

it is necessary to take and enforce a proceeding by executing the warrant of the Dean of Guild or not. It is only if they do take such a proceeding that the statute gives expenses. Instead of doing that he took a course which we must presume, in consequence of the judgment of the Sheriff, to have been one that no reasonable or sensible occupier of the premises would have resisted. He gave notice in some form, and sent a contractor to pull down the buildings. It so happened that the occupier was not a very reasonable or very well-advised person, and brought an untenable proceeding by way of interdict to prevent the buildings being pulled down. In that he was unsuccessful, and caused expense to the town authorities. That is not an expense of removing a tenant, but is an expense which must be borne by the person who caused it, and not by the owner, who is an innocent third party, and who has not got these expenses to pay by any express provision of the statute. It seems to me that the expense which is here involved in this case is very clearly not an expense of removing tenants or occupiers, but an expense consequent upon failing to remove tenants or occupiers, and if there is any expense caused by that course I am afraid it must fall upon the tenant or occupier, or, if the town cannot recover from the tenant or occupier, then upon the town itself.

The Court recalled the interlocutor of the Dean of Guild dated 20th February 1902, and remitted the case to him.

Counsel for the Appellant—Campbell, K.C.—T. B. Morison. Agents—Nisbet & Mathison, S.S.C.

Counsel for the Respondents—C. K. Mackenzie, K.C.—W. Thomson. Agents—Graham, Johnston, & Fleming, W.S.

Thursday, June 19.

SECOND DIVISION.

[Lord Kincairney,
Ordinary.

CUNNINGHAM v. SKINNER.

Reparation—Slander—Innuendo—Dishonesty—Fair Retort—Company.

An advisory committee appointed to investigate the affairs of a company issued a memorandum, in which they made statements with regard to a person who had formerly been managing director. These statements were made in answer to a report by the managing director, in which he made allegations against the advisory committee. In the memorandum it was stated that the sum charged by the managing director for office expenses was much in excess of what was either required or disbursed, and that sums had been paid away really in connection with his private business, but had been charged to the company, and that the time of a clerk had been occupied with

such business. In an action of slander brought by the managing director, and based upon the memorandum, he innuendoed it as imputing dishonesty to him. *Held* that he was entitled to issues.

Reparation—Slander—Privilege—Action by Former Managing Director of Company Against Advisory Committee of Shareholders—Memorandum Issued by Advisory Committee of Shareholders in Answer to Statements made by Managing Director—Company.

In an action of damages for slander, where the allegations complained of had admittedly been made by the defenders as members of a committee appointed by the shareholders to investigate the financial position of a company of which the pursuer had been managing director, and in answer to accusations made against them by the pursuer, *held* that the defenders were entitled to have the word "maliciously" inserted in the issues which were allowed.

Res Judicata—Dismissal.

In an action of damages for slander based upon averments practically the same as those in a previous action brought by the pursuer, which had been dismissed upon the ground that he, having become bankrupt, and having been consequently ordained to find caution, had failed to do so, *held* (*diss.* Lord Young) that the present action could not be excluded by the plea of *res judicata*, in respect that the decree in the previous action was one of dismissal and not of absolvitor.

Mora.

In an action of damages for slander based upon statements in a document issued more than ten years before, the pursuer explained that he had been prevented from bringing the action sooner owing to his being an undischarged bankrupt, and to his being unable to pay the expenses awarded in a previous action on the same grounds, which had been dismissed in respect of his failure to find caution for expenses, and also to his not being able to obtain possession of certain necessary documents and papers. *Held* that the action was not barred by *mora*.

Process—Caution for Expenses.

In an action of damages for slander brought upon the same grounds as a previous action which had been dismissed ten years before in respect that the pursuer having become bankrupt had failed to find caution for expenses, the defenders alleged that the pursuer was *vergens ad inopiam*, and asked that he should be ordained to find caution for expenses. The pursuer had obtained his discharge and had paid the expenses of the previous action. *Held* that he was not bound to find caution.

This was an action of damages for slander at the instance of John Ralston Cunningham junior, merchant, Glasgow, against George Skinner, baker, Glasgow, and others.

The defenders pleaded, *inter alia*, as follows:—“(1) The pursuer should be ordained to find caution in respect that he is *vergens ad inopiam*, and in respect of the nimious actions which he has raised against the present defenders. (4) The pursuer's statements being irrelevant the action should be dismissed. (4) (a) *Res judicata*. (5) *Mora*. (6) The statements complained of . . . being privileged, *et separatim* not being slanderous, decree of absolvitor should be pronounced.”

The slander complained of was alleged by the pursuer to be contained in a certain memorandum dated 21st September 1891, and issued by the defenders, who along with certain other persons had been appointed as a committee to investigate the financial position of a company called the Solana Mining Company, Limited, of which the pursuer was formerly managing director.

The pursuer averred that the Solana Mining Company, Limited, was incorporated under the Companies Acts on 10th July 1889; that its capital was £30,000 divided into 6000 ordinary shares, of which the pursuer held 5639; that it also issued debenture stock which was held by the pursuer, the defenders, and others; that on 29th January 1891 the committee above mentioned was appointed; that they issued a report in which they recommended that the working of the mines should be continued, and that additional capital should be raised; that this report was approved by the share and debenture-holders; that the defenders and the other members of the committee formed a fraudulent design of throwing the company into liquidation, their object being to take advantage of a preference which the pursuer by an agreement had accorded to their holdings in the company's stock—although the basis of that agreement had been that the company was to be carried on—and to sell the company's assets at a small figure to a syndicate in which they were interested; that the company went into voluntary liquidation on 28th May 1891, and that the liquidation was placed under the supervision of the Court on 19th December 1891; and that the sale of the company's assets was effected, and the pursuer's interests in the company sacrificed.

The pursuer then set forth the memorandum of which he complained, and which he alleged was maliciously framed and circulated by the defenders in order to accomplish their ends and discredit the pursuer.

This memorandum contained, *inter alia*, the following allegations against the pursuer:—“For instance, although Mr Cunningham undertook to carry on the company without remuneration, it was found that the sum he charged and was allowed in name of office expenses, secretary's salary, &c., was much in excess of what was either required or disbursed. The list of the company's debts in Britain as submitted by him was inaccurate, a large item having been omitted though the creditor was pressing hard for his money. Further, it came to light that considerable amounts had been paid away in Spain really in con-

nection with Mr Cunningham's private business, but had been charged to the company, and also that much of the time of Mr Findlay, the clerk at the mines, had been occupied with such business. . . . A more remarkable departure, however, from the line of duty which should have been followed by Mr Cunningham as managing director consisted in his habitual and deliberate exclusion from the ordinary business correspondence falling to be submitted to his directors, of those financial details which would have awakened the suspicion or alarm of the board. Mr Cunningham gave written instructions, repeated and re-enjoined at various dates, to the officials of the company in Spain to write to him privately upon the difficulties of the company arising from want of funds and otherwise. This was complied with. Only after great delay and difficulty was this private correspondence obtained from the mines, Mr Cunningham having refused to hand over the letters in his hands. *This correspondence, which is as extensive as the so-called 'official' correspondence, was never submitted to the directors, who were quite ignorant of its existence.* In the meantime it is deemed unnecessary to print extracts from these letters, but they may be seen in the liquidator's hands. These letters disclose that the company had been utterly unprovided with the necessary means for carrying on its business; that there were incessant calls from the mines for funds to meet overdue wages and current expenses; and that in consequence the management and the working had got into a disorganised state. . . . From the facts above set forth it will be seen that the decision of the committee to liquidate the company arose from two causes, either of which was sufficient justification for the course adopted—(1) the financial embarrassment of the company, (2) the policy of concealment which Mr Cunningham was found to be adopting towards the directors and the committee. In brief, the committee which Mr Cunningham so seriously maligns commenced their work with an earnest endeavour to extricate Mr Cunningham and the company from a desperate position. They were at first hopeful of success, and had Mr Cunningham's demeanour and conduct been straightforward their efforts might have succeeded, but as damaging facts, one after the other, in regard to Mr Cunningham's conduct and management came under their notice they were most reluctantly compelled to acknowledge that any attempt to carry on the company would have resulted in general dissatisfaction and great loss of money. Even had the financial difficulty not been an overwhelming one, conduct of the kind above described on the part of a director would have been sufficient to endanger the safety of any undertaking.” . . .

The memorandum bore to be a reply to a report issued by the pursuer to the shareholders on 7th September 1891. The pursuer admitted that he had issued this report. In it he alleged that the liquida-

tion had been brought about from a desire to reduce his holding to a minimum figure; that an agreement by which he surrendered his control over the company was obtained from him in an altogether unfair manner; that the policy pursued by the committee had been a secret policy; that their aim was to get his shares into their hands so that they might be able to wind up the company regardless alike of his interests and of those of the debenture-holders; and that he had reason to believe that the members of the committee entertained a good opinion of the mines, and that their action had not been dictated by the opinion that the mines were not worth carrying on. The committee in their memorandum denied these imputations.

With regard to the memorandum, the pursuer averred as follows:—"Said memorandum above quoted is of and concerning the pursuer, and falsely, maliciously, and calumniously represents, and was intended by the defenders to represent, that (1) the pursuer had been guilty of fraud and dishonesty, and that his character was such as to render him unfit to be connected with the management of any company. In particular, the said circular represents that the pursuer had defrauded the company by fraudulently charging for office expenses sums not required for that purpose, and not so disbursed; (2) that the pursuer had fraudulently applied the funds of the company in connection with his own private business, and had charged the payments against the company; (3) that the pursuer fraudulently employed Mr Findlay in the joint service of himself and the company, whilst falsely representing to the directors that Mr Findlay was in the sole employment of the company, and charging the whole of Mr Findlay's salary against the company; (4) that the pursuer had fraudulently misrepresented the financial position of the company to his co-directors, or concealed the same from them, and had fraudulently and dishonourably concealed from them a secret correspondence carried on by him with the officials of the company in Spain; (5) that the pursuer's demeanour and conduct had not been straightforward, meaning thereby that it had been dishonest, and that such damaging facts had come to the knowledge of the defenders with regard to the pursuer's conduct and management as to render it impossible to carry on the company, meaning thereby that the pursuer's conduct and management had been fraudulent; that the pursuer had abused his position as a director of the company and been guilty of conduct which would have been sufficient to endanger the safety of any company on whose directorate the pursuer had a place, meaning thereby that the pursuer's conduct as a director had been dishonest. The said circular was hurriedly framed and issued by the defenders without any inquiry being made as to the truth of the statements made therein. The said false and slanderous statements were made by the defenders in the knowledge that they were false. They were made maliciously and without probable or any cause."

The pursuer also averred as follows:—"In consequence of the said statements printed and circulated by the defenders, or with their authority, as above stated, the pursuer has suffered severely in his feelings, character, and commercial credit, and has suffered loss and damage to the extent of £20,000. The pursuer has found it utterly impossible to do any business owing to the publicity given to the said false and malicious charges, and he in 1892 raised an action in the Court of Session to vindicate his character therefrom, and to obtain reparation for the injuries he had suffered thereby. In that action the defenders succeeded in getting the pursuer ordained to find caution, and on his failure to do so it was dismissed. The pursuer [who had been sequestered on 28th December 1891] for years was opposed by the defenders, particularly by the said John Mann junior and George Skinner, and also by John Munn Ross, C.A., Glasgow, trustee in pursuer's sequestration, in his attempt to obtain his discharge in his sequestration, and it was only after great outlay, and overcoming the greatest possible opposition, that he got his discharge on or about 21st December 1896. The pursuer's books and papers were retained by his said trustee, who denied him access to them that he might obtain the necessary data for furthering his petition for discharge, and for carrying on his business afresh, and it was only after protracted litigation in the Sheriff Court and Court of Session that the pursuer recently obtained delivery of his books and papers and was awarded expenses. Thereupon, although well aware that their claim had been settled, the defender John Mann junior, on his own behalf and on behalf of and at the instigation of the other defenders, maliciously and fraudulently arrested the aforesaid expenses on the plea that the pursuer was still owing them the sum of £65 in respect of legal proceedings against them in 1892. The First Division recalled the arrestments, with expenses against the defenders, on 3rd June 1900. The pursuer believes and avers that the said defender John Mann junior raised this fictitious claim solely for the purpose of delaying or blocking the pursuer's proceedings to recover his position and property. The delay in bringing the present action is entirely due to these and other tactics of the defenders and the said John Munn Ross. The pursuer finds that the charges are still current, and that he has no alternative but to vindicate himself from them."

It appeared that the action of slander raised by the pursuer against the defenders in 1892, and referred to by the pursuer *supra*, was in substance and to a great extent in terms identical with the present, and raised the same question. It was signeted on 21st November 1891. On 28th December thereafter the pursuer's estates were sequestered; on 16th February intimation of the dependence of the action was ordered to be made to the trustee, who declined to assist himself. On 3rd March 1892 the pursuer was ordained to find caution for expenses.

He failed to find caution, and in respect of his default an interlocutor was pronounced on 15th March 1892 dismissing the action. The pursuer had since paid the expenses awarded against him in this action.

The defenders averred that the pursuer was continually engaged in reckless litigation; that he had brought sixteen unsuccessful actions; and that he was *vergens ad inopiam*.

By interlocutor dated 20th November 1901 the Lord Ordinary (KINCAIRNEY) repelled the defenders' preliminary pleas and approved of two issues, and appointed them to be the issues for the trial of the cause.

The issues approved by the Lord Ordinary were as follows:—“Whether on or about 21st September 1891 the defenders, or any and which of them, framed, subscribed, and circulated a memorandum or statement in the terms set forth in the schedule appended hereto; whether the said memorandum or statement is in whole or in part of and concerning the pursuer, and falsely, maliciously, and calumniously represents that the pursuer had been guilty of fraud and dishonesty, and in particular that he had defrauded the Solana Mining Company, Limited, by fraudulently charging for office expenses sums not required for that purpose and not so disbursed, to the loss, injury, and damage of the pursuer? Damages laid at £10,000 sterling. 2. Whether the said memorandum or statement is in whole or in part of and concerning the pursuer, and falsely, maliciously, and calumniously represents that the pursuer had fraudulently applied the funds of the said company in connection with his own private business and had charged the payments against the said company, to the loss, injury, and damage of the pursuer? Damages laid at £10,000 sterling.”

The defenders reclaimed.

The pursuer gave notice of a motion to vary the terms of the issues approved of by the Lord Ordinary by deleting from each of them the word “maliciously.”

Argued for the defenders—(1) *As to Relevancy*. There was no libel at all in the report. The statements in it did not bear the innuendo sought to be put upon them. No charge of fraud was made, nor was it said that the pursuer was appropriating money to his own use. The inference suggested by the innuendo was not the inference which reasonable persons would draw on reading the report, and that was the criterion to be looked to—*Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741. The statements complained of were made in answer to pursuer's attack on the defenders contained in the statement issued by him to the shareholders of the company. The defenders' statements were made by way of fair retort, and so did not ground an action of libel. The statement must be read as a whole, and the pursuer was not entitled to pick out casual expressions and found on them—*Gray v. Society for Prevention of Cruelty to Animals*, July 18, 1890, 17 R. 1185, 27 S.L.R. 906; *Laughton v. Bishop*

of Sodor and Man, L.R., 4 P.C. App. 495. The memorandum was not circulated to outsiders, but only to parties interested in the company affairs. In any view the statements were privileged, and malice ought to be inserted in the issues. (2) *As to Res Judicata*.—In the former action the decree should have been one of absolutor and not one of dismissal—*Gray v. Ireland*, July 18, 1884, 11 R. 1104, 21 S.L.R. 766; *Teulon v. Seaton*, June 30, 1885, 12 R. 1179, 22 S.L.R. 786. A decree by default is a decree *in foro*, and can only be got rid of by a reclaiming-note—*Forrest v. Dunlop*, October 15, 1875, 3 R. 15, 13 S.L.R. 2. In the present case a wrong decree had been pronounced in error, but the Court could competently deal with the case as if the appropriate and proper decree (*i.e.*, one of absolutor) had been in fact pronounced—*Shirreff v. Brodie*, May 24, 1836, 14 S. 825. The pursuer was virtually bringing the same action on a new summons—the only difference being the innuendo which was now sought to be put upon the statements in the memorandum. (3) *As to Caution*.—The law as to this was clear, *viz.*, that it was always a question for the discretion of the Court which would be exercised in view of the facts and circumstances of each case, and among such circumstances long delay in bringing the action should be considered. The pursuer here had delayed bringing his action for ten years. The pursuer was a reckless litigant. He had had no fewer than sixteen litigations, in all of which he had been unsuccessful. The defenders had in the interval lost valuable evidence that would have been originally available. In these circumstances the pursuer should be ordained to find caution for expenses—*Ritchie v. M'Intosh*, June 2, 1881, 8 R. 747 (*per Lord Young*), 18 S.L.R. 528; *Clarke v. Muller*, January 16, 1884, 11 R. 418, 21 S.L.R. 290; *Collier v. Ritchie & Company*, November 4, 1884, 12 R. 47, 22 S.L.R. 38; *Teulon v. Seaton (ut supra)*; *Scott v. Roy*, July 15, 1886, 13 R. 1173, 23 S.L.R. 855; *Borthwick on Libel*, p. 388.

The Court only called for a reply on the questions of *Res judicata*, *Mora*, and caution.

Argued for the pursuer—*As to Res Judicata*.—A decree of dismissal could never be *res judicata*. The defenders had asked for a decree of dismissal, and had acquiesced in it. If a defender was content with and acquiesced in a decree of dismissal he could not afterwards raise it into a decree of absolutor—*Wilson v. Magistrates of Musselburgh*, February 22, 1868, 6 Macph. 483; *Stewart v. Greenock Harbour Trustees*, June 26, 1868, 6 Macph. 954; *Gow v. M'Ewan*, January 26, 1897, 2 Adam 215, 34 S.L.R. 421. Except under the statute authorising abandonment a pursuer could not abandon by withdrawing a conclusion except on the footing that the defender got absolutor—*Earl of Ancaster v. Sandeman*, November 7, 1893, 1 S.L.T. 291. Although a decree of absolutor had been pronounced the Court would consider the grounds upon which it was granted, and if it were granted for failure to obey an order of Court, then it would not be *res judicata*.

—*Millie v. Millie*, November 27, 1801, M. 12,176, *affd.* March 18, 1807, 5 Pat. App. 160; *Leith v. Leith*, June 7, 1822, 1 S. 468; *Clark v. Newmarch*, November 17, 1825, 4 S. 182. It was only where the merits had been inquired into that the plea of *res judicata* would be sustained—*Jenkins v. Robertson*, April 5, 1867, 5 Macph. (H.L.) 27. But the Court could not competently go behind its own interlocutor. The cases cited on both sides showed that though the circumstances were similar, a decree of absolvitor had been pronounced in some and a decree of dismissal in others. There was therefore no inflexible rule. The case of *Shirreff* (cited *supra*) was a case of clerical error, and so not in point. 2. *As to Mora*—The pursuer was not an undischarged bankrupt. He was now discharged, and had also paid the expenses in which he had been found liable. As soon as he got his discharge he sought to recover the documents and papers necessary to enable him to raise an action, but the defenders refused to produce them, and he had to sue for them. Therefore it was solely due to the fault of the defenders that he had not brought the action sooner. *Mora* by itself was not a ground for throwing out an action—*Moncrieff v. Waugh*, January 11, 1859, 21 D. 216; *Gourlay v. Wright*, June 23, 1864, 2 Macph. 1284; *Cunninghame v. Boswell*, May 29, 1868, 6 Macph. 890.

At advising—

LORD JUSTICE-CLERK—The defenders in this case object to the pursuer being allowed issues on various pleas. I have been unable to find grounds on which it can be maintained that there is not relevant matter for issues. The alleged accusation against the pursuer does, I think, clearly admit of the innuendo which the pursuer puts upon it, and which if he were allowed to go to trial and made it out successfully would entitle him to a verdict. But then it is maintained that this is a new summons on a matter which was made the subject of an action many years ago, and which action was finally disposed of against the pursuer. The facts are that while the former suit was pending the pursuer became a bankrupt, that his trustee declined to sist himself, and that accordingly the pursuer was ordained to find caution for expenses. This he failed to do, and in respect of the default his action was thrown out by an interlocutor of dismissal. This, it is maintained, makes it incompetent for him to raise a new action. The contention is, that although in ordinary circumstances a decree of dismissal will not debar the party from raising another action, yet that in that case the true and proper judgment should have been one of absolvitor. That may be so, and assuming that it was the question comes to be, whether the Court must proceed on what was done, and not on what might or should have been done. I am of opinion that the former view is the right one. I think the authorities go distinctly to that, viz., that if a judgment is one of dismissal it cannot be founded on to exclude a subsequent action. Therefore

while it may be possible that, if the Court had been asked to grant absolvitor, it might have done so, the absence in fact of such a decree makes objection to a new action untenable.

But then it is said that there has been long delay in bringing the action. Now, while I do not say that there may not be cases the circumstances of which combined with long delay might justify a court in refusing to allow a cause to proceed, a case with such circumstances must be rare indeed. Here the circumstances are simple. The pursuer was a bankrupt without means either to carry on litigation or to provide security for costs. He is now discharged, and has paid the expenses decreed for against him in the previous litigation. I am unable to see that in that state of facts he can be held barred from proceeding with his claim. Nor do I see that there is ground for making it a condition that he shall find caution. Except as regards the delay, he now brings his action in the position of an ordinary litigant, and is not bound to secure his adversary's costs as a condition of proceeding.

Upon the form of the issues I have formed a very clear opinion that the Lord Ordinary is right in ordering malice to be put in issue. The pursuer's own record makes it plain that the words complained of were used in an explanatory answer made by the defenders to accusations put forward against them by the pursuer. I think that they were entitled to make such pertinent answers and comments in reply as would meet his attack. Their position was privileged, and therefore if the pursuer is to succeed he must prove that they acted maliciously.

I am therefore for adhering to the interlocutor of the Lord Ordinary approving of the issues as adjusted by him.

LORD YOUNG—This is certainly a very peculiar case—an out-of-the-way case. The pursuer and the defenders were partners of a company called the Solana Mining Company, Limited. It went into liquidation, I think, upwards of ten years ago, and the dispute between the pursuer and his copartners, the defenders, began in the management of the affairs of the company rather more than ten years ago. A committee was appointed to look into its affairs, and then a controversy arose between the pursuer and the defenders. He wrote and published a pamphlet imputing discreditable proceedings to them, and alleging that the company had come to grief in consequence of their improper and really dishonest proceedings, these proceedings being taken by them with the view of their acquiring the company upon very inadequate terms. They also, upwards of ten years ago, published their representation of the true state of facts, imputing misconduct and the reverse which had come upon the company to him, and this action, which is now raised after the lapse of more than ten years, is in respect of the slanderous imputations against him in the article written by the defenders. He brought

more than one action—he brought a good many actions—against them in the interval, in all of which he failed. In one of the actions, he being then an undischarged bankrupt, the Court ordered him to find caution for expenses, and he did not obey that order, and a decree dismissing the action was pronounced.

The first question to be considered is—what is in law the effect of an action being dismissed in consequence of the pursuer thereof not obeying an order of the Court to find caution for expenses as a condition of being allowed to proceed with it? He was ordered to find caution, and he did not obey that order. Now, what was the proper interlocutor to pronounce—I do not say the words of it—but what was the proper thing for the Court to do? Now, I do not think it is doubtful that it was to dispose of the action so that it could not be repeated. I do not think that is doubtful. I do not think it is doubtful that the defenders, who got the order upon the pursuer to find caution for expenses as a condition of proceeding, were entitled to have that action finally disposed of. It is said, and I assume quite correctly, the proper expression of the interlocutor to attain that end is an interlocutor of absolver. But if an interlocutor dismissing the action with costs is the form in which the interlocutor is put by the Court, does that operate something different from what it was the duty of the Court to operate, and certainly must have been the intention of the Court to operate in the circumstances, which are not doubtful, because it appears upon the face of the proceedings that the interlocutor of dismissal was in respect that he had failed to obey the order of the Court to find caution for expenses as the condition of his being allowed to proceed with the action? Now, the question is, whether that mistake—and in that view it was a mistake to put in dismissal instead of absolver—is not fatal, so that he is at liberty at any time, not only within the next ten years but within the next forty years I suppose—I do not know whether forty years would make a difference—to repeat an action against the same defenders upon the same ground and upon the same conclusion? I think you are entitled always to look at the ground of the judgment and why it was pronounced. In the course of the argument, I put the case—if the action had gone to trial, and there had been a verdict for the defenders, and the interlocutor was applying the verdict and dismissing the action with expenses, would that leave the pursuer entitled to bring another action because dismissal instead of absolver had been put in the interlocutor? I do not think any sensible or rational consideration would lead to that conclusion, but it may possibly be law nevertheless—I do not think it is. And if the proposition be true that when a bankrupt is ordered to find caution for expenses because his trustee will not take up the action—will not proceed with it—the defender is entitled to have the action finally disposed of, I do not think that

right is destroyed by dismissal being put in instead of absolver, any more than a similar right exactly would be destroyed by dismissal instead of absolver being pronounced in applying a verdict for the defender with expenses. I am therefore of opinion that this action, which is just a repetition of the action which was dismissed, and in which the defender was entitled to be assolized, cannot be entertained.

There is another question which we desired to know more about after consideration of the first argument in the case, namely, whether, at this distance of time, and looking to the nature of the action, which is inquiry into proceedings which took place with reference to the affairs of a company upwards of ten years ago, the pursuer ought now to be allowed to proceed, having given no explanation for the delay—none whatever which can excuse him—without finding caution for costs. I think the defenders are put in an extremely hard position by being required to defend their views expressed ten years ago as to the affairs of the company at that remote period. Why was there the delay, except the same poverty which seems to have been upon the pursuer all through. Now, I think it is in the judgment and discretion of the Court, considering what justice requires them to do in the legitimate interests of the parties, to order caution for expenses to be found, and it appears to me that this is a case in which that discretion ought to be exercised by ordering caution to be found by this dilatory party—dilatory on account of poverty which we have no grounds for supposing has been removed, or if, as was suggested rather poetically, it is possible that he may have come into a fortune recently, then it would be no hardship upon him to find caution for costs. But there is no ground for suggesting such a supposition, and therefore in my opinion the discretion of the Court ought to be exercised, if the first view I have submitted were not to be taken, as I understand it is not to be, by ordering caution to be found.

We had an argument upon the relevancy. I do not think, as the case is to go to trial—for I understand that both your Lordships are agreed that it is to go to trial—I do not think it would be expedient, and it might be hurtful, to express my views upon that subject, which can be of no effect. The case will have to go to trial if these views which I have expressed are disallowed.

LORD TRAYNER—The Lord Ordinary has adjusted issues for the trial of this cause, but the defenders maintain that no issue should be allowed because this action is irrelevant. They also say that the action is excluded, (1) on the ground of *res judicata*, and (2) by *mora*, and further that in any view the pursuer should not be allowed to proceed with the action except on condition of his finding caution for expenses.

I think the action is relevant, and the averments sufficient to warrant the issues which have been allowed. The plea of *res judicata* is based upon the fact that in a

previous action raised by the pursuer against the defenders, of which this action is practically a repetition, he (having during the dependence of that action been rendered bankrupt) was ordained to find caution for expenses, which having failed to do, the Lord Ordinary before whom the case depended dismissed the action. It is maintained by the defenders that in those circumstances the present action is excluded. I do not agree in that view, and I base my opinion on the grounds expressed by Lord Deas in the case of *Stewart*, 6 Macph. 958. The former action having been "dismissed" does not preclude the pursuer from bringing and insisting in this action. The defenders say that the interlocutor in the former action, having been pronounced in respect of the pursuer's failure to obtemper an order of Court, should have been one of absolvitor, and not merely of dismissal. In this I think the defenders are right. But we have not now to consider the effect of an interlocutor which might have been pronounced but was not, but the effect of an interlocutor as pronounced. Dealing with the matter so, and agreeing, as I have said, with the views of Lord Deas in *Stewart's* case, I am for repelling the defenders' plea of *res judicata*.

The delay in bringing this action has been very great, but it is not without explanation. The pursuer's case as averred is that the defenders' slander ruined him and brought about his bankruptcy; that he is only now in a position pecuniarily to vindicate his character; and that as he has done nothing to indicate an abandonment of his present claim, but proceeded to enforce it as soon as he was in a position to do so, the mere delay in bringing this action is not *per se* sufficient to exclude it. I take the pursuer's view of this matter.

Lastly, I think there is no reason for ordering the pursuer to find caution. He has been discharged under his sequestration, and is therefore no longer a bankrupt. He may be poor, but that is not a reason for ordering him to find caution.

The pursuer has moved us to vary the issues as adjusted by the Lord Ordinary by striking out the word "maliciously," leaving the necessity for proving malice to be determined at the trial. But I think the Lord Ordinary did right in inserting that word, because the pursuer's averments disclose a *prima facie* case of privilege on the part of the defenders. I am therefore for refusing the pursuer's motion to have the issues varied as proposed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—A. M. Anderson. Agents—Deas & Kennedy, W.S.

Counsel for the Defenders and Reclaimers Ure, K.C.—M'Clure. Agent—F. J. Martin, W.S.

Saturday, June 21.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

CHISHOLM v. MOSS.

CHISHOLM v. KELLOCK.

Licensing—Penalty—Title to Sue—Common Informer—Licensing (Scotland) Act 1828 (Home Drummond Act) (9 Geo. IV. c. 58), sec. 13—Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35), secs. 25 and 29—Publicans' Certificates (Scotland) Act 1876 (39 and 40 Vict. c. 26), sec. 11—Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. c. 53), secs. 2, 27, and 28—Public-House.

Held that a common informer has no title to sue for a penalty under section 13 of the Licensing Act 1828 (Home Drummond Act), in respect that by section 25 of the Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35) all offences against section 13 of the Home Drummond Act must be prosecuted at the instance of the procurator - fiscal or some person specially appointed for the purpose.

The Licensing (Scotland) Act 1828 (Home Drummond Act) (9 Geo. IV. c. 58) enacts, Sec. 13—. . . "No justice of the peace or magistrate in any county or royal burgh who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, or who shall be in partnership with any person as a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, shall act as such justice of the peace or magistrate respectively in the execution of this Act; nor shall any justice of the peace or magistrate act in the granting of any certificate when he shall be proprietor or tenant of the house or premises for which such certificate shall be applied for; and everything done by a justice of the peace or magistrate respectively in any case in which he is so disqualified to act shall be null and void; and every justice of the peace or magistrate who shall knowingly or wilfully offend in any of the premises aforesaid shall forfeit and pay the sum of fifty pounds, to be recovered by any person who will prosecute for the same, before the sheriff of the county, within six calendar months next after the offence has been committed."

The Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35) enacts, Sec. 25—"Every person who shall commit any breach of certificate, or who shall in any other manner offend against either of the recited Acts (viz., 9 Geo. IV. c. 58, and 16 and 17 Vict. c. 67), or this Act, shall be prosecuted, and all penalties, together with the expenses of prosecution and conviction, to be ascertained on conviction, shall be recovered, unless by this Act otherwise specially directed or authorised, before the sheriff or any two or more