in said Small Debt summons, the use of the diligence complained of was unjustifiable, wrongful, and malicious, and was nimious and oppressive. (2) The defenders Beattie and Nisbet having wrongfully and maliciously arrested the pursuer's wage, they and the cautioners for the defender Nisbet are bound to compensate him for the loss and injury thereby sustained. (3) The said summons not having been served upon pursuer, the decree granted thereon was inept, and all diligence following on said decree was illegal and unwarrantable."

The defender Beattie pleaded, *inter alia*—"(1) The action is incompetent. (2) The pursuer's statements are not relevant or sufficient in law to sustain the conclusions of the summons." [The first and second pleas for the other defenders were similar.]

On 18th March 1908 the Sheriff-Substitute (MACKENZIE) sustained the first and second pleas-in-law for each of the defenders, dismissed the action, and decerned.

Note.—"The pursuer's agent admitted that his client was barred by section 30 of the Small Debt Act from claiming damages on account of any irregularity in the proceedings prior to the decree pronounced against him in the Small Debt action, but he argued that he was entitled to complain of the subsequent arrestment as unjustifiable, in respect that the sheriff officer knew when he lodged it that the decree on which it proceeded was inept owing to the summons never having been served on the pursuer. It appears to me that the foundation of this complaint is the alleged irregularity of the proceedings prior to the decree, and that the defenders can claim the protection given by section 30, as Mr Stewart says in his book on Diligences, at p. 778—'If the diligence is bad only because the decree is irregular, this is a defect in the judicial proceedings. The Court must judge of the irregularity of the diligence on the assumption that the decree is valid and regular.' In the present case the pursuer alleges no irregularity in the execution of the arrestment, and assuming that the decree had been regularly and properly obtained, the party in right of it was quite justified in using the diligence of arrestment upon it. I am therefore of opinion that the pursuer's averments are irrelevant—*Gray* v. *Smart*, 19 R. 692; *Crombie* v. *M'Ewan*, 23 D. 333."

The pursuer appealed, and argued—(1) The Sheriff-Substitute's ground of judgment was wrong. In *Gray* v. *Smart*, March 18, 1892, 19 R. 692, 29 S.L.R. 589, and *Crombie* v. *M'Ewan*, January 17, 1861, 23 D. 333, cited by him, and also in *Turnbull* v. *Russell*, November 15, 1851, 14 D. 45, and *Pollock* v. *Goodwin's Trustees*, June 24, 1898, 25 R. 1051, 35 S.L.R. 821, the judgment depended upon the statutory rule that a standing decree of the Small Debt Court could not be impugned. But in the present case the Small Debt decree under which diligence had been done had been recalled under section 16 of the Small Debt (Scotland) Act 1837 (1 Vict. cap. 41). (2) As the Small Debt summons had not been served on the pursuer, diligence done thereunder was a wrong for which the person who instructed the service and the diligence was responsible, and there was no need to aver malice—*M'Gregor* v. *M'Laughlin*, November 17, 1905, 8 F. 70, 43 S.L.R. 77; *MacRobbie* v. *M'Lellan's Trustees*, January 31, 1891, 18 R. 470, 28 S.L.R. 322; *Wilson* v. *Alexander*, July 23, 1846, 9 D. 7. If malice required to be averred, a general averment of malice was here sufficient—*Baillie* v. *Hume and Adamson*, December 8, 1853, 16 D. 161. (3) As regards the messenger, a relevant case was made against him, because it was averred that he knew of the fault in the original service which vitiated the diligence—*Ritchie* v. *Dunbar*, February 28, 1849, 11 D. The messenger was liable if he proceeded irregularly, and malice was not necessary—Graham Stewart on Diligence, p. 806. [The LORD PRESIDENT referred to *Scot* v. *Banks*, 1628, M. 6016, there cited.]

Argued for the defender (respondent)—The diligence was protected by the decree, and the decree was protected by section 30 of the Small Debt Act. True, the decree had now been recalled, but it was standing and *ex facie* regular when diligence was done on it. Diligence was not wrongous when there was standing at the time of the dili-

gence an *ex facie* regular decree. In any case malice must be averred; there was here no averments of malice, nor of facts and circumstances inferring malice.

At advising—

LORD PRESIDENT—This is an action of damages brought by one Clark against Beattie, and also against Nisbet, a sheriff-officer, and his cautioners. The circumstances out of which the case arises are as follows:—The defender Beattie raised a Small Debt action against Clark, the present pursuer, and employed the defender Nisbet to serve the summons in that action. According to the pursuer's averment, which at this stage of the case must be taken as true, the summons was really never served upon the pursuer at all, but was served at the house of his mother, in which the pursuer did not reside. The pursuer further avers that notwithstanding this the execution of service was filled up as if the summons had been duly served, and that following upon this a decree was obtained in absence. This decree was extracted by Beattie, and in virtue of it an arrestment was lodged in the hands of the pursuer's employers. It is this wrongous use of diligence that the pursuer complains of in this action.

The learned Sheriff before whom this action was brought has dismissed it, conceiving that the diligence is protected by the decree, which again is protected by section 30 of the Small Debt Act. That judgment would be undoubtedly right but for one fact, which apparently has escaped the Sheriff's notice, and which I have not yet mentioned, namely, that the present pursuer, when he found that these proceedings had been taken against him, applied for and obtained, in terms of the Small Debt Act, a re-hearing of the case, and at that re-hearing the decree was recalled. Accordingly, although the cases cited by the learned Sheriff undoubtedly decide that a party cannot complain of a diligence which follows regularly enough upon a decree which is protected by a finality clause and cannot be set aside, these authorities can have no application to a case where a decree, so far from being not open to review, has, as a matter of fact, already been set aside. In such a case the ground of the diligence is gone, and with it the protection which otherwise would have extended to the diligence.

When I come to consider the question on its merits, it seems to me that the law on the point has been quite satisfactorily settled in the recent case of *M'Gregor* v. *M'Laughlin*, 8 F. 70. I need not repeat what I said in that case. It is enough to say that I entirely adhere to the distinction there taken between actions of damages for misuse of the forms of process and actions of damages for misuse of diligence. In that case the earlier decision in *MacRobbie* v. *M'Lellan's Trustees*, 18 R. 470, was noticed and approved, and in that decision it was made clear that if diligence has followed upon a decree which is bad—not merely wrong upon the merits, as, for instance, in the case of a decree pronounced by a Lord Ordinary and reversed upon appeal, but bad because of some intrinsic fault which makes it really no decree at all—then that diligence is wrongous and an action of damages will lie for its use. Now upon the facts here the decree was plainly quite wrong, because it was pronounced when there had been really no service at all on the defender; and, accordingly, I think that, upon the authority of *MacRobbie's* case, an action of damages lies against the person who put that process in motion. While I am referring to *MacRobbie's* case it may be well that I should mention a fact which I have discovered in connection with that case. The circumstances there were that an agent took a decree which was *ultra petita*, and no doubt the client was personally entirely ignorant of what had been done. The report bears that the Lord Ordinary disallowed the issue as against the client, and that in the Inner House it was not insisted in against him, but only against his agent. Now, of course, the case against the agent was plain enough, because he was really responsible for taking the decree, and therefore it was quite obvious that the action lay against him; but I confess it puzzled me very much to see upon what grounds the client had been let out consistently with the Lord President's opinion, and consistently with the general law upon the subject. However, upon looking further into the matter and examining the session papers, and conferring with Lord Salvesen, who was counsel in the case, I have ascertained that the true history of the case was this, that the agent, who, of course, knew that he was the person who had committed the fault, accepted full responsibility. The agent would have been liable in relief to the client, and so in the pleadings he accepted responsibility; and as he was a person of means and perfectly good for any sum of money that could be decerned for against him, the pursuer simply did not press the matter as against the client, and was content with an issue against the agent. But that, of course, is not, as the report seems to suggest, anything like a judgment of absolvitor in the case of the client.

On the whole matter I think that here there must be an issue in ordinary form granted against Beattie for wrongous diligence.

On the other hand, I think that the action, so far as directed against the sheriff-officer, fails. If an action for damages in respect of the decree were competent, it would no doubt be brought against the sheriff-officer here, because the pursuer avers that the officer was aware that the pursuer did not reside in the house at which he served the summons, and therefore must have known that he was returning an execution which was untrue. But then this is not an action of damages in respect of the decree, and indeed no such action would lie, as was pointed out in the two cases I have just cited. The claim here is for damages for the wrongous use of

diligence after the decree had been obtained. Now diligence does not always or necessarily follow upon the execution of a summons, and the officer could not know whether diligence would or would not be used against the pursuer in this case. But after the execution was returned a decree was taken, and that decree contains the ordinary warrant for diligence, arrestment, and poinding. There was nothing on the face of the decree to show that there was anything wrong with it, and there was not necessarily anything wrong. It may be that it was, as we are now told, invalid, but it was not necessarily so, even although the service as executed was bad. For all that appeared in the decree it was possible that the defender had compeared at the Small Debt Court, and that decree had then been pronounced against him. There was nothing upon the face of the decree to show that that was not so, for there is no difference in point of form between a Small Debt decree obtained against a compearing defender and a decree in absence. That being the case, it seems to me the case falls directly within the authority of the old case of *Scot* (M. 6016), and that as there is not any averment that the messenger knew that the diligence was wrong, and in spite of that went on with it, there is no relevant case against the messenger. Accordingly, I think the messenger—and with him, of course, his cautioners—must be assoilzied.

LORD KINNEAR—I agree with your Lordship.

LORD JOHNSTON—I agree, and have nothing to add.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court recalled the interlocutor of the Sheriff-Substitute dated 18th March 1908, assoilzied Thomas Nisbet and his cautioners from the conclusions of the action, and decerned; and remitted the cause so far as directed against the defender and respondent Andrew Beattie to the Sheriff to proceed as accords.

Counsel for the Pursuer (Appellant)—Hamilton. Agents—Sharpe & Young, W.S.

Counsel for the Defender (Respondent)—Findlay. Agent—J. Dunbar Pollock, Solicitor.

Friday, December 4.

FIRST DIVISION.

MACKENZIE'S TRUSTEES *v.* KILMARNOCK'S TRUSTEES AND OTHERS.

Succession—Liferent and Fee—Liferent with Testamentary Power of Disposal.

Where the same person is given a liferent and a power of disposal over the capital, "the Court will not declare a fee unless there is both an unlimited liferent and an absolute power of disposal, as opposed to a mere testamentary power of disposal."

Succession—Faculties and Powers—Power of Appointment—Exercise of Power—Division of Unappointed Portion of Fund.

In the marriage-contract of A M his father bound himself to pay £25,000 to the marriage-contract trustees, to be held by them after A M's death "for the liferent use and behoof of the child or children of the said intended marriage, but for their respective liferent uses allenarly, and in such shares or proportions as their said father may by any writing under his hand direct and appoint, and failing such direction and appointment, then equally among them, share and share alike, and during the minority of said child or children the said trustees shall apply the annual income or produce of said sum of £25,000 towards their maintenance and education, and on their respectively attaining majority their respective shares of said income or produce shall be paid over to themselves during their several lifetimes; declaring nevertheless that any of the daughters shall be entitled to settle their shares of said sum in any contracts of marriage into which they may enter with consent of their father during his life, and that in so far as not so settled the whole of said children shall be entitled to dispose of their respective shares of said capital sum, by will or other testamentary writing under their hands." A M survived his father and was survived by one daughter and three sons. In the marriage-contract of his daughter A M appointed to her a one-fourth share both of income and capital which she with his consent settled in her marriage-contract and conveyed to trustees. A M by deed of appointment also directed "that on the expiry of my own liferent one-fourth of the annual income of said sum of £25,000 be paid to my eldest surviving son," V "if then surviving, and for the remainder of his life, subject always to the conditions and provisions of said marriage-contract, and I declare this appointment to be irrevocable."

Held (1) that the power of appointment had been validly exercised in the case of the daughter, because the power to her "to settle" her share in her marriage-contract imported the setting aside of capital, and also in the case of the son V because the appointment to him though in form an appointment of income carried incidentally with it a power of disposal by will; and (2) that the unappointed capital fell to be divided equally among the four children of A M.

A Special Case was presented to the Court by (1) the trustees acting under the antenuptial contract of marriage entered into