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-

agent himself has written a letter promising to take no proceedings for a certain time. I have, therefore, allowed an issue against both defenders, and the form as adjusted is similar to that in *Sturrock* v. *Welsh & Forbes*, 18 R. 109."

The defenders reclaimed.

Argued for Davis & Company—The claim for damage for alleged wrongful diligence was rested entirely upon an unilateral objection supposed to have been constituted by the letter of 7th November. No such obligation could be spelt out of the terms of that letter. It was plainly not written for the purpose of granting any concession to the debtor or giving him time. Time had not been asked. The letter was written in the interest of the creditor pressing for payment, and not in the interest of the debtor. It indicated a resolution to take proceedings in two days, but it did not bind the creditor to wait for that time—*cf. Kennedy*, Mor. 9441. The diligence was done on the 2nd day. If the action was irrelevant against either of the defenders it must fail, because the alleged claim was made against them conjunctly and severally.

Argued for Brown—No obligation was given by the letter. Even if there was an obligation, it was the obligation of the creditor, and not of his law-agent. Accordingly an action against this defender based on breach of contract was irrelevant.

Argued for the pursuer—The letter doubtless contained a threat, but a conditional threat, viz., a threat of diligence failing payment in two days. Every businessman would read that as an undertaking not to proceed to extreme measures until two days had elapsed—see letter in *Cameron* v. *Mortimer*, February 9, 1872, 10 Macph. 461. It was immaterial whether the obligation was that of the debtor or of his law-agent, because the obligation was only the *causa remota* of this action, which was based upon a wrong done jointly by both. The law-agent, of course, knew of the letter, for he wrote it, therefore he knew that diligence within the two days would be wrongful, nevertheless he joined with the debtor in doing this wrong. For wrongful use of diligence both the person at whose instance it was done and his law-agent who carried it through were liable in damages to the person wronged. Even where the claim was joint and several, it was quite proper to have a separate issue against principal and agent—*Smith & Company* v. *Taylor*, December 8, 1882, 10 R. 291; *Sturrock* v. *Welsh & Forbes*, November 14, 1890, 18 R. 109; *MacRobbie* v. *M'Lellan's Trustees*, January 31, 1891, 18 R. 470.

At advising—

LORD M'LAREN—This is an action claiming damages against a creditor of the pursuer and his solicitor for alleged wrongous use of diligence. The claim is a joint and several one, and accordingly unless there is a relevant claim against both defenders it follows that there is no relevant claim against either.

Again, it has been much discussed whether the claim is based upon breach of contract or upon delict, but in the view which I take of this case, it is not necessary to come to any decision upon that question. My own opinion tends in the direction of Mr Clyde's argument, because wherever a creditor is not entitled to use diligence, either because of the non-existence of the conditions necessary to the payment of the debt, or because he has bound himself not to use diligence, he commits a wrong in using it. Wherever a creditor obtains a warrant without disclosing to the authority giving out the warrant that the debt is not matured, he commits a legal wrong, and I am rather inclined to think that all irregularities in the use of diligence are in that sense wrongful acts.

But in considering the relevancy of this case, the first subject of inquiry is the meaning of the so-called obligatory letter, which is in these terms—[*His Lordship read the letter given above*]. Now, I think that the debtor on receiving that letter might draw two inferences. He might infer, first, that if he did not pay the debt within two days proceedings would be taken against him, and he might also infer—although of this I am more doubtful—that if he entered into negotiations for payment of the debt, or if he promised payment at the end of two days, he would not be distressed for payment during that time. The letter might be regarded as a step opening the way towards voluntary payment, but also as containing a threat in the event of payment not being made.

If the pursuer had answered the letter and promised payment in two days, and if on receiving his reply the creditor had done nothing to lead him to suppose that action would be taken sooner, this would have amounted to an indulgence, and in such circumstances I think the creditor would have been chargeable with breach of agreement, and would have acted wrongfully had he used diligence before the two days expired. In the case supposed it is the debtor's offer to pay, and the tacit acceptance of that offer (which is as good as a formal acceptance) that create the obligation not to use diligence. But the essential step to the rearing up of an implied obligation to give time must be taken by the debtor himself. Here he merely says that the letter was received by him, and that diligence was done within the two days; he does not say that he gave an undertaking to pay his debt in two days in response to the creditor's demand.

I cannot read this letter as constituting an unilateral obligation on the part of the creditor to refrain from enforcing his legal rights. Its manifest purpose was to compel payment rather than to grant indulgence. I think that in this case the foundation for a case of wrongful diligence does not exist, and that the defenders committed no legal wrong in protesting and charging on the bill.

It follows, therefore, from my view of the construction of the letter, which is

different from that of the Lord Ordinary, that the pursuer is not entitled to an issue, and that the defenders should be assoilzied.

LORD KINNEAR—I am of the same opinion. The only wrong alleged is the use of diligence in breach of an undertaking. I do not think the defender gave any such undertaking, or came under any obligation not to exercise his legal rights. It seems to me that the letter was truly a demand for payment of an already overdue bill. The creditor was entitled to immediate payment, and he goes on to say that if payment is not made within two days he will take proceedings. The recipient of the letter might not unnaturally understand that to mean that the creditor did not at the time of writing intend to take proceedings for two days. But a mere indication of intention, if it had been much more unequivocal than it really is, will not make a contract or infer an obligation. It might perhaps have been converted into an obligation if the pursuer had treated it as an offer for acceptance, and the writer had assented to that construction. But the pursuer took no notice of the letter whatever. He thought it expressed an intention, and he ran the risk of his creditor adhering to his intention, and so delayed payment of an overdue bill without attempting to get an undertaking from his creditor not to proceed with diligence.

I think the letter amounts to nothing more than notice that the creditor will certainly take proceedings after two days, but without any promise that he will not take proceedings earlier if he thinks it necessary. If he thought the pursuer's silence a sufficient reason for using diligence earlier, he was within his legal right in taking the steps complained of.

I agree therefore in thinking that there is no issuable matter on record, and that the defenders must be assoilzied.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuer—Clyde—Sandeman. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders Davis & Sons—Guthrie—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defender Brown—Cullen. Agent—Party.

Saturday, February 16.

SECOND DIVISION.

M'CLYMONT'S EXECUTORS *v.* OSBORNES.

Succession—Fee or Liferent—Substitution in Moveable Estate.

A testator directed his executors to invest one-third of the residue of his estate in the name of his niece Mrs O., "she to receive the interest or dividends from the same during her lifetime for the maintenance, upbringing, and education of her children, and at her death the principal to be divided equally among her children except George and Thomas, who are provided for in this will otherwise; declaring, however, that the principal is not to be divided until her youngest child is twenty-one years of age in the event of her dying before that term."

Mrs O. and six children, including George and Thomas, survived the testator. Thereafter Mrs O. died intestate and without having disposed of any part of the one-third of the residue during her life. She was survived by three children, George, Thomas, and John,

Held (1) that under the will Mrs O. took the fee of one-third of the residue, and (2) that failing her there was a substitution in favour of her children other than George and Thomas, and that, as Mrs O. had done nothing to evacuate the destination, her son John succeeded on her death to the fee of the said share.

Frog's Creditors v. *His Children*, 1735, 3 Ross's L.C., Land Rights, 602, and *Lindsay* v. *Dott*, 1807, M. *voce* Fiar, App. 1, *followed.*

Thomas M'Clymont, who died unmarried on 16th February 1883, left a holograph will or testament dated 19th February 1880, by which he ordained his executors nominated under the will to pay over the residue of his estate as follows:—"One-third of said residue to be invested in railway debentures or railway preference shares in name of Agnes Smith or Osborne, wife of George Osborne, my niece, she to receive the interest or dividends from same during her lifetime for the maintenance, upbringing, and education of her children, and at her death the principal to be divided equally among her children except George and Thomas, who are provided for in this will otherwise; declaring, however, that the principal is not to be divided until her youngest child is twenty-one years of age in the event of her dying before that term."

The capital sum represented by the one-third of residue in question was invested by the executors in railway preference or debenture stock, and amounted to £3800, and the revenue was not less than £140.

At the dates of the execution of the said will and at the death of the testator, Mrs Osborne's family consisted of six children,