erect, had narrated that after examination the Dean of Guild approved of what had been done—using any appropriate language to distinguish between approbation of what had been done, and the ordinary case of approval of something proposed to be done. I cannot think, however, that the omission to notice this distinction should invalidate the warrant. At most the effect of such criticism would be to have the case remitted to the Dean of Guild to pronounce an interlocutor more accurate in point of form. But this would not be desirable, as the case has been defended, and is brought here in order that we may dismiss the application and give effect to the appellants' plea of right. That is a course which I think it is impossible for us to follow in view of the procedure which followed in the Dean of Guild Court. When it was seen there that the defenders' objections involved questions of property which were not appropriate to the jurisdiction of that Court, the Dean of Guild sisted process in order that an action might be raised by the defenders before a competent court for the determination of the question. The defenders did not avail themselves of that sist; they took no proceedings, but asked for a judgment on the case as it stood. Accordingly, judgment was given for the petitioners approving of the work as erected.

It has been said that the *onus* lay upon the latter to clear their title by instituting an action for that purpose, but no authority for this proposition has been cited, and according to my experience it is contrary to the usual practice. To support an application to the Dean of Guild a petitioner must produce a title to property which is *prima facie* good, but if there is opposition by anyone who says that the subjects are not included in the petitioner's title, or that he has a right of servitude, then, unless the question be one within the jurisdiction of the Dean of Guild, it is his duty to sist the case in order to have the question determined in this Court. In such circumstances it is, according to all precedent, for the defender to raise the action. Now, the petitioners produced a *prima facie* title, and, in the absence of any attempt of the defenders to disprove it by an action, the Dean of Guild had no alternative but to act upon it and grant a warrant.

I think that no sufficient ground has been stated for our displacing this warrant, and accordingly I am for dismissing the appeal.

LORD ADAM—I agree, and while I think that the form of the warrant is not a happy one, and that it would have been better if it had been expressed as approving of works already executed instead of sanctioning their erection, it does not appear to me that the appellants have been in any way prejudiced by this incorrectness of form. Had the petition craved approval of works already executed, the appellants' objections to it would have been the same, viz., that the property was his, and that a nuisance was caused by the petitioners, and the Dean of Guild would have acted just as he has acted, that is to say, he would have sisted the case to allow the objectors to make out their contention by raising an action. The only difference would have been that in the event of their not doing so, he would have pronounced an interlocutor approving of the works executed instead of a warrant to erect, but the appellants would have been in precisely the same position as they are now. Accordingly, their real objection is not to the form of the petition, but to having, as they say, the *onus* of raising an action thrown upon them. I agree that the Dean of Guild was quite right in doing so. There may be cases in which the *onus* should be on the petitioner, as for example where the subjects are *ex facie* the objector's property, and are not included in the petitioner's titles, but that is not the case here, and nothing has been said to show this should have been done. The result of the action would of course be the same on whichever party this *onus* lay, so that the question is comparatively unimportant. On the whole matter I agree that the appeal should be dismissed.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for Petitioners and Respondents —Shaw, Q.C.—Graham Stewart. Agents—Curror, Cowper, & Curror, W.S.

Counsel for Respondents and Appellants — W. Campbell — Gunn. Agent — John Mackay, S.S.C.

Friday, October 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROONEY *v.* CORMACK.

(*Ante*, vol. xxxii. p. 544—June 22nd 1895).

Expenses—Will—Reduction—Separate Defences—Liability of Defenders inter se for Expenses.

An action was raised for the reduction of a will against the testamentary trustee, and against the residuary legatee, a pupil child, who was represented by a *curator ad litem*.

By the will a legacy was bequeathed to the first defender, who was sole trustee, and who had prepared the will as the confidential legal adviser of the testator.

The will was challenged on the ground that it had been obtained from the testator, who was weak and facile, by fraud and circumvention on the part of the first defender. The case went to trial, and the jury returned a verdict in favour of both defenders.

Held that the pursuer was liable in expenses to the first defender only, and that the latter was personally liable in expenses to the other defender, on the ground that he had prejudiced the

case against him, and rendered a separate defence necessary, by his action in preparing as law-agent a will under which he took benefit.

James Rae, Esquire of Newton and Kirkpatrick, Dumfriesshire, died unmarried on 17th February 1894 leaving a trust-disposition and settlement dated 27th January 1894, under which his law-agent, J. F. Cormack, solicitor, Lockerbie, was sole trustee. By this trust-disposition he left various legacies, including an annuity of £200 to his sister Mrs Mary Rae or Rooney, and £500 to the said J. F. Cormack, who was directed to hold the remainder and residue of the truster's means and estate, amounting to about £25,000, for behoof of James Mackie, described as a natural son of the truster, and who was nine years old at the time of his death.

In February 1895 Mrs Mary Rae or Rooney, the sole next-of-kin of the said James Rae, and Janet Rae, his niece and heir-at-law, brought an action of reduction against J. F. Cormack and James Mackie (to whom a *curator ad litem* was subsequently appointed) for the purpose of having the trust-disposition and settlement set aside.

The action went to trial upon the two following issues:—"Whether the pretended trust-disposition and settlement, dated 27th January 1894, is not the deed of the late James Rae?" "Whether on or about 27th January 1894 the late James Rae was weak and facile in mind and easily imposed upon, and whether the defender John Ford Cormack, taking advantage of his said weakness and facility, did by fraud and circumvention impetrate from him the said trust-disposition and settlement, to the lesion of the said James Rae?"

The jury found for the defenders on both of these issues.

The defenders on 18th October moved the Court to apply the verdict of the jury, and to find the pursuers liable in the expenses of both the defenders.

At advising—

LORD PRESIDENT—The jury have found for the defenders on both the issues, the first being—in the usual form—whether the deed in question was not the deed of Mr Rae, and the second being whether Mr Rae was weak and facile, and whether the defender, taking advantage of his weakness and facility, did, by fraud and circumvention, impetrate the deed from him. The pursuers accordingly have been found to be in the wrong, the jury having held that the deed was the will of the testator and that it was honestly executed. The Court must therefore follow the ordinary rule and find the pursuers liable in expenses. But I do not think that they ought to be found liable in two sets of expenses, because in ordinary circumstances there would have been only a single defence, the trustee conducting it. But here, in the interests of the boy, it was in every way right that he should be separately represented, because the trustee, by his proceedings in connection with this will, had so prejudiced the case that the jury might have been apt, but for the separate representation of the boy, to disregard his interest, and, identifying the will with the trustee, to condemn both. The expense so occasioned was brought about by the action of Mr Cormack, and it appears to me that the proper solution of the question is that the pursuers should be found liable in the expenses of the trustee but not in the expenses of the boy, and that on the motion of the boy's *curator ad litem* we should find Mr Cormack liable in the expenses of the boy's separate defence.

LORD M'LAREN—I think that the Court has jurisdiction over the whole subject of expenses in any action before it. It is not necessary to have any conclusion for expenses on the part of a defender as against the pursuer, and I see nothing to prevent our granting an award of expenses to one defender against another where they stand in such a relation as to make it just that such an award should be given.

I agree that the course proposed by your Lordship is reasonable and just.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties, on the defender's motion to apply the verdict, apply the verdict of the jury, and in respect thereof assoilzie the defenders from the conclusions of the action, and decern: Find the pursuers liable in expenses to the defender John Ford Cormack as trustee, and remit the account thereof to the Auditor to tax and to report; and on the motion of Alexander Wylie, *curator ad litem* to the residuary legatee James Mackie, find the said John Ford Cormack liable personally in expenses to the said *curator ad litem*, and remit the account thereof to the Auditor to tax as between agent and client and to report."

Counsel for the Pursuers — Jameson — Salvesen. Agents — Fraser, Stodard, & Ballingall, W.S.

Counsel for the Defender Cormack — W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for the *Curator ad litem* — Hunter. Agent—Alexander Wylie, S.S.C.