The Court pronounced this interlocutor:—

"The Lords, in respect it is unnecessary to decide the question raised by the defenders in their first plea in law, Recal the interlocutor of the Lord Ordinary of 15th February 1876 in so far as it sustains that plea: *Quoad ultra* adhere to the interlocutor reclaimed against, with additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—Fraser—Campbell Smith. Agent—William Spink, S.S.C.

Counsel for Defenders — Dean of Faculty (Watson)—Kinnear. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, June 30.

FIRST DIVISION.

[Sheriff of Edinburghshire.

BATCHELOR *v.* MACKERSY AND PATTISON.

Counsel and Client—Advocate—Liability for Misconduct of Cause.

An advocate in undertaking the conduct of a cause enters into no contract with his client, and what he does *bona fide* according to his own judgment will bind his client, and will not expose him to any action, even if the client's interests are thereby prejudiced.

Agent and Client—Liability for Misconduct of Cause.

An agent must as a general rule follow the instructions of his client, but when the conduct of a cause is in the hands of counsel, the agent is bound to act according to his directions, and will not be answerable to the client for what he does *bona fide* in obedience to such directions.

Relevancy.

Averments of disregard of instructions, improper conduct, and unskilful management, made by a client against his agent and counsel, which were *held* not relevant to support a conclusion for damages in an action by him against both for misconduct of a cause.

This was an action raised in the Sheriff Court of Edinburgh at the instance of Alexander Batchelor, general dealer, Rhonehouse, in the stewartry of Kirkcudbright, against William Mackersy, W.S., and George Handasyde Pattison, advocate. The conclusion of the summons was for a sum in name of damages sustained by the pursuer "through the wilfulness, maliciousness, gross negligence, systematic disregard of instructions, and ill-guided recklessness" of the defenders, the one as agent, the other employed by him as counsel, in their management of an action in the Court of Session.

The circumstances of that action, and the averments upon which the present action was based, were, so far as material, as follows:—The pursuer's father Robert Batchelor, shoreporter, Dundee, had left a trust-disposition nominating trustees, and directing them on the death of his wife to sell his means and estate and divide the proceeds equally amongst his family, six in number. Robert Batchelor died in 1848, and his widow in 1855, at which date nothing had been heard of the pursuer, who had gone abroad for eight or ten years; and on the estate being realised it was distributed as directed. The pursuer's share was consigned in bank, but at a later date it was paid over to his surviving brothers and sisters in the belief that he was no longer alive. On his return home, eventually, he was unable to obtain it nor to make the trustees account for their intromissions, and he accordingly instructed Robert Broatch, writer, Dalbeattie, to get the necessary proceedings raised before the Court of Session for the purpose. The defender Mackersy was employed as Edinburgh agent, and three actions were raised, which were afterwards conjoined in the name of Francis Suttie, to whom the pursuer, for a consideration, had assigned his share of his father's estate. They were directed against the trustees and against Alexander Lindsay, into whose hands the truster's heritable property had passed on its being sold in 1855, as an individual. In the course of the proceedings, upon 7th February 1871, the sale of the heritable property was found, after proof before the Lord Ordinary, to be illegal, and Lindsay was ordained to lodge an account of his intromissions with the rents he had drawn from it since Whitsunday 1855.

In October 1871 the defender Pattison was first employed as counsel in the actions referred to, as the previous counsel, Mr Black, declined to continue to act, on the refusal by his client to listen to a compromise which he thought favourable. The pursuer averred (cond. 5) that it was at this time "that the wilfulness, maliciousness, gross negligence, systematic disregard of instructions, and ill-guided recklessness, in the management or conduct of said proceedings before the Court of Session, began, of one or more of which the defenders, or one or other of them, have been culpably guilty."

The pursuer further averred (cond. 6)—"In carrying out said accounting, and with the view to the proper ascertainment of the pursuer's one-sixth share of his father's estate, the defender William Mackersy was instructed to get the heritable property sold by public roup, as directed by the trust-deed. Instead of obeying these instructions the defenders did, both of them, wilfully and recklessly consent to a remit to a pretended man of skill to value and report upon the heritable subjects. Against this the pursuer remonstrated. Notwithstanding, the defenders lodged a minute craving such a remit, and by interlocutor of 23d January 1872 the Lord Ordinary made a remit accordingly. The defender George Handasyde Pattison was well aware of the instructions that had been given for a sale of the subjects. The pursuer's interests were prejudiced by this remit, and it would have been greatly to his profit had there been a sale instead of a remit." It was admitted that Broatch was present before the reporter, and attended the inspection; the interlocutor making the remit was not reclaimed against, and there was no judicial repudiation of the defender Pattison's actings, nor was his mandate recalled.

Cond. 7 was as follows:—"After said remit had been made, and report obtained and lodged in process, the Lord Ordinary, by interlocutor of

14th May 1872, allowed the report to be seen, and the parties to lodge a note of objections thereto within eight days. The pursuer being made aware of the terms of the report, and being greatly dissatisfied therewith, also with the conduct of the reporter and his incapability of executing such a remit—ascertained on a visit to Dundee—instructed the defender William Mackersy to lodge objections to the report, and crave a proof or a remit to another architect, if proof could not be got after the remit had once been made, so as to shew that the subjects had been undervalued to the extent of Two hundred and fifty-two pounds (£252) and the alleged meliorations and additions thereon overvalued to the extent of One hundred and twenty-one pounds (£121), all to the pursuer's loss to the extent of one-sixth of Three hundred and seventy-three pounds (£373), and the profit of the defender Alexander Lindsay in said action. But these instructions the defender William Mackersy wilfully, recklessly, and negligently disregarded, and lodged no objections. These instructions were repeatedly given. According to the opinion of an eminent, indeed the leading, architect in Dundee, from whom a report was also obtained and sent to the defender William Mackersy, the value of said heritable subjects in 1872 was £986, and that the cost of effecting the additions and meliorations at the time they were done would be £155, while the judicial reporter valued the subjects at £734, or £252 less than the other architect; and that the cost of the meliorations and additions would be £276, or £121 more than the other architect. In short, he reported that it took more to execute these meliorations and additions, which consisted only of an upper storey on one of the houses, than it would take to build the whole property originally. The report was glaringly absurd."

Cond. 8 averred—"In accounting for the rents the said Alexander Lindsay debited himself with the amounts thereof, as appeared from the valuation roll of the burgh of Dundee, amounting from Whitsunday 1855 to £586, 19s. On inquiry at the tenants it was found that in almost every instance each tenant had paid much more than his rent was stated to be in the valuation roll. The defender William Mackersy was consequently instructed to get a proof or a remit to examine the tenants and Lindsay, and recover receipts and rentals, so as to ascertain the true amounts of the rents Lindsay had drawn. After considerable and unaccountable delay, a remit was made, but only to recover receipts and rentals, not to examine the tenants. The pursuer remonstrated against such a limited remit, and again instructed that the remit should be extended to an examination. The other defender G. H. Pattison was made aware of this instruction, but would not, or at least did not, obey it—this most negligently and wilfully, recklessly, and by *crassa negligentia* and unskilfulness."

In condescendence 9 it was stated that on the remit being executed it was found that many of the tenants had no receipts, and that the rentals recovered were of a very confused nature, and the pursuer again gave instructions to get a remit, which were disregarded. A report was got upon these receipts and rentals from Messrs Robertson, accountants in Edinburgh, stating that the excess of rents truly drawn by Lindsay over those given up in the valuation roll amounted, exclusive of interest, to £392, 10s. 5d. The defender Mackersy communicated the terms of this report to the pursuer, who, it was averred (cond. 11) "instructed him to get a judicial remit to an accountant to report a state of accounts between the parties to the Court. This, also, the defender William Mackersy wilfully, recklessly, culpably, and negligently failed to do, and did not do. The instructions to get this done were given to the said William Mackersy repeatedly by letter, as indeed all instructions were given by letters." Further (cond. 12) "Instead of getting a remit to an accountant in conformity with said instructions, the said William Mackersy, by misrepresentations . . . prevailed on the said Robert Broatch to consent to the amount of rents accountable for by Lindsay being adjusted by counsel. Mr Broatch, without any authority from his client, gave such consent, but in doing so stated that he had 'no authority to grant such a letter, and I grant it with great reluctance. It depends entirely on what Mr Pattison does whether the authority will be acquiesced in. If he proceeds on such a footing as not to meet with my client's refusal, my client will repudiate the authority, and engage the services of other agents and counsel.' After complaining that other things had been done in the cause contrary to express instructions, the letter of authority proceeds—'the result of Mr Pattison's adjustment is to be submitted to me before anything be done on it. That I condition in granting the authority.' The terms of this authority were duly communicated to the defender G. H. Pattison. The pursuer was not aware that any such authority had been asked or given, and did not authorise it to be given. That authority, however, such as it was, was afterwards recalled, and instructions renewed to get a remit to an accountant as above stated."

The authority to adjust the rents was then withdrawn, notwithstanding which it was alleged by the pursuer that the defender Pattison concurred in a joint minute, whereby the present pursuer stated his interests wers sacrificed to a large extent. With reference to this minute, the pursuer averred that "the said William Mackersy was instructed, and undertook to get said minute withdrawn from process, and he was put in funds to fee counsel for that purpose; but he wilfully failed to attend to this instruction, and did not even try to get the minute withdrawn, but allowed a remit to be made to an accountant to report a state of accounts in terms of the said joint minute. The said G. H. Pattison was also written to on the subject, but he neither explained his conduct nor tried to get the minute withdrawn. . . . . The pursuer explains that at a meeting in Edinburgh between him, his agent Mr Broatch, and the defender Mackersy, on 6th May 1873, that defender undertook to get the minute withdrawn from process and engage another counsel on being supplied with funds for that purpose. Money was sent for that purpose, but the defender Mackersy, instead of obeying these instructions, or notwithstanding the repudiation of the minute on 17th May 1873, procured a remit to Mr Jamieson, C.A., Edinburgh, to report a state of accounts in terms of said minute. The pursuer Mr Suttie, and Mr Broatch, were in entire ignorance of this remit of

17th May 1873 till after it was pronounced. Thereafter the defender Mackersy's agency was recalled, intimations made to Mr Jamieson and Lindsay's agent that the minute was repudiated, and objections lodged with Mr Jamieson to him proceeding under the remit, which, with the productions therewith, are referred to, and an effort made to get another agent to act; but the pursuer was told that the only redress he had was against the defenders for damages for the great loss he had sustained, as the Court would not go back on what had been done by them in Suttie's name, and he was advised to let things go on to an end and then raise proceedings against the defenders for damages."

In 1873 Mr Suttie granted the present pursuer a retrocession of the share in the estate which had been assigned to him, and he was sisted as a party pursuer with Suttie. Decree was afterwards taken for both pursuers for the balance which had been reported as due.

The Sheriff-Substitute (HALLARD) pronounced the following interlocutor:—

"*Edinburgh*, 18*th June* 1875—The Sheriff-Substitute having again considered the closed record and productions, after hearing the pursuer and counsel for the two defenders thereon, Finds that the pursuer's allegations are irrelevant and insufficient to support the conclusions of the action: Therefore dismisses it and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits the same when lodged to Mr Robert Barclay Selby, solicitor, or to the Clerk of Court, to tax and report.

"*Note.*—This is an action of damages against a counsel and a solicitor for mismanagement of a cause. Instances of such proceedings against law-agents are to be found in the books, but none have been cited in which a counsel appears as defender. In England there is only the noted case of *Swinfen* v. *Lord Chelmsford*, 5 Hurlstone and Norman, 890, to which reference will be made in the sequel.

"The pursuer pleaded his case in person, not having been able, as it would seem, to find any one willing to incur the peril of being his legal adviser. It is to be hoped that he will not on that account suppose that the legal value of any statement he has made, and of any plea he has urged, has been overlooked. The record containing these statements and pleas is full of detail. From this mass it is possible to deduce a brief outline sufficient to explain the plea for the defence which has been sustained by the foregoing interlocutor. The pursuer is one of six children. His father died in 1848, leaving in trust property chiefly consisting of heritage, and a widow, who was provided for by a liferent. At her death in 1855 the trust-property became open for division among the six beneficiaries. It was sold, and in that manner came into the hands of a Mr Lindsay, one of the assumed trustees. This took place during the pursuer's absence from this country. On his return he challenged what had been done. His father's trustees, and specially Lindsay, as the illegal acquirer of property forming part—the chief part—of the trust, were made defenders in three actions instituted against them in the Court of Session in July 1869, January and April 1870. These actions were ultimately conjoined, and came to depend before Lord Ormidale.

"Here this narrative may be interrupted to explain that these proceedings were not begun in the pursuer's own name. For some reason which does not appear he had in April 1869 assigned to some one else his right to challenge the doings of the trustees, and call them to account for their intromission. His assignee was a person named Suttie, in whose name the conjoined actions were raised and carried on. In August 1873 Suttie granted a retrocession to the pursuer, in which the present proceedings seem to have been indicated by anticipation. The pursuer is thereby empowered not only to prosecute the pending suits to a termination, but also to get annulled 'what has been done in my (Suttie's) name, but without any authority in the conduct of said action,' &c. The assignation and retrocession are in process. The Sheriff-Substitute construes them as having the effect of placing the present pursuer in the same position as if the three conjoined actions in the Court of Session had been carried through in his name from beginning to end. There is not, it is true, any special assignment by Suttie of any claim of damage in respect of the defenders' actings as counsel and agent in these three suits. It is thought, however, that such a claim, if it existed, would pass a pertinent or accessory of the right actually conveyed. The Sheriff-Substitute would therefore have been disposed to repel the defenders' plea against the pursuer's title to sue. No such judgment has been pronounced, because it would do the pursuer no good, as on relevancy the Sheriff-Substitute's opinion is against him. In what remains to be said it will be assumed that the present pursuer, Batchelor, was the pursuer from beginning to end of the three suits which he accuses the defenders of mismanaging.

"In these suits the leading feature was the voiding of the illegal purchase by Lindsay, and the consequent accounting by him for the fruits of the property while it remained in his possession. He had to restore the rents received; but he made on the other side certain claims for improvements. It may briefly be said that the whole gist of the pursuer's complaint is that Lindsay was allowed too favourable terms. He was debited with too small a sum in name of rents, and credited with too large a sum in name of meliorations. There was a remit to an architect to ascertain the value of the property, and to an accountant to ascertain the money due. It is in their conduct of these matters that the defenders are said to have sacrificed their client's interests.

"From beginning to end of the Court of Session proceedings the pursuer and his country agent, Mr Broatch, were closely watching them, even while Suttie's name appeared as pursuer. It was not mere passive watching, but active and frequent interference. Mr Black, at one time pursuer's counsel, seems not unnaturally to have grown impatient under this state of things, and to have made way for the defender Mr Pattison. Indeed, considering how close this watching, and how continuous this interference must have been, according to the pursuer's own account of the matter, the wonder is that Mr Pattison did not speedily follow the example of Mr Black. He

did not do so. He remained the pursuer's counsel to the end of the suit, the pursuer being fully aware of all that was done. This fact alone seems sufficient to dispose of the present cause. If the pursuer was not pleased with his counsel the remedy was in his own hands.

"Take, however, some of the specific charges made against Mr Pattison. He did not adopt the valuation of Messrs Robertson. He did not take their figure of £392, 10s. 5d. as truly representing the excess of rents above the valuation roll for which Lindsay was liable. He appears to have thought that this figure, which the pursuer now insists upon as accurate, proceeded on conjectural grounds. Can it be contended that in so doing he exceeded the discretion entrusted to him in the conduct of the cause? Again, there is the matter of the minute referred to in articles 13 and 14 of the pursuer's condescendence—a minute adjusted between Mr Pattison and the opposite counsel, Mr Asher. Is it doubtful that here again, so long as Mr Pattison was allowed to remain in the position of counsel in the cause, he was entitled to exercise his judgment as to what was best for his client's interest? If in doing so, and quite obviously with no purpose of his own to serve (for none is even hinted at) he was to incur any such liability as is here pressed against him, the honourable practice of an advocate's calling would become full of peril.

"Indeed, the whole case, as made on the record against both defenders, comes to this—that they refused to allow the pursuer to manage or mismanage the case in his own way, under the sanction of their names as his professional advisers. No doubt he heaps upon their conduct such words as wilfulness, malice, gross negligence, and ill-guided recklessness. But these big words do not touch the essential character of the proceedings themselves as averred and admitted on the record.

"Another illustration of implicit obedience to orders which the pursuer expected from his counsel and agent, under penalty of an action of damages, will be found in article 8 of his condescendence. He insisted on their obtaining proof by parole in a matter which obviously could only be proved by writing, viz., the payments of rent by the tenants of the property. One sees the force in this connection of Lord Mackenzie's observation in *Burness* v. *Morris*, July 7, 1849—'It is not the usual practice of the bar to state every objection which the client suggests, and I do not think it would be any improvement that they should do so.'

"Such being the nature of the case as stated against the defenders, the judgment in the well-known case of *Swinfen* applies *a fortiori*. Nothing so strong was done here as in that case. But it was there unanimously ruled by the English Court of Exchequer that 'no action lies against a counsel who, being employed to conduct a cause at *nisi prius*, enters into a compromise and withdraws a juror, even though contrary to his client's instructions, provided it is done *bona fide*.' The Sheriff-Substitute will not lengthen this too long note by making any quotation from the judgment as delivered by Chief Baron Pollock.

"Very few words indeed are needed to dispose of the case as against the agent. From the beginning to the end of the proceedings in question, Mr Mackersy, on the pursuer's own shewing, acted under the guidance of Mr Pattison. Indeed, the *gravamen* of the charge against him is, that he preferred that guidance to the pursuer's express instructions. That in so doing he did wisely in the pursuer's own interest is highly probable. But it is too clear for argument that in such circumstances if there be no case against the counsel there can be none against the agent."

This interlocutor was adhered to by the Sheriff (Davidson) on appeal.

The pursuer appealed to the First Division of the Court of Session.

Authorities quoted—*Gilfillan* v. *Brown*, March 8, 1833, 11 S. 548; *Currie* v. *Glen*, December 19, 1846, 9 D. 308; *Swinfen* v. *Chelmsford*, 5 Hurlstone and Norman, 890, and 29 L. J., Exchequ. 382; *Megget* v. *Thomson*, February 2, 1827, 5 S. 275; *Landale* v. *Tod*, January 10, 1831, 9 S. 268; *Cates* v. *Indermaur*, 1858, 1 Foster and Finlason, 259.

At advising—

Lord President—This is an action of damages raised by a client against his counsel and agent in respect of alleged misconduct in an action in which the client was interested. The Sheriff-Substitute has found the action irrelevant, and that judgment has been affirmed by the Sheriff. The case is now before this Court; and as it is one of a very rare description—I think almost without a parallel in this Court—it is necessary to attend to the principles by which it must be decided.

An advocate in undertaking the conduct of a cause in this Court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the Court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound in every cause that comes into Court to take the retainer of the party who first applies to him. It follows, also, that he cannot demand or recover by action any remuneration for his services, though in practice he receives *honoraria* as a return for these services. Another result is, that while the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel to get rid of his client. On the other hand, the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does *bona fide* according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced. These legal powers of counsel are seldom, if ever, exercised to the full extent, because counsel are restrained by considerations of propriety and expediency from doing so. But in such a case as this it is necessary

to have in view what is the full extent of their legal powers.

The position of an agent is somewhat different. There is a contract of employment between him and his client by virtue of which the client, for certain settled rates of remuneration, is entitled to require from the agent the exercise of care and diligence and professional skill and experience. The general rule may fairly be stated to be that the agent must follow the instructions of his client.

But the general rule is subject to several qualifications. The agent, of course, cannot be asked to follow the client's instructions beyond what is lawful and proper. For the agent as well as the counsel owes a duty to the Court, and must conform himself to the rules and practice of the Court in the conduct of any suit. He is also bound by that unwritten law of his profession which embodies the honourable understanding of the individual members as to their bearing and conduct towards each other. But above all in importance, as affecting the present question, is the undoubted special rule that when the conduct of a cause is in the hands of counsel, the agent is bound to act according to his directions, and will not be answerable to his client for what he does *bona fide* in obedience to such directions.

Such being the principles applicable to a case of this kind, it is now necessary to examine the record in order to see whether the Sheriff and Sheriff-Substitute have arrived at a right conclusion and in accordance with these rules. The pursuer is one of six children of a person of the name of Robert Batchelor, who left some property behind him at his death in 1848. This property was in the hands of trustees, and it appears that, with a view to a division of the property, certain heritable estate which belonged to the defunct was brought to sale on the 16th of May 1855, and was then bought by one of the trustees. The sale and purchase were illegal, and although all the rest of the children of Mr Batchelor acquiesced in what was done and took their share of the estate on the footing that it was valid, the pursuer, who had been absent from the country at the time, appeared after the lapse of a great many years, and insisted in having the sale declared to be illegal, with a view to ascertaining what his share of his father's property was. It is necessary to attend to the nature of the action said to be misconducted in order to judge of the force of the arguments made by and on behalf of the pursuer. There was a judgment pronounced in 1871 finding the sale to be illegal, and the consequence of that was undoubtedly that the pursuer was found entitled to have an accounting upon the footing that the property was not properly valued at the price paid for it by the trustee who bought it, and to have its real value declared as that should be ascertained.

Now, the first complaint made upon the part of the pursuer is that his counsel and agent did not insist upon having the estate sold over again. That would, no doubt, have been one way of ascertaining the true value of the estate; but it was not the only way, and it was not, in certain views, by any means the most expedient way of proceeding. Accordingly, it appears to me that it was quite a question for the consideration of the counsel in a case of this kind whether to insist upon a re-sale of the estate or whether they should have a valuation; and the counsel, in the exercise of his discretion, thought that the latter course was preferable, and instructed the agent accordingly, and they both treated the case on the footing that there would be no re-sale, but a valuation. Now, this ground of complaint is an attempt by the client to make the counsel, and the agent acting under his instructions, answerable for the counsel's discretion in a matter eminently fitted for that discretion, and accordingly the irrelevancy of that complaint is at once apparent. I need hardly refer to those vituperative adjectives sprinkled so freely over the record, which do not add anything to the facts. If the facts are not of themselves sufficient, the mere use of abusive language will not have that effect.

The next ground of complaint is this, that when a remit had been made to an architect to value the property, and the architect had made a report on the subject, the client and his country agent were anxious that that report should not be acquiesced in, but that the counsel and agent should ask the Lord Ordinary to allow proof, or to remit the matter to another architect—not for any reason alleged on record of any corruption or misconduct on the part of the architect to whom the remit had been made, but simply because the client had been dissatisfied. Now, I need hardly say to your Lordships that if any counsel had been so ill-advised as to make such a motion to the Lord Ordinary, he would not have succeeded, and no proof would have been allowed, and no fresh remit made. If the Lord Ordinary's interlocutor had come before your Lordships for review, you would have expressed an opinion that no such demand should have been satisfied. The complaint resolves into this, that the counsel and agent both did their duty.

The next matter is, what was the amount of rents intromitted with by the purchaser of the property, and a question arose how that was to be ascertained. An account had been given in by the trustee, and it is alleged that it had been found, on inquiry at the tenants, that much more had been paid than the rents which were stated by the trustee, and which were of the amount contained in the valuation roll, and accordingly it is alleged that the agent was instructed to get a proof, or a remit to examine the tenants and recover the receipts and rentals, so as to know the true amount of the rents which had been drawn. A remit was obtained, but only to recover the receipts and rentals, and not to examine the tenants. The pursuer instructed the agent that the remit should be extended to an examination, but the counsel would not, or at least did not, obey. Here, again, it is impossible not to see that there would have been a great difficulty in making out any case for a proof at large. The competency of proving the receipt of rents of this description otherwise than by writ or oath is a matter with which every one is acquainted, and this was plainly a very absurd demand upon the face of it; but supposing it had been ten times more reasonable, it was a matter of discretion for the counsel, and which he was entitled to decide for himself and his client—and he did decide it. That he was entitled to decide it is a matter of clear law.

The next complaint is very much a repetition of

the same thing. It is alleged that the pursuer had ascertained, by inquiries of his own from an accountant extrajudicially employed, that the report which had been made about the rents was by no means correct, and the pursuer says that he instructed Mr Mackersy to get a judicial remit to an accountant to report on this matter to the Court; but this he neglected to do. Without getting a remit in conformity with these instructions, as the pursuer alleges, Mr Mackersy prevailed on the country agent to consent to the amount of rents being adjusted by counsel—that is to say, by the counsel on each side. Mr Pattison was made fully aware of the pursuer's wishes, and yet, notwithstanding, he went on with the counsel on the other side to adjust the amount of rents for which Lindsay, the trustee, was to account. This is set out in the 12th article of the condescendence—[*reads* ut supra].

Then it is said that the authority was withdrawn, and that Mr Pattison was made aware of the withdrawal, yet that he went on to adjust the amount of rent for which Lindsay, the trustee, was to account. Now, here again there were several courses open. It was quite possible to have an inquiry, and to a certain extent there had been inquiry. Whether it was possible in the circumstances to carry any inquiry further we have not the means of knowing, but it was a very proper question to be settled by adjustment—there is no doubt about that—and that the counsel upon both sides should meet together and consider the matter upon fair and equitable grounds, and fix the amount for which the defender, the trustee, should be liable to the pursuer, was certainly a very advantageous and convenient mode of proceeding. That that was within the power of counsel, after the exposition which I have given regarding their powers, I do not suppose anybody can doubt. Mr Pattison was not only *bona fide* exercising his right, but he was doing it for the benefit and advantage of his client.

Now, these are really the whole grounds of action, and it is needless to advert further to them. They are stated in a very pleonastic way, but they resolve themselves simply into this. The conduct of the case was in the hands of Mr Pattison, who was entitled to decide what was to be done in regard to the whole of these matters. He did decide, and instructed Mr Mackersy to act according to his advice and direction. Mr Pattison himself is not answerable for the exercise of his own judgment in these matters; and Mr Mackersy, as agent, is not answerable because he acted under the instructions of Mr Pattison. Therefore I am clearly of opinion that the interlocutor of the Sheriff-Substitute, and the Sheriff affirming it, were just and well founded.

Lords Deas, Ardmillan, and Mure concurred.

The Court adhered.

Counsel and Agent for Pursuer (Appellant) Party.

Counsel for Mackersy (Defender and Respondent)—Burnet. Agent—George Begg, S.S.C.

Counsel for Pattison (Defender and Respondent) — Dean of Faculty (Watson) — Black. Agent—William Saunders, S.S.C.

Friday, June 30.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

CUMSTIE *v.* CUMSTIE'S TRUSTEES.

Fee and Liferent—Destination—"Heirs whomsoever"—Fiduciary Fee.

Certain heritable property was disponed "to A, B, and C (three brothers), equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever of the said A, B, and C, equally betwixt them in fee, heritably and irredeemably:"—*Held*, in a question between C, claiming as the immediate younger brother of B, and B's trustees, that B's right was a mere liferent, without any power of disposal—*diss.* Lord Deas, on the ground that the words "liferent use allenarly" were inserted to protect the fee for issue of B's body, and since they had failed, the destination over to his heirs whomsoever implied a fee in his person.

Observations on the case of *Newlands*.

On 23d August 1843 the late William Cumstie acquired from a family of the name of Bayne certain heritable subjects in Oban, and took the disposition in favour of himself, his wife, three of his sons and their heirs, in the following terms:—"To and in favour of the said William Cumstie and Mrs Jean Harriot or Cumstie, his spouse, and the longest liver of them two in liferent, for their liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Alexander Cumstie, merchant there, equally betwixt them in liferent, for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Alexander Cumstie, equally betwixt them in fee, heritably and irredeemably." Infeftment followed thereon in favour of the respective parties in liferent and fee, in the precise terms of the destination. Certain other heritable subjects in Oban, held by the said William Cumstie under a feu-charter granted by the Marquess of Breadalbane in favour of William Cumstie and his heirs and assignees, he disponed in terms of the following destination:—"To and in favour of myself and Mrs Jean Harriot or Cumstie my spouse, and the longest liver of us two, in liferent for our liferent use allenarly, and after the death of the longest liver to and in favour of James Cumstie, merchant in Oban, Arthur Cumstie, merchant there, and Peter Cumstie, merchant there, my sons, equally betwixt them in liferent for their liferent use allenarly, and the respective heirs whomsoever of the said James Cumstie, Arthur Cumstie, and Peter Cumstie, equally betwixt them in fee, heritably and irredeemably." Infeftment followed upon this disposition also in favour of the parties in liferent and fee respectively in the precise terms of the destination. William Cumstie, the purchaser of the two properties, died in November 1852, and Mrs Jean Harriot or Cumstie died a few days after her husband. They were survived by their four sons named in the two destinations. The first subject was thereafter liferented by