No. 16. JOHN WATT, Appellant.—*Warren—Noland.*

DAVID BLAIR, The TRUSTEES for FISHERIES, &c., in Scotland, and J. CAMPBELL and T. WILLIAMSON, Respondents.—*Gifford—Moncreiff.*

Reparation—Trustee.—**Held,—1.—(reversing the judgment of the Court of Session,) that an allegation against a defender of having instigated other parties to do an injurious act to the pursuer, was competent to be proved, although these parties were not called as defenders; and,—2.—(affirming the judgment of the Court of Session,) that gratuitous trustees, acting bonâ fide in the supposed discharge of their duty, were not liable in damages.**

June 25. 1821.

2D DIVISION.

Lords Newton and Gillies.

IN August 1808, Watt having imported into Dundee a quantity of linseed, Blair, one of the officers of the Trustees for Manufactures, &c. in Scotland, presented a petition to the Sheriff of Forfarshire, stating that he had lately surveyed the linseed, which he found to be bad, and as such prohibited by the statutes 3d Geo. I. c. 7, 13th Geo. I. c. 26, and 24th Geo. II. c. 31, from being imported or sold, or exposed to sale in Scotland; that Watt was about to sell it to be exported to Ireland; and praying to have it condemned, and the penalties provided by the above statutes awarded to him. After various proceedings before the Sheriff, it was agreed to have the quality of the linseed ascertained by inspectors mutually chosen. This having been done, the inspectors reported that one parcel was good, and recommended the vegetative powers of the other to be ascertained by experiment. Blair, however, insisted upon a proof; and the Sheriff, upon advising it, found the one parcel to be good, which he authorized Watt to sell, and directed the above experiments to be made on the other. Against this judgment Blair entered an appeal to the Circuit Court of Perth, which was objected to as incompetent; because, although an appeal was permitted by the statutes against a sentence condemnatory, none was allowed where there was a decree of absolvitor. A judicial arrangement was then made, by which Watt agreed that the parcel which had been found good by the Sheriff should be exported, or sold for crushing into oil; that he should abide by the result of an experiment to be made on the other parcel; and that if it should be found not to be fit for sale, then he should dispose of it in the above manner. In this Blair acquiesced, and the Court, (without prejudice to this arrangement,) certified the case to the High Court upon the question of competency. Eight months having elapsed, and no further proceedings having been taken in the appeal, it fell in terms of a provision in the above statutes. A new seizure was

subsequently made by Campbell and Williamson, officers of the Trustees for Manufactures, &c., and an application made to the Sheriff to have the linseed condemned. The Sheriff having found that the question had been finally settled by the judicial arrangement before the Circuit Court, and pronounced judgment accordingly, Campbell and Williamson entered an appeal to the High Court of Justiciary. That Court remitted to the Sheriff 'to dismiss the action, and grant warrant for delivering up the seed in 'question to the respondent (Watt,) in terms of the interlocutors 'pronounced by the Sheriff in the action at the instance of the 'said David Blair, and which was the subject of the appeal at 'the last Spring Circuit;'—'in respect that the linseed in question is the same cargo anent which an appeal was taken to the 'Circuit Court of Justiciary held at Perth in spring 1809, which 'was certified to this Court, and the appeal in which was allowed 'to fall, by not being insisted in within the period limited by the 'act of Parliament; and therefore that the present action was 'totally incompetent.' June 25. 1821.

Watt thereupon brought an action in the Court of Session against Blair, stating that all the proceedings had been resorted to oppressively, and at a time when there was a great scarcity of linseed, and a high price was given for it; that Blair was himself a dealer in linseed, and was actuated in his whole conduct by a spirit of rivalry; that when the cargo in question arrived, he had been called on to examine it, but had failed to do so; that, on subsequently being directed by the Trustees to do so, samples had been delivered to him for the purpose of ascertaining its quality; but that, being desirous to prevent the linseed from being brought into the market, he, instead of examining, had seized it; that, with the same view, he had maintained the litigation before the Sheriff Court, and entered an incompetent appeal to the Circuit Court; that the second seizure had been made by Campbell and Williamson at his instigation; and that, by this illegal conduct on the part of Blair, he had been prevented from selling the wheat at a time when a very high profit could have been obtained. He therefore concluded for £10,000 as the damages which he had thus sustained. Lord Newton, on the 14th of December 1810, found, 'In respect the seed libelled on was imported in-'to Dundee as crushing seed, and attempted to be sold by the 'pursuer as sowing seed, that the defender David Blair was in 'bonâ fide to make the seizure, and subsequent appeal to the 'Circuit, and take the other steps which he did, till a second 'seizure was made by Campbell and Williamson: And in respect 'he has not called Campbell and Williamson as defenders in this 'action, finds it is not competent to prove that the defender in-

June 25. 1821. ‘ stigated and abetted them ;’ and therefore assoilzied Blair. To this interlocutor the Court, on the 21st of February 1812, adhered. Against this judgment Watt reclaimed, and he then brought an action against Campbell and Williamson and the Trustees, concluding against them for damages on account of the second seizure. In defence, the Trustees pleaded, That they had caused the seizure to be made after they had taken the advice of counsel, by whom they were instructed that it was their duty to cause it to be seized ; that the duty which they performed to the public was gratuitous ; and therefore, having acted bonâ fide, they were not responsible. By Campbell and Williamson it was pleaded, That they were the officers of the Trustees, and that they had made the seizure in obedience to their orders. The Court, on the 17th of November 1812, (on the report of Lord Gillies,) conjoined the actions, refused the petition for Watt, and ‘ assoilzie ‘ the Board of Trustees from the supplementary action, but find ‘ no expenses due to the Board ; and decern.’ *

Watt having appealed against these interlocutors, the House of Lords ‘ Ordered and adjudged, that so much of the said in- ‘ terlocutor of the Lord Ordinary, of the 14th December 1810, ‘ as finds that, in respect the appellant had not called Campbell ‘ and Williamson as defenders in that action, it was not competent ‘ to the appellant to prove that the respondent Blair, the defender ‘ in that action, instigated and abetted them, and therefore assoil- ‘ zied the defender from the conclusions of the libel, and decerned, ‘ be reversed : And it is further ordered and adjudged, that the ‘ cause be remitted back to the Court of Session, to review as well ‘ the rest of the said interlocutor of the 14th December 1810, as ‘ the interlocutor of the 21st February 1812, and the interlocutor ‘ of the 17th November 1812, except such part of the said inter- ‘ locutor of the 17th November 1812 as absolves the Board of ‘ Trustees, which part is hereby affirmed ; and, upon such review, ‘ to do in both actions as shall be just.’

The Lord Chancellor, after detailing the facts and the procedure in the actions before the Sheriff and the Court of Justiciary, observed that it was necessary that he should call the attention of the House particularly to the summons in the present action. After stating the proceedings before the Sheriff, and the judgment pronounced by that Judge on the 16th of April 1809, the summons alleged that this judgment ‘ having been pronounced upon a full investigation by the Sheriff, act- ‘ ing ministerially under an act of Parliament ; and upon an applica- ‘ tion at the said David Blair’s instance as a public officer, he ought to ‘ have been satisfied therewith, the law authorizing no appeal in cases

* Not reported.

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'of the like nature, unless against a sentence condemnatory,'—that is, the appellant contended, by his summons, that a party suffering under a judgment condemnatory, had a right of appeal to the Circuit Court, and that a party seeking condemnation had no such right of appeal. The summons then set forth the other proceedings that followed, (which his Lordship had already stated.) It then states the consequence thus: 'That in consequence of the improper, illegal, and oppressive proceed-
'ings above detailed, instituted, promoted, and carried on by the said
'David Blair, or through his means, the pursuer not only lost the whole
'of the last season in the disposal of his linseed, and in which it might
'have been sold for great profit and advantage; but, from the great im-
'portation into Scotland during the present year, the price of that article
'has decreased so much, that the pursuer had no hope of selling the said
'linseed at a price equal to its original cost; he, therefore, upon the
'7th day of April (then) last offered delivery of the said two cargoes
'of linseed to the said David Blair under form of instrument, and pro-
'tested that he should be liable to him, the said pursuer, in the highest
'price at which the pursuer might have sold the said linseed since the
'importation thereof.'

The summons therefore concluded, 'That the said David Blair 'ought and should be decerned and ordained to make payment to the 'pursuer of the sum of £10,000 sterling, or such other sum, less or 'more, as should be ascertained to be the just and true amount of the 'loss, damages, and expenses incurred, or to be incurred, by the pur-'suer, by and through the conduct and proceedings of the said David 'Blair.'

In the proceedings upon the summons, it became matter of contention whether it was to be considered as in the nature of an action of trespass in England; that is, if the seizure was illegal, whether the officer was not liable, whether he acted maliciously or not in making it; or whether it was to be considered as in the nature of an action upon the case in England; that is, whether, though the seizure should have been illegal, the officer was liable if he acted bonâ fide, or without malice.

It is to be remarked, that this action was against Blair only, not merely on account of the first, but also on account of the second seizure, and that neither the Board of Trustees, nor Campbell and Williamson, were made parties to it; and that, when it came before Lord Newton, a Judge of great eminence, he pronounced this interlocutor: 'Having 'considered the libel and defences, and heard parties' procurators—in 'respect the seed libelled on was imported as crushing seed,' (his Lordship observed this was a mistake—no seed could by law be imported as crushing seed,) 'and attempted to be sold by the pursuer as sowing 'seed;' (this also his Lordship observed was not so,) 'Finds the de-'fender David Blair was in bonâ fide' (so that Lord Newton considered this as if it were an action on the case, and as if the officer acted bonâ

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fide, he was not liable) ‘ to make the seizure and subsequent appeal to ‘ the Circuit, and take the other steps which he did, till a second sei- ‘ zure was made by Campbell and Williamson ; and in respect he has ‘ not called Campbell and Williamson as defenders in this action, finds ‘ it is not competent to prove that the defender instigated and abetted ‘ them ; therefore assoilzies the defender from the conclusions of the ‘ libel, and decerns.’

Upon this interlocutor several questions presented themselves.

1. Whether Blair acted bonâ fide ?

2. Whether, if he acted bonâ fide, he would thereby be liberated from the consequences ?

The Lord Ordinary finds that Blair was in bona fide to make the seizure, and take the other steps which he did, till the second seizure was made ; so that his Lordship seems to think a distinction was to be made between the first and the second seizure. Whether Blair was in bona fide, after the second seizure, Lord Newton gives no opinion, but says, ‘ In respect he has not called Campbell and Williamson as de- ‘ fenders in the action, finds it not competent to prove that the de- ‘ fender instigated and abetted them.’

This is the interlocutor first appealed from ; and even supposing Blair was in bona fide till the second seizure, I doubt whether this interlocutor was sound, in alleging that, ‘ in respect the pursuer has not ‘ called Campbell and Williamson, it is not competent to prove that the ‘ defender instigated and abetted them.’ (His Lordship here read the words of the summons, in so far as it relates to the aiding and abetting.) If A. instigate B. to abet him in an illegal act, I am not prepared to say that he was not a person that might be sued for damages by reason of such illegal acts. I therefore doubt the soundness of Lord Newton’s interlocutor in this respect. If Campbell and Williamson were the instruments of Blair, he was bound to indemnify them for these acts in which they were his instruments. It therefore does not appear to me that it was necessary to bring these parties before the Court. But all parties were brought before the Court. A difficulty was thus introduced in the case, which otherwise would not have arisen.

On the 21st February 1812, an interlocutor was pronounced by the Second Division of the Court of Session, which was the second interlocutor appealed from. It was pronounced before the Board of Trustees and Campbell and Williamson were made parties. The ratio of the interlocutor is not stated. It merely sustains the defences, and assoilzies the defender. Whether it followed the ratio given in Lord Newton’s interlocutor, or proceeded upon other grounds, as well as the grounds therein stated, does not appear.

After this, the appellant brought his action against the Board of Trustees and Campbell and Williamson, with conclusions in the summons against these parties similar to those in the summons against

Blair; and a minute was given in, in which it was stated, that 'the 'petition for the pursuer in the said action against the said David Blair 'is so stated as to contain the whole of the pursuer's case in this action 'against the Board of Trustees, and James Campbell and Thomas Wil- 'liamson; and therefore craved the Court to conjoin the two actions, 'and find the whole defenders, jointly and severally, liable in damages 'to the pursuer.' A minute was also given in for the respondents, referring to the answer of the respondent Blair. June 25. 1821.

The interlocutor pronounced after these minutes were given in, was in these words, (17th November 1812:) 'The Lords having resumed 'consideration of this petition, with the answers, the process against the 'Board of Trustees at the instance of the petitioner, and minutes given 'for both parties, of consent conjoin that process with the original ac- 'tion; and having advised the whole, refuse the desire of the petition, 'and adhere to the interlocutor therein complained of; assoilzie the 'Board of Trustees from the supplementary action, but find no ex- 'penses due to the Board, and decern.'

A difficulty arose, of this nature. The first summons was against Blair only: The second summons was against the Board of Trustees and Campbell and Williamson, but prayed nothing against Blair; and when the Court came to pronounce their interlocutor, that interlocutor does not assoilzie Blair, leaving, as I suppose, the former interlocutor to remain in this respect. The interlocutor assoilzies the Board of Trustees, but does not assoilzie Campbell and Williamson. At first, I conceived this must have been a mistake; but, upon looking at the certified papers, I find the interlocutor correctly stated.

It might be according to the form of proceeding in the Court of Session, (and I do not mean to say it was not,) that there was an end of the action against all the parties; but, according to the view I have been enabled to take of the matter, (and I have been enabled to obtain information elsewhere,) I am unable to find that this action was brought to a conclusion against Campbell and Williamson, or against Blair, unless it was to be so inferred from the former interlocutor.

In these circumstances, I do not see how this interlocutor makes an end of the cause. If it had assoilzied all the parties, then the House would have had to consider whether it was right in so doing. But as it had not done so, perhaps the most respectful way would be to remit, with some findings, which I propose to embody in the shape of a judgment, to be submitted to the House.

Lord Redesdale observed, that all the acts founded upon were very different in point of language, and that nothing was so injurious as that acts of Parliament should use different words, if they meant to express the same thing. The acts of Parliament in the present case were so worded as to make it very difficult to say what was their meaning.

In the next place, his Lordship observed, that these acts were de-

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fective, unless there was some other act; because these acts applied to the case of seed from flax raised from Scotland, as well as seed imported from abroad; but no seed was allowed to be crushed into oil, unless it had received damage at sea, and it might receive damage from other causes. The Board of Trustees, therefore, appear to have been driven into an irregular course, which was not authorized by the acts of Parliament, of allowing seed to be crushed into oil.

Another circumstance was, that if there were to be such proceedings upon these acts of Parliament, which were to endure for such a period of time as had happened in the present case, seed which might be fit for use at the period of a first seizure, might be unfit for use at the period of a second; not to mention that the season might be lost for sowing at a time when the seed was fit for it.

His Lordship, therefore, submitted it to the consideration of the Trustees, whether some general act should not be brought into Parliament, combining all these acts, and providing for all the difficulties that had arisen in the present case, because otherwise the present acts might be used as instruments of oppression.

A. MUNDELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 30.)

No. 17.

JOSEPH ASTLEY, Appellant.—*Warren—More.*
JOHN TAYLOR, Respondent.—*Romilly—Forsyth.*

***Patent.*—The Court of Session having found that the specification of a patent was not sufficiently expressed to entitle the patentee to pursue an action for violation of it, a remit made to ascertain this and other facts by a jury.**

June 25. 1821.

2D DIVISION. Lord Meadowbank.

ASTLEY, conceiving that he had made a discovery of an improved mode of manufacturing sal ammoniac, obtained a patent, of which the specification was in these terms: 'I, the said Joseph Astley, do hereby declare, that the nature of said invention is described in manner following: That is to say, I prepare the salt called muriate of magnesia, or the muriate of alumine, or one or other of the metallic muriates, or any of the combinations of muriate acid from which the acid is capable of being disengaged by heat. What I commonly employ is the muriate of magnesia, which may be procured in different ways, and very easily and economically from the mother liquor of salt-pans, called bittern or salt oil. The other salts contained in this being separated by evaporation and crystallization, I use