Wednesday, March 8.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

J. & W. KINNES *v.* ADAM & SONS.

Reparation—Diligence—Wrongous Use of Diligence—Sequestration—Relevancy — Malice and Want of Probable Cause.

A petition for sequestration, though it may result in diligence, is not itself a diligence, but an action in which the alleged debtor may appear to oppose sequestration. In an action of damages for a wrongful application for sequestration it is therefore necessary to aver malice and want of probable cause; and in consequence of a mere technical error in an application for sequestration an action of damages for wrongous use of diligence will not lie.

Process—Partnership—Title to Sue.

Where one of two partners of a firm raises an action in name of the firm, and the other disclaims the action—*question*, Whether the partner raising the action has a title to sue?

On 3d August 1881 John Adam & Sons, plasterers in Dundee, presented in the Sheriff Court of Forfarshire a petition for sequestration of the estates of J. & W. Kinnes, ironmongers and plumbers there, and of the estates of James Kinnes and William Kinnes, the individual partners of that firm. Adam & Sons were creditors of the firm to the extent of £500, and at the date of its presentation the firm of J. & W. Kinnes was notour bankrupt, having been made so within four months previous to the presentment of the petition.

The oath lodged by the petitioners duly set forth the amount of the debt due to them, and that they held a security for their debt. To that security it stated no value was attached. It did not state that the petitioners held no other security for the sum. The Bankruptcy (Scotland) Act of 1856 provides by section 22 that the petitioning creditor shall in his oath specify any security he holds and "depone that he holds no other obligants or securities than those specified."

James Kinnes, one of the partners of the firm of J. & W. Kinnes, appeared and opposed this prayer for sequestration.

Among other objections he objected that the oath did not state that no other security for the debt than that mentioned was held by the petitioners. The Sheriff-Substitute allowed the oath to be amended to the effect of adding the averment that the petitioners held no other security for their debt, and thereafter granted sequestration in ordinary form. James Kinnes then presented in the Bill Chamber an application for recal of the sequestration, which proceeded on various grounds, and, *inter alia*, on the above-mentioned objection to the form of the oath. The Lord Ordinary on the Bills (M'Laren), proceeding solely on the ground that the oath was as originally produced in the petition disconform to the Bankruptcy Statute of 1856, recalled the sequestration, and his interlocutor became final.

This action for damages against Adam & Sons was then raised by James Kinnes in name of the firm of "J. & W. Kinnes, now or lately ironmongers and plumbers in Dundee, and James Kinnes, lately ironmonger and plumber in Dundee, and presently baker there." The summons concluded (1) for £5000 in name of damages to the firm for loss sustained "by and through the wrongful, illegal, and unwarrantable application for and awarding of sequestration;" (2) for £5000 in name of damages sustained by James Kinnes for the damage sustained in like manner by him. In the pursuers' condescendence it was averred that the firm was established in 1862, and had since done a very large business, and was possessed of a great amount of heritable property in Dundee, which, though somewhat burdened with debt, would yield a large reversion; that the sequestration obtained was wrongful, illegal, and unwarrantable, and had been found to be such by a final judgment of the Court of Session; and further, that the defenders knew, or ought to have known, such to be the case when they applied for and obtained it.

The first plea-in-law for the pursuers was—"The sequestration condescended on having been obtained by the defenders *periculo petentis*, and the same and the application therefor having been wrongful, illegal, and unwarrantable, and found to be so by the Court of Session, and the pursuers having by the said sequestration suffered great loss and injury, the defenders are liable to the pursuers in reparation and damages."

William Kinnes was not a party to the action. He lodged in process a minute disclaiming it.

The defenders pleaded—That in respect of this minute of disclamation for one of the partners of J. & W. Kinnes, the other partner had no title to sue in the company name. They also maintained that the pursuers were, in point of fact, hopelessly insolvent, and had suffered no loss from the application for sequestration. They pleaded, *inter alia*—"(3) The pursuers' averments are not relevant, and, *separatim*, are not sufficiently specific to be remitted to probation."

The Lord Ordinary (M'Laren) repelled this plea, as well as the plea to the effect that the pursuers had no title to sue, and adjusted issues for the trial of the cause, in which the question was put whether the defenders "wrongfully applied for, procured, and maintained sequestration of the estates of J. & W. Kinnes, to their loss, injury, and damage?"—a precisely similar question being also put as to the application for sequestration of the estates of James Kinnes as an individual.

To his interlocutor allowing the pursuers to lodge issues his Lordship appended this note:—"At this stage I have to dispose of two of the defenders' pleas involving the questions of title to sue and relevancy.

"(1) The objection to the title is that the action is instituted in the name of the firm of J. & W. Kinnes by one of the partners, the other partner having disclaimed.

"The objection, in my opinion, is not well founded. I consider that the point is ruled by the case of the *Antermony Company* v. *Wingate*, reported in 4 Macph. 1017. In this case Lord President Colonsay observed that one partner has not a right to obstruct litigation at the instance of another partner for the recovery of debts due to the company, and that a partner is understood to have an implied authority to use the name of his copartner when necessary. Lord Curriehill

said that the implied mandate of any partner to uplift and discharge debts extended to the institution of actions, and Lord Ardmillan said he would have been prepared to sustain the instance even against the positive disclaimer of the non-acceding partner. It is true that in the case of the *Antermony Company* there was no disclaimer from the non-acceding partner. But it was admitted that he was absent in Australia and had not assented to the action, and I do not think that the production of a disclaimer would have made any difference. There cannot be degrees of dissent to an action; and in the present case I am of opinion that the instance is good notwithstanding the dissent of one of the members of the copartnery.

"(2) The question which is raised by the plea to the relevancy is the question of privilege. The action is brought to recover damages for wrongful use of sequestration under the 'Bankruptcy Act 1856;' and the defender, while admitting that the sequestration of the pursuers' company was obtained at his instance, and that it was afterwards recalled by the Lord Ordinary on the Bills, pleads that this was a judicial proceeding, and that it was privileged in this sense, that the injury sustained by the pursuer is not actionable unless it is averred that it was done maliciously and without probable cause. The rule is well settled in its application to actions of damages arising out of contentious proceedings; and by an extension of the rule, depending on a somewhat different principle, it has been held that the right to use arrestment or inhibition on the dependence of an action is as unqualified as the right to bring the action itself, and therefore that in order to succeed in an action of damages for wrongful use of arrestments malice must be established and probable cause negatived. It has not been determined in such an unqualified sense that actions founded on non-contentious proceedings, or proceedings taken *ex parte*, are relevantly laid without the averment of malice and want of probable cause. But in the cases of this character which have been subjected to the test of decision, the word 'wrongful' has been held to be the proper term by which to characterise the injurious act, and it has been held unnecessary to aver malice. To this category I refer actions for wrongful use of diligence against the person or property of a debtor, including sequestration for rent, and also applications for interim interdict granted upon the representation of the applicant without inquiry. I am not sure that the decisions in the miscellaneous cases here grouped together have been based on the same reasons; but I think they may perhaps be brought within the general ground of judgment—that the law does not accord the highest degree of privilege to a party setting in motion the judicial and executive powers of the Courts of Justice, except in cases where the adverse party has an opportunity of stating and proving his case, and where, therefore, the responsibility rests either with the adversary (if he does not bring forward his case), or with the Judge.

"The case of an application by a creditor for the sequestration of his debtor's estates does not, in my apprehension, come within the class of privileged cases. No doubt the debtor may appear and oppose the application, but the grounds on which he can successfully oppose are limited. In the debtor's absence the creditor must be held responsible for the correctness of the proceedings to this extent, that a correct statement is laid before the Judge, supported by an affidavit and vouchers, in terms of the statute. In this respect the cases—such as *Miller* v. *Hunter*, 3 Macph. 740—with reference to wrongful use of interim interdict, appear to be in point. For though the respondent may oppose, he is not in a position to bring forward his whole case, and therefore the responsibility for error rests with the complainers. Sequestration in bankruptcy must also be considered under the statute as equivalent to poinding and other modes of execution against the debtor's real and personal estates. It is not easy to see why the creditor using this very comprehensive diligence should be privileged against the consequences of his mistakes in a greater degree than a poinding creditor putting his decree in force in the ordinary way.

"For these reasons, I am of opinion that the action is relevantly laid, and I shall appoint the pursuers to give in issues for the trial of the case."

The defenders reclaimed, and argued—(1) On the question of title to sue: Any right James Kinnes had to raise an action must be on the principle of implied mandate, which applied only to ordinary actings as a partner. Now, the minute of disclamation showed conclusively that not only was there no mandate, but that the partner was unwilling to have the action raised. In the case of the *Antermony Coal Company* the partner whose concurrence was held unnecessary was himself the debtor in the obligation he was unwilling to enforce, and the case was no authority for the proposition that one partner could in the teeth of another's wishes raise actions in the firm's name—Mackay's Practice, i., 290; *Shotts Company* v. *Hopkirk*, 6 Sh. 399; *May* v. *Matthews*, 13 Sh. 94; Clark on Partnership, i., 524. (2) The action was irrelevant. The pursuers did not deny that the defenders were entitled to apply for sequestration. They founded their case on the fact that through a technical defect the sequestration had failed to take effect. No doubt if sequestration were a mere diligence, in which a party proceeds *ex parte* and *periculo petentis*, this action might lie, because even an innocent blunder in diligence will ground an action of damages. But a proceeding for sequestration is a judicial proceeding—an action in which the debtor is cited to appear—and in which, in point of fact, this debtor did not appear. The rule applicable to an action, whether the pursuer ultimately succeeded or not, was that a litigant making an honest application to a Court, and stating his grounds of action, is not liable to an action of damages unless malice and want of probable cause be averred. Here the defenders had used their legal right of raising this action, and nothing was alleged against them except that in the end they had failed. Such a ground of action was without precedent.

Authorities—*Brodie* v. *Young*, Feb. 19, 1851, 13 D. 737; *Wolthekker* v. *Northern Agricultural Company*, Dec. 20, 1862, 1 Macph. 211; *Davies & Co.* v. *Brown & Lyell*, June 8, 1867, 5 Macph. 842; *Gibb* v. *Edinburgh Brewery Company*, June 19, 1873, 5 Macph. 705.

Argued for pursuers—This was a case of dili-

gence wrongly done, and it was well settled that the person who so used diligence was liable in reparation, even if it might have been rightly done. Sequestration was a diligence none the less that the debtor was summoned to show cause against it. Indeed it was the most sweeping and comprehensive diligence in the law, and it would be strange if the rules as to diligence did not peculiarly apply to it.

The Court made avizandum.

At advising—

Lord President—This is an action raised at the instance of the firm of J. & W. Kinnes and James Kinnes, one of the partners of the firm, for his interest, and there is an objection to the title to sue. That objection it is not necessary to dispose of, for there is an objection to the relevancy of the action which I think there is good ground for holding sufficient.

The pursuer says that the firm of J. & W. Kinnes has been established in, and carried on business from, the year 1862, and that on 3d August 1881 the defenders John Adam & Sons presented to the Sheriff of Forfarshire a petition under the Bankruptcy Act of 1856 for sequestration of the estates of the firm and of the individual partners. Without going through the allegations further, it is sufficient to say that these are general and vague allegations that this application was oppressive, and that it and the sequestration which followed upon it were wrongful, illegal, and unwarrantable, and that they have been found to be so by a judgment of the Court of Session. I think it would certainly be necessary in such a case that the pursuer should say in what respect the proceedings were wrongful, illegal, and unwarrantable. But here it is needless to attempt to do so, for it is admitted that the sequestration was recalled on the single ground that the petitioning creditors had failed to say in their oath that they held no other security for their debt than the security specified. The sequestration was recalled on that ground, and on that ground only. The pursuer says that in consequence of the fact that the sequestration was recalled on that technical ground the defenders are liable in damages, and he declines to take an issue of malice and want of probable cause. I am clearly of opinion that this action will not lie without such an averment. The creditors used a remedy which the law gives absolutely and without qualification. Any person who has a debtor indebted to him to a certain extent, and whose debtor has been within a certain period previously made notour bankrupt, is entitled to apply for sequestration, and here the defenders did no more. If there were an allegation that the debt was fictitious, or that the evidence of the notour bankruptcy was fictitious, I could understand such a case as is here attempted to be made. But here there is no such allegation; there is nothing but a purely technical objection. It is said for the pursuer that a purely technical objection to a diligence which has been used is quite enough to found such an action as the present without any averment of malice and want of probable cause. That may quite well be so. Where diligence is being used one can understand very well that every step must be accurate or an action of damages may result, but there is clearly a distinction between that case and an application to a Court for sequestration. A petition for sequestration is, I think, an action, and though where it is granted it has the force of diligence, and that with stringent effects, that does not make the petition not an action. In like manner a summons of adjudication has effects of the nature of diligence after decree has been granted, but the process of adjudication itself is not a diligence. In my opinion, then, a petition for sequestration is an action followed no doubt by stringent effects of diligence.

A distinction was taken at the discussion between remedies which may be obtained as matter of absolute right and those which can be obtained only on special grounds, and the case of *Wolthekker* was referred to—a case decided in the Second Division of the Court while I presided there, and in which all the Judges concurred in the following passage in my opinion—"When I was in practice it was understood to be quite settled that a litigant using any legal right or remedy to which he was absolutely entitled, and which he required to apply for no special warrant to enable him to use, could never be made liable for the consequences of its use unless he was shown to have resorted to it maliciously and without probable cause." I went on to say—"It would be most unreasonable and inconsistent to give the pursuer of an action the right to use inhibition and arrestment on the dependence, and at the same time to make him answerable in damages merely because he fails in obtaining a judgment against the defender though he used his legal right moderately and in good faith. I think it would be quite as reasonable to make him answerable for damages arising from his having raised an action in which he has not succeeded." It appears to me that this is just a case in which the party raised an action in which he has not succeeded. I am for recalling the interlocutor, and dismissing the action.

Lord Deas—I agree with your Lordship that it is not necessary to decide the validity or invalidity of the objection to the pursuer's title to sue, since there is a consideration in regard to the relevancy of the action which is conclusive of itself. The question is, whether the flaw in the petition for sequestration can be made the ground of an action of damages without an averment of malice and want of probable cause? Now, the petition for sequestration is an action in the first instance. It is very important, I think, to note what the flaw was in respect of which the sequestration was afterwards recalled. It was this, that while the creditor said in his oath that he held a security he failed to set forth that he held no other security. And a sequestration which had been awarded in the usual way was in respect of that omission recalled, and that is the ground of action in this case. Nothing can be more technical; and the objection being of that technical kind, I agree with your Lordship that the application for sequestration here had not arrived at the stage when it could be said to be a diligence, and was at that stage at which it was an action. I think, therefore, that without an averment of malice and want of probable cause the action is irrelevant.

Lord Mure—The question of title to sue is one of nicety, and upon it I give no

opinion, because I think it clear that the objection to relevancy is well founded. This action is founded upon the supposition that what happened was a mistake in the due execution of a diligence. But that is not so. The petition was served and the party was called to show cause why he should not be sequestrated. It was a judicial proceeding *in foro contentioso*. The creditor required to lodge a copy of the oath required by statute, and the debtor appeared to point out an error in it and to oppose sequestration. The Sheriff repelled the objection he took, and awarded sequestration *in foro contentioso*. Thereafter a petition for recall of sequestration was presented, and the sequestration was recalled, and on that recall this action is grounded. But the defenders here only exercised their ordinary privilege, and I am clear as to the rule that a person who has only exercised his ordinary privilege cannot be subjected to an action of damages unless there be made against him an averment of malice and want of probable cause.

Lord Shand—I agree with your Lordships in holding that an application for sequestration of a debtor's estate, though it result in a diligence of a sweeping character, is a judicial proceeding. Nothing could be a better illustration of that than what took place here. An application for sequestration was presented to a Court; a legal question was raised which was founded on a technical objection to the oath produced; the Judge decided that question and granted sequestration. On a petition for recall that judgment was reversed, and the opinion of the Judge who awarded sequestration was held to be wrong. I think it clear that this was a judicial proceeding, and that the pursuer can only maintain his claim against the defender by averring malice and want of probable cause. I do not mean that this record would be made a whit better by merely putting in these words if alongside of them we had merely the averment that there was a technical objection to the oath produced in this judicial proceeding. In order to give substance to a case founded on that circumstance mere averment of malice and want of probable cause would not suffice. I am of opinion that in the absence of an averment of malice and want of probable cause, and some specialisation of circumstances to ground that averment, this action is irrelevant.

The Court recalled the interlocutor of the Lord Ordinary, disallowed the issues proposed, sustained the third plea-in-law for the defenders, and assoilzied them.

Counsel for Pursuer — Rhind. Agent — R. Menzies, S.S.C.
Counsel for Defenders—W. C. Smith. Agents —Murray, Beith, & Murray, W.S.

Thursday, March 9.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

ROSS *v.* HERDE.

Process—Reclaiming Days—Expiry of on Saturday.

A reclaiming note was *refused* as incompetent because it had been boxed on Monday instead of the previous Saturday, on which day the reclaiming days had expired, there being no consent by the respondent.

The reclaimer cited as authorities 6 Geo. IV. c. 120, sec. 18; *Hume* v. *Macalister*, 21st Feb. 1855, 27 Sc. Jur. 195, 17 D. 477; *M'Call* v. *Laing & Wilson*, 7th July 1868, 40 Sc. Jur. 569. The respondent replied that in the cases cited the note was received of consent—here there was none.

Counsel for Suspender and Respondent — Baxter. Agent—W. Lowson, Solicitor.
Counsel for Respondent and Reclaimer — J. A. Reid. Agent— D. H. Wilson, S.S.C.

Thursday, February 9.

OUTER HOUSE.

[Lord Fraser.

CLYNE (GARDEN'S EXECUTOR) *v.* GAVIN AND OTHERS.

Entail—Bond of Provision—Personal and Real—Competition — Aberdeen Act (5 Geo. IV. cap. 87), secs. 4, 8, and 9.

A bond of provision in favour of younger children was granted under the Aberdeen Act, and was registered in the register of sasines as being in a deed containing an annuity in favour of the granter's widow. The sums due to the children were not paid by the succeeding heir, but the children assigned their rights to a third party, who advanced the amount, and to whom the heir paid interest for several years. The heir on succeeding granted a bond conveying to trustees in security his rights in the entailed estates. The trustees under this bond were duly infeft, and subsequently intimated to the tenants on the estate the assignation to the rents contained in their bond. After the date of this intimation the holder of the bond of provision obtained decree for the amount, and used arrestments thereon in the hands of the tenants. *Held (per* Lord Fraser, Ordinary) that the holder of the bond of provision had a personal right merely, and that the arrestments used by him must be postponed to the prior intimated assignation to the rents, and the tenants assoilzied accordingly in an action of furthcoming raised by the holder of the bond of provision.

The late Peter Ettershank Gordon, as heir of entail in possession of the entailed estate of Mosstown, on 3d October 1842 granted a bond of provision in favour of his wife and younger children, by which he gave an annuity to his wife on his death, and also bound and obliged himself, and