Counsel for the Petitioners—Robertson, K.C.—J. Stevenson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent Mrs Douglas—Gentles, K.C.—Gilchrist. Agents—Gray, Muirhead, & Carmichael, S.S.C.

Counsel for the Respondent C. J. Munro—Maconochie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, June 14.

FIRST DIVISION.

SOCIETY OF WRITERS TO HIS MAJESTY'S SIGNET *v.* MACKERSY.

Administration of Justice—Law Agent—Misconduct—False Claim of Damages—Suspension—Law Agents (Scotland) Act 1873 (36 *and* 37 *Vict. cap.* 63), *sec.* 22.

An action for damages in respect of physical injuries was raised in the Court of Session and proceeded for trial before a Judge and jury. At the conclusion of the pursuer's case the Judge, on the motion of counsel for the defenders, withdrew the case from the jury in respect that there was no evidence to support it.

In view of the facts disclosed and his Lordship's remarks with regard to the action, the Society, of which the pursuer's agent was a member, presented a petition under the 22nd section of the Law Agents Act 1873, praying the Court to find that he had been guilty of misconduct in respect, *inter alia*, that he had raised the action solely on information (which he took no steps to verify) received from an inquiry agent of unsatisfactory character and antecedents. In answer the respondent stated that he had raised the action in good faith on a mandate duly granted by the pursuer; that the inquiry agent was a competent person to take precognitions, and that he had no reason to doubt the information thus received; and that in any event his conduct in the matter did not amount to more than negligence. After a proof the Court *found* that the respondent was guilty of misconduct as a law agent in respect of the reckless disregard of the duty incumbent upon him to satisfy himself that the claim of damages in question was a genuine one and not a false one, and *suspended* him from practising as a law agent for one year.

The Society of Writers to His Majesty's Signet, and the Keeper and Deputy-Keeper of the Signet, and the office-bearers of the Society, presented a petition to the First Division in which they moved the Court to find that William Robert Mackersy had been guilty of misconduct as a law agent in the matters therein referred to, or one or more of them, and thereupon to do therein as shall be just.

The petition stated—"2. William Robert Mackersy, residing at 12 Gayfield Square, Edinburgh, was admitted a member of the said Society on 17th January 1888, and enrolled a law agent under the Law Agents (Scotland) Act 1873 on 9th March 1888, and also enrolled by the clerk to the Lord President as an agent practising in the Court of Session in terms of section 12 of the said Act, and duly subscribed the roll on 20th March 1888. 3. The said William Robert Mackersy acted as agent for the pursuer in an action for damages nominally at the instance of Mrs Mary Elder or Lynch, 74 Causewayside, Edinburgh, against William Sinclair Allan, builder and contractor, 60 Gilmore Place, Edinburgh, the summons being signeted on 8th November 1922. The summons was called before Lord Murray on 18th November 1922. The record was closed on 19th December 1922, and the cause was thereafter transferred to Lord Blackburn, before whom and a jury the trial proceeded on 1st February 1923. At the conclusion of the pursuer's case counsel for the defender moved his Lordship to withdraw the case from the jury. His Lordship granted the motion, and in doing so said—'It is not a practice that I am very fond of following, that of withdrawing a case from the jury, and I have never done so yet, but on this occasion I have no hesitation whatever in saying that this case ought never to have been brought, and I think it is a perfect scandal that a man who was in no way to blame should be made the victim of an action of this sort, the record containing a tissue of lies which there is not a scrap of evidence to support in the case. I think it is a scandal to the profession and a disgrace to whoever was responsible for raising the action.' 4. His Lordship's remarks were published, and the case was made the subject of adverse comment in the press. The matter was consequently brought to the notice of the petitioners, who held an inquiry into the conduct of the said William Robert Mackersy in relation to the said case. The petitioners have, in the course of their inquiry, obtained the following information—(1) The said Mrs Lynch is an old and illiterate woman in poor circumstances. On 2nd November 1922 she was crossing a street in Edinburgh when she negligently ran in front of a motor car, which was moving at a very slow speed. She came in contact with the car and fell. The car at once stopped. She suffered no serious injury. She was, however, driven in the said car to the Royal Infirmary, where she was examined by Dr Brewster and found not to need medical treatment. She was then driven to her home in the said car. (2) On the following day Mrs Lynch was called upon by a Mr Isaac Scott. The said Isaac Scott is not a law agent or qualified practitioner, nor is he a clerk in the employment of Mr Mackersy. He is, in fact, a person who lies in wait for legal claims, and who advertises in the newspapers for business in connection with accident and compensation claims, divorce inquiries, and marriage. The said Isaac Scott has, it is believed and averred, acted for Mr Mackersy for many years as a procurer of mandates and of evidence for the purpose

of raising actions and prosecuting speculative claims in Court. After his interview with Mrs Lynch, to whom neither Mr Isaac Scott nor Mr Mackersy was known, the said Isaac Scott carried to Mr Mackersy a pretended mandate bearing to be granted by Mrs Lynch, and to authorise Mr Mackersy to take proceedings in connection with the said accident. In point of fact the said pretended mandate was in the handwriting of the said Isaac Scott, including the pursuer's signature 'Mary Lynch' and a mark 'X' which the pursuer was never asked to acknowledge, although she denied in her evidence that Mr Mackersy had authority from her to raise the action. The said Isaac Scott, on Mr Mackersy's behalf, interviewed two eye-witnesses of the accident, and took from them statements which he falsified in material particulars in order to make a relevant case. Upon these statements, which were adopted by Mr Mackersy without inquiry, Mr Mackersy framed precognitions. Mr Mackersy never submitted the said statements or precognitions to the witnesses for their revisal or confirmation. They were in fact false, and not in accordance with the statements actually made to the said Isaac Scott by the witnesses. A false memorandum based on the said precognitions was prepared by Mr Mackersy and submitted to junior counsel, along with a statement by the said Isaac Scott, and the said precognitions to enable him to prepare a summons. The said memorandum and statement contained an untrue and prejudicial suggestion that the defender and the other occupants of the car 'were in a hurry to reach a public house in the locality, well known as the rendezvous of defender and defender's employees.' The condescendence annexed to the summons contained averments which were in accordance with the memorandum and statement, and precognitions furnished by Mr Mackersy (omitting the said suggestion), and were materially false in fact. The summons was served on the defender within six days of the accident, and without any previous intimation of a claim to the defender, or opportunity being afforded to him to consider the claim for damages and to settle the same, if genuine, without resort to litigation. The defender's agents protested against Mr Mackersy's conduct, and received a reply. Defences were lodged which contained a denial of the pursuer's averments, and set forth the true circumstances of the accident as afterwards proved at the trial. These answers were framed, *inter alia*, on precognitions obtained from the same two eye-witnesses by the defender's agents. Mr Mackersy took no steps to investigate the truth of the defender's averments, either by way of interviewing the said eye-witnesses with regard to them or otherwise. At adjustment junior counsel for the pursuer, on Mr Mackersy's instructions, added to the record a false statement that the defender's averments were untrue. Apart from this denial no additional averments or explanations were put on record at adjustment for the pursuer. (3) The said memorial prepared by Mr Mackersy, *inter alia*, contained a false and grossly exaggerated account of the pursuer's injuries and false statements that she had suffered a terrible shock, that her life would be shortened, that she would probably never work again, and even that her recovery was doubtful. It further falsely represented that there was need for urgency in raising the action because she appeared to be in a dangerous condition, and might succumb to her injuries. These statements were not founded on any report or information from medical men, nor were they supported by any information derived from witnesses. They were made by Mr Mackersy, the petitioners believe, for the purpose of deceiving the defender and concussing him to settle the said action. The said averments were also made with the purpose of misleading the jury and prejudicing the defender, and in furtherance of a scheme devised by him and the said Isaac Scott to extort money from the defender by means of the said action. The report of Dr Brewster, a house surgeon at the Royal Infirmary, was available to Mr Mackersy before he instructed counsel to prepare the summons. No attempt was made by him to obtain Dr Brewster's report, or to take his evidence, or precognosce him. A report was obtained from Dr Brewster by the defender's agents setting forth that on examination Mrs Lynch was suffering from considerable shock, but that apart from slight bruising of the right forearm no injury was found. This report referred to her condition within an hour of the accident. She was examined by her panel doctor, Dr Aitken, on 5th November 1922. In the following week the said Isaac Scott called on Dr Aitken and asked for his written report. Dr Aitken informed him, as was the fact, that he had already apprised Mr Mackersy that he would furnish him with a report on receipt of the usual fee, one guinea. It was not till 29th January 1923 that Mr Mackersy tendered the said fee and obtained Dr Aitken's report. The said report, *inter alia*, bore that he had found no signs of serious injury anywhere. The papers in the case (without the said report) were first submitted to senior counsel by Mr Mackersy on the afternoon of 29th January 1923. No consultation with counsel was held, but senior counsel was informed by Mr Mackersy that Dr Aitken's evidence was 'all right,' and was led to expect that Dr Aitken's report would be furnished to him in the course of the trial. No medical report or precognition was in fact furnished to him. Dr Aitken had previously been cited to attend at the trial as a witness for the pursuer by Mr Mackersy, but his citation was cancelled by Mr Mackersy without the cognisance of senior counsel. Upon these facts it is humbly submitted that Mr Mackersy deliberately kept back from senior counsel information which it was essential he should know. (4) Notwithstanding efforts made by Mr Mackersy to induce the defender to make a payment in settlement of the case, the action proceeded to trial on 1st February 1923. Mrs Lynch, in cross-examination,

repudiated Mr Mackersy's authority to raise the action. She was not re-examined by her counsel on this point, and the alleged mandate was not put to her. Neither the said Isaac Scott nor Mr Mackersy, who were present in Court, went into the witness-box. Mrs Anne M'Ewan, a neighbour of Mrs Lynch, whose name appears on the alleged mandate as a witness thereto, gave evidence on other matters, but she was asked no question relative to the said mandate, nor was the mandate put to her to verify her alleged signature. The pursuer's testimony that Mr Mackersy had no authority to raise the action was accordingly uncontradicted. The two eye-witnesses of the accident were witnesses for the pursuer, and in their evidence they entirely contradicted the averments made for her on record, and confirmed the defender's averments. 5. The foregoing facts disclose serious professional misconduct on the part of the said William Robert Mackersy in relation to the said action. The matter is rendered more serious by reason of other acts of professional misconduct, one of which was brought to the petitioners' notice and was the subject of disciplinary action in 1909, and the others after the investigation held by the petitioners into the facts of the action of Lynch against Allan. . . . 9. In these circumstances the petitioners have deemed it to be their duty to bring to your Lordships' notice and to complain of the conduct of the said William Robert Mackersy in relation to the whole actions referred to herein. By section 22 of the Law Agents (Scotland) Act 1873 it is provided that 'every enrolled law agent shall be subject to the jurisdiction of the Court in any complaint which may be made against him for misconduct as a law agent, and it shall be lawful for the Court, in either Division thereof, to deal summarily with any such complaint, and to do therein as shall be just.' By section 14 of the said Act it is, *inter alia*, provided that 'the name of any person shall be struck off the said rolls, in obedience to the order of the Court, upon application duly made, and after hearing parties or giving them an opportunity of being heard.'"

Mr Mackersy lodged answers in which he submitted that petitioners' averments as to misconduct on his part were irrelevant and wanting in specification, and that in any event he had not been guilty of misconduct as a law agent. He further submitted that in view of the lapse of time since the incidents in 1909 and 1921 now made a ground of complaint, and the fact that the individuals and authorities concerned and aware of the facts took no action relative thereto, the present proceedings so far as based thereon were unjust and oppressive and should not be entertained.

Thereafter the petitioners lodged a minute in which they made the following further averments:— "Since presenting the petition the petitioners have ascertained the following additional facts:— 1. That the said Isaac Scott mentioned in the petition and answers was a man of disorderly, criminal, and dishonest character. He has been convicted in the Edinburgh Police Court as follows:— (1) on 15th November 1901 for shebeening, when he was sentenced to a fine of £7 or six weeks' imprisonment; (2) on 16th June 1903 for drunkenness and riotous and disorderly conduct, when he was sentenced to a fine of 7s. 6d. or five days' imprisonment; (3) on 27th August 1903 for drunkenness and riotous and disorderly conduct and annoying an inspector of police, when he was admonished; (4) on 29th April 1904 for street betting, when he was sentenced to a fine of 40s. or ten days' imprisonment; (5) on 11th June 1906 for wife assault, when he was sentenced to a fine of 10s. or seven days' imprisonment; (6) on 8th April 1913 for breach of the peace, when he was sentenced to a fine of 5s. or three days' imprisonment; and (7) on 19th March 1914 for breach of the peace, when he was sentenced to seven days' imprisonment. In addition to the above convictions the said Isaac Scott, on or about 26th July 1911 in the Edinburgh Burgh Police Court, made a judicial confession of the crime of forgery, when he received the benefit of the Probation Act. 2. That the said Isaac Scott, on or about 31st May 1921, raised an action for £500 in name of damages for slander against William Mackay, bookseller, 35 George IV Bridge, Edinburgh, in which action the respondent acted as agent for the pursuer. In the defence to the said action the defender averred that the pursuer had been convicted on six occasions and had confessed to forgery as above mentioned. The said action was settled on or about 18th October 1921 by payment by the defender to the pursuer of one shilling and expenses. 3. That the respondent, though thus well aware of the unreliable and dishonest character of the said Isaac Scott, continued to maintain relations with him, and he raised the action of *Lynch* v. *Allan* referred to in the petition upon a mandate and information obtained from the said Isaac Scott without verification. From at least 4th November 1922 to 27th January 1923 the said Isaac Scott was in the pay of and receiving the sum of £2 per week from the respondent. The petitioners believe and aver that for many years previously the said Isaac Scott was in receipt of payments from the respondent."

Proof was allowed and led before Lord Skerrington. Thereafter counsel were heard on the petition and evidence.

Argued for petitioners—Respondent's conduct must be judged by the ordinary standard of honourable practice recognised by reputable members of the profession—*In re A Solicitor*, [1912] 1 K.B. 302. The proof established that he had not conformed to this standard. He had presented the case of *Lynch* to the Court without taking reasonable steps to ensure that the statements in the pleadings for which he was responsible were based on credible evidence. Such precautions were the more necessary in view of the previous history of the inquiry agent whom he had chosen to employ — *Gill* v. *Lougher*, 1830, 1 C. & J. 170; *Ex parte Whetton*, 1822, 5 B. & G. 824; *Baylis* v. *Watkins*, 1864, 33 L.J. Ch. 300.

Argued for respondent—Respondent had acted in the case of *Lynch* on a mandate duly granted by pursuer and concurred in by her brother-in-law. He had no reason to doubt the information supplied to him by Scott. In any event his failure to verify it did not amount to more than negligence. Counsel referred to *Jack* v. *Pearson*, 1825, 1 W. & S. 577; Begg on Law Agents, p. 349; *Society of Solicitors before the Supreme Court* v. *Officer*, 20 R. 1106, 30 S.L.R. 926.

At advising—

LORD SKERRINGTON—Upon 3rd November 1922 a person named Isaac Scott, who carries on business as an inquiry agent in Edinburgh, called upon the respondent with a mandate authorising the latter to take the necessary action in connection with an accident to a Mrs Lynch, whom he stated to have been run down by a motor car while crossing Home Street, Edinburgh, about noon on the previous day. Scott explained to the respondent that, owing to her physical condition consequent upon the accident, Mrs Lynch had been unable to sign the mandate, but that she had marked it with a cross in presence of a witness, as appeared from the mandate itself. At the request of the respondent, a stepbrother of Mrs Lynch named George Lochrin called upon the respondent on 4th November, and signed a docquet concurring in and confirming the instructions in the mandate. In the meanwhile Scott, acting on the respondent's instructions, interviewed two eye-witnesses of the accident, whose names and addresses were supplied to the respondent by the police office, viz., Thomas Melrose and Alice Cairns afterwards Mrs Macfarlane. They are properly described as "independent" witnesses, because prior to the accident they were unknown to each other and to the parties to the litigation. Mrs Lynch herself was not in a condition to give a satisfactory description of the accident. Apart from her and from the persons who were in the motor car at the time there were no witnesses of the accident except the two whom I have named.

The report which Scott made to the respondent of the evidence which Melrose and Cairns were prepared to give was in the form of a written "statement" prepared by him, but he supplemented it by verbal information which he gave to the respondent. Its tenor may be gathered from manuscript jottings made by counsel upon Scott's statement and from a "note to counsel" which the respondent prepared with the assistance of Scott. A summons which concluded against the owner of the motor car for payment to Mrs Lynch of £300 in name of damages was signeted on 8th November 1922. It was prepared by junior counsel on information supplied to him by the respondent. It is proved that the description of the accident and of its causes contained in the condescendence annexed to the summons was based upon and was in conformity with Scott's written and verbal report of the evidence of Melrose and Cairns. On the other hand it is also proved that the description of the accident and of its causes contained in the defences corresponded substantially with the evidence which these same two witnesses had given to the defender's law agent when precognosced by him shortly after the service of the summons. The discrepancy between these two versions of the same accident is very striking, and it cannot be accounted for upon any theory of an innocent mistake upon the part either of the witnesses or of one or other of the persons who interviewed them. In article 2 of the condescendence it was stated that the motor car was being driven "at a rapid rate," that the driver ran Mrs Lynch down "with great violence," and that "after she had fallen on the street the said car pushed or dragged the pursuer along for about 20 feet before her body escaped from it. The car then went on some distance further." In the answer for the defender it was stated that "the car was proceeding at a very low rate of speed"; that the pursuer, who was crossing the street in an easterly direction, stopped when she got to the eastmost set of car rails, "apparently with the view of letting the defender's car past. The driver of the said car sounded his horn as a warning to the pursuer, and proceeded slowly. When the defender's car was a short distance from where the pursuer was standing, she suddenly darted towards the east pavement, right in front of the car; when she had almost passed across in front of the car she either stumbled or again hesitated, and the left front mud guard just touched her. The car was immediately drawn up, and the wheel never touched her." To this it was replied for the pursuer that "the statements in answer are untrue, and are denied." In article 3 of the condescendence the pleader, as is usual in such cases, stated in what respects the driver of the car was negligent. "He was driving far too fast, and was not keeping a proper look-out. He was guilty of great recklessness in proceeding along Home Street as he was doing. The pursuer was going quite slowly and regularly across the street, and her position on the street was, or ought to have been, visible to the said driver for a considerable distance. Had he been keeping a good look-out he could quite easily have passed her in safety, there being ample room for him to manœuvre his machine. In these circumstances his action in running her down at high speed was gross fault. The explanation in answer is denied." In the answer for the defender it was "explained that the sudden action before mentioned of the pursuer gave the driver of the defender's car no chance whatever of completely avoiding the pursuer, and her fall was entirely due to her own fault." As one of the questions in the case is whether Scott acted in good faith, it is not out of place to quote the following passage from his written report, though it was not reproduced in the condescendence. After stating that the car was proceeding "at an accelerated speed," the report continued—"It is believed that the workmen in the motor together with the driver of said car were in a hurry to reach a public-house in the locality well known as the

rendezvous of defender and defender's employees. As a result of this anxiety, with a total disregard to foot-passengers, they dashed northwards at an abnormal rate of speed."

The action *Lynch* v. *Allan* came on for trial before Lord Blackburn and a jury on 1st February 1923. Four witnesses were examined for the pursuer, viz., Mrs Lynch, Mrs Macfarlane (formerly Miss Cairns), Thomas Melrose, and Mrs M'Ewan. As occasionally happens in a case where a person has met with an accident attended by considerable pain and shock, Mrs Lynch's recollection of the accident was vague, and her evidence was not helpful. Mrs M'Ewan spoke only to Mrs Lynch's condition after the accident. Melrose and Macfarlane, however, gave very distinct evidence contradicting the description of the accident contained in the pursuer's condescendence, and affirming that contained in the defender's answers. At the close of the evidence for the pursuer the Judge was moved by the defender's counsel to direct the jury to return a verdict for the defender. The senior counsel for Mrs Lynch, who was examined as a witness in the present petition, deponed that he did not oppose that motion; that he thought it useless to do so, and that he regarded the case as hopeless, seeing that the evidence given at the jury trial by Mrs Macfarlane and by Melrose were substantially different from their story as contained in the precognitions supplied to him by the respondent. Accordingly, the action took end with a verdict for the defender. I think it right to state that, in my opinion, no criticism can justly be made upon Mrs Lynch's junior and senior counsel in connection either with the preparation of the summons or with the subsequent conduct of the case.

I must here refer to an answer given by Mrs Macfarlane in her re-examination as a witness at the jury trial when she apparently assented to a somewhat leading question by Mrs Lynch's counsel suggesting that the driver of the motor car might have avoided Mrs Lynch if "he had just guided his car slightly to the right." In his argument in the present petition, the respondent's counsel attached great importance to this answer as tending to establish that Mrs Lynch had what he described as an "alternative case" irrespective altogether of the speed at which the motor car had been driven. I do not think it necessary or indeed relevant to consider whether Mrs Lynch might have been successful in her action of damages if her claim had been differently presented to the Court and to the jury. On the other hand, it is both relevant and necessary to consider whether the claim of damages, in the form in which it was presented to the Court and to the jury by the respondent, was based upon a false and fraudulent description of the accident, of which Scott was the author. There is nothing in the evidence which suggests that Mrs Lynch and her stepbrother Lochrin acted otherwise than honestly in connection with her claim of damages.

It is impossible to reconcile the evidence which was given in the present petition by Scott on the one hand and by Melrose and Macfarlane on the other hand in regard to what passed between Scott and Melrose and between Scott and Macfarlane when he interviewed them separately for the first time a few days after the accident, and for the second time a few days before the jury trial. Following upon the two earlier interviews Scott reported to the respondent in the manner and to the effect already mentioned. In his evidence he deponed that his report of what Melrose and Macfarlane had told him was substantially correct, but the value of this testimony was detracted from by the fact that he was compelled to admit that having noticed on his visit to Mrs Lynch that she had a bandage on her right hand, he expanded this simple fact into the absolutely unfounded statement which appears in article 4 of the condescendence to the effect that her right hand was "very badly bruised and torn." As regards what passed at the later interviews with Melrose and Macfarlane, Scott deponed that he was satisfied that they were not adhering to their original statements "in a number of things," and that he so informed the respondent. Scott further contradicted the testimony of Melrose and Macfarlane in regard to his alleged attempts to tutor them in their description of the accident. On the other hand Melrose and Macfarlane deponed that they told the same story of the accident from first to last, viz., to Scott, to the defender's law agent when he precognosced them, and to the jury. They repudiated point by point the contents of Scott's report as a misrepresentation of the accident and also of what they had told him. They further deponed that Scott had attempted on these occasions to induce each of them to endorse a version of the accident which he represented that he had received from the other—in regard to the high speed of the motor car and to Mrs Lynch having been dragged along the street after she had been knocked down. Melrose also deponed that the picturesque story about the public-house was suggested to him by Scott, but that he refused to support it. In this conflict of testimony the primary question is one of credibility, and I have no hesitation in preferring the evidence of Melrose and Macfarlane to that of Scott. The real evidence in the case points in the same direction. For example, the excerpts from Scott's note-book do not support but contradict the important statement which I hold it proved that he made to the respondent to the effect that Cairns (or Macfarlane) corroborated the account of the accident which the note-book attributed to Melrose. Again, Scott's evidence in regard to what passed at the interviews in question involves various improbabilities. Melrose and Macfarlane were not cross-examined as to whether they had conspired together in order to invent a false description of the accident, and of the discreditable arts to which (as they deponed) Scott had resorted in order to induce each of them to endorse a version of the accident which he suggested to them. It is unlikely that

stories so circumstantial and so similar were fabricated by two persons without collusion. Again, Melrose and Macfarlane had no motive for giving inconsistent versions of the accident to Scott and to the defender's solicitor. On the other hand Scott had a direct and obvious motive to make the charges of negligence on the part of the driver of the motor car not merely relevant but also formidable. The existence of such a motive is no evidence that he allowed it improperly to influence his conduct, but it makes it easier to accept the evidence that he did in fact yield to this temptation. If his report was a fabrication, it was one which might easily have attained its object. I was struck by the evidence of the defender's solicitor to the effect that he had been "worried" by a fear that the pursuer's version of the accident might be supported by witnesses whom he had been unable to discover, and I should not have been surprised if he had advised his client to accept the respondent's suggestion that the action should be compromised.

For the reasons which I have indicated I am of opinion that it has been established that the action which the respondent brought into Court at the instance of Mrs Lynch was based upon a fraudulent and fictitious version of the accident which was fabricated by Scott. It is not alleged in the petition, and the evidence does not compel us to hold, that the respondent knew of this fraud and that he made himself either actively or passively a party to it. It remains, however, to consider whether the conduct of the respondent in connection with this litigation was consistent with his professional duty, and if not, whether he was guilty of misconduct as a law agent in the sense of the Law Agents Act 1873, sec. 22.

The painful position in which the respondent now stands is due primarily to his having delegated the performance of an important professional duty — the precognoscing of the witnesses for the pursuer— to a person who had received no training as to how this duty ought to be performed. In adopting this course the respondent deviated from what I understand to be the ordinary practice of the legal profession, and his evidence in the present petition shows that he did not appreciate the reasons upon which that practice is based. As was pointed out by Lord Halsbury, L.C., in *Watson* v. *Young* (1905, 7 F. (H.L.) 109, at p. 111), "the preliminary examination of witnesses to find out what they can prove" is "a step towards and is part of the administration of justice." The course of justice may be seriously and even irretrievably obstructed if a person with a vivid imagination and with little respect for the truth is turned loose upon the witnesses. This possibility is not necessarily excluded if the work is done by a law agent or a law agent's clerk, but it is at least reasonable to suppose that a person who has been trained to do a certain piece of professional work according to the traditions of an honourable profession, and who knows that he is responsible to the Court for the way in which he performs it, will as a general rule be more competent for the work than one who has received no such training, and who may be ignorant of the responsibility under which he acts. The respondent in his evidence deponed that "an inquiry agent is quite a competent man to take precognitions." He also laid stress upon the fact that Scott carried on an "absolutely independent business," by which I understood the respondent to mean that he was concerned only with the contents of Scott's reports, and that he did not consider that he was under any responsibility in regard to the way in which Scott conducted his inquiries. So far as appears, the respondent never gave Scott any hints on the subject, although there were circumstances in Scott's previous history which ought to have suggested to the respondent that a word of warning and advice was specially necessary. If there are cases in which it is legitimate for a law agent to delegate the preliminary examination of the witnesses to an untrained person over whom he has no control, they are in my judgment exceptional, and the law agent who adopts this course ought to use special vigilance and precautions in order to secure that no evil consequences result from it. In the case of *Lynch* v. *Allan* there were no exceptional circumstances of any kind, and there was no reason why Scott should be instructed to examine witnesses whose names and addresses the respondent had discovered for himself, except that Scott considered himself entitled to do this work, and that it was profitable for the respondent to comply with Scott's wishes in this respect. Scott deponed that it was part of his business to receive early information of accidents, to visit the injured person, and to obtain (I do not suggest by improper means) a mandate for the raising of an action of damages. If the injured person did not express a preference for a particular solicitor, Scott suggested the name of a solicitor who was frequently, but not invariably, the respondent. When he was asked for what purpose he took all this trouble Scott answered, truthfully, as I thought, "for the purpose that I might create work for myself with regard to inquiries connected with the accident"—in other words, in order that he might conduct the preliminary examination of the witnesses. Obviously Scott would introduce no more work to the respondent if he did not receive what he regarded as his legitimate reward. Moreover, as these litigations were of a speculative character the respondent had nothing to gain from a pecuniary point of view by subjecting witnesses already examined by Scott to a second and personal examination by himself. Indeed, in his evidence the respondent made the extraordinary suggestion that in cases introduced to him by Scott he regarded Scott as his employer and acted on Scott's instructions. He deponed that the £2 per week which he regularly paid to Scott was not of the nature of remuneration but represented an estimated balance on a *contra* account kept between him and Scott as

independent men of business. Whatever may be the explanation of the fact it is, in my opinion, proved that in his conduct of the action *Lynch* v. *Allan* the respondent abstained from taking any, even the simplest and most natural, precautions in order to assure himself that a claim based upon information derived solely from Scott was a genuine and honest claim. He did not even check Scott's written and verbal reports by the entries in Scott's notebook which lay upon the table when he was drafting the papers which professed to be "precognitions." In short, the charge in the petition that he adopted Scott's statements "without inquiry" has been proved. Both the respondent and Scott deponed that it was exceptional for the former not to see some at least of the witnesses. This fact, if it be a fact, emphasises the impropriety of the respondent's conduct of the action with which we are concerned. The respondent pleaded his health as an excuse for his inaction. I do not doubt that the state of his health made it necessary for him occasionally to spend a day in bed and that it made his work somewhat of a strain upon him, but it did not incapacitate him from carrying on his business. There was no sudden attack of illness and no sudden emergency. If a law agent accepts speculative business and is prevented from giving personal attention to it he ought to employ a competent substitute so that the duties which he owes to his client, to the public, and to the Court, may not remain unperformed. In the respondent's conduct of the action in question he fell short, on his own admission, of the very humble standard of duty to which in his own opinion he was bound to conform. The respondent continued to display the same callous indifference as to the genuineness of the claim which he was prosecuting at various critical periods of the litigation when the point was brought prominently under his notice, *e.g.*, when he was confronted by the alarming discrepancy between the version of the accident appearing in the defences and that on the strength of which he had brought the action; upon the repeated occasions when his counsel, both junior and senior, requested that the eye-witnesses of the accident should be specially examined with reference to the version of the accident contained in the defences, and when he assured them that the witnesses would speak up to their precognitions; and upon the occasion when Scott informed him, a few days before the trial, that Melrose and Macfarlane did not adhere to their original statements in regard to the speed of the motor car. I requested the respondent to describe what had passed between him and Scott when the latter made this painful disclosure. His answer was, "I cannot tax my memory in regard to that."

Up to this point I have not referred, except incidentally, to the separate charge which the petitioners make against the respondent in connection with what they correctly describe as "the false and grossly exaggerated account" of Mrs Lynch's injuries contained in the fourth article of the condescendence in the action of damages. In my opinion the most serious matter for the respondent as regards this part of the case is the categorical statement in condescendence 4 that "it will be a long time before the effects of the accident pass off, if they ever do. It will shorten her life." When he authorised the service of a summons containing this statement he knew that Mrs Lynch's panel doctor had examined her and that the medical report would be delivered on payment of one guinea. He did not pay the fee and receive the medical report until a few days before the trial. The respondent's behaviour as regards this matter comes very near to a wilful shutting of his eyes to the truth, but I think that it is possible to hold that his conduct may be ascribed to the same crass indifference to his duty as actuated him in regard to the other matters already referred to. I do not think that it has been proved that he acted in furtherance of a fraudulent scheme devised by him and Scott as alleged in the petition.

As regards the charges of professional misconduct made against the respondent in the petition in connection with certain other litigations it is sufficient to say that the charge of professional misconduct in connection with the case of *Docherty* has not been proved, and that no reason has been stated why the matters excluded from the proof (paragraphs 6 and 8 of the petition) should be re-opened.

Reverting now to the respondent's conduct in the case of *Lynch* v. *Allan* my conclusion upon the evidence is that, after giving him the benefit of every reasonable doubt arising in his favour, it is impossible to do otherwise than to find him guilty of misconduct as a law agent in respect of his reckless disregard of the duty which was incumbent upon him to take ordinary and recognised measures in order to satisfy himself that a claim of damages, which he was instrumental in presenting to the Court for trial, was a genuine and not a false one, and of the further fact that this breach of duty occurred in circumstances which, far from being calculated to mislead him into any undue confidence, were such as plainly to call for the exercise of special vigilance and caution on his part. As regards the course which we ought to follow I venture to suggest that, having regard to the age of the respondent and to his state of health, we may, without impropriety and without in any way condoning what was undoubtedly a grave offence, pronounce what I should regard as a lenient sentence, viz., that he be suspended from the exercise of his office of law agent in Scotland for the period of one year from this date.

The LORD PRESIDENT (CLYDE), LORD CULLEN, and LORD SANDS concurred.

The Court found that the respondent had been guilty of misconduct as a law agent in the matter of the action of damages at the instance of Mrs Mary Elder or Lynch against William Sinclair Allen mentioned

in the petition, and suspended him from the office of a law agent in Scotland for the period of one year.

Counsel for the Petitioners — D. P. Fleming, K.C. — Normand. Agent — J. H. Jameson, W.S.

Counsel for the Respondent—MacRobert, K.C.—Duffes. Agent—R. F. Calder, Solicitor.

Tuesday, June 17.

FIRST DIVISION.

GILHOOLEY *v.* JOHN WATSON LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8 (1) (*f*) *as amended by Workmen's Compensation Act* 1923 (13 *and* 14 *Geo. V, cap.* 42), *sec.* 11 (2)—*Industrial Disease—Certificate of Certifying Surgeon and Medical Referee—"Condition of the Workman."*

A medical referee, when dismissing an appeal from a certifying surgeon, certified that the workman was suffering from miners' nystagmus and was thereby disabled from earning full wages in his employment. The employers moved that the case should be sent back to the medical referee on the ground that it was his duty to have reported as to the extent of the disablement, *i.e.*, whether partial or total. The Court *refused* the motion *holding* that neither under the Workmen's Compensation Act 1906 nor under the Workmen's Compensation Act 1923 was a certifying surgeon or a medical referee required to certify as to the extent of the disablement.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 8 (1) (*f*)—"If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purpose of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final."

The Workmen's Compensation Act 1923 (13 and 14 Geo. V, cap. 42) enacts—Section 11 (2)—"Where a matter is referred to a medical referee under paragraph (*f*) of subsection (1) of section 8 of the principal Act, the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by the medical referee, and such certificate by the medical referee shall be conclusive."

John Gilhooley, miner, 54 Hall Street, Blantyre, having claimed compensation for injury under the Workmen's Compensation Acts 1906 to 1923, from John Watson Limited, coalmasters, Earnock Colliery, Hamilton, obtained a certificate from a certifying surgeon that owing to miners' nystagmus he was disabled from earning full wage. The employers appealed to the medical referee who dismissed the appeal. Thereafter the employers moved the Sheriff-Substitute of Lanarkshire, at Hamilton (SHENNAN) as arbitrator to send the case back to the medical referee on the ground that he had not exhausted the remit made to him. The arbitrator refused the motion, and at the request of the appellants stated a Case for appeal, which set forth, *inter alia*—"This is an arbitration instituted on 26th February 1924 in which the respondent claims compensation in respect of incapacity due to miners' nystagmus under the following circumstances:—On 24th December 1923 the respondent who was a miner in the appellants' employment obtained a certificate from a certifying surgeon certifying that he was disabled from earning full wages at his work as a result of miners' nystagmus. The appellants appealed against this certificate to the medical referee. On 9th January 1924 the medical referee dismissed the appeal, adding a certificate under section 11 (2) of the Workmen's Compensation Act 1923 in these terms—'And I hereby certify that the present condition of the workman as ascertained by my examination is as follows — He is suffering from miners' nystagmus and is thereby disabled from earning full wages at the work at which he was employed.' On 18th March 1924 the appellants moved that I should send back the case to the medical referee on the ground that he had not exhausted the remit made to him, meaning really that the referee had not fully discharged his functions in disposing of the appeal from the certifying surgeon. I heard parties on the appellants' motion, and on 21st March 1924 I issued an interlocutor refusing the appellants' motion to remit to the medical referee. Section 11, sub-section (2), of the Workmen's Compensation Act 1923 requires that a medical referee when disposing of an appeal from a certifying surgeon's certificate 'shall also certify as to the condition of the workman at the time when he is examined by the medical referee.' The appellants contended that under this provision the medical referee's duty was to report as to the workman's fitness for work, *i.e.*, whether he was wholly or only partially disabled. I was of opinion that in the present case the medical referee had done all that the section prescribes by certifying the workman's actual physical condition at the time of his examination, in addition to dealing with the question of whether the certifying surgeon at the date of his examination, was warranted in granting a certificate. I drew attention to the contrast in the terms of paragraph 15 of Schedule I of the Workmen's Compensation Act 1906 under which a medical referee is required to report 'as to the condition of the workman and his fitness for employment,' these being treated as two separate things. It is to be observed further that neither under the Act of 1906 nor under the Act of 1923 has a certifying surgeon power to certify as to fitness for employment. His sole duty is to find whether the workman is disabled from earning full wages, and he is not called on to give an opinion as to extent of the disability, *i.e.*,