or not, to demand his books and papers, and in an application to enforce that right the Sheriff had privative jurisdiction under the Act.

Section 24 of the Building Societies Act 1874 provides that every officer of a society registered under the Act "shall, upon demand made, or notice in writing given or left at his last or usual place of residence, give in his account as may be required by the board of directors or committee of management of the society, to be examined and allowed or disallowed by them, and shall, on the like demand or notice, pay over all the monies remaining in his hands, and deliver all securities, and effects, books papers, and property of the society in his hands or custody to such person as the society appoint; and in case of any neglect or refusal to deliver such account or to pay over such monies, or to deliver such securities, and effects, books, papers, and property in manner aforesaid, the society may sue upon the bond, or may apply to the Court, who may proceed thereupon in a summary way, and make such order thereon as to the Court in its discretion shall seem just, which order shall be final and conclusive."

The First Edinburgh and Leith 415th Starr-Bowkett Building Society raised an action in the Sheriff Court at Edinburgh against their secretary, Alexander Munro, accountant, East London Street, Edinburgh, to have him ordained to give in an account of his intromissions as secretary with the society's funds, and pay over the balance thereon, and deliver up all the titles, books, and documents in his possession as secretary to a person named. The condescendence set forth that the defender having refused to obey the directions of the society had been removed from his office, but refused to give up an account or deliver the society's documents. The pursuers pleaded that the defender having been appointed secretary, and having been legally removed from office, they were entitled to decree as prayed for. The defender denied that he had been legally dismissed, and pleaded, *inter alia*, that being still secretary he was "entitled to have and hold possession of all the books, documents, and other effects of the society, in terms of the rules of the society." The Sheriff on 25th June 1883, on appeal from the Sheriff-Substitute, pronounced an interlocutor allowing to both parties a proof of their respective averments, and a diet of proof was fixed.

The defender appealed to the Court of Session, and upon the motion that the case be sent to the roll the respondents objected to the competency of the appeal, and argued that under sec. 24 of the Building Societies Act of 1874 the interlocutor of the Sheriff was final.

The appellant argued that this was not a dispute of the kind contemplated by the Act, from which there could be no appeal, and that the only reason alleged for demanding the books was his alleged dismissal, which, if it had happened, took the case out of sec. 24.

Authorities—37 and 38 Vict. cap. 42, secs. 4, 24, and 36; *Davie* v. *Colinton Friendly Society*, November 10, 1870, 9 Macph. 96; *Hamilton* v. *Hamilton*, March 20, 1877, 4 R. 688; *Rain* v. *Gill*, May 19, 1877, 4 R. 732.

At advising—

Lord President—I think that this is a very clear case. The prayer of the petitioner is that Alexander Munro be ordained to give in an account of his intromissions with the funds of the society as secretary, as at 30th April 1883, and to give up all the books, documents, and property of the society presently in his possession. Now, this is a proceeding under the 24th section of the statute, and it is a matter of no consequence whether he is still secretary of the society or not, or whether he has been legally dismissed or not. Under this section of the Act the society is entitled whenever it pleases to call for delivery of the books and papers in the hands of any of its officers, and being dissatisfied with Munro, and having made the demand in writing in terms of the statute the society was entitled to have what it claimed.

It seems to me that the averment that the appellant has been dismissed is irrelevant to the present action. The society desired that its books and papers should be delivered up, and the present petition has been presented in consequence of the appellant's refusal to deliver up the documents demanded. The Sheriff has acted summarily in the matter, and in my opinion within his jurisdiction.

The words "final and conclusive" in this section of the statute have the same meaning as the words "final to all intents and purposes without any appeal" in the Friendly Societies Act of 1855. We had occasion to construe these words in the case of *Davie* v. *The Colinton Friendly Society*, and we there held that the jurisdiction of this Court was excluded by sec. 41 of that Act, by which a privative jurisdiction in such cases was conferred upon the Sheriff.

I am therefore of opinion that the present appeal is incompetent.

Lords Deas, Mure, and Shand concurred.

The Court refused the appeal as incompetent.

Counsel for Pursuer—Brand. Agent—R. Ainslie Brown, S.S.C.

Counsel for Defender—Rhind. Agent—Robert Menzies, S.S.C.

Wednesday, October 17.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

M'INTOSH *v.* CHALMERS.

Reparation — Force and Fear— Wrongous Imprisonment—Writ Granted in Prison.

An imprisoned debtor granted, while in prison, and as a condition of his release, certain writings, one of these being a letter of indemnity undertaking to free and relieve his incarcerating creditor of all liability in connection with his incarceration. The transaction was carried out by the creditor's law-agent, but the debtor was not represented by a law-agent, and had no opportunity of consulting one after the writings were presented to him for signature. The warrant of imprisonment was afterwards

suspended as illegal, and the debtor raised an action of damages for wrongous imprisonment against the incarcerating creditor, with a subsidiary conclusion for reduction, if necessary, of the letter of indemnity. The defender pleaded the letter of indemnity as a bar to the action. The Court, on consideration of a proof, which established that the incarcerating creditor had acted *in mala fide*, and not for the purpose of recovering a debt due to him by the pursuer, but for that of aiding a third party in certain designs against the pursuer, sustained the action as one of damages for wrongous imprisonment, found that the letter of indemnity having been granted by the pursuer while in custody under an illegal diligence was to be regarded as obtained by means of force and fear, and could not be maintained as a bar to the action, and that the pursuer was entitled to damages.

Agent and Client—Law-Agent's Hypothec.

Opinions (*per* Lord Justice-Clerk and Lord Young) that a law-agent's hypothec over papers belonging to his client could not stand in the way of the production of a document in his possession belonging to his client in an action against the client by a third party for reduction of the document.

William M'Intosh, the pursuer in this action, was a partner of the firm of M'Intosh Brothers, wholesale merchants in Leith. The firm, which was formed in 1861, consisted of the pursuer (who had been a member of a previous firm carrying on the same business) and his brothers Adam M'Intosh and Alexander M'Intosh. Adam M'Intosh died in 1876, and the business continued to be carried on by the surviving partners. John M'Intosh, after mentioned, an excise officer in Edinburgh, was another brother of the pursuer. John and Alexander M'Intosh were executors of Adam. Walter Chalmers, the defender, was a commission agent in Leith. The present action was one of damages for wrongous use of diligence and wrongous imprisonment. The pursuer concluded for reduction if necessary of the letter of indemnity after referred to.

The material averments of the pursuer were as follow:—"(Cond. 6) Subsequent to the death of the said Adam M'Intosh, the said John M'Intosh and Alexander M'Intosh tried various means to have the pursuer turned out of the said firm without any adequate consideration, and the actions and schemes referred to not proving effectual, the said Walter Chalmers, John M'Intosh, and Alexander M'Intosh concocted a fraudulent, wrongful, and malicious scheme for all or one or more of the following purposes, viz., depriving the pursuer of his rights as a partner of said firm, of turning the pursuer out of the said co-partnership so that the defender and the said John M'Intosh, or either, might take his place therein, and of obtaining payment of the contents of the bill after mentioned from the pursuer to the relief of his copartner Alexander M'Intosh. (Cond. 7) The said fraudulent scheme was carried out as follows:—The Distillers' Company, Limited, Glenochil Distillery, Menstrie, held an acceptance of the said firm of M'Intosh Brothers, dated 17th January 1880, p. £289, 10s. 8d., payable three months after date. It fell due on 20th April 1880, and not having been paid at the time, was protested for non-payment, and the protest recorded in the Sheriff Court books of Midlothian on 6th May 1880, but pending disputes between the pursuer and Alexander M'Intosh, his partner (which disputes the pursuer now believes and avers were originated and caused by the fraudulent attempts of Alexander M'Intosh, the defender, and John M'Intosh, to turn the pursuer out of said firm), the said bill was allowed by the Distillers' Company, Limited, to lie over until about the 24th July 1880. At said date it was renewed by a new bill p. £289, 14s. 10d. being taken by the Distillers' Company, Limited, and payable three months after date. An entry to the effect that a new bill had been so taken was made by Alexander M'Intosh in the books of M'Intosh Brothers on 24th July 1880, so as to deceive the pursuer, and conceal from him the real nature of the transaction which he and the defender and John M'Intosh were now in the course of carrying out. While representing to the pursuer that the bill p. £289, 10s. 8d. had thus been renewed on 24th July 1880, the defender and the said Alexander and John M'Intosh on the 4th August fraudulently, maliciously, and in pursuance of said fraudulent and malicious scheme, procured a pretended assignation to said first-mentioned bill, and to the diligence following thereon. Said assignation was at their desire and request, acting in pursuance of said fraudulent scheme, taken in name of the defender Walter Chalmers, who in pursuance of said scheme charged the pursuer on the 11th day of August 1880, and thereafter on the expiry of the charge he on the 18th day of said month incarcerated the pursuer in the Tolbooth of Edinburgh. On the 3rd of August 1880 a mandate was, in pursuance of said fraudulent scheme, granted by the defender and Alexander M'Intosh, in favour of David Forsyth, S.S.C. [the defender's agent], requesting him to prepare an assignation of said bill in favour of defender, and afterwards to charge M'Intosh Brothers and the individual partners thereof for payment. Defender's and said Alexander M'Intosh's intention throughout was that the diligence should be put in operation against pursuer alone, as was afterwards done. At the same time the bonded spirits to the value of £842, 6s. 2d. were conveyed to the defender as mentioned in Cond. 11. Said transactions were entirely outwith the knowledge of pursuer. (Cond. 8) On the day of the pursuer's incarceration, the defender Walter Chalmers, acting in pursuance of said scheme, waited on the pursuer, and informed him that he would be incarcerated unless he would at once give up to the said Alexander M'Intosh his interest in the firm of M'Intosh Brothers. The pursuer refused to do this, and the defender shortly thereafter caused the pursuer to be lodged in prison. The pursuer was detained in jail at the defender's instance from Wednesday the 18th August till Friday the 20th August, when certain deeds or writings after mentioned having been impetrated from him he was set at liberty. Meantime a note of suspension and liberation had been prepared and presented by the pursuer against the defender Walter Chalmers, under which, after various steps of procedure, the Lord Ordinary (Rutherfurd Clark) on 16th December 1880 suspended the said charge, whole grounds and warrants thereof, and granted warrant for the pursuer's

liberation with expenses. This interlocutor having been reclaimed against by the defender Walter Chalmers, their Lordships of the Second Division, of date 16th February 1881, refused the reclaiming-note, and adhered to the interlocutor reclaimed against with additional expenses. Reference is made to the proceedings in the said process of suspension and liberation." Cond. 9 set forth that the assignation in favour of the defender was prepared by his agent, and bore to proceed on the consideration of £289, 10s. 8d., the principal sum in the bill, together with a sum of expenses, and that the Distillers' Company had before paying it expressly declined any responsibility beyond delivering the assignation and the bill and protest. "(Cond. 10) These transactions with reference to the said assignation were carried on collusively by the defender and Alexander and John M'Intosh, and the pursuer was put in prison in pursuance of their fraudulent scheme to turn the pursuer out of the firm, and to impetrate from him the pretended deeds and writings after mentioned. The pursuer was never asked to pay the said bill until it was assigned to the said Walter Chalmers, and the charge given thereon was the first intimation he received of the bill being assigned as aforesaid. The said Walter Chalmers gave no money or other consideration for the bill, nor did the said Alexander M'Intosh or John M'Intosh. The bill was assigned as aforesaid long after it became due, and after the Distillers' Company (Limited) had accepted a renewal. The affairs of the said firm have not been wound up, nor the state of indebtedness as between the individual partners ascertained, and it is averred that on an accounting the said Alexander M'Intosh is greatly the pursuer's debtor. The said charge and imprisonment were wrongful and illegal, and have been found to be so by the foresaid judgments of Lord Rutherfurd Clark and of the Second Division of the Court. (Cond. 11) Further, in pursuance of said scheme, and in order to prevent the complainer from raising money wherewith to pay the sum contained in said charge, the said Alexander M'Intosh, in or about the month of July or August 1880, made a fraudulent and collusive sale to the said Walter Chalmers of the whole stock of the firm of M'Intosh Brothers then lying in bond, to the amount of £842, 6s. 2d. sterling, without any consideration or payment whatsoever, and granted delivery-orders upon the warehouse-keepers for the said stock. This fraudulent and collusive sale was entered into by the said Alexander M'Intosh without the knowledge or consent of the pursuer, the only other partner of the firm of M'Intosh Brothers. Chalmers gave no money or value for the bill pretended to be assigned to him, and it was delivered to Alexander M'Intosh for behoof of the firm of M'Intosh Brothers when it was renewed as already set forth, but even although Chalmers had given value for the said bill, he received goods belonging to the firm amounting to much more than the value of said bill, and neither the pursuer nor his firm of M'Intosh Brothers were indebted to Chalmers in any sum whatever at the time the pursuer was charged and incarcerated on said bill. When the pursuer learned that Chalmers and Alexander M'Intosh were entering into some transactions which they were keeping secret from the pursuer, the pursuer wrote a letter to Chalmers warning him against advancing any money to Alexander M'Intosh, and repudiating all liability on the part of himself or his firm in respect of such pretended advances. The defender, Walter Chalmers, is called upon to produce said letters. (Cond 12) On 19th August 1880, in pursuance of said scheme, the defender instructed the said David Forsyth to prepare a petition for sequestration of the pursuer's estates, which petition was most wrongously signed by the defender, although in full knowledge that no real grounds of debt existed against the pursuer. Further, on the third day after the pursuer's said incarceration (20th August 1880) he was on the instructions of the defender visited in prison by David Manson, a clerk of David Forsyth, S.S.C., the agent of the defender, for the purpose of carrying out said fraudulent scheme. Said clerk, then and there acting on the defender's employment and instructions by means of threats of continued imprisonment and of making the pursuer bankrupt under the petition for sequestration above mentioned, and of pointing and selling his household furniture, and thereby rendering his wife and family houseless, impetrated from the pursuer, who was then very weak in body and much distressed in mind, and whose mind was overpowered by fear and by the threats above mentioned, three pretended deeds or writings, the first of which, so far as the pursuer recollects and understands its meaning, bears to be a dissolution of the firm of M'Intosh Brothers. The second was an agreement to hand over the whole assets of the firm for nothing, or for a grossly inadequate consideration. The third was a letter of indemnity bearing to free and relieve the defender Walter Chalmers of all responsibility for his share in these transactions, and of all liability for, *inter alia*, the imprisonment of the pursuer. The defender Mr David Forsyth, S.S.C., and his clerk, who waited on the pursuer in prison, all knew that Mr Peter Morison, S.S.C., was then agent for and acting on behalf of the pursuer, and they did not communicate the contents of said documents to him or submit them to him to be revised, well knowing that he would prevent the pursuer from executing them. The pursuer has never received one penny for his share or interest in the firm of M'Intosh Brothers. Having thus impetrated these documents from the pursuer, the defender late in the evening of the 20th August liberated him from prison." It was then set forth that the pursuer challenged the validity of the deeds so obtained from him as soon as he had had an opportunity of consulting his agent, but that the defender and the pursuer's brothers proceeded to act upom them by advertising the dissolution of the firm and dividing its assets among them. "(Cond. 15) By all these proceedings, which were most wrongful and illegal and fraudulent, malicious and oppressive, the pursuer has been greatly injured; he has been subjected to illegal and malicious diligence and imprisonment; he has suffered, and will suffer, greatly in his health, feelings, prospects, credit, and reputation; he has been unjustly deprived of his property, and turned out of his business without any money or consideration whatsoever, and for sometime he has not even had the means of procuring legal assistance to obtain redress. The pursuer's business was a very valuable one, he had the chief

interest in it, and it was mainly owing to his connection with the firm that the customers continued to deal with it, and by turning the pursuer out in this way the business and the pursuer have been ruined. He estimates the loss, injury, and damage he has suffered, and will suffer in the premises, at the sum of £3000. For this the defender is liable to the pursuer by way of reparation."

The pursuer pleaded—"(1) The defender having wrongfully, illegally, oppressively, and maliciously caused the pursuer to be charged and apprehended and detained in gaol, as condescended on, he is liable in reparation and damages. (2) The said other proceedings of the defender complained of being illegal, unwarrantable, malicious and oppressive, and the pursuer having suffered loss, injury, and damage thereby, the pursuer is entitled to reparation. (3) The said pretended letter of indemnity dated on or about 20th August 1880, having been impetrated from the pursuer by force and fear as condescended on, and in pursuance of said fraudulent scheme, it ought, if necessary to the ends of justice, to be reduced."

The defender in his answers denied that the bill of the Distillery Company was allowed to lie over by the holders, and alleged that, on the contrary, the pursuer was charged upon it, and in consequence applied to the defender for assistance in July 1880; and that it was at his request and on condition of getting an assignation to the bill that the defender agreed to join with Alexander and John M'Intosh in an acceptance of the renewed bill. He also stated that neither the pursuer nor the firm had paid any of the contents of the bill and that the renewal bill was paid by him to the Distillery Company when due. He also denied that he had ever had stock of the firm conveyed to him to the amount of his risk, but that there was generally a large deficiency. The letter of indemnity libelled for reduction was in the hands of his agent, Mr Forsyth, S.S.C., who claimed a hypothec over it and declined to produce it.

He pleaded, *inter alia*—"(1) The defender being unable to obtain possession of the document under reduction, is not bound to satisfy production at least *hoc statu*. (2) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (4) The action is excluded in respect of the letter of indemnity sought to be reduced."

On 15th July 1882 the Lord Ordinary, on pursuer's motion, pronounced an interlocutor holding the production satisfied. The letter of indemnity however was not produced, as Mr Forsyth claimed a right of hypothec over it, and declined to put it into the defender's hands that he might produce it.

The Lord Ordinary, after hearing parties on the issues proposed by the pursuer for the trial of the issues, found the averments in the summons not relevant to entitle the pursuer to an issue, and dismissed the action.

"*Opinion.*—It was conceded that the pursuer is not entitled to recover damages for wrongous imprisonment unless he can succeed in setting aside the letter of indemnity mentioned in the 12th article of the condescendence. But his averments are not, in my opinion, relevant to infer reduction of that letter. He maintains that he is entitled to an issue of force and fear on the authority of the cases collected in Bell's Illustrations, i. 8, of which *Fraser* v. *Black*, 13th December 1810, was relied on as most nearly in point. But these were cases where imprisonment had been used to obtain an advantage beyond its lawful object; and they do not appear to me to be in point. The pursuer was not imprisoned in order to extort from him an indemnity for wrongous imprisonment. But being imprisoned on a charge which he was in a position to suspend, the defender agreed to his being released before any order for his liberation could be obtained upon a note of suspension, which had already been prepared for that purpose. If he stipulated, as a condition of his consenting to the pursuer's liberation, that the latter should undertake to discharge him of personal liability for the imprisonment, and if the pursuer agreed to that condition, there seems to be no reason why such an agreement should not stand good. The pursuer says he was induced to consent by threats of continued imprisonment. But the defender could not imprison him contrary to law; and he must be held to have known that he could obtain his liberation by means of the proceedings he had taken for that purpose. If the defender, or his agent's clerk, through whom the arrangement is said to have been made, intimated that without an indemnity they should not interfere for his liberation before he could be liberated in due course of law, that does not appear to me to be a threat calculated to overpower the will or affect the validity of the pursuer's consent.

"He had to consider whether he should rely upon his process of suspension and liberation, and retain his claim for damages, or abandon his claim for damages and obtain an immediate release. Having chosen the latter alternative, he is in my opinion barred from insisting in his present claim.

"It is further averred that the indemnity was impetrated under threats of making the pursuer bankrupt, under a petition for sequestration, and of poinding his furniture. But he could not be made bankrupt by a petition for sequestration if he was not already bankrupt in fact, and it is averred that there was no ground of debt upon which these proceedings could have been taken. They could, therefore, have been effectually prevented by the pursuer (*Kerr* v. *Edgar*, Bell's Illustrations, i. 9). But threats of proceedings which are entirely without foundation, and must be futile, are not such threats as to overpower a mind of ordinary firmness, which is the only ground for an issue of force and fear.

"For the same reasons I think there is no relevant averment to support the third issue. But, had it been otherwise, the pursuer could not, in my opinion, have an issue to affect the validity of these agreements in this action, since they are not agreements made with the defender, and the only person who has an interest in maintaining them has not been called."

The pursuer reclaimed, and the Court, after hearing counsel, recalled the Lord Ordinary's interlocutor, dispensed with issues for the trial of the cause, and of consent of parties remitted the cause to the Lord Ordinary, with instructions, before answer, to allow the parties a proof of their averments, reserving in the meantime all questions of expenses.

A proof was thereafter taken at considerable length before the Lord Ordinary, in the course of which the material facts averred by the pursuer

as above set forth were proved. In particular, it appeared from the evidence that after the death of Adam M'Intosh in 1876 differences began to arise between Alexander M'Intosh and the pursuer over the accounting for Adam's interest in the business, and that there was a good deal of litigation between Alexander and John and the pursuer relative thereto. Between 1877 and 1880 the breach was widened by differences arising over the defence of an excise prosecution of the firm during that time. The firm in 1880 was insolvent, and the pursuer wished to have the business wound up, while Alexander was averse to this. In February of that year the pursuer obtained the appointment of a judicial factor to the firm, who sold the business by auction to the pursuer for £50. Alexander was then ejected from the firm, and interdicted from interfering in the business. This breach was, however, partially healed by an agreement which readmitted Alexander to the firm in May for another twelve months. Some negotiations afterwards took place between the brothers (in which the defender took an active part as an intermediary and friend of Alexander) for an arrangement by which the pursuer was to be bought out of the firm, of which the basis was a deed of agreement signed by pursuer in prison, but these were never brought to any definite conclusion before the pursuer's incarceration.

Mr Forsyth, who acted as law agent for Alexander M'Intosh, and also for the defender, deponed that the diligence done against the pursuer was done at the instance of the defender, and that for the purpose of bringing the firm to an end; that the transactions were carried out by Mr Manson, his clerk, and that he declined to produce the letter of indemnity sought to be reduced because it was hypothecated to him for the business account due to him by the defender, against whom he had raised an action for payment of his account.

The pursuer himself deponed that he had become aware in the course of 1880 that Alexander was, unknown to him, transferring a considerable amount of the stock of the firm to the defender, for which he took bills in exchange. This was proved from the books of the firm to have commenced in April of that year. On 24th July the pursuer wrote to the defender the letter referred to in condescendence 11, which was as follows:—"Dear Sir,—I have just seen from an entry in the books of the firm made by my brother that you and he have had a transaction on 21st inst. I beg to inform you that I know nothing of the transaction, that it was not authorised by me, and that you must look to my brother Alexander alone for repayment. Further, you know the terms upon which my brother and I stand at present, and you must enter into all such transactions with him at your peril." He had also written again to him, and also to Alexander, in nearly the same terms to each, remonstrating against their having transactions with the stock of the firm. He had never been asked to pay the bill before he was charged on it. Any transaction between the Distillery Company and the defender or his brothers with reference to the bill had been carried on entirely without his knowledge. When lodged in prison he was very much upset, and could not sleep. He was in great distress of mind, and signed the documents merely to get out. He spent the time in his own cell, and took no part in the amusements of the other prisoners.

Mr Roy, S.S.C., who had formerly acted as agent for the firm when it was defending the excise prosecutions, and who had been sent for by the pursuer while in prison, and visited him there on the 19th August, deponed that he found the pursuer in a very agitated state, and not in his opinion fit to execute a deed, and that he "was desirous of getting out on almost any terms." This witness also stated that while he was employed by the firm Alexander M'Intosh used to bring the defender to his office. He formed the opinion that the defender was either a sleeping partner or a money-lender, or that he was connected with the firm in some way, and that he had great hostility to the pursuer. Mr Roy's account of the pursuer's condition while in prison was corroborated by pursuer's own agent, Mr Morison.

Alexander M'Intosh deponed that the renewal bill was granted because the Distillery Company would not wait; that they refused to take the bill of the firm without security, so he got the defender and his brother John to sign it along with him; that he never transferred goods of the firm to the defender in security of that bill; that all the goods defender got he granted bills for outside of that bill, and that he got goods for all the bills he granted to the firm with the exception of that of the Distillery Company; that he had nothing to do with putting his brother in prison, and gave no authority to Chalmers to execute the diligence, but was surprised when he heard of it; that after the pursuer was ejected from the firm he carried on the business alone under the name of M'Intosh Brothers & Co., and Chalmers had no interest in it; that when he signed the mandate authorising diligence against the firm he was not exactly aware of what he was doing; he had no notion what the purpose of it was; that at the sequestration of the firm in July 1881 defender was a creditor for more than £300.

Alexander Manson, Mr Forsyth's clerk, who obtained the pursuer's signature to the deeds in prison, said there did not appear to be anything wrong with either his health or mind at that time; he was quite cool and collected, and not in the least agitated. The witness did not threaten him in any way, nor do anything to put him in fear. He admitted telling him that a petition for his sequestration was contemplated, but he denied saying anything about any intention of seizing and selling his furniture. The reason he did not communicate with pursuer's agent on the 20th was because it was impossible to do so on account of his absence from town, and at the same time to procure the pursuer's liberation the same night. "I was quite aware that the interests of William M'Intosh under the deeds in question were entirely adverse to the interests of the other parties to the deeds. (Q) Did you not in such circumstances think it would be right that William M'Intosh should have an adviser?—(A) It was for him to think that. I had no consideration as to what his interests were when I went to the prison."

A person named Mouat who had been a fellow prisoner of the pursuer corroborated Mr Manson in stating that the pursuer while in prison was quite collected and quite able to transact business.

This witness had signed the agreement for the dissolution of partnership and the letter of indemnity, as a witness.

The defender deponed that he paid the bill when it fell due, and produced the cheque which he granted in payment. He had never got any benefit from his connection with M'Intosh Brothers, but had become bankrupt in consequence of it. He denied having ever said that he would have pursuer turned out of the firm, or that he would lay him by the heels if he could get a bill out of him.

It appeared that in the action raised against him by Forsyth for payment of his account he had deponed that the assignation was for behoof of Alexander M'Intosh, that he (defender) was to derive no benefit from it, that the suspension at pursuer's instance was opposed in the interest of Alexander M'Intosh, and that Mr Forsyth was never his agent, and had undertaken not to hold him liable for anything done in the account there sued for. In this action he deponed that Forsyth was his agent, that the object of the assignation and the other proceedings was not simply the benefit of Alexander M'Intosh.

The Lord Ordinary assoilzied the defender.

"*Opinion.*—There can be no question that the pursuer was imprisoned wrongfully, and the facts brought out in evidence tend to aggravate rather than to lessen the serious character of the wrong done to him. But it is admitted on record that the pursuer gave the defender 'a letter of indemnity bearing to free and relieve him of all liability for the imprisonment of the pursuer;' and I retain the opinion I formerly expressed, that if the indemnity cannot be set aside the claim for damage is barred.

"It is said that the letter of indemnity is not proved because it has not been produced for the inspection of the Court. But the pursuer has formally dispensed with the production of the document. Production was held as satisfied upon the pursuer's motion; and the express purpose for which he obtained that interlocutor was to enable the merits of the reduction to be discussed without actual production of the document, and on the footing that its contents were correctly stated in the record. But if there were no such interlocutor it is a universal rule that no fact needs to be proved in an action which the party against whom it is raised has admitted at the hearing, or by his pleadings, and the granting of the indemnity, and the terms in which it was conceived, are explicitly set forth by the pursuer in the 12th article of his condescendence. If, however, it were necessary to prove the letter, I think it has been competently and sufficiently proved. It is decided in England that secondary evidence may be given of the contents of a document when it is shown to be in the possession of a stranger to the cause not legally bound to produce it, and who refuses to produce it, after being sworn as a witness and asked for the document—*Miles* v. *Odey*, 6 C. and P. 732; *Marston* v. *Downes*, 1 A. and E. 31; and although it has not, so far as I am aware, been expressly so decided in Scotland, the principle of the English cases is entirely in accordance with the rules of evidence which are followed in this Court.

"On the merits of the reduction I am of opinion that no sufficient ground has been established for reducing the letter of indemnity o denying it effect. There can be no question that the pursuer was much distressed by his incarceration, and very anxious to obtain his release, but there is no evidence that his consent to the indemnity was obtained by fraud, or by force or fear, or that he was in such a condition of mind as to prevent his giving a perfectly intelligent consent. Before the documents in question were signed he had seen his agent Mr Morison, who explained to him the steps he was taking for the purpose of obtaining his liberation, and advised him to sign no deeds while he was in prison. The pursuer asked when he should be liberated under these proceedings, to which the agent answered that he could not undertake to say. But the pursuer was extremely anxious to be released at once, and having been informed by his agent that it was uncertain how long it might be before he could be liberated in course of law, he preferred to agree to the defender's terms, under which he might be immediately set free upon his executing certain documents, and among others the letter in question, relieving the defender of liability for his imprisonment. The evidence of Mouat, who witnessed his signature, and who was not cross-examined, is, that his consent to the deeds he signed was given quite freely and intelligently. It may have been, and I think it was, a very improper proceeding to take the other deeds from the pursuer while he was still in prison, or at least to make his signing them a condition of his being released from an imprisonment which was wrongful from the beginning. But the stipulation for an indemnity was a different matter. The evidence is, that being anxious to obtain his release sooner than he could possibly have obtained it without the defender's intervention, he undertook to relieve the defender of all liability for his incarceration, and I think he is bound by the undertaking.

"It is unnecessary to consider whether the agreement for a dissolution and the assignation of the pursuer's interest in the copartnery are equally binding, because the pursuer does not seek to have them set aside. But leaving the deeds standing, he seeks to recover damages from the defender for the wrong done to him by their execution. Now, I think the conduct of the defender in making use of the pursuer's imprisonment for the purpose of obtaining the execution of these deeds was highly blameable, even if he originally caused him to be imprisoned for any other and more legitimate purpose. But I cannot see that the pursuer has established any good ground for his claim of damages. If the deeds were not procured wrongfully, or if they were not to his prejudice, he can, of course, have no claim. If, on the other hand, they were wrongfully procured, it was in his option to abide by them or to set them aside; and if he has not chosen to set them aside he cannot recover damages from the defender for the consequences of his own election to have them standing. But if the claim were well founded in law, it fails because no damage has been proved. It is not proved that the consideration offered for the pursuer's retirement was less than the true value of his interest in the business. The continuing partner depones that the firm was insolvent when the assignation was granted; and whether this were so or not, it became bankrupt and was

sequestrated within twelve months thereafter. It appears to me, therefore, that the pursuer has suffered no prejudice from the execution of the assignation."

The pursuer reclaimed, and argued—On his own evidence in the previous case the defender was in bad faith. The diligence was not fairly used by him. It was not used to get payment of a debt, but to serve the designs of another person. The imprisonment was illegal. It had long been settled law that any document granted by a person in prison, especially by illegal use of diligence, was null at the option of the granter on the ground of force and fear—*Dundas* v. *Hardy*, 1700, M. 6860; *Craig* v. *Mowat*, 1555, M. 16,480; *Lowe* v. *Downie*, 1586, *ib.*; *Grant* v. *Leslie*, 1642, M. 16,483; *Marr* v. *Stewart*, 1667, M. 16,484; *M'Intosh* v. *Farquharson*, 1671, M. 16,485; *Murray* v. *Spalding*, 1672, M. 16,487; *Burnet* v. *Ewen*, 1680, M. 16,494; *Heriot* v. *Bird*, 1681, M. 16,496; *Whytford* v. *Muir*, 1688, 16,497; *Nisbet* v. *Stewart*, 1708, M. 16,512; also cases in Bell's Ill. i. 8, *et seq.* A transaction in prison might be valid if the parties were acting at arm's length, and the debtor were protected by an agent, but never where a creditor goes to an unprotected debtor and says "I know my diligence is illegal, and I am liable in damages, but you shan't stir from here until you have granted me a letter renouncing your right of action against me." The result of the decisions was, that wherever the debtor could show either that the imprisonment was not lawful in itself, or being lawful, that the deed granted related to some collateral or extrinsic obligation, it could not stand—*Fraser* v. *Black*, December 23, 1810, F.C.; Bell's Ill. i. 10; *Heriot*, *supra cit.*; Smith's Law of Contracts, p. 223; Pollock's Principles of Contract, p. 568.

The defender replied—There was no evidence that he had acted unfairly or *in mala fide*, or of any effect of force and fear on the mind of the pursuer. Imprisonment on a legal warrant had never been held to amount to force and fear, otherwise no transaction between creditor and debtor in prison (and these were common) could ever stand (Stair, i. 9, 8). The early cases cited were instances of documents granted while in private and unlawful imprisonment in unsettled times, and could not apply to public imprisonment under a regular and legal warrant. No case had gone the length of saying that a person can treat a formal document as so much waste paper merely because it was granted in prison to his incarcerating creditor—(*Craig* v. *Paton*, Dec. 13, 1865, 4 Macph. 192, Bell's Lect. i. 188). Having granted the letter of indemnity, the pursuer was now precluded from inquiring into the legality of the imprisonment.

In the course of the hearing pursuer's counsel stated that he now gave up claims to damage in respect of his ejection from the firm, as it appeared to have been at the time insolvent.

At advising—

Lord Justice-Clerk—Before we had allowed a proof in this case I had great doubts if the action of the defender could possibly be sustained, and now that we have heard the whole facts I have come to a very clear conclusion that this letter of indemnity must be set aside, and that the pursuer is entitled to prevail in his action.

There is one question of some importance which has been dealt with as preliminary. We have not before us the document which is the subject matter of the reduction. It is true production has been held as satisfied, but that upon an inventory only and without production of the document itself. Though that would have been sufficient to avoid decree, *contra non producta*, in terms of the certification contained in the summons, it would have been still competent to the pursuer to prove his grounds of reduction. But I think that if we were to proceed to reduce the document it would have been necessary that it be produced. It is stated against the production of the letter of indemnity that it cannot be produced without the assistance of a third party in whose custody it is. Mr Forsyth obtained it through his clerk Mr Manson, and he says it is subject to his hypothec, and declines to produce it. My impression is that that is not a case in which the plea of confidentiality could have been sustained, and that it is quite clear that the plea of hypothec cannot for a moment be sustained. But in the aspect which the case has now assumed it is hardly necessary to bring this question to a point.

The next question is, whether this document is a sufficient bar to this action? I have no doubt on this point. It turns out that the letter—I shall not now go into the question of the regularity of the diligence—was obtained from the pursuer while he was incarcerated at the instance of the defender at a time when his mind was naturally affected by his situation, and when he was not represented by an agent. I have always had a strong opinion on this point—that it does not matter whether there is any inability on the part of the prisoner to act for himself or not, but that in every case of the kind it is always the duty of the creditor's agent to see him properly protected if he is in a position where his freedom of action is in any way impeded, and I think the Lord Ordinary was warranted in saying that it was an improper proceeding to take a document from the pursuer when in prison and unprotected by an agent.

The next question is, whether the letter of indemnity granted in prison on an apparently regular warrant, but which was in reality illegal, can be sustained to any effect? As far as I can see from the authorities, it is sufficient in order to set aside a document so granted to show either that it was illegal in itself or was granted while the granter was under illegal diligence. I think that is the general rule, the only exception to which is where the surrounding circumstances make it appear that the obligation was granted for an adequate consideration. I think that is the rule to be gathered from the cases we had quoted to us. In the case of *Fraser* v. *Black* the Court found that the fact that the writ granted related to extrinsic matters was sufficient to warrant its being set aside. I think that is the sound view of the law—that where the diligence is itself illegal it is impossible to sustain any deed granted while the party is imprisoned under it, unless this plea were excluded by a clear advantage and consideration received on the part of the debtor. When we come to analyse the facts which we have here, I think we need not, for the purpose of deciding the case, lay down any abstract rule. William M'Intosh and Alexander M'Intosh were partners in the firm

of M'Intosh & Co. Chalmers was not a partner. It appears that the pursuer was remonstrating with his brother about his transactions with Chalmers with the goods of the firm, and that Chalmers was greatly in Alexander's confidence. It appears that he also remonstrated with Chalmers. At that time a bill accepted by the firm was past due and had been protested by the holders. On 24th July a letter was written by the pursuer to Chalmers warning him that he was not on good terms with his brother, and would not be responsible for his transactions, and on the same day the renewal bill was granted by Alexander along with the defender and his brother John, substantially to take up the bill already protested. And then comes a singular transaction — the original creditors in the first bill granted an assignation of the old bill and the diligence upon it to Chalmers, and on that assignation the pursuer was charged and incarcerated.

I have come to a very clear conclusion that the pursuer's incarceration was not intended to compel payment of any debt due by him to Chalmers, but to benefit Alexander M'Intosh; and when I contrast Chalmers' evidence in this case with what he said in the former case, and with Alexander M'Intosh's evidence, I have come to the conclusion, without any hesitation, that this letter of indemnity cannot be maintained in bar of this action, and that damages should be given to the pursuer for illegal incarceration.

Lord Young — I concur in your Lordship's opinion, and also in the grounds which you have stated, and I have not much further to add. I should like, however, to make a few observations regarding some features of the case which seem to me interesting and important.

The action is an action of damages for wrongous imprisonment, combined with a reduction—or at least a reductive conclusion has been conditionally introduced into the summons—of a letter of indemnity which is pleaded in bar of the action. It is admitted and clear that the imprisonment for which damages are claimed was wrongful—was illegal—that is to say, it was an invasion and violation such as the law would not sanction of the rights, as a citizen, of the party imprisoned; and it being clear that this diligence was illegal in the technical sense of wrongful, the defence — the only defence — is that the pursuer undertook as a condition of being set free to bring no action in respect of the imprisonment.

Now, the reduction of this letter of indemnity is concluded for, and that conclusion is rested on this, that looking to the circumstances under which it was obtained it cannot have effect. And if it were necessary to proceed in the reduction, I confess I do not see how we could do so without the production of the document, and I am of opinion with your Lordship that no agent could, on any plea of hypothec, have withheld production of that letter or an equivalent of it for the satisfaction of parties and of the Court. I have never known a case of reduction of a document proceeding without production of the document itself or an equivalent. It is true the defender could not be dealt with as contumacious in not producing it, in respect it was pledged to his agent, but I think a diligence should have been granted to enable him to recover the document, and if he had means of recovering it I should not have entertained the reduction till it was produced. That that letter could have been retained by an agent on hypothec is absurd. No agent's hypothec could stand in a bar of a document libelled to be reduced in this Court being produced and lodged in process; and to have secondary evidence of the contents of such a document is ridiculous. For what is secondary evidence here? The kind of secondary evidence which has been considered good here is to this effect—"I have the document, and I will not tell you its terms, but only my opinion of its import." It is absurd to call that secondary evidence. The best secondary evidence of the terms of a writing is a copy, and to hold that hypothec could stand in the way of the one and not of the other, *i.e.*, in the way of the primary and not of the secondary evidence would be ridiculous. But I do not think it is necessary to delay the decision of the case for the production of the document, or to proceed upon the reductive conclusions. In that view the case is this—the imprisonment was wrongful, and the author of the imprisonment says—"You shall not recover damages for it, because as a condition of its termination you have granted to me a letter of indemnity." I am of opinion that such a transaction by the author of a wrongful imprisonment as a condition of its termination cannot be upheld. I think there is a radical distinction in this respect between lawful and unlawful diligence, and even where a doubt as to its lawfulness has to be encountered. I think there is a fundamental difference between a person under legal restraint, and a person wrongfully imprisoned, and I am further of opinion that a transaction between the author of a wrongful imprisonment and his victim as a condition of ending it cannot be upheld, and that the doctrine of transaction as between independent persons cannot be applied to this case. The party is entitled to say—"I was under illegal restraint, and I shall show it." But while of that opinion, I am also of opinion that it might be too strong so to state it as a general proposition as I have stated it. But looking to all the circumstances of the diligence here, and to the circumstances of the transaction, I agree with your Lordship that—if the general proposition is too wide—that transaction should not be upheld as a bar to this action, and that we may so decide without knowing in the least what the terms of the document are, I would suggest that we should deal with the case by sustaining the acion as an action of damages for wrongous imprisonment, and find that the imprisonment was wrongful, and that the letter of indemnity, the subject of the defender's fourth plea-in-law, cannot be sustained as a defence to the action.

Lord Rutherfurd Clark — If the only case of the pursuer had been that the diligence was ultimately held to have been illegal, or, in other words, was beyond the legal right of the defender, I should have had great hesitation in holding that the pursuer was entitled to reduce the letter of indemnity. But I do not go into that question. It is not necessary to do so. I decide the case on the special circumstances to which your Lordship has referred.

In my opinion it has been established that the defender did not use the diligence honestly—that is, for the purpose of recovering a debt due to him

by the pursuer, but for the purpose of aiding Alexander M'Intosh in his designs against the pursuer. Further, I think that it is clear that the defender must have known, or must be held to have known, that the diligence was illegal, and must be held to have used it with that knowledge. In these circumstances I cannot hold a letter of indemnity to be binding on the pursuer which was taken from him while in prison and without legal advice, and without knowledge either of the facts or of his rights. The parties did not transact with equal knowledge or on equal terms.

The Court pronounced this interlocutor—

"The Lords . . . sustain the action as an action of damages for wrongous imprisonment: Find that the imprisonment complained of by the pursuer was wrongful, that the letter of indemnity founded on by the defender cannot be sustained as a bar to the action: Therefore recal the said interlocutor; find the pursuer entitled to damages; assess the same at £20 sterling; and ordain the defender to make payment of that sum to the pursuer: Find the pursuer entitled to expenses; remit to the Auditor to tax the same and report, reserving the question of modification, and decern."

Counsel for Pursuer (Reclaimer)—Guthrie Smith—Rhind—Shaw. Agent—Peter Morison, S.S.C.

Counsel for Defender—Campbell Smith. Agent—L. M'Intosh, S.S.C.

Friday, October 19.

FIRST DIVISION.

SPECIAL CASE—FIFE COUNTY ROAD TRUSTEES *v.* COWDENBEATH COAL COMPANY.

Road—Public Road—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 32 *—Agreement for Use of Level-Crossing.*

Prior to 1878, road trustees, in return for an annual payment of £20, granted to a mineral company the right to construct a railway on the level across a public road, it being further agreed that the use of the crossing should continue only so long as the public safety and convenience were not endangered, and that its use was to be "discontinued whenever the trustees may desire this to be done." By the Roads and Bridges Act of 1878 the whole property, powers, and privileges of the road trust were transferred to the county road trustees appointed under that Act. *Held* that the company were bound, in addition to paying the annual assessment for roads made under the statute, to continue to pay the £20 annually for the privilege of the level-crossing to the county road trustees, but that the trustees might at any time bring the agreement to an end on giving reasonable notice, without reason assigned.

This Special Case arose out of an agreement entered into in 1855 between the Trustees of the Great North Road, which passes through the county of Fife, and the Forth Iron Company, who were the lessees of the minerals in the estate of Cowdenbeath in that county. By this agreement permission had been granted to the Company to construct a railway on the level, crossing the Great North Road at right angles, for the purpose of conveying minerals from their workings on the west side to their principal depôt on the east side of the road.

The annual payment agreed to be made by the Company to the Road Trustees for the use of this crossing was £20.

By an agreement, between the same parties dated 6th September and 25th October 1867, and 15th April 1868, it was further provided, *inter alia*—"The parties, considering that on 18th April 1855 permission was given to the said Company to construct a level-crossing on the Great North Road for the purpose of conveying their minerals across said turnpike road by means of horse traction, and that the attention of the Road Trustees has been drawn to the fact that loaded waggons from the pits of the said Company can be taken across the turnpike road solely by the impetus acquired in coming down the incline from the pits, whereby danger may arise to the public, therefore it is agreed as follows:—*First*, That the permission to use the level-crossing is personal to the said Company, is limited to their mineral traffic from their said pits, and traffic to said pits in connection with said mineral traffic, and shall continue to be used only so long as the said Trustees think that the public safety is not thereby endangered, or the public put to greater inconvenience than the said Trustees consider right, and that the use of the rails across the said turnpike road shall be discontinued, and the rails removed, at the expense of the said Company, whenever the said Trustees may desire this to be done."

In 1870 the Cowdenbeath Coal Company succeeded the Forth Iron Company as the lessees of the said minerals, and down to 1879 they regularly made use of the crossing in question and paid the Road Trustees annually the sum of £20 for the use thereof in terms of the original agreement.

On the 17th December 1878, the Commissioners of Supply of Fife adopted the Roads and Bridges (Scotland) Act 1878, and at Whitsunday 1879 the tolls in Fife were abolished and the management of the highways was, under the said Act, taken over by the County Road Trustees of Fife.

Section 32 of the Roads and Bridges (Scotland) Act 1878, provides:—"From and after the commencement of this Act, the whole turnpike roads, statute labour roads, highways, and bridges within each county respectively shall form one general trust, with such separate district management as shall be prescribed by the trustees as hereinbefore provided; and all the roads, bridges, lands, buildings, works, rights, interests, moneys, property, and effects, rights of action, claims and demands, powers, immunities, and privileges whatever, except as hereinafter provided, vested in or belonging to the trustees of any such turnpike roads, statute labour roads, highways, and bridges within the county, shall be by virtue of this Act transferred to and vested in the county road trustees appointed under this Act, who, subject to the qualifications hereinafter expressed, shall be liable in all the debts, liabilities, claims,