plied mandate and power to attend a meeting of creditors of one of the partnership debtors, and, for the partnership, to enter into a composition arrangement which would be binding on the partnership.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the appeal against the interlocutor of the Sheriff of 24th July 1894, Recal the same: Affirm the interlocutor of the Sheriff-Substitute of 11th July 1894, and remit the cause back to the Sheriff-Substitute to pronounce decree accordingly," &c.

Counsel for the Pursuers — Macaulay Smith. Agents—Patrick & James, S.S.C.

Counsel for the Defender—Guy. Agents —Sturrock & Sturrock, S.S.C.

Friday, February 1.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* HIGHLAND RAILWAY COMPANY.

Arbitration — Submission — Award — Construction — Admissibility of Extrinsic Evidence.

By agreement to refer, dated 18th June 1886, the Highland and the Great North of Scotland Railway Companies submitted to the decision of Mr Beale as arbiter the following question:—"Whether the proviso of section 82 of the Highland Railway Act 1865 applies to traffic exchanged under the Great North of Scotland Act 1884 between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage, and under the rules of the Clearing House?"

The arbiter in his award, dated 9th July 1886, awarded and determined "that the proviso of section 82 of the Highland Railway Act 1865 . . . does not apply to traffic exchanged under the Great North of Scotland Act 1884 between the two companies at Elgin," and further "that the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage and under the rules of the Clearing House."

In an action raised by the Great North of Scotland Railway Company against the Highland Railway Company for implement of the award, the defenders asked that they should be allowed a proof of the following averment by them:—"The terms 'traffic exchanged under the Act of 1884 between the two companies at Elgin,' occurring in the question submitted to Mr Beale, do not include, and were understood by the parties not to include, passenger traffic. This was explained to Mr Beale, and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."

The Court (*aff.* the judgment of Lord Wellwood) *refused* to allow the proof asked for by the defenders, on the ground that the questions put to the arbiter and his answers thereto were distinct and unambiguous.

By the Highland Railway Act 1865 (28 and 29 Vict. c. 168) the undertakings of the Inverness and Aberdeen Junction and the Inverness and Perth Junction Railway Companies were dissolved, and the whole united as the Highland Railway Company. By section 82 it was provided that the Highland Company should afford the Great North of Scotland all needful accommodations and facilities for through traffic, and should be bound to accept from the Great North of Scotland Railway Company the same mileage rate in respect of competitive traffic passing *via* Aberdeen as they were for the time charging in respect of similar traffic passing *via* Dunkeld: "Provided always that the rates and charges shall be calculated as if the traffic passed over the shortest distance, that the lines of the company, and the lines of or worked by the said Great North of Scotland Railway Company in connection would give, and out of such charges the company shall receive its full mileage proportion of the distance which the traffic passing over their railways has actually traversed." . . .

Section 83 provided that "In all cases through traffic, whether by railway or otherwise, passing between the lines of the companies to or from places to the east or south of Keith shall be exchanged at Keith."

By the Great North of Scotland Railway Act 1884 it was provided that traffic over the lines of the two companies might be exchanged at any junction.

After the passing of this Act the Great North of Scotland Railway Company began to exchange traffic from places east and south of Keith at Elgin, carrying it from Keith to Elgin by their own line *via* Craigellachie, instead of sending it by the Highland Company's route from Keith to Elgin *via* Mulben, which is nine miles shorter than the route *via* Craigellachie.

The Highland Railway Company appealed to the proviso in section 82 of their Act of 1865, which is quoted above. The Great North of Scotland Railway Company denied that this proviso controlled the Act of 1884, and as the companies could not agree as to the footing on which through rates should be divided, they agreed on 18th June 1886 to refer the following questions to Mr James Beale as arbiter:—"(1) Whether the proviso to section 82 of the Highland Act 1865, above quoted,

applies to traffic exchanged under the Act of 1884 between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage and under the rules of the Clearing-House. (2) If the proviso applies at all, does it apply to anything other than competitive traffic passing *via* Aberdeen."

On 9th July 1886 Mr Beale issued the following award—"I hereby award and determine that the proviso of section 82 of the Highland Railway Act 1865, printed on the fourth page of, and referred to in the above written submission, does not apply to traffic exchanged under the Great North of Scotland Railway Act 1884 between the two companies at Elgin, and I further award and determine that the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage and under the rules of the Clearing-House."

Various questions arose between the companies as to the meaning and effect of this award, and in February 1894 the Great North of Scotland Railway Company brought this action against the Highland Railway Company with the object of having them ordained to implement the decree-arbitral in the manner in which the pursuers construed it.

The parties maintained various conflicting contentions as to the construction and effect of the award, the pursuers, *inter alia*, asserting and the defenders denying that it applied to passenger traffic. In support of their contention on this point the defenders also asked to be allowed a proof of the following averment—"The terms 'traffic exchanged under the Act of 1884 between the two companies at Elgin,' occurring in the first question submitted to Mr Beale do not include, and were understood by the parties not to include, passenger traffic. This was explained to Mr Beale, and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."

On 25th November 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds and declares, decerns and ordains, in terms of the conclusions of the the summons," &c.

"*Opinion.*—[*After dealing with the questions raised as to the construction of the award his Lordship referred to the defenders' motion for proof and proceeded*]—It is true that in certain circumstances it is competent to examine an arbiter as to what took place before him, and as to what is embraced in his award—*The Duke of Buccleuch*, in L.R., 5 Eng. and Ir. App. 418 *Glasgow City and District Railway Company* v. *M'George, Cowan, & Galloway*, 13 R. 609, are illustrations. Such a course may be competent where there is a reasonable doubt as to the terms of the question submitted to the arbiter, or where the award is in general terms, and it is relevantly averred that the arbiter arrived at it on consideration of matters *ultra vires compromissi*. But here it is proposed by parole evidence, and on averments of the vaguest kind to contradict the written agreements of the parties which, in my opinion, unambiguously embrace traffic of every description. As I have already pointed out, the award simply echoes the question put; and therefore we have to look to the terms of the submission to ascertain whether there is any ambiguity. In my opinion there is no reasonable doubt as to the meaning of the submission, and I think it would be dangerous, after an interval of eight years, to send such loose averments to proof. I have the less hesitation in refusing proof, because I should gather from the previous case between the parties that the present defenders' contention there was that Mr Beale did deal with the question of passenger fares, but that his award fell to be interpreted to the effect that the division of passenger fares should be regulated by the 25th rule of the Clearing-House. . . .

"On the whole matter, I think the pursuers are entitled to decree."

The defenders reclaimed, and argued, *inter alia*, that proof should be allowed that Mr Beale pronounced his award on the understanding that no question as to the division of passenger traffic receipts had been submitted to him—*Macdonald* v. *Longbottom*, June 15, 1860, 29 L.J., Q.B. 256; *Mumford* v. *Gething*, November 17, 1859, 29 L.J., C.P. 104.

Argued for the pursuers, *inter alia*—Mr Beale's decision was unambiguous, and it was absurd to ask the Court, after a lapse of eight years, to allow proof of what the person who pronounced it meant by it.

At advising—

LORD JUSTICE-CLERK—[*After dealing with the questions raised as to the meaning and effect of the award*]—The only other question raised was upon the allegation that it was understood that "traffic" in the question did not include passenger traffic, and that the parties and Mr Beale proceeded upon that footing in the submission, and the Highland Company ask a proof that they may establish this fact so as to affect the scope of the award. It was also contended in debate that the award was ambiguous. I cannot assent to the suggestion that there is any ambiguity. The question is distinct, and was adjusted by the parties as being distinct, and Mr Beale adhered to the words of the question in his answer. But if the question be plain, and the answer to it be plain, is it competent to enter upon an inquiry whether the arbiter understood it, or how he understood it? I do not think so. The cases cited where proof has been allowed are all cases of a different kind from this. Here all that is said is that the arbiter understood that part of what on the face of it is included in the question submitted was not dealt with in an award which deals in terms with the whole question put. We must assume that the arbiter selected by the parties understood

the question submitted to him, and disposed of it not partially but fully, as in form his award bears to do, and I see no reason for allowing a proof such as that asked for by the Highland Company.

I would move your Lordships to adhere to the interlocutor reclaimed against.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court adhered.

Counsel for the Pursuers — Graham Murray, Q.C.—Ure—Ferguson. Agents—T. J. Gordon & Falconer, W.S.

Counsel for the Defenders—H. Johnston—Dundas—Blair. Agents—J. K. & W. P. Lindsay, W.S.

Friday, February 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MACKERSY *v.* DAVIS & SONS, LIMITED, AND ANOTHER.

Reparation—Wrongful Use of Diligence—Breach of Obligation—Relevancy.

A creditor wrote to his debtor "that failing a settlement within two days proceedings are to be adopted for recovery of the amount due." No notice was taken of this letter.

Held (*rev.* judgment of Lord Stormonth Darling) that the creditor had come under no obligation to refrain from taking proceedings until two days had elapsed, and that the debtor had no ground for an action of damages because diligence had been used within that period.

Observed that possibly such an obligation might have been constituted if the debtor had written acknowledging the letter as a promise to delay taking action for two days, and the creditor had acquiesced in that construction.

Mr W. R. Mackersy, W.S., Edinburgh, was debtor to Messrs Davis & Sons, Limited, money-lenders there, in a promissory-note for £30, which fell due on 1st November 1894. Upon 7th November 1894 Marcus J. Brown, S.S.C., the creditors' law-agent, wrote to Mr Mackersy as follows:—"I am requested by my clients, Messrs J. Davis & Sons, Limited, to receive payment from you of the sum of £30, being the amount contained in your past-due acceptance to them. I am also requested to intimate that failing a settlement within two days proceedings are to be adopted for recovery of the amount due."

No notice was taken of this letter, nor was any offer of payment made until 19th November. Upon 9th November the promissory-note having been presented at the debtor's office during his temporary absence, was protested. The debtor was on the same day charged upon the extract registered protest, and his name subsequently appeared in the "black list."

Thereafter Mr Mackersy brought an action of damages against J. Davis & Sons, Limited, and M. J. Brown, conjunctly and severally, for payment of £500 for wrongful use of diligence, in which he averred that by the terms of the letter of 7th November "the defenders promised or undertook to allow the pursuer two days, viz., the 8th and 9th November, within which to make payment of the sum due under said note before protesting the said note, registering protest, or taking any other proceedings thereon for the recovery of said sum. The pursuer, relying on the said promise or undertaking, refrained from making immediate payment of the sum due, but was prepared to make payment thereof to the defenders before the expiry of the 9th November;" and pleaded—"The defenders having wrongfully and in breach of their promise or undertaking protested the promissory-note condescended on, and registered the protest and charged the pursuer as condescended on, whereby great loss and damage has been suffered by the pursuer, they are liable to him in damages."

The defenders both pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant. (2) The proceedings complained of not having been wrongful, the defenders should be assoilzied."

Upon 19th January 1895 the Lord Ordinary (STORMONTH DARLING) approved separate issues for the trial of the case against each of the defenders.

"*Opinion.*—I am of opinion that the letter of 7th November 1894 set out on record imports an obligation to stay proceedings for two days. The precise extent of this obligation may depend on facts as to the despatch and receipt of the letter, and it will be for the judge presiding at the trial to direct the jury as to its proper construction. But if, as the pursuer avers, the note was protested, the protest registered, and a charge given within the period allowed for payment, it follows that these proceedings were wrongful, and that damages are due.

"So much for the case against the creditor. But an issue is asked also against the law-agent, and it was strenuously argued by Mr Cullen that although an agent may be liable for his own delict, he is not liable for breach of an undertaking given on behalf of the principal and not repudiated by him. I am of opinion that this distinction is not warranted either by doctrine or authority. The liability of the agent (along with the principal) for wrongous use of diligence, where the wrong consists in some irregularity of procedure, is undoubted. But the cases go much further than that. He is equally liable if he does diligence for the full amount of the debt, when he knows that part of it has been paid, or that a composition has been accepted, or that there has been a due tender of payment; in short, when he knows of any circumstance which makes the use of diligence unjustifiable—(See chap. 21 of Begg on Law-Agents). Now, there cannot be a clearer case of such knowledge than when the law-