No. 46. WILSON AND M'LELLAN, Appellants.—*Jo. Campbell —T. H. Miller.*

DUNCAN SINCLAIR, Respondent.—*Spankie—Robertson.*

Repetition—Held, (reversing the judgment of the Court of Session,) 1. That where a payment has been made in virtue of a decree in absence and diligence thereon, repetition cannot be ordered so long as the decree and diligence are not set aside; 2. That it is not relevant to entitle a party to repetition to allege that he has paid under a mistake in point of law; and 3. That a party who has had the means of knowing the facts before making a payment, and seeks reparation on an allegation that he paid under a mistake in point of fact, may be barred from claiming repetition.

Dec. 7, 1830.

1st Division. Lord Newton.

ALEXANDER M'CRA, on the 25th of July, 1820, granted his promissory note to Duncan Campbell for L.130, payable three months after date. Campbell endorsed this note to Harrison, and by him it was endorsed to another party, who endorsed it to Wilson and M'Lellan, merchants in Greenock. By them it was discounted with the Greenock bank. When it fell due, on 28th October, it was dishonoured by M'Cra, and was thereupon protested by the Bank, from whom Wilson and M'Lellan retired it, and got up the protest with a receipt. It was alleged that the note was vitiated in substantialibus; but if it was so, at this time it did not appear to have been observed by any of the parties. The protest, however, contained a material blunder. It set forth, that the note was payable on the 28th of July, and that it had been protested upon that day, in place of the 28th of October. It was recorded at the instance of Wilson and M'Lellan, extracted, and letters of horning raised. The letters were transmitted by the agents of Wilson and M'Lellan to Angus Sinclair, messenger at Oban, with instructions to execute them against M'Cra, Campbell, and Harrison. He charged Harrison, but reported that he could not find the other parties. Having returned an execution against Harrison, letters of caption were expede, which the agents for Wilson and M'Lellan sent to Sinclair on the 4th of January, 1821, desiring him 'to execute the enclosed caption 'against Harrison on receipt, and report to us in course that you 'have done so.' They afterwards, on the 11th, by authority of Wilson and M'Lellan, sent a state of the debt to Sinclair, and mentioned that, 'in case a bank draft or other document is sent us 'for the debt, which will not be due before the 20th, you must 'add interest till the time such draft falls due.' Sinclair, on the 22d, sent to the agents two bills by private parties, and about

L.30 in bank notes. The bills were returned, but the money was kept, and put to Harrison's credit; and on the 3d of February, the agents wrote to Sinclair, that 'we have to request that 'you will immediately on receipt put the caption in your custody in execution against Mr Harrison.' Sinclair failed to do so; and in May, 1829, Wilson and M'Lellan raised an action against him, and also against his brother, Duncan Sinclair, who was his cautioner, founding on the neglect to execute the caption, and concluding for payment of the balance of the debt, and L.50 of damages. The partibus on the summons bore that a counsel had appeared, and that it had been taken to see by Mr Robert M'Kenzie, W.S., as agent. The process, with the writs founded on, were borrowed by M'Kenzie; but having returned no defences, decree in terms of the libel was pronounced on the 31st of May, and a remit made to the auditor to tax the expenses. A correspondence then took place between the agents for Wilson and M'Lellan and M'Kenzie, in which the latter requested a copy of the account of expenses, and stated that he would be present at the auditor's, 'to attend to the interest 'of my clients;' and accordingly he was present at the taxation. A discussion afterwards took place between them as to the conclusion for damages, which it was agreed should berestricted to the actual disbursements; and a minute to that effect was lodged in process, and decree obtained accordingly.

In virtue of this decree, letters of horning and caption were raised against the two Sinclairs, and sent to M'Pherson, a messenger, by whom the amount of the sum charged for was remitted in March, 1822. Nothing farther took place till April, 1823, when an agent on behalf of the cautioner, Duncan Sinclair, applied to the agents for Wilson and M'Lellan to deliver to him the grounds of debt, diligence, and proceedings; and they in consequence sent the bill, diligence thereon, and the diligence raised on the decree conform to inventory, for which a receipt was granted on the 10th of April. In September thereafter, an application was made to them for an assignation to the diligence in favour of Duncan Sinclair; but this was declined on the ground that they understood that the debt had not been paid by him, but by M'Pherson the messenger, who, it was alleged, had incurred a liability for the debt. The agent for Duncan Sinclair having, however, stated, that the debt had been paid by Duncan Sinclair, and bound himself to 'guarantee Messrs Wilson and M'Lellan against any claim 'which may be made against them on account of the assignation being granted in favour of Mr Sinclair instead of Mr 'M'Pherson,' the assignation was executed, in September,

Dec. 7, 1830. 1824, by Wilson and M'Lellan. This deed contained a clause of warrandice in these terms: 'which assignation above written we bind and oblige ourselves, our heirs, executors, and successors, for our respective rights in the premises as aforesaid, to warrant to the said Duncan Sinclair and his foresaids, from all facts and deeds done or to be done by us in prejudice hereof.'

In virtue of this assignation, Duncan Sinclair raised diligence in his own name, and apprehended the endorser, Campbell, who was liberated on consigning the amount. This was paid to Sinclair, and the promissory-note, and diligence thereupon, delivered up to Campbell. The vitiation in the note, and the blunder in the protest, having been then discovered, Campbell raised an action of reduction, repetition, and damages against Duncan Sinclair, in which the Lord Ordinary, on the 27th of February 1827, reduced the note and diligence, and decerned in repetition, 'in respect that Duncan Sinclair cannot undertake to prove that the alteration of the date on the promissory-note in question was made before or at the time it was delivered by the grantor to the pursuer,' (Campbell.)

In the meanwhile Duncan Sinclair, on the institution of this process, had called on Wilson and M'Lellan to relieve him; and they having declined to do so, he raised an action against them, concluding, 1. For reduction of the decree pronounced against him and his brother Angus, and of the diligence following thereon. 2. For repetition of the amount of the money, which, in virtue thereof, he had paid to them. And, 3. For relief of the action raised by Campbell against him. The leading grounds of reduction of the decree was, that the promissory-note was vitiated, and the protest inept, so that the diligence raised thereon was illegal, and consequently the failure of his brother to execute it could not infer any liability against him, and that the decree had passed in absence. The conclusion for repetition was deduced as a consequence of the reduction of the decree; but it was farther rested on the ground that Wilson and M'Lellan 'were bound and obliged by having granted the foresaid assignation, containing the clause of warrandice before-mentioned, to warrant the foresaid sums and promissory-note, and other alleged grounds of debt assigned by them, to be truly due and free from all nullities and defects whatever.'

In defence, Wilson and M'Lellan maintained, 1. That the decree had not passed in absence; but, on the contrary, counsel and agent had appeared both for Duncan Sinclair and his

brother; that the agent had attended the taxation of the account of expenses, and that the conclusion for damages had formed the subject of a compromise. 2. That both Duncan Sinclair and his brother had had an ample opportunity, before paying the money, of making themselves acquainted with all the facts; and that the agent subsequently employed by Duncan was in possession of all the documents for several months before the assignation was requested, and was in the full knowledge of their nature, or must be presumed to have been so, at the time it was granted. And, 3. That the warrandice against fact and deed could not infer a liability for the vitiation of the note and the blunder in the protest.

To this it was answered, 1. That M'Kenzie did not appear for Duncan Sinclair, but for his brother, and had no authority to act for the former. 2. That the payment of the money had not been made voluntarily, but under the compulsion of diligence, and at a time when Duncan Sinclair (who was merely a cautioner) had not had an opportunity of seeing the documents, and was ignorant of the facts. And, 3. That although the clause of warrandice might not extend to the effect of warranting the solvency of the debtors, yet it necessarily imported that the documents assigned were legal and effectual.

The Lord Ordinary pronounced this interlocutor:—'Finds, 'that whatever implied obligation, in respect to warrandice, 'the defenders might originally have incurred, by taking 'decree against the pursuer, and compelling him to pay the 'full balance of their debt, with the expenses of diligence and 'process, the pursuer, by afterwards accepting from them 'an assignation to the debt and diligence, with warrandice 'from fact and deed only, has limited his recourse to the extent of this species of warrandice: Finds, that as the defects 'which have been found to render the grounds of debt and 'the diligence invalid, have not arisen from the fact or deed of 'the defenders, they are not liable in repetition; therefore, 'sustains the defence founded on the limited nature of the 'warrandice accepted of, assoilzies the defenders, and decerns, 'but finds no expenses due.' His Lordship at the same time issued the subjoined note.* This interlocutor the Court recalled,

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* Note.—'The Lord Ordinary has found no expenses due, because he thinks 'the pursuer's a hard case. He conceives that the messenger could not have been 'subjected in damages for neglect, had it appeared that the document of debt was 'vitiated, or the diligence inept, and that when the defenders compelled the pursuer, 'as his cautioner, to pay up the full balance of the debt, with the expense of the

Dec. 7, 1830. and made a remit to the Lord Ordinary, who thereafter having reported the case, their Lordships pronounced the following interlocutor, on the 12th of February, 1829:—'The Lords, in 'respect of the vitiation of the bill, and the illegality of the 'protest, and diligence thereon, Find the defenders, Archibald 'Wilson, James Jamieson, and John M'Lellan, jointly and 'severally liable in repetition to the pursuer of the sum of 'L.116, 4s. 9d. Sterling, paid by the pursuer to the defenders, 'with interest since the 12th day of March, 1822 years, and de-'cern accordingly. And further, remit to the Lord Ordinary to 'hear parties on the other conclusions of the libel for relief; 'also find the said defenders, Archibald Wilson, James Jamie-'son, and John M'Lellan, jointly and severally liable to the 'pursuer in expenses.'*

Wilson and M'Lellan appealed.

Appellants.—1. The decree and diligence, by virtue of which the respondent paid the money to the appellants, have not been set aside. Till reduced, a decree in absence is as good and effectual as a decree in foro; but although the Court below have not set aside the decree and diligence, yet they have ordained the appellants to restore the money which they received by force of that decree. In point of fact, however, the decree was not in absence—counsel and agent appeared both for the respondent and his brother, and attended to their interests, the agent was present at the taxation of the account, and entered into a compromise relative to the conclusion for damages. The decree, therefore, was not reducible, and consequently the respondent was not entitled to repetition.

2. But supposing that the decree had been set aside, still the respondent is not entitled to repetition. The claim is made by him on the footing, that he was compelled to pay contrary to law. It is said, that his brother made no default, because the diligence was inept. This is just a plea, that the respondent paid under a mistake in point of law. But such a plea is irrelevant. A party who pays under a mistake in point of fact, or

'diligence, they were bound to assign to him the debt and diligence, with absolute 'warrandice. When he incautiously, however, accepted of an assignation, bearing 'the limited warrandice from fact and deed, the Lord Ordinary is of opinion, that, 'in terms of the doctrine laid down by Mr Erskine, B. 2, tit. 3, sec. 27, the implied obligation must be superseded by the expressed one.'

* 7 Shaw and Dunlop, 401.

in ignorance of a fact, may be entitled to repetition, provided he has not barred himself by his acts and deeds. But a party who alleges that he paid under a mistake in law, cannot demand restitution. He is presumed to know, and is bound to know, the law, and therefore cannot plead ignorance. But independent of this, the respondent, or at least the party for whom he was liable as cautioner, had full opportunity of knowing the facts. The letters of horning and caption necessarily recited the protest, and consequently he must have seen its terms; and, again, in the action in which decree was obtained, all the writs libelled were produced. Besides, before paying the money, the respondent had it in his power to examine the writs; and before he got the assignation, they were in possession of his agent for more than a twelvemonth.

3. Although the appellants bound themselves only in warrandice from fact and deed, the Court below have found them liable in absolute warrandice. It is laid down by all the authorities, that, where a party accepts warrandice merely from fact and deed, he undertakes the hazard of all the defects in the right. But it is not and cannot be alleged, that either the vitiation of the bill, or the blunder in the protest, was the fact and deed of the appellants.

Respondent.—1. It is true that the Court have not reduced the decree, but the case is not exhausted, and it is competent, upon motion, for the Court still to do so. It is a simple decree in absence, against which the respondent is entitled to be reponed at any time. It is not true that he made appearance, and even although he had, the decree was not pronounced on the merits, but causa incognita.

2. The diligence was illegal, both in itself, and as proceeding on a promissory-note, which could not be the warrant of lawful diligence. The respondent's brother therefore committed no default in not executing that diligence, and consequently incurred no liability for the debt. The respondent never saw the note nor the diligence till long after he had paid the money, and this payment was made not voluntarily, but by compulsion. He did not pay merely through a mistake in law—he paid on the representation of the appellants, that they had in point of fact a lawful ground of debt and lawful diligence. This was an error in fact, and not a mere error in law.

3. Independent of any clause of warrandice, the appellants were bound—not to warrant the solvency of the debtors—but debitum sub esse. They, however, expressly bound themselves

Dec. 7, 1830. to warrant against fact and deed, which implied a similar obligation; and as the diligence was raised at their instance, and under their directions, it was their fact and deed.

LORD CHANCELLOR.—My Lords, this case was argued at great length two successive days on the part of the appellants and respondent; it is an appeal from certain judgments of the Court of Session in Scotland, allowing of the repetition—as they call it—the payment back of certain monies which had been paid by Duncan Sinclair, the pursuer in the action, and the respondent in this appeal, to other parties, in consequence of a decree in a former action, that decree being in a suit brought against him by these parties for the recovery of damages against him, as the cautioner of his brother, Angus Sinclair, who had failed in his duty, it was alleged, as messenger, in the execution of a certain process. It is necessary that I should remind your Lordships, that, by the law of Scotland, a summary recourse is given upon a bill of exchange or a promissory note, which, by the law of England, can only be had in consequence of a judgment obtained in an action brought by the party entitled against the party liable. This follows, in England, the course of all ordinary actions. The plaintiff, who, we will say, is the holder of a bill of exchange, sues the acceptor, or the drawer sues the acceptor, or the indorsee sues the drawer. Here he has judgment upon the verdict, and execution issues as in any other suit, the bill having, independently of the mode of transferring the interest in it, no privilege except this—that, by the custom of merchants, extended, by statute, to the case of promissory notes, no consideration is necessary to be proved. In this particular—of the non-obligation to prove consideration, and a consideration being prima facie presumed—alone is there any peculiarity in bills of exchange and promissory notes, and actions thereupon brought, and judgment and execution thereupon had. In Scotland it is material to observe—very conveniently, as it has always appeared to those who have attended to the comparative merits of the two systems of jurisprudence, and very conveniently to those engaged in commerce, and tending to prevent the multiplicity of undefended causes (which are so numerous in this country on notes and bills, that Lord Chief-Justice Tenterden has lately, for the purpose of ridding himself from those inconveniences, appointed days for trying undefended causes and actions on bills of exchange and notes, assuming that they are, generally speaking, of that description)—in Scotland, very much to the benefit of suitors and those engaged in trade there, bills and notes have this further privilege attaching to the right of action:—A certain process of registration takes place, whereupon, in case of no suspension pursued to interrupt, a proceeding takes place, and a party may have his execution, which is the proceeding in England, after having obtained a verdict and a judgment in the action.

In the present case a promissory note had been dishonoured, and this course was pursued by the indorsee against the maker of the note; protest was recorded, and diligence raised thereon, and the messenger, Angus Sinclair, the brother of Duncan Sinclair, the defendant below in the first

action, was intrusted with the execution of that diligence. The warrant of the messenger who executes the process must bear upon the face of it that he has a legal authority. Now, it appeared, when it came to be looked into, that the notary's protest had this blunder or defect—that while the promissory note which was payable at three months, and drawn on the 25th of July, and became due (including the three days of grace,) on the 28th of October, the notary's document, the protest, purported to make it payable on the 28th of July, and that the process was thus wholly illegal and inept, and that the messenger, in executing that process, would have been guilty of a wrong, and made himself liable to an action for false imprisonment. Nevertheless, the ground of the action against Duncan Sinclair was conceived to be correct, he being cautioner or security for his brother, the messenger. He, therefore, when he was complained of in that action, suffered the decree to go out in absence, being not then aware, any more than his brother, the principal, of the defect of the process, which justified him in not executing it, and which turned, what appeared to be his fault, into the only correct conduct to be pursued.

Much litigation has arisen, both in the Court below and here, upon this material point—the nature of that proceeding against Duncan Sinclair. It is on one side stated to be a decree in absence; it is on the other side denied to be a decree in absence. This is most material. A decree in absence, by the law of Scotland, is perfectly different from our laws in this respect, and framed on principles which have been clearly established by an uniform train of decisions, and wholly unquestioned on either side, but which principles, I will venture to say, are the most extraordinary that are to be found regulating the practice of any civilized country. In that respect there seems to be hardly any bounds to the right which a defendant has of opening a proceeding, by simply not appearing after a certain time. I allude to these things because the distinction is of the highest importance, and because, in referring to the laws of both countries, it is our duty to take that which is good in the law of Scotland, and to introduce it, by prudent changes, into our own; and it is our duty to point out what is bad in the law of Scotland, that it may, by a judicious course of amendment, be remedied. I therefore gladly seize such opportunities, when I see my way clearly, and when I am aware that there is no difference of opinion among my brethren at the bar. This being the case at present, I state the great difference in the Scotch practice in this respect; for in England, when a man comes into a Court as a plaintiff, and has given due notice to the defendant to appear—if he has not given due notice, and he has done that which may prejudice the defendant, the latter can relieve himself; but if he has had due notice, and does not appear, he has himself to blame—the plaintiff is not absolved, by the defendant's absence, from the necessity of proving his case, although it becomes an easier matter in all probability. But he proves his case and obtains his verdict; and that verdict, and the judgment proceeding upon that verdict, can no more be set aside than if the defendant

Dec. 7, 1830. had appeared and defended the action in open Court. But it is otherwise in Scotland. A person, before what is called 'litiscontestation' takes place, may be in Court, and may withdraw from the suit, until the act of 'litiscontestation,' unless there be what is called a homologation by himself or an agent duly qualified—which homologation is an adoption of all that has been done before, and operates, by relation back, as if he had been present and not absent. Unless, in these two cases, either his appearing after 'litiscontestation,' or his homologating, he may be afterward let in to state his reasons why that judgment should not stand against him.

My Lords, in the present case I have had some difficulty, in different parts of the argument, in ascertaining whether there was a decree in absence or not. I am satisfied that here there was such a decree in absence, as this party might seek to have himself reponed or restored against. Nevertheless, it is most singular to observe, that, in the Court below, certain things were alleged on the one side and denied on the other, which, if an issue had been taken and tried upon them, would have decided this question—whether there had been a decree in absence or not. In the second article of the condescendence, it is stated that M'Kenzie actually attended, and acted as the agent of the defenders at the auditing of the account—that he was present at the taxing of the costs in the Master's Office, as we should say in our Courts. It is said that he not only did so, but that he wrote to require that the decree might be altered in his client's favour, and added, that to a decree to this effect his client would make no opposition; and, therefore, they contend, it is quite immaterial whether it was a decree in absence or not. Now this is articulately denied on the other side. They say that he had no authority, and that Duncan Sinclair was not bound by Mr M'Kenzie's acts, either in admitting or correcting the decree, or promising to take no advantage of the absence. Now, if this had been tried in a regular way, and it had been found that M'Kenzie had authority, there was an end of the question. I agree that, if it had been found the other way, that would not have been the case—but that may be the case with many things. Supposing a plea of the statute of limitations, and an issue being taken on it, that it is decided one way that the claim was supra sex annos, that is, fatal to the action; but if it is decided the other way, that it is infra sex annos, then comes in the defence of a release made. These are good and material issues, and may be tried daily in the Courts of Westminster Hall. Now, what I would humbly submit to your Lordships is, that the Court of Session ought to have sent that issue to be tried; because, when we find it asserted on the one side, and denied on the other, the assertion is no reason for the fact being presumed to be correct. The Court of Session have not decided that point, and we are left to reason upon it. I should much regret having to send it back, and thus still farther to protract this suit, and to increase the expense of the parties, who have already incurred considerable costs, where the amount in dispute is small; though I might otherwise, in a case of much larger amount, think it fit to advise your Lordships to send it back, with some intimation of what appears to me to be the error of the Court.

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Then, my Lords, we are to find our way to the truth of the case, as if neither of these facts existed—as if Mr M'Kenzie had no authority, and the parties had no knowledge of the proceedings on the other side. Then, how do the Court decide? Sinclair paid the money under a mistake in point of fact. As soon as he discovered the error, he brought his action —first, to be restored against the decree; secondly, for repetition of money paid by him under a mistake, against the parties to whom it was so paid. The action is competent, if it is taken to be a decree in absence, because it is undenied that there was an error in fact under which Sinclair paid for the default of his brother Angus, Angus having made no default, and Duncan Sinclair having paid upon the supposition that he had made default. Supposing the judgment to have no other effect, it being a decree in absence, it is said that Harrison—the party against whom the act had been executed, or not sufficiently executed by Angus—paying part and not the whole, is sufficient proof that Angus might have obtained the whole of the money by due diligence; but, non constat, that Harrison did not refuse to pay the residue when he discovered the defect of process— therefore I put that out of the question; but Sinclair brought his action, and recovered under the interlocutor I am about to read to your Lordships. And if the facts stood, as I have stated, and there were no more facts in the case, I should have no doubt whatever that the decree was good; but I shall presently show your Lordships there are other facts in the case which make it perfectly clear the other way, and that it is impossible for me to advise your Lordships to affirm any part of this decree. In the first place, it is admitted on both sides, that the decree cannot stand in the form in which it has been pronounced: First of all, the summons is formal and accurate. It treats the judgment in absence as a nullity, and prays for the restitution of the sum paid, as paid under mistake, and without any judgment existing. It is admitted on all hands, that that is the mode of proceeding,—that you must treat the judgment as a nullity, and begin by reducing or setting aside that judgment. As long as it stands unreversed, it is a warrant for that which was done under it,—as long as it stands unreversed, it is impossible to say that the party, however wrong in paying the money—however much he paid the money under mistake, and in his own wrong,—has a right to recover it back, standing the judgment; and, accordingly, the summons, which brought the matter into Court, is framed most technically and formally. It seeks to have the judgment in absence set aside, which is right; and then, praying the setting aside of that judgment, it seeks to have the repetition of the money paid under it.

Now, my Lords, with the judgment before them for payment of this money, what do the Court do? The learned counsel for the respondent, to whom I put it, whether it was possible, according to the practice of the Scotch Courts, that any other course could be taken than that I took the liberty of pointing out, first, to reduce the judgment, and then, if the judgment was reduced, as a consequence to repay the money, candidly admitted that it was impossible that any other course could be followed. Now, how

Dec. 7, 1830. did the Court proceed on advising the case?—They unanimously concurred in pronouncing the following judgment:—' Find the defenders, Archibald ' Wilson, James Jamieson, and John Maclellan' (they were the pursuers in the former action), ' jointly and severally liable in repetition to the pur- ' suer of L.116, 4s. 9d. sterling, paid by the pursuer to the defenders, with ' interest since the 12th day of March, 1822 years, and decern accordingly; ' and further, remit to the Lord Ordinary to hear parties on the other ' conclusions of the libel for relief; also, find the said defenders, Archi- ' bald Wilson, James Jamieson, and John Maclellan, jointly and severally, ' liable to the pursuer in expenses; appoint an account thereof to be given ' in, and remit the account to the auditor to be taxed, and to report.' Thus omitting the first conclusion of the libel, (and without dealing with which they could give no answer to the summons; for it could not be an answer to all the proposition,) they have jumped to the last stage instead of the first, and have given the repetition before the decree was reduced—they have actually decreed for the remedy, the decree standing in full force with all its authority. It is agreed on all hands that that cannot be done.

Next, my Lords, the reason on which the decree is granted cannot stand, because your Lordships will see that the validity of the bill, in respect of which Angus Sinclair was executing the process of diligence, is quite out of the question. Who ever heard that a sheriff's-officer, or other person intrusted with the process of the Court, is bound to look into the validity of the bill, and of the diligence issued out? And yet the Court actually proceed as if the vitiation of the bill was a conclusive argument in the case in determining the merits of the question, the conduct of Angus Sinclair, the messenger, charged with the execution of the process, and the liability of his brother, the cautioner, against whom, for his default, this action is brought! ' The Lords, in ' respect of the vitiation of the bill, and the illegality of the protest and ' diligence thereon, Find the defenders, Archibald Wilson, James Jamie- ' son, and John Maclellan, jointly and severally, liable in repetition.' As I have already stated, my Lords, the decision is wrong, ex concessis, —admitted to be so by the respondent himself—in respect of its not giving reduction, but at once giving the consequence of that for which he proceeded, namely, the repetition. But the reasons on which that decision is founded are, if possible, still more manifestly wrong, because the Court consider the vitiation of the bill to be one ground, as well as the illegality of the diligence for discharging the officer for his neglect. My Lords, it is not immaterial to remark this error; because, if I had advised your Lordships to affirm this judgment, the case would have stood on the record of the Court of Session, and have been acted on, and cited at your Lordships' bar, as a proof that, by the law of Scotland, a messenger has a great deal to do with the ground of the action on which he is executing the diligence; for it would at once have been stated, that this House had fallen into this view of the Scotch law, and of the Scottish mode of decision: Therefore, had I recommended to your

Lordships to affirm, I should have felt it my bounden duty to have proposed to remit to the Court below to erase the reason, and to proceed to the reduction, before they gave the repetition, which can be the consequence only of that reduction.

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But, my Lords, there are other circumstances in this case, and I shall only refer to one or two, which make it perfectly clear that there can be no affirmance of any part of the decree. When a person pays money under a mistake, he has no right to recover that money, unless where it was a mistake in point of fact. If he pays by mistake in point of law, there was at one time a little doubt in Westminster Hall; but it is now settled, that he has no right to recover it back again. Since the case of Brisbane *v.* Dacres*, in which Sir Alan Chambre, a most learned Judge, differed from the rest of the Court, holding that an action lay for money had and received, to recover money paid by mistake in point of law; and the other judges holding that it could not, it has been considered an established point that the mistake must be in the fact. But, my Lords, there is one circumstance which would be fatal altogether to such an action. If the party who has paid the money is under an unavoidable mistake, if the mistake is no fault of his, then he may have it back again; but, if he has himself to blame—if he himself paid the money, ignorant of the fact, and had the means of knowledge of the fact within his power—and did not use those means, he shall in vain attempt, by means of proceeding at law, to have that repaid to him. That has been decided in our Courts repeatedly. It is a rule founded in the strict principles of ordinary and universal justice, which will never allow a man to take advantage of his own wrong,—or, what is the same thing, of his own gross negligence. The ground of action being ignorance, it must be unavoidable ignorance,—it must not be ignorance through his own fault, of having shut out the light by wilfully closing his eyes. That is the principle which runs through the whole of our law. I have stated this principle because it applies to the Scottish law as well as to the English, and it must apply to the administration of justice under every system of jurisprudence. I do not find it alleged at the bar, that it is not the law; but the fact is attempted to be denied, and denied with no success, in my opinion. Duncan Sinclair had the papers, including the protest, in his possession for twelve months. The agent of this man had some of those papers in his possession; but he having in his possession the papers which contained on the face of them the error—for it is an error, ex facie—having in his possession the document containing the bill in one part, and a blank in the protest in the other—he chose to remain in ignorance. One can never tell whether a man knows or not;—he may know, and tell you he did not know; but how can any one know that Duncan Sinclair had not read this over, again and again? My Lords, there are several other views of this case, which I will not trouble your Lordships with going

* 5 Taunton, 143.

Dec. 7, 1830. through. They all concur in imprinting on my mind the same impression, that it is impossible for me to advise your Lordships to affirm this judgment.

As for the observations made in the Court below, treating the promissory note as of no value, because, through the error in protest and diligence, it had lost the privileges of summary execution, these are plainly without foundation. It was good for all not actually paid on it, although it lost those privileges; and I now humbly move your Lordships that these interlocutors be reversed.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be reversed.

Appellants' Authority.—2 Ersk. 3. 27.
Respondent's Authorities.—Riddell, 9th February, 1706. Ferrier, 16th May, 1828, (6 Shaw and Dunlop, 818.)

J. M'QUEEN,—S. S. BELL,—Solicitors.

No. 47. JOHN M'TAVISH, Appellant,—*John Campbell—Wilson.*

JAMES SCOTT and OTHERS, (M'KENZIE'S TRUSTEES,) Respondents,—*Denman, Att.-Gen.—James Campbell.*

Cautioner.—Circumstances in which it was held, (reversing the judgment of the Court of Session,) that cautioners for a tenant, who had stipulated that the landlord should exercise his right of hypothec before calling on them to fulfil their obligation, were discharged.

Dec. 7, 1830.
1st Division.
Ld. Alloway.

M'KENZIE of Dundonell, who held a lease of the farm and house of Seabank, near Inverness, agreed to sublet them to Mrs Fraser, from May 1818 to May 1822, at the yearly rent of L.135, payable at Martinmas yearly, on condition of caution being found for the rent. The appellant M'Tavish, writer in Inverness, and two other parties, thereupon granted an obligation to 'guarantee the rent of one hundred and thirty-five 'pounds, offered by Mrs Jean Fraser, for Seabank, in manner 'stated in her missive, the principal tacksman Dundonell '(M'Kenzie) being bound to exercise his right of hypothec be'fore calling on us to fulfil this obligation.'*

Possession was taken; but the rent not being paid at Martinmas 1819, M'Kenzie applied for, and obtained on the 30th No-

* Mrs Fraser's husband, Captain Fraser, was alive, but he was insolvent, and in consequence all right on his part to the lease was excluded.