

cated by the Wages Arrestment Limitation (Scotland) Act 1870 (33 and 34 Vict. cap. 63), which did not save from arrestment the surplus of wages above 20s. a-week. The pursuer could not recover in any court of law his earnings at dentistry, and therefore for him it was not properly a trade or livelihood at all. (2) What was a humanitarian rule should not be extended to the practice of dentistry by an unregistered practitioner, for though this was not illegal, it was not regarded with favour by the law.

LORD JUSTICE-CLERK—This case has got into a somewhat unfortunate position. The Sheriff says that the petitioner designs himself in these proceedings as a dental surgeon, but his agent simply followed the designation given in the application by those seeking his sequestration. Now, the petitioner never in his practice maintained that he was a qualified dentist, or designed himself as dental surgeon, which would have made him liable to certain penalties. It seems, then, a strange thing to say that because these words occur in his designation in the petition, the petitioner should be shut out from stating a relevant case. If he had come forward calling himself a surgeon dentist, and saying he had a degree which he had not, that would have been a different case.

I think the case must be remitted to the Sheriff for proof, and so holding, that it is advisable to say a few words further as to the nature of the case.

The practising of dentistry is not illegal though performed by a person who has not the qualifications of the Dentists Act 1878. This was expressly observed in *Emslie v. Paterson*, 1897, 24 R. (J.) 77. Therefore the petitioner in practising dentistry was not acting illegally. Is he then entitled to have excluded from the sequestration those implements, or any of them, mentioned in the prayer of the petition? That depends on questions of fact. Whether a person uses the tools himself, or carries on a trade where he makes other persons use the tools, is a question of fact which is very important. It is also a question of fact what are the ordinary implements and tools of every trade, and this the Court cannot be expected to know. I think, therefore, the Sheriff-Substitute was right in allowing proof. It may be that a dentist does his whole work himself with his own hands—the tools and implements he so uses are, then, the tools and implements of his trade. It was said by the respondents that only the tools and implements of an ordinary working man were exempt from being attachable for debt, but opinions were expressed in *Gassiot, Petitioner*, November 12, 1814 (F.C.), that books or even desks would be implements of trade of a teacher of languages, and so not attachable for debt.

I think, therefore, it is proper to have the facts ascertained, and therefore that it is necessary to recal the Sheriff's interlocutor.

LORD KYLLACHY, LORD STORMONTH DARLING, and LORD LOW concurred.

The Court sustained the appeal, and remitted to the Sheriff to allow parties a proof of their averments.

Counsel for Pursuer (Appellant)—Thomas Trotter. Agents—Struthers Soutar & Scott, Solicitors.

Counsel for Defender (Respondent)—Cullen, K.C.—Ingram. Agent—J. Dunbar Pollock, Solicitor.

Thursday, November 30.

FIRST DIVISION.

JOHN NIMMO & SON, LIMITED,
PETITIONERS.

Witness—Foreign—Arbitration—Witness and Haver in England—Appointment of English Commissioner—Letters of Diligence to Cite Witness—Form of Interlocutor.

An arbiter having ordered a proof and appointed a commissioner in England for taking the deposition of a witness and haver who was resident there, the party at whose instance the commission had been granted presented a petition, *inter alia*, for approval of the appointment of the commissioner and for letters of diligence for citing the said witness to appear before him.

The Court *refused* to grant letters of diligence but *confirmed* the appointment of the commissioner.

By deed of submission dated 8th, 10th, 18th, and 21st January 1904, entered into between John Nimmo & Son, Ltd., 163 Hope Street, Glasgow, and the Collieries Consolidation Syndicate, Limited, and the United Collieries, Limited, both incorporated under the Companies Acts 1862 to 1890, it was agreed that all questions arising under or relating to the adjustment of a certain minute of agreement should be referred to the Right Hon. Charles Scott Dickson, Lord Advocate for Scotland, as arbiter.

The arbiter having accepted office, in the course of the proceedings under the reference allowed a proof, and it was found necessary for Nimmo & Son to recover certain documents mentioned in a joint specification. The arbiter accordingly pronounced the following orders:—On 13th November 1905.—“The arbiter . . . before answer allows both parties a proof of their respective averments and to each a conjunct probation; appoints the proof to proceed before him on . . . Further respectfully recommends to the Lords of Council and Session to grant warrant for citing witnesses and havers on the application of either party.”

On 25th November 1905:—“The arbiter, having considered the note for John Nimmo & Son, Limited, appoints the Mayor or Town-Clerk of Rotherham his commissioner in Rotherham for taking the deposition of D. W. Rees, secretary of the North Central Wagon Company, Limited, Rother-

ham, a witness for the said John Nimmo & Son, Limited, and as a haver in terms of the joint specification, and the arbiter respectfully recommends the Lords of Council and Session to sanction and confirm the appointment of the said commissioner named by the arbiter, and to require and enforce the attendance of the said D. W. Rees before the said commissioner."

"The arbiter, having considered the joint specification of documents for which diligence is craved by the parties, respectfully recommends the Lords of Council and Session to grant diligence against havers at the instance of both or either of the parties for recovery of the documents called for in the said joint specification, and the arbiter grants commission to J. Wright Forbes, Esquire, Advocate, Edinburgh, to take the oaths and receive the exhibits of the havers, to be reported *quam primum*."

John Nimmo & Son, Ltd., accordingly presented this petition.

The petitioners stated that in order to carry the said orders into effect it was necessary that diligence should be granted for citing witnesses and havers, and that authority should be interponed to and the appointment of the said commissioner in Rotherham named by the arbiter sanctioned and confirmed, and warrant granted for letters of diligence for citing the said D. W. Rees as a haver and a witness to appear before the said commissioner, and that in common form of law at the instance of the petitioners.

The prayer of the petition craved (1) warrant to cite havers, (2) warrant to cite witnesses, and (3) in particular "to interpose authority, sanction and confirm the appointment of the said commissioner in Rotherham named by the writer, and to grant warrant for letters of diligence at the petitioners' instance for citing the said D. W. Rees as a haver and a witness to appear before the said commissioner, or to do otherwise or further in the premises as to your Lordships shall seem proper."

The petition was unopposed. Counsel for the petitioners cited the following cases in support of the application:—*Blaikies Brothers v. The Aberdeen Railway Company*, July 8, 1851, 13 D. 1307; *Highland Railway Company v. Mitchell*, May 30, 1868, 6 Macph. 896.

[The LORD PRESIDENT referred to the Act 6 and 7 Vict. c. 82, cited in the two cases above referred to.]

Counsel moved the Court to grant the prayer of the petition.

LORD PRESIDENT—We shall appoint your commissioner to be the commissioner and he can cite his witnesses. If the witnesses do not obey his citation he can apply to the Court in England. We shall adjust an interlocutor.

The Court pronounced an interlocutor which *quoad* the first two craves of the prayer was in the usual form, and as regards the remaining crave was as follows:—"and (3) interpose authority to and sanction and confirm the appointment of the

Mayor or Town Clerk of Rotherham as commissioner for citing D. W. Rees, Secretary of the North Central Wagon Company, Limited, Rotherham, as a haver and witness to appear before the said commissioner, and for his examination as a witness in the matter of the said reference."

Counsel for Petitioners—Horne. Agents—Drummond & Reid, W.S.

Wednesday, December 6.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles, at Edinburgh.]

MITCHELL (ALEXANDER'S EXECUTOR) v. MACKERSY.

Executor—Eadem persona cum defuncto—Compensation—Debt Due by Law-Agent to Executor in respect of Executory Estate Compensated with Debt Due to Law-Agent by Deceased in respect of Business Account.

The law-agent of a deceased lady, who at her death was his debtor for the amount of a business account, was employed by her executor to realise her estate. The estate turned out to be of less value than the amount of the business account.

In an action by the executor against the law-agent for payment of the amount realised by the deceased's estate, *held* (1) that the executor was not a trustee for the creditors of the deceased, but was simply the representative of the deceased and debtor to her creditors and creditor to her debtors, and (2) that consequently the pursuer's claim was extinguished by compensation.

Globe Insurance Company v. Mackenzie, August 5, 1850, 7 Bell's App., 296; and *Stewart's Trustee v. Stewart's Executrix*, May 21, 1896, 23 R. 739, 33 S.L.R. 570, *followed*. *Gray's Trustees v. Royal Bank*, November 27, 1896, 23 R. 199, 33 S.L.R. 140, *disapproved*.

Expenses—Process—Appeal—Failure to Inform Sheriff as to Position of Authoritative Decisions a Ground for Refusing Successful Party Expenses of Appeal.

A Sheriff in an action before him granted pursuer decree following a decision of one of the Divisions of the Court of Session founded on by the pursuer. That decision was contrary to a previous decision of the House of Lords, which had not been quoted to the Division. The defender failed to point out this omission to the Sheriff.

In an appeal, the Court, while following the House of Lords decision and recalling the Sheriff's judgment, allowed no expenses in the Court of Session to either party, both being responsible for the position which made the appeal necessary.