

*Mitchell v. Gregg*, F. C., December 7, 1815, M. 13,137; *Procurators of Paisley*, March 8, 1823, 2 S. 283. (2) The petitioners had an interest to bring forward the petition, as three-fourths of their number were notaries-public, and there was no association of notaries-public. Law-agents were admitted to the office of notary-public without any examination. In *Mitchell's* case their title was sustained—*Incorporated Society of Law Agents v. Clarke*, December 3, 1886, 14 R. 161. (3) There had been no undue *mora*, and the respondent was not entitled to plead it.

At advising—

LORD PRESIDENT—The authorities cited by Mr Dundas satisfy us that the Court of Session has the power of depriving delinquent notaries-public of office. There is the passage from Sir George Mackenzie expressly stating the power of deprivation to reside in the Court, and the two cases of *Stewart* and *Hope* are instances of the exercise of that power.

This being so, it is the duty of the Court to deprive when cases of delinquency are brought to its knowledge; and there is no valid objection to the Court being moved to act by the present petitioners.

The notaries against whom this petition is directed have been convicted of breach of trust and embezzlement—crimes directly within the region of the office in question—and it is quite plain that persons so situated are unfit holders of that office. It is true that in the case of the respondent Laing the conviction was in January 1891, and his sentence expired in January 1892. But it is manifest that if in May 1891, when the name of that respondent was struck off the Register of Law-Agents, he was not deprived of the office of notary, this was merely because the Court was not apprised of his holding it. We are unable to find, in the circumstances which I have mentioned, adequate ground for refusing now to do what we should unquestionably have done then had we been asked.

The prayer of the petition is therefore granted.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court granted the prayer of the petition, and no motion was made as to expenses.

Counsel for the Petitioners—Dundas, Agents—Carmont, Wedderburn, & Watson, W.S.

Counsel for the Respondent Laing—W. Campbell—Forsyth. Agent—W. Ritchie Rodger, S.S.C.

Wednesday, December 13.

FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.

RHIND v. KEMP & COMPANY.

*Reparation—Taking Decree in Absence for Debt Paid after Action brought—Process—Jury Trial—Judicature Act 1825 (6 Geo. IV. c. 120), sec. 28—Evidence Act 1866 (29 and 30 Viet. c. 112), sec. 4.*

A brought an action of damages in the Court of Session against B for having taken decree in absence against him in a debts recovery action after he had paid the debt for which he was sued. *Held* (*rev. Lord Stormonth Darling*) that the Court was not entitled to refuse to send the case to trial by jury on the ground that only a small award of damages could be recovered.

*Reparation—Taking Decree in Absence for Debt Paid after Action brought—Issue.*

A brought an action of damages against B, a debt collector, who had been employed by C to get payment of a debt due to him by A. A averred that after B had caused an action to be raised against him he had paid C a sum in settlement of the debt and expenses; that C had thereupon written to B to stop the proceedings against A, but that B, in disregard of these instructions, had wrongfully and maliciously caused decree in absence to be taken against him. *Held* that A must put malice but not want of probable cause in issue.

John G. Rhind, grocer in Glasgow, raised an action against Messrs John Kemp & Company, Glasgow, for payment of £500 in name of damages.

The pursuer averred, *inter alia*—“(Cond. 1) The defenders are, *inter alia*, a firm of debt-collectors. . . . (Cond. 2) On or about the first week in May 1893 Messrs Meglaughlin, Marshall, & Company, provision merchants, Glasgow, employed the defenders as agents to recover from the pursuer a claim of £14, ls. . . . The defenders did not make known to pursuer the true sum which Messrs Meglaughlin, Marshall, & Company would accept, but suggested other terms, and illegally demanded payment of expenses which had never been incurred. . . . The defenders thereafter caused a debts recovery summons to be served upon the pursuer for said debt at the instance of Messrs Meglaughlin, Marshall, & Company. . . . The pursuer on Saturday 20th May got a friend to call on Meglaughlin, Marshall, & Company, and arrange terms with them, and the pursuer was to call on Meglaughlin, Marshall, & Company on Monday morning 22nd May and pay the sum arranged for. It is believed and averred that in consequence of this, and in consequence of the pursuer's refusal to pay said fee which the defenders

endeavoured illegally to extort from him, the defenders conceived malice and illwill against the pursuer, and took occasion to gratify their malicious feelings towards him in the wrongous and oppressive proceedings aftermentioned. (Cond. 3) On Monday 22nd May said debts recovery action was due to be called in Court at 12 o'clock, and on the morning of that day the pursuer as arranged called at the office of Messrs Meglaughlin & Company about 9.25 a.m. The pursuer saw John Meglaughlin, head partner of said firm, and paid £8, 8s. 6d. in full settlement of said debt and expenses, and on the express understanding and agreement that the legal proceedings in the Debts Recovery Court were to be stopped forthwith. Mr Meglaughlin there and then received the money from the pursuer, granted him a discharge of his whole liability, and in his presence wrote a letter to the defenders telling them to stop proceedings at once against the pursuer as the firm's claim against him had been settled. Mr Meglaughlin, considering that the matter was of great urgency and importance to the pursuer, sent a special messenger with said letter to the defenders. Said letter was delivered at defenders' place of business and received by them at 5 minutes before 10 o'clock, more than two hours before the diet of appearance in the action above referred to. The defenders wrongously and maliciously failed to carry out said instructions in said letter, and in consequence the pursuer has sustained loss, injury, and damage on account of the proceedings thereby occasioned. (Cond. 4) Neither the pursuer nor Meglaughlin, Marshall, & Company knew anything of the alleged solicitors, and could not communicate with them, and the defenders were bound to obey the instructions of their clients Messrs Meglaughlin, Marshall, & Company, and it was the duty of the defenders to have stopped said legal proceedings and to withdraw said action forthwith. But contrary to the instructions of their clients, the defenders illegally, wrongfully, and maliciously caused decree in absence to be taken against the pursuer for the said sum of £14, 1s. and expenses. This decree was taken by the defenders most wrongously and oppressively in the knowledge that the case had been settled and ought to have been withdrawn, and in the face of the explicit written instructions timeously received by them from Messrs Meglaughlin & Company to stop said proceedings at once. This the defenders did in order to gratify their feelings of illwill towards the pursuer, and for the purpose of ruining his business as a merchant in Glasgow."

The defenders in answer denied that they had ever demanded a fee from the pursuer, or had been actuated by any malice towards him. They averred that after they had had some correspondence with the pursuer they had been directed by Messrs Meglaughlin, Marshall, & Company to transfer the matter to a solicitor, and had transferred the case in terms of these instructions. They admitted that on 22nd May

they had received instructions to stop the proceedings against the pursuer, but averred that they had at once transmitted these instructions by a messenger to the solicitor in charge of the action.

The pursuer proposed issues for trial of the cause.

On 3rd November 1893 the Lord Ordinary (STORMONTH DARLING) dispensed with the adjustment of issues, and allowed the parties a proof of their averments.

"*Opinion.*—This is an action of damages, and would naturally fall to be tried by a jury, but I think the defender has succeeded in showing cause for its being tried by way of proof. The principal wrong complained of is the failure of a firm of debt-collectors to stop an action in the Debts Recovery Court after a settlement had been effected with the client who had instructed them.

"This is a kind of wrong which has been held to be actionable as against a principal only when malice is alleged, and I do not see why a different rule should be applied to an agent—*Davies & Company*, 5 Macph. 842. In that case great stress was laid on the fact that the party complaining of the wrong did not take the trouble to go to Court and see that the action was dismissed.

"Now, that was the case here, and therefore although the pursuer may have a right to recover damages if he can show that the defender acted maliciously, it is plain that the damages cannot be heavy. I think it would be an abuse of the forms of Court to invoke the aid of a jury for determining so trivial a matter." . . .

The pursuer reclaimed, and argued—The action was one appropriate to trial by jury, and special cause must be shown why it should not be so tried—29 and 30 Vict. cap. 112, sec. 4; 6 Geo. IV. cap. 120, sec. 28. The special cause must be one affecting the legal quality of the action. Triviality of damage was not a "special cause" in the sense of the Act of 1866—*Trotter v. Hopper*, November 24, 1888, 16 R. 141; *Crabb v. Fraser*, March 8, 1892, 19 R. 580; *Donnachie v. Thom*, December 15, 1892, 30 S.L.R. 231; *Willison v. Petherbridge*, July 15, 1893, 30 S.L.R. 851. The rubric in the case of *Nicol v. Picken* was not borne out by the report.

Argued for the defenders—It was the practice of the Second Division to send trivial actions of damages to proof instead of trial by jury, and this course might appropriately be followed here—*Nicol v. Picken*, January 24, 1893, 20 R. 288.

At advising—

LORD PRESIDENT—I do not agree with the Lord Ordinary in the conclusion he has come to. I should certainly be very slow to interfere with the discretion of the Lord Ordinary if the question were as to any peculiarity which in his opinion rendered this particular action unsuitable for the ordinary course being followed, namely, of sending the case for trial by a jury. But his Lordship has proceeded on this ground. He says that it is plain that the damages recovered cannot be heavy,

and that he thinks "it would be an abuse of the forms of Court to invoke the aid of a jury for determining so trivial a matter." Now, that is a ground of judgment of very wide and general application, and I cannot agree with it. The existing statute law is that (unless of consent of parties) actions of damages must go to a jury unless special cause be shown to the contrary. Here we have an action for malicious wrong, concluding for £500 of damages, and the mere fact that one can conjecture that there will not be a large award is not, in my opinion, a "special cause" which satisfies the statutory requirement. If any vindication of the course prescribed by the statute law is needed, it may be found in this, that it affords a more rapid mode of finally settling such matters, be they trivial or weighty.

LORD ADAM—I am of the same opinion. This being an action of damages goes in ordinary course and of right to a jury unless the party objecting can show special cause why it should not go, and if the Lord Ordinary in the exercise of his discretion thought that in an action of this kind a special cause had been shown, I should be very slow to interfere with his judgment. But here he has not found a special cause in the peculiarity of this particular case, but on general grounds, because he considers that the amount of damages to be recovered will, if any, be small, and that a proof is a less expensive mode of trial. On this ground he thinks that the case is not fitted for jury trial. But that goes against the statute law on the matter, which says that actions of damages must go to a jury except where the parties consent or special cause is shown, and this being the rule prescribed by the Legislature, we cannot hold that a case is not to go to trial by jury merely because we think that the amount of damages that will be recovered will be small. There is no room, in my opinion, for the exercise of any discretion in such a state of circumstances.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

Parties were then heard on the form of issue to be allowed.

Argued for the pursuer—If the action had been against the principal creditors, the pursuer would have had, on the authority of the case of *Davies*, to insert malice and want of probable cause in the issue. But the defenders were neither litigants nor practitioners in courts. They were bound to obey their instructions, and if they failed to do so they were protected by no privilege. The pursuer therefore was not bound to put either malice or want of probable cause in issue.

Argued for the defenders—Malice and want of probable cause must both be put in issue—*Davies & Company v. Brown and Lyell*, June 8, 1867, 5 Macph. 842; *Ormiston v. Redpath, Brown, & Company*, February 24, 1866, 4 Macph. 488. [LORD

PRESIDENT—But does not want of probable cause generally apply to an overt act? What room is there for it when the act complained of is one of omission? The defenders said that they had probable cause for taking decree, because they had not received timeous notice that the proceedings were to be stopped.

The Court approved of the following issue for trial of the cause:—"Whether on or about the 22nd day of May 1893 the defenders wrongfully and maliciously caused a decree in absence, at the instance of Messrs Meglaughlin, Marshall, & Company, provision merchants, No. 6 North Albion Street, Glasgow, for the sum of £14, 1s. sterling and expenses, to be taken against the pursuer in the Debts Recovery Court at Glasgow, to the loss, injury, and damage of the pursuer?"

Counsel for the Pursuer—Shaw—T. B. Morison. Agent—Peter Morison junior S.S.C.

Counsel for the Defenders—Guthrie—G. Watt. Agents—Winchester & Nicolson, S.S.C.

Tuesday, November 28.

OUTER HOUSE.

[Lord Wellwood.

MAGISTRATES AND TOWN COUNCIL OF ST ANDREWS v. FORBES.

*Representation—Onerous Creditors and Legatees—Delay in Making Claim against Executor.*

A legatee who has received payment cannot be called on to refund what he has received for the benefit of an onerous creditor of the testator, if at the time he received his legacy there remained sufficient funds in the hands of the executor to meet all claims, and if the creditor has failed *debito tempore* to claim against the executor. Circumstances under which a claim after five years held not to be *debito tempore*.

The facts of the case are narrated in the following opinion:—

LORD WELLWOOD—There is not much dispute as to the material facts of this case. At Whitsunday 1876 the late Mr J. G. T. Forbes, whom I shall call Dr Forbes, purchased the estate of Auchrannie, and to enable him to do so borrowed from the pursuers, in their capacity of trustees or administrators of the Bell Fund, the sum of £4000, and granted in their favour a bond and disposition in security over the lands of Auchrannie.

The loan to Dr Forbes was a loan for a fixed period—ten years.

Shortly after the purchase Dr Forbes arranged to convey Auchrannie to his brother Charles Forbes, and did so by disposition dated 12th and recorded 16th May 1877. The conveyance was made under burden of