

marry), and the said Maria Louisa Montignani, and such other lawful child or children as may hereafter be born of the said Mrs Jane Dobson or Montignani, in fee, stand duly vest and seised in security of the foresaid sums in the subjects above-mentioned. Mr Montignani has sold two of the security subjects, and is now desirous of paying off the burdens. These circumstances are fully sufficient to warrant the appointment of a judicial factor. Without such an appointment, the petitioner Mr Montignani cannot obtain a valid and sufficient discharge of the said sums and securities, and cannot therefore clear the records of the same, or grant a clear title to the purchasers. Although Mr Montignani is proprietor of the subjects over which the securities extend, Mrs Montignani can effectually discharge these bonds and dispositions in security and sums of money, so far as her liferent alienarily therein is concerned, because she holds the same exclusive of the *jus mariti* and power of administration of her husband. But Maria Louisa Montignani, their only child, is a pupil. Her natural guardian and administrator-in-law is the petitioner, Mr Montignani. His interests as debtor in the bonds are adverse to those of his said daughter, who has the rights of a creditor therein; and he cannot therefore effectually concur with his said pupil child in discharging the bonds and dispositions in security and himself of the debt thereby constituted. But further, the said pupil has not the sole right to the whole fee of the said bonds and dispositions in security and sums, but she has only right thereto along with such lawful children as may be born of Mrs Montignani by her present or by any future husband, and that, too, only in such proportions as Mrs Montignani may appoint; and failing such appointment, the destination in the bonds is equally among them and their heirs and assignees. There is therefore at present no one who can attend to the interest in the said bonds and dispositions in security of the said pupil child, and of any other child who may be born of Mrs Montignani, or who can validly and effectually discharge the said bonds and dispositions in security—uplift the sums for which the same were granted—and see to their re-investment in such a manner as—while it gives the liferentrix the full enjoyment of the liferent thereof, shall completely secure the rights of the children in the fee. All this can be fully and effectually accomplished by the appointment of a judicial factor over the fiars' right and interest in the foresaid bonds and dispositions in security and sums of money. There is no other mode in which that can be accomplished. The purchasers will not carry through the purchase unless the records are cleared of the foresaid bonds and dispositions in security by virtue of discharges granted by Mrs Montignani as liferentrix, and by a judicial factor appointed over the fiars' interest by the Court. They will be quite satisfied with such a discharge. Both Mr and Mrs Montignani are anxious for such an appointment. Mr Montignani is anxious for it, because it will enable him to complete his contract of sale—non-implementation of which may expose him to a claim of damages—and because it will enable him to get quit of the two houses, which he does not wish to hold any longer—to obtain payment of the prices of the houses—and to pay off two of the bonds. Mrs Montignani is anxious for it, because she naturally wishes that the rights of her present child, and of any future children which she may have, in the fee, may be effectually protected by the intervention of a judicial factor, while she enjoys as liferentrix the full annual proceeds arising from a proper investment of the money. When this minute was ordered the petitioners were asked whether the subjects could not be freed and disburdened by giving intimation and premonition under the provisions in the bonds to the creditors to appear and receive payment of the sums due, and thereupon to grant sufficient discharges thereof, by consignation in bank of the sums due in the event of

the creditors failing to appear, and receive and grant a discharge for the same, and by thereafter, raising a summons of declarator of redemption of the subjects from the said bonds and dispositions in security, taking decree therein, and recording the decree in the register of sasines. This procedure would not in the present case effect the desired end. In the first place, it would not free the subjects of the said securities, because it is essential to the validity of such procedure that due premonition and requisition shall be made to the creditors. But here no such due intimation and premonition can be given to the fiars, because Maria Louisa Montignani is not the sole fiar, and all the other children who may be born of her mother have a right to participate therein as fiars, and because she is a pupil, and the debtor making the premonition is her father and administrator-in-law. To say the least, the validity of a discharge obtained by premonition, consignation, and decree of declarator of redemption in such circumstances would be very doubtful. It would expose the purchaser to serious questions as to its validity, and also to troublesome objections in the event of a re-sale; and if so, he is not bound to undertake such a risk. But further, it would not effect one of the principal objects which the appointment of a judicial factor would secure. The money would remain in bank at bank interest, and would not be invested, so that Mrs Montignani might not obtain the same return from it as if it were invested on heritable security, and thus would be deprived of the full enjoyment of her right of liferent. Further, if the money were so consigned, the appointment of a judicial factor would still be necessary for the protection of the fiars' interest in the consigned fund. As the money would be consigned by Mr Montignani, and as his *jus mariti* and power of administration is excluded, he could not act as administrator-in-law for his pupil child, Maria Louisa Montignani, even were she the sole fiar. But she is not the sole fiar, and her father has no right to interfere as regards the rights of children who may hereafter be born of Mrs Montignani by her marriage with him, or by any subsequent marriage which she may enter into, in the event that he should predecease her.

The petitioners referred to the cases of Gowans, 9th March 1849 (11 D. 1028); Prentice, 9th March 1849 (11 D. 1029); Johnston, 11th July 1822 (1 S. 596); Mann, 19th July 1851 (14 D. 12); Lamb, 11th March 1857 (19 D. 700).

The Court to-day granted the first alternative of the prayer of the petition, and appointed a judicial factor over the fee of the foresaid sums of money contained in the bonds and dispositions in security above-mentioned, and over the fiars' right and interest in and to the said bonds and dispositions in security, and in and to the foresaid subjects themselves, in so far as conveyed in security of the said sums for the interest of the said Maria Louisa Montignani, and of any other lawful children who may be born of the petitioner Mrs Jane Dobson or Montignani, and in order that the said sums may be invested under the same destination as they are at present.

SECOND DIVISION.

BELL *v.* BLACK AND MORRISON.

Reparation—Judicial Slander—Title to Exclude.

Held that a party was not excluded from claiming damages for judicial slander by the fact of his having compromised the action in which the alleged slander was committed.

Counsel for Pursuer—Mr Monro and Mr Gordon.

Agents—Messrs Murdoch, Boyd, & Henderson, W.S.
Counsel for Defenders—The Lord Advocate and Mr A. Moncrieff. Agents—Messrs Murray & Beith, W.S.

Mr Bell, farmer, Glenduckie, sometime ago raised an action of damages against the defenders, the

joint procurators-fiscal of Fifeshire, for having obtained and carried through an illegal search of the pursuer's house and repositories in connection with the Dunbog case. In that action, which was compromised, the defenders averred in defence that the statements in the petition upon which a warrant was obtained "were and are true, and were made by the defenders in good faith and on probable grounds." The pursuer has raised a second action against the defenders, and in reference to the statement in the first action he says that it implies and imports that he had been engaged in a conspiracy against the life of the Rev. Mr Edgar and Mr John Ballingall, and for the purpose of setting fire to their premises, and also that he had been engaged in writing and sending threatening letters. These averments, he now contends, were not relevant or pertinent to the defence of that action, and were, moreover, false and calumnious, and he concludes for £1000 of damages. The defenders pleaded that the pursuer having accepted a settlement of the action in which these statements were made, he cannot now make them the foundation of another claim. To-day the Court refused to sustain this plea, and adjusted issues for the trial of the cause.

OUTER HOUSE.

(Before Lord Barcaple).

ANTERMONY COAL CO. v. WINGATE & CO.

Process—Mandatory. In an action at the instance of a company, suing by its descriptive firm and its individual partners, one of whom was a company with a proper firm and the other an individual who was abroad, motion that the latter should be ordained to sist a mandatory *refused* (per Lord Barcaple).

Counsel for the Pursuers—Mr Lamond. Agent—Mr W. Burness, S.S.C.

Counsel for Mr Cadell Bruce—Mr A. Moncrieff. Agents—Messrs Lindsay & Paterson, W.S.

In this action the pursuers are the Antermomy Coal Company and its individual partners (Austin & Co., coalmasters, Hamilton and Glasgow, and Walter Wingate), and the defenders are Wingate & Co. and the individual partners of that firm. Appearance having been made on behalf of one only of the defenders, Mr Cadell Bruce, he to-day moved that the pursuer Wingate, who is at present abroad, and who is also one of the partners of Wingate & Co., the defenders, should be appointed to sist a mandatory, in respect that the action was at the instance of a company trading under a descriptive name, who were not entitled to sue by that name except along with at least three partners.

It was argued for the pursuer that in the present case all the purposes for which a mandatory was necessary were served. The pursuers were a Scotch company. One of their partners, Austin & Co., resided and traded within the jurisdiction of the Court, and the debt sued for was a company debt. In *Rob's Trustees v. Hutton*, 28th May 1863 (unreported), which was an action at the instance of two and a quorum of the trustees and executors of a party deceased, against the only other surviving and accepting trustee and executor nominated by the testator, Lord Kinloch (Ordinary) refused a motion by the defender that one of the pursuers, who was stated to have left Scotland, should be appointed to sist a mandatory, and on a reclaiming note the First Division adhered. The Lord Ordinary refused the motion.

Tuesday, Feb. 20.

FIRST DIVISION.

GILMER v. HENRY.

Bankruptcy—Composition Contract. Suspension of a charge on a bond granted for payment of a

composition held (aff. Lord Barcaple) to be barred by section 143 of the Bankruptcy Act.

Counsel for Suspender—Mr Gifford and Mr Arthur. Agent—Mr A. D. Murphy, S.S.C.

Counsel for Respondent—Mr Mackenzie and Mr Alex. Blair. Agents—Messrs Murray & Hunt, W.S.

This was a suspension of a charge given upon a bond for payment of a composition in bankruptcy, which was refused by Lord Barcaple. The suspender reclaimed, and the Court to-day, without calling on the respondent, adhered.

It appeared that the parties had entered into a partnership in 1863, and carried on business in Leith until January 1864, under the firm of Gilmer, Henry, & Company. The company was then sequestrated. Under the contract of copartnership each partner was to advance capital to the extent of £300, but Gilmer having only advanced £150, Henry claimed as a creditor on the estate of the company for £150 as capital over-advanced by him. On 1st February 1864 the suspender offered a composition of 20s. in the pound on all debts due by the firm at the date of the sequestration, and also to provide for the expenses of the sequestration. This offer was entertained, and on 3d March 1864 it was accepted, the composition being made payable by instalments at three and six months respectively, after the suspender's final discharge. The respondent, by his mandatory, was present as a creditor at the meetings when the composition was offered and agreed to.

By section 143 of the "Bankruptcy Act, 1856," it is enacted that "neither the bankrupt nor his successor offering the composition, nor the cautioner for the composition, shall be entitled to object to any debt which the bankrupt has given up in the state of his affairs as due by him, or admitted without question, to be reckoned in the acceptance of the offer of composition, nor to object to any security held by any creditor, unless in the offer of composition such debt or security shall be stated as objected to, and notice in writing given to the creditor in right thereof."

The suspender argued that the provision in this section was not applicable to this case (1) because in the oath admitted by the suspender and respondent to the state of affairs the debt now claimed was not said to be due by the company; and (2) because the debt was not properly a company debt, but a debt due if at all by the suspender as an individual. The cases of *Black*, 15th December 1859 (22 D. 215), and *Hatley*, 23d May 1861 (23 D. 881), were referred to.

The LORD PRESIDENT thought, if it were necessary to decide the point, that this was a debt due by the company, and that that was a sufficient ground for sustaining the charge. But whether it was or not, it was treated as a company debt; the respondent in respect of it appeared by his mandatory at the meetings; and although it is not inserted in the state of affairs sworn to, yet it was inserted in a document referred to in the oath, containing lists of the debts due by the company and by each of the partners, where it was treated as a claim against the company.

LORD CURRIEHILL said—The respondent here made his claim, and attended meetings through his mandatory. The votes were unanimous, and the mandatory is entered in the minutes as one of the persons voting. The composition contract is settled; and the Act of Parliament says that the bankrupt shall not thereafter be entitled to object to any debt claimed which has been (1) given up as due, or (2) admitted without question. The Lord Ordinary holds that the claim was admitted without question, and I agree with him. It is not necessary to inquire further; but I think the claim was one against the company. Of course, as betwixt the respondent and the other creditors, it was a postponed debt, because he was liable to them; but in a question with the suspender it was not.

LORD DEAS concurred with the Lord President, and Lord ARDMILLAN with Lord Curriehill.

The reclaiming note was therefore refused.