carrying capacity. . . . Any excess of freight over £550 to be equally divided between the charterer and owner. . . . The freight to be paid thus:—In cash one month after vessel's sailing from Glasgow." There was an express stipulation reserving the owner's lien for freight, dead freight, demurrage, &c.; and it was provided, "Bills of lading to be signed by the master as presented to him, and at any rate of freight, without prejudice to this charter-party." Brokerage, if not previously paid, to "be deducted from the freight on arrival."

The Barbata, having taken on board at Greenock a general cargo, partly shipped by the charterer and partly by sub-freighters under bills of lading, which stipulated for payment of freight one month after sailing, "ship lost or not lost," sailed on 19th September 1866; but, having met with baffling winds, ran ashore on Ailsa Craig on 22nd September, ship and cargo being totally lost. This action for freight being brought, the defender pleaded that the Barbata having been lost, the pursuers had become unable to perform their part of the contract before the freight became payable. It was contended that, if the freight had been actually paid, and the ship lost before it was earned, it would have been subject to repetition by the owner in the absence of special stipulation excluding such repetition. The Lord Ordinary (KINLOCH) found that, according to the true construction of the charter-party, the freight was absolutely payable at the fixed term stipulated, irrespectively of the vessel arriving at her port of discharge or of her being lost by perils of the seas at any period of her voyage, and decerned in favour of the pursuers.

The defender reclaimed.

GIFFORD and GUTHRIE for him.

SOLICITOR-GENERAL and N. C. CAMPBELL in answer.

At advising—

The LORD JUSTICE-CLERK said the question was of some importance. A month was too short a period for a voyage to Demarara, and consequently the stipulation as to payment of freight was in effect a stipulation that the sum stipulated as freight should be paid irrespective of any contemplated arrival of the vessel. The stipulation, so far as the actual earning of freight for the voyage was concerned, was just the same as if it had been stipulated to be paid on the vessel sailing from Glasgow, or two days after sailing. Viewing the question on the charter-party alone, there was an absolute obligation, prestable on a day certain, to pay a fixed sum, and to pay a share of an additional sum to be ascertained, against which only this could be urged, that as freight is properly due only when earned, there had been a failure in the giving of the consideration. The case must be treated as if the freight had been paid and were sought back by an action of repetition. Payments of what is called freight were frequently made in advance, without the parties intending repetition. The agreement must be looked to, to see if this was intended or not. His Lordship agreed with the Lord Ordinary in thinking that the vessel's arrival was not an element in the liability of the charterer. There was authority for this construction in English decisions. *Saunders* v. *Drew*, 3 B. and Ad. 445, *Kendall* v. *De Silvale*, 4 M. and S. 38, were clearly in favour of this construction. Although there was some difficulty in going beyond the charter-party for means of construing it, the actings of parties were also in favour of this view. The sub-freights were undoubtedly payable without repetition, so that on the view for which the defender contended he would recover in any event. The charterer had also insured freight as part of the value of the goods he had put on board. His Lordship then referred to the American and French law, which require a special stipulation to exclude repetition of freight paid in advance, and said that that rule had not been received in this county.

The other Judges concurring, the Court adhered.

Agent for Pursuers—John Patten, W.S.

Agent for Defender—D. J. Macbrair, S.S.C.

Friday, November 27.

FIRST DIVISION.

HAMILTON *v.* EMSLIE AND CRAWFORD.

(*Ante*, v, 734, ii, 96.)

Agent and Client—Professional Skill—Crassa Negligentia — *Reparation — Wrongous Poinding—Hypothec—Landlord and Tenant—Sheriff Officer.* Effects of an agricultural tenant were poinded to the value of £72 for a debt of £13; warrant of sale was obtained, but was suspended by the Court on the ground of illegal excess of poinding. The poinding creditor, being sued by the tenant for damages, and by his law agents for their business accounts, brought an action of relief and damages against his law agent, by whose instructions the poinding had been executed. *Held* that in the circumstances the law agent was not liable, the mistake committed by him in regard to the excessive poinding not being so gross as to subject him to personal responsibility.

Emslie, a writer in Ardrossan, was employed by Hamilton to recover payment of a debt of £13, due on a bill by M'Kinnon to Hamilton. On a recorded protest, Emslie obtained a warrant of poinding, which he put into the hands of a sheriff officer, giving him general instructions to execute the poinding. The officer poinded goods to the extent of £72, 19s., whereupon Emslie obtained a warrant of sale of the whole poinded effects. His reason for poinding so much was that the debtor's rent was in arrear, and it was said to be the practice in Ayrshire in such circumstances to poind as much as would meet the landlord's claim. M'Kinnon presented a suspension and interdict. Interdict was granted; and thereafter the Lord Ordinary, on consignation, passed the note and continued the interdict. The Court, on 21st June 1866, adhered.

Out of these proceedings several actions arose, including an action of damages by M'Kinnon against Hamilton for wrongous poinding, in which the pursuer obtained a verdict, with £35 damages.

The present action was at the instance of Hamilton against Emslie, and Crawford (the sheriff officer employed by him), asking payment and relief of the loss and liability to which the pursuer had been subjected by reason of the wrongous poinding executed in his name by Crawford under the instructions of Emslie. Emslie defended, but Crawford did not appear in the action.

The Lord Ordinary (KINLOCH) decerned against Emslie, on the ground that, having undertaken professional employment on behalf of the pursuer, he was bound to exercise due professional skill in the employment, and had failed in his duty, since

he ought to have known, as a professional man, that the poinding had been illegally executed.

The defender reclaimed.

D.-F. MONCREIFF, FRASER and BURNET for reclaimer.

SCOTT and MAIR for respondent.

At advising—

LORD DEAS—The circumstances of this case are shortly these.

The defender Emslie is what we call in Scotland a country writer, and what is called in England an attorney, and carries on business in that capacity, and also as a bank-agent in Ardrossan. He was employed by Hamilton to do diligence in order to recover the contents of a bill for £13 which had fallen due at that branch of the bank. It was noted by Emslie as a notary, and a protest was expede; and, in consequence of instructions from Hamilton, Emslie recorded the protest, and got a warrant of poinding in the usual way. He then put the warrant into the hands of a sheriff-officer with general instructions to execute a poinding. It appears clearly enough from the evidence both of Emslie and of the officer that no special instructions were given as to executing the poinding. The debtor was an agricultural tenant, and his half year's rent was unpaid, and consequently the landlord had a right to that extent. In consequence of that the sheriff-officer, in executing the poinding, appraised to the value of something above £72, the excess over the debt and estimated expenses being the rent due to the landlord. After that, Emslie, through a procurator in the Sheriff-court, obtained a warrant to roup, and under that warrant no doubt a roup might have taken place to the full amount of the articles appraised. At that stage the debtor presented a note of suspension and interdict to prevent the sale, on the ground that the poinding was illegal in respect of the excess of value of the articles poinded. The Lord Ordinary on the Bills passed that note, and we adhered. Of course, strictly speaking, there could be no judgment of the Court at that stage, but we expressed a clear opinion that in respect of the excess the poinding was not according to law. After that the Lord Ordinary suspended, and consequently decided that this excess of value was not lawful. Then there were actions brought against Hamilton by the Edinburgh agent employed in that suspension and interdict to recover his expenses, and by Emslie to recover the expenses due to him, and these parties got decrees *in foro* against Hamilton. The debtor then brought an action of damages against Hamilton, and at the date of the Lord Ordinary's judgment that action was in dependence. It has now been disposed of by a verdict for £35.

This is an action by Hamilton against Emslie, substantially to the effect that Emslie shall keep him *indemnis* against all these proceedings, on the footing that they all arose from the mistake in law on the part of Emslie in authorising or allowing that poinding to be executed for a larger sum than the amount of his debt and expenses. The question is, Is Emslie so liable? The Lord Ordinary has found that he is liable, and has decerned in terms which throw the whole of these damages and expenses on Emslie.

Now I take it there can be no doubt about the law. To see how the law stands, we must see under what category of liability this claim falls.

This is not a case of the preparation of title deeds, or deeds of that description in which our law and practice allow very high charges, either in the shape of *ad valorem* fees or otherwise, and which large fees infer a corresponding responsibility. Nor is it a case in which it is alleged that there was any misconduct on the part of the agent. There is no intentional wrong done, no moral wrong, nothing under the category of misconduct. Farther, it is not alleged that this comes under the category of negligence. There was no neglect of anything. The category under which it comes is error in point of law, which may subject the agent in liability if the error can be shown to be of that gross kind which the law calls gross ignorance. An agent accepting employment of this kind does not guarantee that the advice which he gives, or the opinion which he forms in point of law, shall turn out to be correct. No charges are allowed to be made commensurate with an obligation of that kind. Supposing that Emslie had simply been consulted by letter, or personally, as to whether the client was entitled to execute and ought to execute this poinding to the amount done here, and Emslie had given his opinion that he was so entitled, and consequently the thing was done. For that, if he wrote a letter, he would have had 3s. 4d., or 6s. 8d. if it had been a consultation. That would be all he could charge his client with, and so, if he had more trouble, his charges would have gone on, of the same kind. Now it appears to me to be very clear that if, in giving advice of that kind, an attorney or writer was to be held to guarantee that his opinion in law was right, the consequence would be that there would be no respectable and responsible men in the profession. Some men, reckless of consequences, and having nothing to lose either in character or means, might undertake employment in such a way, but the result would be to drive all respectable men out of the profession. As things stand it is undoubtedly very necessary for a client to take care whom he consults or selects as his adviser. On considerations of that kind the law is fixed that an agent does not in the ordinary case undertake any responsibility except that he gives his advice according to the best of his knowledge; though, no doubt, if that is so grossly erroneous that no man would be held entitled to exercise the profession if he had not better knowledge, the agent might render himself responsible. I take it that an agent is not liable if he turns out to be wrong, if it is a matter on which men of the profession might reasonably differ, and which is not clearly laid down in books of practice.

Now, what is the error here on which this claim turns? It is this, that the agent thought it was quite legal to execute this poinding to the extent done, and moreover that that was the best course for his client. It is quite plain that the officer thought that, and took for granted that it was the only course in the circumstances, for he executed the poinding as a matter of course. I don't think that that goes to rid the agent of his responsibility, but it shows that it was done as a matter of course, and not as an unusual thing. The Lord Ordinary did not allow an investigation as to whether that was the practice in Ayrshire or no, for practice in Ayrshire merely, not recognised elsewhere, would not be a sufficient excuse for error in a question of this kind. But I am not prepared to say that if the question had been directed to the practice over the country, there would have been any incompetency in that. There is no doubt of this, that if the officer had been asked "Why did you

execute this poinding?" and his answer had been that he did it as he always did, the answer would have been material. Now we found that this poinding was not legal, and we found so on the ground of inexpediency and risk of consequences if that were allowed. A creditor might recover the whole amount of his claim, and might neither be able nor willing to account for the proceeds; and such poindings might be used very oppressively to tenants by selling off their whole stock so as to injure them very seriously. But I am not aware that we said anything to the effect, that if it were lawful it would be contrary to the interest of the client. It would plainly be the reverse. A creditor in such a proceeding is liable to be stopped by the landlord. If he has poinded merely the amount of his debt, the landlord may come and say—These articles are hypothecated to me, and I insist that they shall not be carried away for your debt. And if a sale takes place, the landlord may say, you make yourself liable by selling what you know is hypothecated to me; you ought to have got me conjoined in the poinding, or secured my payment in some way. If the landlord here had not claimed a preference, the creditor need not have sold the full amount. There was here no poinding for another man's debt—for this was a debt for which the creditor might have been made liable, or which, if unpaid, might have prevented him from getting his own debt paid. What was done was not done for the benefit of the landlord, but for the benefit of the client. If it had been legal, it would have been for the client's benefit. The agent, it turns out, was mistaken in law in thinking that this could be done, and instead of being good for the client, it turns out to be the reverse. But the question is, Is that such a gross mistake in law as to make the agent liable for all the consequences? I am not the least prepared to say that I should have thought it unreasonable if any of my brethren had differed from my view that it was illegal. I should not have been surprised if the Lord Ordinary had decided it one way, and the Court another: or the Court one way, and the House of Lords another. There was no authority on the matter. It was a new question on which, in my apprehension, other Judges might reasonably have differed. Now it is material to keep in view that it is on that error alone that the whole liability is founded, for it cannot be said that, if Emslie continued to be Hamilton's agent after that, and advised him to resist proceedings against him, he incurred any liability for that; and if he did not, how can he incur liability for this? The Edinburgh agent tells us that he conducted these proceedings in the belief that Hamilton was right in point of law, and he says that he acted by advice of counsel. They turned out to be wrong; but if there is such liability as Hamilton insists on, then the Edinburgh agent also is liable for advising him to go on with the action. It would come to this, that if an agent said "I think you should go on with the litigation," he is to be liable if he doesn't succeed. I don't see the difference in the principle of liability.

The result of the opposite view would be excellent for clients, for in every litigation the agent would be responsible. I don't mean to go over the authorities. It is not necessary to go farther than the case of *Purves* v. *Landell* (10th Mar. 1845, H. L., 4 Bell, 46), where the opposite doctrine to that which I hold to be the law was considered to be so extraordinary that the House of Lords refused to believe that that opposite doctrine had been laid down in this Court, and thought it must be an error in the report. [His Lordship then quoted from the opinions of the Judges in the House of Lords in *Purves*, and continued]—No doubt was expressed in this Court in the subsequent case of *Cooke* v. *Falconer's Reps.* 26th Nov. 1850, 13 D. 157. I apply the law there laid down to this case; and being humbly of opinion that, though there was an error here in law, it was not of that gross kind which infers liability on the agent, and looking on this case as very important in a general point of view, I entertain no doubt that the ground of liability here alleged has not been substantiated, and that therefore the defender ought to be assoilzied.

LORD ARDMILLAN—I concur generally in the opinion of Lord Deas. I do not enter on the question which has been raised regarding the competency of the conclusion for relief. There is an alternative conclusion for damages; and if the pursuer's grounds of action are well founded in fact and in law, there can be no doubt of the competency of the conclusion for damages. Accordingly, it is with reference to that conclusion that I have applied my mind to the consideration of the case.

This action has been raised against the defender, who is a writer in Ardrossan, for damages, in respect of the fault of the defender in the conduct of proceedings in which he acted as agent for the pursuer. It is alleged and instructed that the defender, acting as agent for the pursuer, and under instructions from the pursuer, poinded the effects of Alexander Mackinnon for a debt of £13. It appears that the defender employed a sheriff-officer to poind the effects of Mackinnon, which were situated in Bute; and the sheriff-officer poinded effects to the amount of £72—the debt being £13. This is the act, and said to be the fault, complained of by the pursuer Hamilton, who has been sued by his debtor for damages, in respect that the poinding was illegal, and he now sues the defender.

It is not alleged that this defender acted otherwise than in entire good faith,—negligence, carelessness, or wilful irregularity is not attributed to him,—and the particular act of excessive poinding was not his personal act, but was immediately and directly the act of the sheriff-officer, who had no instructions to depart, and apparently did not depart, from the usual course. It has been found by this Court that the poinding was illegal. I remain of the opinion then expressed, that the poinding creditor is not entitled to poind in great excess above his debt in order to provide for rent due to the landlord, or protect himself from the landlord's interference. Such a procedure is not strictly correct, and might be abused to the effect of injuring the tenant. But I agree with Lord Deas in thinking that all that the client is entitled to expect from his agent is reasonable skill and care, and that, before the decision in this case was pronounced, there had been no such clear and authoritative decision, and no such fixed and well understood practice, in regard to this including of the landlord's rent in the poinding, as to make the act of poinding for both the debt and the rent in such circumstances an act involving gross ignorance and want of skill. I do not dwell on the offer of proof of local practice. The Lord Ordinary rejected such proof when tendered, and I am not prepared to differ from him; for proof of local practice does not support an averment of *communis error*. But I consider it well settled that, for a

mere mistake in judgment, a professional man, acting according to his light and without negligence or carelessness, is not liable in damages. All men are liable to err; there is no guarantee against error; and if the error does not arise from what the law considers delict or quasi-delict, there is no liability in damages. This I think is the result of the decision in the case of *Purves v. Landell* in the House of Lords on 10th March 1845, and in accordance with the earlier opinions of Lord Mansfield and Lord Ellenborough. It is said that the summons is not relevant, but I am not prepared to dispose of this case on the plea of want of relevancy alone. I cannot dismiss the action because the word "gross," or some similar word, is not used in the record. But on the facts instructed, there must be "*crassa negligentia*," gross ignorance or inexcusable error; and, under the circumstances which have been here disclosed, I am of opinion that the error on the part of the defender was not of that grave character and degree which infers liability in damage. In short, unless the error is inexcusable, I do not think that an action of damages can be sustained. Negligence is always inexcusable; but there is no negligence here. The selection of an officer known to be incompetent, or the giving to the officer erroneous, or even inadequate, instructions, might be inexcusable. There is no such case here. It is to me perfectly plain that the defender acted for the best, and for the interest of his client—neglecting nothing, selecting an experienced sheriff-officer, giving him all the directions necessary, and amounting to sufficient instructions—and conducting and directing the procedure according to the best of his judgment. He did not indeed perceive the illegality involved in the course taken. It is not surprising that he did not—for we, in this Court, had some difficulty in coming to that opinion—and I am not prepared to say that his error in not perceiving that illegality was gross, or inexcusable, or of the nature to which the law attaches liability for damages.

On the whole, I am of opinion that the defender should be assoilzied from the conclusions of the action.

Lord Kinloch—I have carefully reconsidered this case; and on the preliminary question of liability I retain the opinion expressed in my interlocutor and note.

On the general principles of professional responsibility I would say only a few words. I agree in holding that it is not every kind of negligence which will subject in damages a law agent employed as was the defender. The negligence must be gross, or what has been termed *crassa negligentia*. It is perhaps not necessary to consider this alternative minutely; for it can scarcely be said that the case against the present defender rests on negligence abstractedly considered. Its foundation rather lies in the want of exercise of sufficient professional skill, and in negligence only so far it is involved in such non-exercise. In the matter of professional skill, I am of opinion that every professional man pledges to his employer the possession and exercise of ordinary and reasonable skill. *Spondet peritiam artis.* It is on this skill that the employer relies for being saved having anything done in his name which is illegal, and may subject him to damages. I do not think it necessary to a claim of damages that the want of professional skill should be gross and unusual. It is enough to establish a want on the agent's part of ordinary and reasonable skill. The distinction I think well stated in the opinion of the Lord Chancellor Lyndhurst, in the case of *Purves* v. *Landell*—"When an action (he says) is brought against a solicitor, he is liable merely in cases where he has shewn a want of reasonable skill, or where he has been guilty of gross ngeligence." I approve and adopt the distinction.

The defender in the present case clearly undertook a proper professional employment in the way of recovering for the pursuer, as his law agent, the amount of this bill of £13. He did not merely give advice, which might or might not be followed; he took on him the duty of recovery. I think it also clear that in the prosecution of this object he must be held to have authorised the poinding of effects to the value of £72 belonging to the debtor. He not merely instructed the poinding in general and unqualified terms, so as in the best view to have left its mode of execution to the discretion of the sheriff-officer, without exercising any control over that functionary; he further received the execution of poinding, which shewed the amount and value of the articles poinded; and, with the fact distinctly brought before him, he instructed and advertised a sale of the effects so poinded. His defence indeed itself implies full knowledge and authority in the matter, for he maintains that this large amount was purposely poinded in order to have enough to pay both the pursuer's claim and the landlord's rent. I cannot therefore hesitate to hold the defender answerable for the poinding, as the law agent of the pursuer.

The poinding has been held illegal, on the ground that it was incompetent to poind effects to the value of £72 for a debt of £13. I am of opinion that the defender was bound as a professional man to know that this was illegal, and to have saved the pursuer from the risk of such a diligence being executed. The illegality appears to me of an obvious description, and such as no professional man ought to have been ignorant of. I conceive that no decision was necessary to teach the illegality of the proceeding. For whilst there is no absolute rule as to the amount proper to be poinded over and above the amount of the debt, I think to poind nearly six times the amount of the debt was an excess so flagrant that no law agent should have any doubt as to its illegality.

The defender's justification, as I have hinted, is that the debtor's landlord had a claim for arrears of rent, which, by virtue of his right of hypothec, formed a preferable claim against the poinded effects; and that to prevent this claim from interfering with recovery of the pursuer's debt, he poinded enough to meet both it and the landlord's rent. It appears to me that this defence does not mitigate the case against the defender; but, on the contrary, strengthens and confirms it. It simply amounts to this, that, on the pursuer's diligence, the defender not only attached goods to meet the pursuer's claim, but also goods to meet the claim of another creditor, by whom he was not authorised, and whose claim the diligence held by him did not in the slightest degree cover. And this he did at his own hand, without any previous communication with the landlord, or any one acting for him. It seems to me that to plead this defence does not avoid the charge of culpability, but only shifts its ground. For the defender to poind the goods under the pursuer's diligence for the landlord's rent was manifestly illegal. It was neither more

nor less than poinding under one man's diligence for another's debt. Again, I think it is to be said that this was an illegality which the defender, as a professional man, ought to have known and avoided.

In the view which I take of the case, it is entirely removed from that class of cases in which a certain discretion is reposed in a law agent, and where he will not be made responsible merely on account of an erroneous exercise of his discretion. I consider the defender as absolutely debarred by the law from using his poinding to the effect of recovering the landlord's rent. I would, in any view, doubt the policy of the proceeding on the part of a creditor's agent. Not only was it a proceeding taken without the landlord's authority—it might be one which the landlord wholly disapproved. The landlord might be otherwise sufficiently secured, and might desire nothing less than to have his tenant's whole farm-stocking attached by legal diligence. But it is enough to say that no considerations of expediency could justify in point of law the use of the poinding for the recovery of the landlord's rent. The only legal, and therefore the only safe course, was to poind under the diligence what the law allowed, and no more. It would lead to the most prejudicial consequences to sanction a poinding in excess on the agent's speculative notions as to the propriety of thereby satisfying the claim of the landlord or other preferable creditor. In the words of one who, to the great loss of the country, is no more on this Bench, when advising the question as to the legality of this very poinding —"If this poinding were sustained on the ground now pleaded, it might as well be maintained that if a debtor's estate were burdened with an heritable debt, for which a poinding of the ground might be executed by the heritable creditor, which would be preferable to the diligence of personal creditors of the owner, it would follow that any personal creditor of the owner, for however trifling an amount, might poind all the moveable effects on the ground in order to guard against the possible contingency of the heritable creditor happening to use his remedy under his real security." The remarks are valuable, not merely as confirmatory of the illegality of the poinding, but as shewing how very clearly manifest the illegality ought to have been in the eyes of the agent employed.

The principle of the interlocutor I therefore continue to hold sound. It is unnecessary now to consider the amount of reparation due, as to which we had a good deal of argument, the opinion of your Lordships leading to entire *absolvitor* from the claim. When the case was before me the proceedings consequent on the poinding had not terminated, and I therefore confined myself to general findings of relief. Now that these proceedings are at an end, the amount of damages would require to be more specifically defined, and some of my findings in all probability to be modified. But into this point it is now unnecessary to enter.

LORD PRESIDENT—I agree with the majority of your Lordships. I think the mistake committed by the law agent is not of a nature to render him liable for the consequences. I do not think it of very great importance to ascertain whether the ground of liability against an agent, with which we are now dealing, requires to come up to what some of your Lordships have called gross ignorance of his profession, or what is described in the language of Lord Lyndhurst as a want of reasonable skill, for whatever ground of liability be required the circumstances of this case do not amount to such.

The first thing done by the law agent under instructions from his client was to employ an officer to execute this poinding. The officer, in executing the poinding, under the general directions of the law agent, committed a mistake which led to the grave consequences we have seen. He included in his poinding an amount sufficient to pay the debt of the poinding creditor five times over, and this he did because he conceived it to be for the interest of his employer, and not unlawful, to extend the poinding so as to meet the landlord's claim for rent, in case he should interfere, as well as his client's debt. The law agent, though not in the outset giving more than general directions as to the execution of the poinding, no doubt afterwards became answerable for what the officer had done; for, after seeing the extent of the poinding, he went on to apply for a warrant of sale, and it was then the tenant applied for interdict.

It is quite true that the Judges of this Division were decidedly of opinion that the poinding was illegal because of excess; but it must be observed that what was done was not in violation of any well-fixed rule of practice, or any judgment of this Court, or any doctrine laid down by writers on diligence or on the law of landlord and tenant. It depended rather on the application of a general principle; and, although in the mind of the Judges that principle was not doubtful, it does not follow that every one would have come to the same conclusion. Here it appears to me that, unless there was something more to guide the legal practitioner than his own reflections merely, he was not displaying such ignorance as to infer liability in a matter of this kind. There is nothing in any decided case, and nothing in any writer in our law, that could have directly led the law agent to hold that the amount of the poinding was in itself illegal. It rather appears to me that there are some things in the books calculated to mislead a practitioner in this matter. There is the case of *Hunter* v. *North of England Banking Company*, 13th Nov. 1849, 12 D. 65. There the defenders poinded certain effects belonging to Macfarlane, a tenant of Hunter's, and having obtained a warrant of sale, advertised them to be sold. Hunter applied for interdict. The bank pleaded that the landlord's hypothec over the furniture and other effects poinded extended only to the rent falling due at the next term of Whitsunday, being the last half-year's rent of the current year, and this sum they had offered to pay on an assignation to the landlord's hypothec. The interlocutor pronounced by Lord Fullerton was this:—"In respect that the poinding does not include the crop, or any part of it, and is limited to the household furniture and stocking; that the only part of the rent remaining due for the current year covered by the hypothec is the sum of £13, payable at Whitsunday next; and that tender of payment of that sum has been made by the respondent, who has also expressed his willingness to account for that sum out of the proceeds of the sale—refuses the note and recals the interdict." And the Court adhered. Now, I think that a person of moderate skill in his profession, reading such a report, might not unnaturally come to the conclusion that the poinding creditor had obviously poinded a sufficient amount to satisfy his own debt and the landlord's, and that he was doing nothing unlawful in offering to meet the claim for rent out of the poinded effects. For a

country practitioner to be charged with gross ignorance of his profession, or want of reasonable skill, so as to make him answerable, when proceedings of this kind are found in reports of modern date, appears to me to be impossible. I am, therefore, of opinion that this is not a case to subject the agent to personal responsibility.

The Court therefore assoilzied the defender, with expenses.

Agent for Pursuer—D. Manson, S.S.C.
Agent for Defender—J. Thomson, S.S.C.

Saturday, November 28.

INCORPORATION OF BAKERS OF EDINBURGH *v.* HAY AND OTHERS.

Agreement—Concluded Contract—Sale of Heritable Subjects. Held, on a construction of letters passing between a proprietor of heritable subjects and an intending purchaser, that no concluded contract of sale was constituted by these letters.

The pursuers in this action sought declarator that a contract of sale was entered into and finally concluded between them and the deceased John Hay, whereby the pursuers agreed to sell, and Hay agreed to purchase, certain heritable subjects, the property of the pursuers, at the price of £5000, payable at Whitsunday 1868.

It appeared that on the 15th June 1867 the treasurer of the incorporation wrote to Mr Hay as follows:—

"Dear Sir,—I am authorised by the Bakers' Incorporation to sell to you, or to the party whom you represent, the mills and whole other property belonging to them at the Water of Leith, for the price of £5000. The whole conditions of the sale must be arranged to the satisfaction of our agent, Mr Ranken.

"This offer is only to be binding for one week from this date.—I am," &c.

Mr Hay replied on 22d June in these terms:—

"Dear Sir,—I am favoured with yours of the 15th instant, stating that you were authorised by the incorporation to sell to me the mills and whole other property belonging to them at the Water of Leith for £5000, and the whole other conditions of sale to be arranged to the satisfaction of your agent, Mr Ranken.

"I hereby accept your offer, upon the understanding that the incorporation shall give me a good title; and farther, that I am to stand in their shoes, and to become possessed of all their rights, as at the present date. I shall be ready to pay the price so soon as the titles can be completed.—I am," &c.

A correspondence, the material portions of which are given in the subjoined opinions of the Judges, ensued between the agents of the parties, and continued down to January 1868, on the 28th day of which month Mr Hay died. The question then arose whether there was a concluded contract of sale, binding on Hay's representatives.

The pursuer pleaded, *inter alia*—(1) by the writings above condescended on and referred to, or some of them, a final and concluded agreement and contract of purchase and sale of the subjects in question was entered into between the said deceased Mr Hay and the pursuers; (2) even assuming the said agreement to be incomplete in itself it was validated by the actings which followed upon it as aforesaid.

Judgment was asked on the first plea.

The Lord Ordinary (KINLOCH) pronounced this interlocutor:—"Finds that no concluded contract of sale of the subjects libelled passed between the pursuers and the deceased Mr Hay: Repels the first plea in law stated by the pursuers on the closed record; and appoints the cause to be enrolled, in order to be disposed of in accordance with this finding.

"*Note.*—By a letter from their treasurer, dated 15th June 1867, the pursuers, the Bakers' Incorporation, offered to the deceased Mr Hay 'the mills and whole other property belonging to them at the Water of Leith,' at the price of £5000. It was added, 'the whole of the conditions of sale must be arranged to the satisfaction of our agent, Mr Ranken.' By his answer of 22d June 1867, Mr Hay accepted the offer, repeating that the price was to be £5000, 'the whole other conditions of sale to be arranged to the satisfaction of your agent, Mr Ranken.'

"It is clear, and was not disputed, that this did not involve any reference to Mr Ranken as arbiter or umpire between the parties. He was the pursuers' law agent, and to act in that capacity; not otherwise. The matters requiring to be adjusted were, doubtless, mostly such as fell within a law agent's province. But whatever they were, it was agreed that they were such as to require adjustment; and the parties are found to start with the mutual consciousness that until an adjustment took place, the contract was not finally arranged.

"Mr Ranken, the pursuers' agent, very clearly expressed his conviction to this effect in his letter to Mr Hay of date 24th June 1867. He reminded Mr Hay that the offer by the pursuers 'was intended merely to indicate the price at which Mr Ramage was authorised to say the Water of Leith property would be sold. The conditions of sale will fall to be arranged with your agent or yourself and me: the nature of the title; the conditions under which the property is held; the term of entry, when you are to have right to the succeeding rents,' &c. Mr Ranken added, that so soon as they came to an understanding on these points, it would be proper to have a meeting of the pursuers' incorporation, 'for instructions to close with you.' Mr Ranken might be wrong in thinking that such a meeting was necessary, but his mode of expressing himself clearly shows how much he considered the conclusion of the contract to hang on the result of the communications. Mr Hay, on his side, intimated no dissent from Mr Ranken's view.

"A correspondence ensued between Mr Ranken and Messrs Adam & Sang, the agents of Mr Hay, in the course of which it was agreed on both sides that it would be proper to have a formal minute of sale, embracing all the conditions of the bargain, as these should be finally arranged, and on 15th October 1867 Messrs Adam & Sang sent Mr Ranken 'draft proposed minute of agreement between the Bankers' Incorporation and Mr Hay.' The fact of a minute of sale being thus contemplated on both sides is very important in the present discussion. It may be that a formal instrument of this sort was not absolutely indispensable to the completion of the bargain; and that if it was clearly established by the writings passing between the parties that the terms of the bargain had been finally settled, this might itself be enough, without a formal document being superadded. But it is