charge; and (*b*) that the conviction is vague and indefinite, and that it cannot be ascertained therefrom, or from the whole proceedings, of what or upon what facts the complainers were convicted.

Argued for the complainers—The complaint was indefinite and wanting in specification of the *modus* of the alleged crime. It began with the double charge, and proceeded to state a double *modus*. It was not clear which *modus* applied to the charge of assault, which to the charge of breach of the peace. The proper way to libel was to set forth first one charge, with the *modus* appropriate thereto, and then the alternative charge and *modus*. (2) According to the complaint and conviction, each of the accused was convicted of assaulting the other and of being himself assaulted. There was nothing to show that one or other of them had not been convicted, not in respect of anything he had done himself, but in respect of something done to him. On such a complaint a conviction of assault as libelled was too general. A conviction must show clearly that the accused was guilty of doing something, not having something done to him.—*Barr* v. *M'Phee*, July 18, 1883, 5 Coup. 312; *Galbraith* v. *Disselduff*, October 25, 1895, 2 Adam, 4.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—I do not know whether the Court may congratulate itself that the case has not come up on a full statement of the facts, which might have on a case stated presented a very difficult question. But it has been brought here on a suspension, and two objections to the conviction are stated. I cannot give any effect to the first objection, that each of the accused, if convicted of assault, might be also held to be convicted of breach of the peace under the second alternative. The complaint is stated with more elaboration than is usual, and is rather in the form of the old indictment. Now, under the old indictment, if a man was charged with assault, and alternatively with breach of the peace, and was found guilty of assault, he was convicted of the acts set forth under the charge of assault and not of those set forth under the charge of breach of the peace. Therefore I think there is nothing in the first objection.

The second objection is that the magistrate in convicting each of the accused of the assault as libelled has convicted each of them of assaulting the other and of being himself assaulted. But that objection is untenable, because when a man is convicted of assault he is convicted in respect of the things he is alleged to have done himself, and not in respect of those things alleged to have been done to him.

There is in my opinion no ground for interfering with the conviction.

LORD KYLLACHY and LORD LOW concurred.

The Court refused the suspension.

Counsel for the Complainers—Guy—Blair. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—Shaw, Q.C. —Lees. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, May 18.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

GEMMELL *v.* ANNANDALE & SON LIMITED.

Principal and Agent—Agent's Powers—Præpositus negotiis—Payment—Payment to Subordinate.

A payment made to and receipt granted by a subordinate of the payee on his behalf is good against the payee himself if either (1) the granter of the receipt receives the money and grants the receipt in the payee's place of business, or (2) if he receives the money and grants the receipt away from the payee's place of business, provided that the payer knows him to be engaged in the carrying on of the payee's business, and has no reason to doubt his authority to receive the money.

This was an action brought in the Sheriff Court at Edinburgh by James Gemmell junior, rag merchant, 69 Cowgate, Edinburgh, against Annandale & Son, Limited, paper manufacturers, Polton. The pursuer craved decree (1) for payment of the sum of £19, 1s. 6d., being the price of certain rags purchased by the defenders from him; and (2) for delivery of three parcels of rags which the pursuer alleged were his property, and of which he maintained the defenders had taken and retained possession wrongfully, improperly, and without the pursuer's consent, or failing such delivery for payment of the sum of £22, 14s. 6d. as damages.

The pursuer averred that he was the sole partner in the business carried on at 69 Cowgate, that he had sold and delivered certain rags to the defenders, but that they had not paid for them, and that the price, viz., £19, 1s. 6d., the sum first sued for, was still due and resting-owing by them to him. He also averred that while he was in prison under a conviction for assaulting his father (James Gemmell senior), his sister, and his brother, his father, who, as the pursuer averred, had ceased to have any interest in the Cowgate business, and had no authority to deal on the pursuer's behalf, wrongfully, illegally, and without the consent or authority of the pursuer, and in his absence. removed certain rags from the pursuer's premises, and delivered them to the defenders.

The defenders on the other hand averred that they had paid the sum of £19, 1s. 6d. referred to, and had received a valid and

sufficient receipt therefor, which they produced, and that as regards the parcels of rags above mentioned they had bought them in the ordinary course of business from the pursuer's father, who was originally sole partner in the Cowgate business, and still retained an interest in it, and who had always taken an active part in its management.

The pursuer pleaded, *inter alia*—"(1) The pursuer having sold and delivered to the defenders the goods first concluded for at the price stated, and said price being due and resting-owing to the pursuer, decree should be pronounced therefor with expenses. (2) The defenders having wrongfully, without the consent or authority of the pursuer, and illegally procured possession of the goods of the pursuer, as condescended on, and which goods they still retain, they ought to be decerned to make delivery thereof as craved."

The defenders pleaded, *inter alia*—"(2) No title to sue. (6) In respect that the pursuer and the said James Gemmell senior are partners in business, the defenders are not liable, and should be assoilzied with expenses. (7) Or alternatively, in respect that James Gemmell senior was held out by the pursuer to the defenders as his manager, and was *præpositus negotiis*, defenders are not liable, and are entitled to absolvitor."

After sundry procedure a proof was allowed and led, the result of which may be summarised as follows:—For a number of years previous to Whitsunday 1892 James Gemmell senior, the pursuer's father, carried on business as a rag merchant at 69 Cowgate under his own name, and on his own behalf, being, however, assisted by his family. At Whitsunday 1892 certain transactions took place between the pursuer and his father, the result of which was that the pursuer took the premises in Cowgate, the father at first being cautioner for the rent, the signboard over the door was changed to "James Gemmell junior, Licensed Broker," the broker's licence being taken out in his name, and the business account headings and memorandum and letter forms were printed in the name of "James Gemmell junior, merchant."

There was a conflict of evidence between the pursuer on the one hand, and his father, sister, and brother on the other hand, as to the true nature and effect of these transactions, the pursuer maintaining that he acquired his father's right in the business for value, as the documents produced by him represented, and the father maintaining that in fact he still continued to be a partner in the business, which was to be carried on in the pursuer's name for behoof of the whole family. He also explained that the apparent sale of the stock was "to protect the newly created business and creditors from the ravages of the old ones." He had got into financial difficulties at that time. The Court ultimately held that upon the evidence the pursuer had failed to prove that any material change in the ownership and conduct of the business took place in 1892, or thereafter, or that the pursuer then became sole owner. There was no proof that any intimation of a change in the ownership of the business was given to the defenders. At Whitsunday 1892 Gemmell senior left 69 Cowgate, where he had previously resided, and went to Elm Row, where for a couple of years or so he carried on business as a bookseller. For a short time at first the pursuer lived with his father at Elm Row, but soon left him and returned to live at 69 Cowgate. In 1894 or 1895 Gemmell senior was deprived of all his effects under a process of cessio, and thereafter he came back to 69 Cowgate and continued to live there till 1st April 1898. During this time he did work in connection with the business, but the work which he did was clerk's and other work in the shop. He did not call upon customers.

The defenders began to deal with James Gemmell senior in 1884. Up to 1892 or 1893 they did a considerable business with the Gemmells, during the first part of the time transacting with the father, but latterly chiefly with the pursuer. Between 1894 and 1898 there were no dealings between them, but on 15th or 16th February 1898 the pursuer came to Polton and arranged a sale of some rags to the defenders at the price of £19, 1s. 6d. These rags were duly delivered to the defenders on 17th February. At the same interview the pursuer arranged to send a sample bale of certain other rags to the defenders for their inspection.

On 20th February 1898 the pursuer was arrested for assaulting his father, sister, and brother, and was confined in the Edinburgh police cells till 22nd February, when he was tried, convicted, and sentenced to forty days' imprisonment without the option of a fine. He remained in the Calton Prison undergoing this sentence till 2nd April 1898. During the time he was in prison the place of business at 69 Cowgate was kept open, and was managed by the pursuer's father with the assistance of the pursuer's brother and sister.

On 22nd February a letter was received at 69 Cowgate addressed to James Gemmell junior enclosing a crossed cheque payable to him. This letter was opened by James Gemmell senior. On the same day the defenders received the account receipted by the pursuer "*p. p.* J. G." This receipt was in the handwriting of and was signed by James Gemmell senior.

On 1st March the defenders received a memorandum bearing to be from the pursuer, but in the handwriting of and signed by his father as for the pursuer, stating that as promised he had forwarded the sample bale for the defenders' inspection, and asking them to quote their highest price therefor. The defenders on 4th March wrote offering 9s. per cwt. On 5th March James Gemmell senior came to Polton and accepted their offer. He received payment for the sample bale, and gave a receipt for the money. The rest of the rags were delivered to the defenders on the same day, and on 8th March the pursuer's father received the sum agreed upon as the price, and granted a receipt for it. Thereafter Gemmell senior sold another parcel of rags

to the defenders for £2, 12s. 10d., which sum he received from them in cash, and gave them a receipt for it signed by him.

On the same day Gemmell senior informed the defenders that his son, the pursuer, was in jail, and that he (Gemmell senior) had been unable to get the money for the crossed cheque in pursuer's favour for £19, 1s. 6d., mentioned *supra*, and asked them to take it back, and give him a cheque in his own favour for the same sum, as he required the money for rent and other business expenses. The defenders complied with this request.

The pursuer deponed that when he saw the defenders on 15th or 16th February he told them that the price would be 11s. per cwt. This was denied by the defenders' representative. He also said that the other parcel of rags was sold below its true price, and that the value of the goods obtained by the defenders from the pursuer's father as above mentioned was in fact £22, 14s. 6d., instead of £18, 16s. 7d., being the amount of the sums paid by them to Gemmell senior.

A sequestration for rent had in the meantime been served upon the pursuer while in jail. An inventory was taken by an officer, but no sale was ever carried out. The rent was subsequently paid by the pursuer. Gemmell senior did not pay the rent with the money he got from the defenders. Before he got the cheque in his own favour from the defenders he had tried to get the money for the crossed cheque from the factor on the Cowgate premises, offering to pay him £5 towards the rent, if the factor would give him cash for the balance, but this the factor declined to do. The pursuer on 23rd March, after the sequestration for rent was served upon him, sent his law-agent with a mandate to Gemmell senior to get the Annandale's cheque from him, but Gemmell senior refused to give any account of it.

The pursuer was aware that this cheque would be coming from the defenders while he was in prison, but he did not take any steps to have the payment of it stopped.

The day before the pursuer got out of prison, his father, brother, and sister left the Cowgate premises, and gave up the keys to the law-agent for the factor. Gemmell senior also sent to the pursuer's law-agent an account of receipts and disbursements during the time that the pursuer was in prison. This account showed a balance of £37, 11s. 5d., "cash in hand retained in part payment of remuneration and share of profits." The pursuer did not take any steps to recover this sum from his father.

On 5th January 1899 the Sheriff-Substitute (HAMILTON) issued the following interlocutor:—"Finds that the pursuer has failed to prove that he and not his father is the owner of the business mentioned on record: Sustains the second plea-in-law for the defenders: Dismisses the action, and decerns: Finds the defenders entitled to expenses, and remits," &c.

Note.—"The so-called sale of the business in 1892 evidently was a device resorted to for the purpose of defeating the claims of the elder Gemmell's creditors. It was therefore a fraudulent transaction, and the pursuer, who was a party to it, cannot, in a question with his father (which this really is), arrogate to himself the position of a *bona fide* purchaser of the business. His title of ownership is no better, perhaps it is even worse, than his father's."

The pursuer appealed to the Court of Session, and argued — 1. The pursuer's father was not a partner in the business. 2. He was not *præpositus negotiis*, and was not held out by the pursuer to be so, at least as regards transactions or acts of any kind outside the shop. Between 1894 and 1898 his work for the business was confined to clerk's and other work done in the shop. He did not call upon customers, and was never authorised by the pursuer to do so. A servant only bound his master if acting within the scope of his employment. The defenders had no right to presume the authority of the pursuer's father to receive payments away from the shop, or to negotiate sales. Payment to a subordinate was only good if made to him in the course of his employment—Smith's Mercantile Law (10th ed.), vol. i. 154. No doubt authority to receive payment was presumed from the fact of being found apparently employed in the payee's counting house at his place of business, and here it must be conceded that if the defenders had paid the sum first sued for over the counter of the pursuer's shop to the pursuer's father, and had got a receipt from him, the payment would have been good, even although in fact the pursuer never got the money—*Barrett* v. *Deere* (1828), 1 Moody and Malkin, 200. The same rule might have applied if they had sent the cash or a cheque payable to bearer by post to the pursuer's place of business, and had got back a receipt in the same terms as that now produced. It might even also be conceded that, if the defenders had refused to change the crossed cheque into a cheque in favour of the pursuer's father, and the payment founded on had been the crossed cheque originally sent, the payment would have been good, although the pursuer's father had succeeded in cashing the cheque, and appropriating the money. But the rule as to presumed authority to receive payments and grant receipts therefor only applied to payments made at the payee's place of business (see *Barrett* v. *Deere*, *cit.*, *per* Lord Tenterden, C. J., at page 201). It did not apply to payments made to subordinates at other places. The payments therefore to the pursuer's father made by the defenders at Polton were not good. Moreover, the statements made by the pursuer's father as to the position of affairs, and his request to have the cheque changed, should have put the defenders upon their inquiry, and if they had made inquiry they would have found that the pursuer's father had no authority to receive payments on behalf of the pursuer, or indeed to represent him at all.

Argued for the defenders—(1) It was not proved that the pursuer's father was ever divested of all share in the Cowgate business. It was proved that no notice of any change was sent to the defenders. (2)

Apart from that, the pursuer's father was *præpositus negotiis*, and the defenders were entitled to presume his authority to receive payments and grant receipts, and to transact business generally. In the circumstances they were entitled to act as they did. When the father came and stated the difficulty with regard to the crossed cheque nothing was disclosed to them which laid upon them any duty of inquiry. Apart from the general rules as to presumed authority which would have been sufficient to cover such a case, here the defenders were dealing with one of the Gemmells from the shop in Cowgate, and indeed the member of the family with whom they had originally and chiefly done business, and were abundantly justified in acting as they did. The pursuer had himself to blame, for he might have stopped payment of the defenders' cheque, and so warned them against dealing with his father.

Lord Young—The issue is a simple one. The action is one for the price of goods sold to the defenders on 17th February 1898. The buyers admit the purchase and admit that it was made from the person carrying on business as James Gemmell junior. Whether the pursuer carried on that business as sole trader or in company with others is a matter not really within the defenders' admission. The defence is that defenders paid for the goods. They produce a receipted account in which payment is acknowledged by "James Gemmell junior, *p. p.* J. G." It is assumed that "J. G." had the authority of J. G. junior to grant a receipt for the price. The pursuer says that this receipt was signed by his father, and the defenders admit that they believe that to be the case. The pursuer says that his father had no authority to grant it, and that his receipt will not exclude the action. The question which thus arises has nothing to do with whether the pursuer is solely interested in the business, or whether it is his father's, or whether other members of the family are interested in it. That is all a question among themselves. The question with the defenders is whether they were justified in paying this account to the father and taking his receipt, or whether they did something so irregular that they must pay the account again. If the father ought to be held as having received the money for the son there may be questions which will remain for decision between *them*, but the defenders are not called upon to litigate these questions. I may say, however, that if the question was between the son and the father as to whose the business was, I should sympathise with the Sheriff's judgment to the effect that there is no evidence showing that the business was transferred to and remained the son's.

A crossed cheque was sent in the first place to pay this account. It was made out in name of James Gemmell junior. Then, on the representation of the father that James Gemmell junior was in prison, as he was, the defenders substituted for it a cheque payable to "bearer." There is no imputation on the defenders' good faith in doing so. They did so on the request of one of the Gemmells coming from the shop with which they had been accustomed to deal. The case was the same as if they had paid cash to the father in the shop and taken his receipt. It was not merely a bona fide payment, but the debtor was discharged. There is no doubt that for several years the father and his children other than the pursuer to a considerable extent carried on the business of the shop, and while the pursuer was in jail on this occasion they kept it open and took part in carrying on the business as they were wont to do when he was there, and I cannot countenance the proposition that a customer was not safe to pay an account to the father. I think we should find that the defence is sound, that as in a question between the pursuer and the defenders the account was paid and the receipt a good discharge.

Lord Trayner—I think we are not concerned with the question whether the pursuer carried on this business solely or in partnership with his father or with others. We can determine no such question, as the parties interested in it are not before us. The question is whether the defenders have duly paid their account and been duly discharged. Their dealings with this business seem to go back to 1884 and to have begun with James Gemmell senior. Changes in the persons carrying on the business there may have been between that time and the date of the account. But there is no proof of any intimation of these changes having been given to the defenders, who have continued to deal with the person or persons carrying on business at 69 Cowgate. Accordingly when in 1898 they bought a quantity of rags from these premises they were simply aware that they were dealing with the business there carried on. To that address they sent in payment a cheque made out in name of, and addressed to the person whose name was on the invoice. That was a good payment, and if the person in the shop who received it has not accounted for it, that does not subject the defenders in the necessity of paying it again. A cheque, it was admitted, was just the same as a payment in cash. If that be so, the defenders having paid cash for their purchase to the person in charge of the business, and received his receipt, are well discharged. It is said that this was altered by what took place subsequently. It seems that a person connected with the business came to them and represented that it would be more convenient if they would take back the crossed cheque which had been sent and give cash or a cheque payable to "bearer." The defenders complied with this request, but that does not derogate from the sufficiency of the original payment. The same principle applies to the other conclusions of the action. James Gemmell senior was *præpositus negotiis* during the pursuer's absence from the business, and payment to him was a good payment in a question between the owner of the business and the defenders.

LORD MONCREIFF—I am of the same opinion. If the defence had depended on the plea of "no title to sue" I should have had difficulty. But the real question is whether the defenders were justified in paying to the pursuer's father and getting his receipt. Now, it was admitted that if they had called at the shop and paid cash the payment would have been good; and I think the result would have been the same if on calling they had given the father a crossed cheque in favour of James Gemmell junior, and the father had asked them for a cheque payable to bearer instead. It would have been different if there had been anything to rouse their suspicion and put them on their guard—if, for example, they had known that the reason why the pursuer was in prison was that he had quarrelled with his father and assaulted him. In such a case they might have been interpelled from paying. But there is no evidence that they knew this.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the pursuer's appeal against the interlocutor of the Sheriff-Substitute of the Lothians dated 5th January 1899, Recal the said interlocutor: Find in fact (1) that prior to 1892 James Gemmell senior, the pursuer's father, was the owner or part-owner of the business carried on at 69 Cowgate, Edinburgh; (2) that the pursuer has failed to prove that any material change in the ownership and conduct of the business took place in 1892 or thereafter, or that the pursuer then became sole owner; (3) that James Gemmell senior, the pursuer's father, was at the time that the rags condescended on were purchased *præpositus negotiis*, and as such entitled to receive payment of debts due to the firm, and to grant discharges therefor; (4) that the defenders did pay to James Gemmell senior the price of the rags condescended on, and received from them the receipts Nos. of process: Find in law that the said receipts are good and valid discharges, and that the pursuer is not entitled to payment from the defenders of the sums sued for, these having been paid and discharged: Therefore assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable in expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuer—M'Lennan—Findlay. Agent—C. Garrow, Law Agent.

Counsel for the Defenders—Dundas, Q.C.—P. J. Blair. Agents—Strathern & Blair, W.S.

Tuesday, May 23.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACKAY *v.* MACARTHUR.

Agent and Client—Constitution of Relation of Agent and Client—Purchase of Client's Property by Agent.

A husband and wife executed an assignation (absolute in its terms) of a policy of insurance payable to the survivor of them in favour of a bank-agent who was also a law-agent, and in order to obtain funds for the husband. In an action by the wife after the death of her husband for reduction of the assignation the Court found in fact (1) that the bank-agent did not act in the transaction as law-agent for the pursuer; (2) that he did not make any misrepresentation as to the nature of the contract; and (3) that consequently there was no ground of reduction.

Opinion that even if he had acted as law-agent for the pursuer it would not have been a valid ground of reduction that, beyond reading over the deed to her, he had taken no steps to ascertain that the pursuer understood the real nature of the transaction or its effect in cancelling her rights under the policy without any pecuniary advantage to herself.

This was an action at the instance of Mrs Margaret Stewart Macpherson or Mackay, widow of the late Alexander Mackay, chemist in Oban, executor-dative *qua* relict of the said Alexander Mackay, as such executrix and as an individual, against Alexander Macarthur, solicitor, Oban, and also agent for the Commercial Bank there, in which the pursuer concluded for reduction (1) of an assignation in the defender's favour of a policy of insurance on her late husband's life for £100; and (2) of an assignation in the defender's favour of a policy of insurance for £500 payable to the survivor of her late husband and herself. The pursuer sued for reduction of the first assignation as executrix of her husband, and of the second in her own right. There was no petitory conclusion. Restitution was offered of the sum paid by the defender for the assignations with interest, and of the premiums paid by him on the policies.

The following statement of the pursuer's pleas and of the facts is taken from the opinion of the Lord Ordinary (KINCAIRNEY):—"In support of the conclusions of reduction of both assignations the pursuer pleads—(1) Fraud and circumvention, and undue influence on the part of the defender, the law-agent of the granters. (2) Essential error, *et separatim*, essential error induced by the misrepresentations of the defender. (3) That the assignations had been executed by the granters in ignorance of their contents, and in favour of their law-agent, and without independent advice.

"With regard to the assignation of the joint policy for £500, the pursuer pleads