

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

the bond, Charles Forbes undertaking to free and relieve Dr Forbes of the sum of £4000 contained in the said bond and disposition in security.

It is a curious fact in the case that Dr Forbes' name does not from first to last appear as the debtor in the bond in the books of the Bell Trust, or in the receipts for interest granted by the trustees. Payment of interest was throughout made by Charles Forbes, and the receipts were granted to him in his own name. It is true that Charles Forbes was agent for Dr Forbes until his death, but I can only account for the entries in the books of the trust and the terms of the receipts, by supposing that the trustees were informed very shortly after the bond was executed that the lands of Auchrannie had been or were to be conveyed to Charles Forbes under burden of the bond and the personal obligation.

In 1886 an important transaction took place between the pursuers and Charles Forbes. In that year the ten years for which the loan was granted ran out, and a correspondence took place between Mr Stuart Grace, Town-Clerk of St Andrews, and Charles Forbes.

Charles Forbes was desirous of having the loan continued, and the result of the negotiations was that the pursuers agreed to continue the loan on Charles Forbes obtaining a fresh valuation of Auchrannie, and granting a bond of corroboration. There is no evidence that Dr Forbes was in any way consulted in regard to the continuance of the loan. The transaction was carried through solely for the convenience and in the interests of Charles Forbes, and he thereafter continued to pay interest and to receive receipts in his own name until his bankruptcy in November 1892.

Dr Forbes died on 21st April 1887. Notice of his death was inserted once in the *Scotsman*, and shortly after notices requiring claims against Dr Forbes to be lodged with the subscriber Charles Forbes appeared in the *Scotsman* and *Dundee Advertiser*. It is not admitted or proved that the trustees knew of the decease of Dr Forbes. But it is admitted that the papers in which the notices appeared were in regular circulation in St Andrews.

Dr Forbes left a deed of settlement by which he appointed his brother Charles Forbes his executor, and after leaving sundry bequests directed that the residue of his estate should be divided between Charles Forbes and the defender, another brother. The special legacies were paid, and during the years 1887 to 1890 the defender received a sum of not less than £4000 as a special and residuary legatee, and on 29th September 1890 granted a complete discharge in favour of the executor. Charles Forbes retained from the executory estate for his own use a sum of not less than £4500. I do not understand it to be disputed that in 1887 Dr Forbes' estate was solvent, and further that sufficient funds were left in the executor's hands after payment of legacies to the defender and others to satisfy any claim at the pursuers' instance. Indeed, this is shown by the admitted fact that

Charles Forbes retained not less than £4500. As he was bound to relieve the executory estate of the debt under the bond, he could not have diminished the defender's legacies by paying the debt out of the executory funds before striking the residue. If he had paid the pursuers' claim with executory funds he would have been bound at once to replace the sum so paid, and his share of residue must, if necessary, have been so applied in any question between him and the other legatees.

On Charles Forbes becoming bankrupt and absconding in November 1892, the pursuers for the first time made the present claim against the defender. The grounds of action are—first, that as one of the residuary legatees the defender is liable as a representative of Dr Forbes; and secondly and alternatively, that he is bound *quantum lucratus* to fulfil the personal obligation in the bond.

The defender denies that he is the representative of Dr Forbes, and further pleads that the pursuers are not entitled to recover in respect that the obligation of Dr Forbes was discharged by delegation, and also that not having claimed *debito tempore* against the executor when he had funds in his hands, they are not entitled to claim repayment from the defender.

The law relied on by the defender in support of the last proposition is thus stated in Ersk. iii. 9, 46—"Legatees being gratuitous creditors are postponed to the onerous creditors of the deceased; but a legatee who has actually received payment is not bound to restore to the creditors of the deceased the sum bequeathed, if it shall appear that there was originally a sufficient fund in the executor's hand for satisfying both creditors and legatees, though he should afterwards have become bankrupt, for legatees cannot by any action compel an executor to clear off the executory debts; the creditors themselves are alone to blame for having neglected to sue him while he continued solvent, and therefore ought to be the only sufferers, and not the legatee, who received *optima fide* what had been bequeathed to him by the proprietor as his own—*Robertson*, June 29, 1760, M. 8087."

This broad and unqualified statement of the rights of legatees in competition with onerous creditors is amply supported by the case of *Robertson*, and subsequent decisions of great weight. The result of the decisions I take to be that a legatee is not a proper legal representative, and this holds good even in the case of a residuary legatee. The heir or executor is the proper representative who must be called to account by the creditor.

If the legatee has been paid his legacy when there are not sufficient funds in the hands of the executor to pay the creditor, the legatee may be compelled to refund, not on the ground of representation, but because in that case payment has been made to him in error. Even if there were originally in the hands of the executor sufficient funds to pay both creditor and legatee, it would seem that the legatee would not be entitled to receive his legacy

in competition with the creditor, if before his legacy is actually paid the funds prove insufficient.

But where the executry estate is sufficient to pay debts and legacies in full, and the legacy is paid, and sufficient funds remain in the executor's hands to satisfy the creditor's debt, the creditor cannot, on the executor subsequently becoming bankrupt, or the funds failing, call upon the legatee to refund the legacy which he has received. This proceeds on the ground that a creditor is bound to come forward *debito tempore*, and that if it can be shown that had he done so he would have received payment of his debt in full, it would be iniquitous if he were suffered to claim repetition from a legatee who had received payment in due course and in good faith.

In the case of *Robertson* the time which elapsed between the death of the original debtor and the bankruptcy of the executor was seven years, while in the present case the period was five years. There is no doubt there is this difference in the circumstances of the two cases, that in the case of *Robertson* the creditors were aware of the death of their debtor, and dealt with and gave time to his executor, while in the present case I assume that the pursuers did not know of the original debtor's death. But this difference is not material. In the first place, the pursuers, who are seeking to avail themselves of an equitable remedy, ought to have known of their debtor's death. It was a public fact, and as much within their knowledge as within that of any of the other creditors. But apart from this, the pursuers by their own course of dealing with Charles Forbes deprived themselves of or diminished the means of information which they otherwise would have had as to the existence of their debtor. If they had dealt with Dr Forbes throughout as their debtor, received interest from him or on his account, and granted receipts in his name, they would at once have been apprised of his death. But instead of doing that they dealt with Charles Forbes as if he were the sole debtor, and entirely lost sight of Dr Forbes, and thus as Charles Forbes also looked upon himself in the same light, the death of Dr Forbes was never brought to the pursuers' notice in connection with this loan. If, then, the pursuers did not know of the death of Dr Forbes, I think they have themselves to blame, and they must be dealt with precisely as if in the knowledge of his death they had dealt with and given time to his executor. There is also this feature in the present case which did not exist in the case of *Robertson*, that before the death of the original debtor the creditors took a bond of corroboration for this very debt from Charles Forbes, the person who was subsequently confirmed executor to the debtor, the purpose being to continue the loan for his convenience. Whether that did or did not amount to delegation it is an important element in judging of the creditor's actings. There are strong reasons for thinking that even if the pursuers had

known of the death of Dr Forbes they would have acted just as they did. The security-subjects had been re-valued only a year before; Charles Forbes, whose separate obligation they held, was in good credit, and they were obtaining 4 per cent. for their loan. It may be doubted whether they would have disturbed the loan.

Having regard to the whole circumstances of the present case, I think they are not less favourable to the legatee than were those in the case of *Robertson*.

The case of *Robertson* was approved of, and followed in two important cases—*Wylie v. Blackie's Trustees*, 16 D. 180, and *Threipland v. Campbell*, 17 D. 487. The reports of both of these cases contain a very full exposition of the principles on which the case of *Robertson* was decided. They were both strong cases for the application of the rule stated by Erskine, as in the one case the creditor made no claim against the legatee for nineteen years after his father's death, and in the other the claim was not made until thirty years after the original debtor's death. But the principle upon which these cases were decided appears to me to be equally applicable to a case like the present, where the creditor did not come forward for five years after the debtor's death.

In the case of *Threipland* the Judges attached considerable importance to the fact that the creditor took a bond of corroboration from the general heir and representative of the debtor. It is true that the bond of corroboration granted by Charles Forbes does not contain a narrative of the causes inducing its execution as did that in the case of *Threipland*. But it is none the less the fact that on condition of his granting it and on that condition alone the pursuers agreed to supersede payment of the sum in the bond. It is also not unimportant to notice that the bond of corroboration by Campbell in the case of *Threipland v. Campbell* contained, as does the bond granted by Charles Forbes, the usual declaration that it was granted in corroboration of the original bond, and without prejudice thereto, or to any diligence that has followed or might be competent to follow thereon, *sed accumulando jura juribus*.

The authorities cited for the pursuers do not appear to me to touch the present question. They are cases which deal with the liability of a proper representative, such as an executor to a creditor whose debt has not been paid. Such was the recent case of *The Heritable Securities Investment Association, Limited v. Miller's Trustees*, 20 R. 675, in which it was held by the majority of the First Division that gratuitous testamentary trustees and executors were personally liable for having made payments to beneficiaries, although at the time when the payments were made the creditors were not pressing for payment of their debt, and the funds remaining in the trustee's hands were apparently sufficient to satisfy all claims. The law laid down in that case is, that in the absence of express consent by the creditors

an executor who pays away funds to beneficiaries or legatees without paying or satisfying the creditors' debt does so at his peril, and that it will not free him from personal liability in the event of ultimate deficiency of funds, that he has set aside for the purpose of satisfying the creditors' claim a fund or security which at the time was sufficient. I understand it to be decided by that case that it is no defence to the executor in the event of an ultimate deficiency that the creditor has not called up his debt, but continued to receive interest upon it from the executor. But that and similar cases do not involve, and are not applicable to a question between onerous creditors and legatees who have received payment *bona fide* when the funds were sufficient to satisfy the creditors' claim in full.

No case has been cited, and I know of none, which militates against or modifies the law laid down by Erskine, and although the present case presents features of novelty and differs in its circumstances from some of those which I have cited, I think the defender is entitled to the benefit of the principle which was recognised in the case of *Robertson*, and the cases which followed on it. On these grounds I shall assoilzie the defender.

I have scarcely alluded to the defender's plea of delegation. In the view which I take, it is not necessary to say whether I should or should not sustain that plea if it had stood alone. But the facts on which it is rested have, I think, a material bearing upon the question whether the pursuers unduly delayed to claim against the executor of Dr Forbes, and have gone far to enable me to reach the conclusion at which I have arrived. It may be that the pursuers' transactions with Charles Forbes in 1886; and their failure to communicate with Dr Forbes, might have even been held to free the latter from his obligation. But even if the pursuers' actings fall short of what is required to constitute delegation, the result shows that they looked so exclusively to Charles Forbes as regarded the loan and payment of interest on it, that they entirely lost sight of their original debtor, and did not know whether he was alive or dead. I think that in a question with the defender it is impossible to acquit the pursuers of such neglect in pursuing their claim against Dr Forbes' estate, while in the hands of the executor, as disentitles them to succeed in their present claim.

Counsel for the Pursuers—Vary Campbell—Pitman. Agents—Gillespie & Pater-son, W.S.

Counsel for the Defender—W. C. Smith. Agents—Lindsay & Wallace, W.S.

Wednesday, December 13.

SECOND DIVISION.

[Dean of Guild Court,
Dunfermline.

TURNER v. FRASER AND ANOTHER.

*Church—Churchyard—Churchyard-Wall,
Interference with—Tombstone—Heritors—
Heritors' Right of Compromise.*

The proprietor of a tenement, bounded on the south by a churchyard, applied to the Dean of Guild to warrant operations which included taking down the churchyard wall and rebuilding it as the back-wall of his proposed tenement. The heritors objected that this "would form an encroachment on the heritors' sole or mutual right of property" in the churchyard wall. The Dean of Guild, finding a competition of heritable right, sisted process, but ultimately, on a joint-minute for the parties, granted warrant finding that the petitioner's operations would not interfere with or prejudice the tombstones or rights of anyone in the wall.

The proprietor of a tablet in the wall, and of a family burying-ground adjoining, who had been sisted as a defender in the Dean of Guild process, appealed to the Court of Session against the interlocutor, maintaining (1) that the proposed operations would injure his tablet, and (2) that the arrangement in the minute was *ultra vires* of the heritors.

Held that it was within the power of the heritors, as guardians in the public interest of the churchyard, after reasonably and judicially considering the matter, to enter into the arrangement expressed in the joint-minute.

Upon 22nd June 1893 Alexander Fraser, merchant, Dunfermline, lodged an application in the Dean of Guild Court there for warrant to erect a tenement on his own property, as shown upon plans produced.

The titles of the petitioner described his property as "lying within the liberties of the burgh of Dunfermline on the south side of the street called the Maygate, and bounded . . . the church-yard upon the south, and by the said street called the Maygate upon the north parts." The petition was served upon John Landale, solicitor, Dunfermline, clerk to the heritors of the parish of Dunfermline, as well as upon the various authorities in the public interest. The building as finally arranged would have the effect of raising the churchyard wall several feet, and using it as a back-wall of the petitioner's tenement.

The heritors entered appearance and lodged answers, in which they averred—"The petitioner's plans show that he proposes taking down the said enclosing wall and rebuilding and carrying it up as the back-wall of a large warehouse. In par-