

not intromitted with his father's estate? and whether, in breach of said instructions, they failed to conduct said defence on said ground. (2) Whether the pursuers conducted the defence to said actions negligently and unskilfully, in consequence whereof the defender sustained loss and damage to a greater extent than the sum sued for?"

The appellant and defender moved that the case should be sisted until the appeal to the House of Lords in *Buchanan v. Buchanan's Trustees* should be disposed of. He further argued—There was here a relevant defence. The breach of instructions was not discovered till late in the action. The failure to lodge a defence, for which special instructions have been given, is equivalent to the failure to enter appearance. The ground of judgment in *Buchanan v. Buchanan's Trustees* was the indebtedness of the appellant. But a debtor on his creditor's death does not become a vitious intromitter. Hence the breach of instructions materially affected the result of the case.

The pursuers argued—The House of Lords never give costs to a successful appellant; hence the accounts now sued for are due in any event. In *Buchanan v. Buchanan's Trustees* the appellant admitted that he was a trustee; and this was the fact. A law agent is not bound to state in defence untrue and irrelevant facts communicated by a client. The failure to plead in accordance with instructions (assuming these to be given) did not and could not affect the result—*Hill v. Finney*, 1865, 4 Foster and Finlason, 616. In any case, the present defence of breach of instructions and negligence (if relevantly stated) is relevant as a defence only to the action as regards the first account—*Burt v. Bell*, Nov. 6, 1861, 24 D. 13. The defence of negligence applies only to the account for the particular piece of business in which the negligence is said to have occurred.

The Lord Justice-Clerk was of opinion that no relevant defence had been stated to the action for payment of the first account. Lord Ormidale and Lord Gifford were, however, of opinion that a proof before answer as to the relevancy should be allowed, especially as there must be a proof as to the second account. The Court accordingly appointed a proof before answer to be led before one of the Judges of the Second Division.

Counsel for Pursuer—J. Henderson—Begg—Asher. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defender—Scott. Agents—Walls & Sutherland, S.S.C.

Tuesday, January 16.

SECOND DIVISION.

[Sheriff-Substitute of Aberdeen and Kincardine.

TRAILL V. ANDREW.

Process—Reponing—Decree by Default.

Circumstances in which held that a defender against whom in the Sheriff Court a final decree by default (in respect of non-appearance) had been pronounced, was entitled to suspen-

sion; and remit made to the Sheriff to repon.

This was a suspension brought by James Traill, residing at Tombeg, Monymusk, of a decree for £35 obtained against him on 19th November 1875, in an action in the Sheriff Court of Aberdeen and Kincardine, at the instance of John Andrew, residing at Cove, Aberdeen, laid on an agreement to give the respondent one-third of the proceeds for the season, and also one-third of the price of a horse sold by the complainer; and also of a further decree for expenses. The action was raised on 12th January 1874, and concluded, alternatively, for damages. Defences were lodged to the action, and a record made up; but after great delay (the action repeatedly falling asleep), and before proof had been led, decree by default was on 19th November 1875 pronounced in favour of the pursuer "in respect the defender has failed to appear either personally or by agent." This interlocutor followed on one pronounced seven days previously, by which the Sheriff-Substitute, in respect the complainer's procurator had ceased to act for him, appointed the respondent to intimate to the complainer that he must appear on 19th November 1875 under certification. The complainer averred that on receiving this intimation he communicated with his agent, and understood that the latter would continue the agency and attend on 19th November 1875. The next intimation he received was a charge on the decrees under suspension. He further averred that these decrees were not well founded in law or in fact.

The complainer pleaded—“(7) The decrees sought to be suspended having been pronounced solely in respect of the complainer's non-appearance, and the said non-appearance having occurred through no fault on his part, and the said decrees being contrary to the justice of the case, the complainer is entitled to suspension.”

The Lord Ordinary (YOUNG) sustained the reasons of suspension *simpliciter*, without allowing proof of the complainer's averments, some of which were either denied or not admitted, and suspended the decrees and charge complained of.

The respondent reclaimed, and argued—(1) Assuming the complainer's case to be relevant, it had not been proved; (2) but his case was not relevant. In *Mackenzie v. Smith*, 23 D. 1201, it was held that decree by default against a defender for failure to lodge a revised paper is a decree *in foro*. Even in the case of a decree in absence it was competent to inquire into the whole circumstances whether or not the decree ought to be opened up; and in *Brown v. Sinclair* (2 Sh. and M'L. 143, and under remit, 15 Sh. 770) Lord Brougham strongly observed on the danger of enabling a man with a negligent attorney or a light purse to harass an adversary with a suit and then to withdraw and suffer judgment to pass against him, and then to escape from the effect of that judgment. Poverty and consequent inability to proceed has generally been pleaded against a decree by default. The complainer might have appealed in the case to the Sheriff or to the Court of Session. (3) Stringent conditions as to expenses should have attached to the suspension of a decree properly pronounced.—*Morrison v. Walker*, 9 Macph. 902; *Cheyne v. M'Gungle*, 22 D. 1490.

The Court unanimously adhered to the Lord Ordinary's interlocutor, but at the same time re-

mitted to the Sheriff to repon the appellant (defender) on such conditions with regard to expenses as should seem just. Their Lordships observed strongly on the delay which had occurred in the case during the repeated prorogations granted on consent of agents, and expressed an opinion that it was the duty of the Sheriff to prevent this. The procedure was a trap for litigants; for, when the defender's agent ceased to act after the long delays which had occurred, advantage was taken of this opportunity to get decree by default.

Counsel for Suspendor — Rhind. Agent—William Officer, S.S.C.

Counsel for Respondent — Campbell Smith. Agent—William Spink, S.S.C.

Tuesday, January 16.

FIRST DIVISION.

THE CALEDONIAN RAILWAY COMPANY v.
GREENOCK AND WEMYSS BAY RAILWAY
COMPANY.

(Case for the Railway Commissioners.)

Process—Case for Opinion of the Court—Railways Regulation Act 1873—Remit to Amend.

A Case having been sent by the Railway Commissioners under the Regulation of Railways Act 1873, for the opinion of the Court, they, in the absence in the statute of provision to remit for amendment if so required, following the precedent of a Case sent for opinion from the Court of Chancery (*Sir F. S. Arthur, Bart., and H. D. Seymour*, Nov. 5 1867, not reported), pronounced an interlocutor intimating what additional information was desired, and superseding consideration of the Case, "to enable the parties or either of them to apply to the Railway Commissioners to amend the Case in such manner as to remove the difficulty."

Counsel for Caledonian Railway—Lord Advocate (Watson)—Johnstone. Agents—Hope, Mackay & Mann, W.S.

Counsel for Greenock and Wemyss Bay Railway Company—Balfour—Asher. Agent—John Carment, S.S.C.

Tuesday, January 16.

SECOND DIVISION.

SPECIAL CASE—YOUNG AND KIRKPATRICK
(YOUNG'S TRUSTEES).

Succession—Trust—Fee and Liferent—Vesting.

A testator by trust disposition and settlement directed his trustees to pay an annuity to his wife, and the whole residue of income to his son, with power to the son to test upon the fee of the estate. If the son predeceased his mother, the whole income of the estate was to be paid to her during her life. On the death of the wife the trustees were to convey the whole estate to the son, if then alive, and if dead to his issue, if he

left any. Failing issue of the son, the estate was to be conveyed to such persons as the son might direct by any writing under his hand, and failing such direction to certain persons named in the trust deed.—*Held* that vesting did not take place till the death of the widow.

This was a Special Case for Mrs Young, widow of the deceased George Kirkpatrick Young of Glendoune, and John George Kirkpatrick Young, his only son, of the first part, and the same persons and others, as trustees under the trust-disposition and settlement and codicil after mentioned, of the second part. It was set forth in the Case that the late George Kirkpatrick Young died on 6th April 1874, leaving a trust-disposition and settlement and codicil thereto, dated respectively 20th May 1868 and 28th December 1871, both registered in Books of Council and Session on 24th June 1874. He was survived by his wife and an only son, John George Kirkpatrick, who was of full age—the first parties to the case. By the deed and codicil Mr Young conveyed his whole estates, real and personal, to the second parties as trustees, for the following purposes:—1st, Payment of debts; 2d, payment of an annuity of £400 in all to the widow, and to allow her the liferent use of the mansion-house of Glendoune, and shootings, &c.; 3d, payment of certain legacies; 4th, the trustees were directed, from the residue of the income of the estates, to pay to the truster's son, the said John George Kirkpatrick Young, such portion thereof as they might consider proper, and the truster expressed his wish that, by disposing of his railway and other stocks, and house in West George Street, Glasgow, the trustees might be enabled to pay off a debt of £5000 over the estate, and to build a farm-steading at Cairnhouse, and make a new road from Cairnhouse. The trust-deed proceeded—"After said debt is paid off and these improvements effected, the whole residue of income from my estate during the lifetime of my said wife shall be paid over to our said son, but with the rights and powers to him, as from and after my decease, of testing on the fee, as in article sixth hereof. *Fifth*, In the event of my said son predeceasing his mother, without leaving a widow or children, I direct in that event the free income arising from my whole estates, heritable and moveable, to be paid over to her during her life. *Sixth*, On the decease of my said wife, survived by our said son, I direct and appoint my trustees to convey over absolutely to him, in common form, the fee of the residue and reversion of my whole estates, heritable and moveable; and failing my said son, by his predeceasing his mother, but leaving issue, then to such issue, in such shares and proportions, and subject to such conditions and restrictions of liferent or provisions for his widow, or otherwise, as my said son may by any writing under his hand have directed, and failing such writing, then my trustees shall convey my estate of Glendoune and other lands in Ayrshire to the eldest son on attaining majority, or, if there be no son, to the eldest daughter on attaining majority, and the remainder of my estates to the other children equally, on their respectively attaining majority, with full power to apply the whole or any part of the income in their upbringing, education, and maintenance during their nonage; and failing issue of my said son, then to the persons he may have by any writing under his hand directed to