

inability to continue the payment, ceased the payment, and a question has arisen between the parish of Melrose, who were called upon by the Asylum authorities to accept initial responsibility after the husband ceased to pay, and the admitted parish of the lunatic's settlement as to the liability for her board. The question at issue is therefore not the ordinary question of the settlement of the lunatic. It is a question of whether the lunatic was a pauper or not. That question might have involved one of continuing liability, because the pauper might have continued a lunatic and the obligation to maintain her might have continued. But we are told that the lunatic is now well and has been removed from the asylum, and that the present obligation to pay for her has ceased. In these circumstances there is no continuing liability possible, because if she turns out only to have had a lucid interval and has to be sent back to the asylum, the question of the husband's capacity to maintain her arises *de novo* in different circumstances. While, then, the appeal is incompetent as the value at stake is below the limit, if there had been a question as to the pauper's settlement there might very well have been a question of continuing liability, because no one can tell whether the convalescence is to be permanent or is merely a lucid interval.

LORD KINNEAR—I agree with your Lordship for the same reasons. I shall only add that I think the case of *Tait v. Lees*, 5 F. 304, is distinguishable. In that case the parties had joined issue in the Sheriff Court as to liability for an amount which would have allowed a decision to be appealed, and after they had joined issue a minute of restriction was put in, reducing the value of the cause to less than £25. The only question was whether the restriction of the conclusions of the summons after the parties had joined issue had or had not the effect of rendering the case unappealable. I do not think that applies to any question we have to consider here.

LORD MACKENZIE was absent.

The Court sustained the objection.

Counsel for Pursuers—Kemp. Agent—James D. Turnbull, S.S.C.

Counsel for Defenders—MacRobert. Agents—Sibbald & Mackenzie, W.S.

Wednesday, June 12.

SECOND DIVISION.

CALEDONIAN RAILWAY COMPANY v. SYMINGTON.

Process—Proof—Diligence to Recover Writs—Primary and Secondary Evidence—Law Agent's Books in an Action against his Principal.

A respondent in an action obtained a diligence to recover the cash books of the complainers in the action, that

excerpts might be taken showing transactions of a particular character, and also to recover certain documents. Failing the principals of the books and documents called for, the specification called for copies, jottings, &c. A partner of the firm of law agents who acted for the complainers was examined as a haver, when he deponed that his firm had none of the books and documents called for, and declined to produce the books of his firm. The commissioner upheld the haver's objection to produce the cash books of his firm, in which were admittedly entries of payments made on behalf of his principal, but ordained him to produce the letter books. The Lord Ordinary upheld the commissioner, and granted a new diligence covering the cash books of the law agents. On appeal the Court recalled the Lord Ordinary's interlocutor, refused the new diligence, and, on the ground that the respondent was not entitled to recover copies till he had used reasonable diligence to recover the principals, upheld the haver's objection to produce the letter books.

The Caledonian Railway Company, complainers, brought an action of suspension and interdict against Hugh Symington, contractor and quarrymaster, Coatbridge, respondent, in which the Lord Ordinary (CULLEN) allowed a proof, and, after sundry procedure, on 20th March 1912 granted a diligence to the respondent for the recovery of the documents contained in a specification of which articles 1, 3, 4, and 6 were as follows:—"1. All notices to treat under the Railway Clauses (Scotland) Act 1845 or Land Clauses Consolidation (Scotland) Act 1845 served by the complainers or anyone on their behalf on the proprietors of the Woodhouse estate, their tenants or lessees or anyone on their behalf, for or in connection with the formation of the Glasgow and Carlisle Railway, and all claims, valuations, reports, arbitration proceedings, awards, and decrees-arbitral following thereon, and all correspondence between said parties, or any of them, relating in any way to said notices, claims, arbitrations, or otherwise. . . . 3. The books of the complainers, including ledgers, journals, cash books, day books, account books, letter books, statement books, receipt books, voucher books, and all others, that excerpts may be taken therefrom showing, or in any way tending to show, the purchase money, compensation, and other moneys paid or payable by the complainers (a) to the proprietors of Woodhouse, their tenants and lessees, and (b) to all other landowners, their tenants and lessees, or anyone on their behalf, for or in respect of freestone or sandstone, within the county of Dumfries, acquired, taken, used, or reserved by the complainers or their contractors for or in connection with the construction of the railway and railways referred to in answer II for respondent between the years 1845 and 1868. 4. All notices to treat served by the complainers,

or anyone on their behalf, on landowners, their tenants or lessees, in connection with the acquisition, purchase, or reservation of freestone or sandstone within said county, referred to . . . for or in connection with the formation of the complainers' undertaking; all claims, valuations, reports, arbitration proceedings, awards, and decrees-arbitral following thereon, and all correspondence between said parties, or anyone on their behalf, relating in any way thereto, between the years 1845 and 1868. . . . 6. Failing principals of all or any of the books and documents called for, drafts, duplicates, excerpts, jottings, or copies thereof are called for."

On 29th April 1912 the commission was executed and Mr William John Kirk, W.S., a partner of the firm of Hope, Todd, & Kirk, W.S., the complainers' Edinburgh law agents, was examined as a haver.

The following narrative is an excerpt from the interim report by the commissioner to the Lord Ordinary—"Being called upon to produce under article 3 of the said specification (the haver) depones, I have none. Entries regarding the payments made on behalf of the Caledonian Railway Company, referred to in article 3, went through books kept by my firm, and these books are still in existence; but they are the books of my firm and their property, and I decline to produce them. These books were paid for by my firm, and not charged against the complainers, and are not complainers' books. *By the commissioner*—I decline to produce them because they are my firm's books, and the call applies to the complainers' books. I decline to produce them on the ground of confidentiality also. They contain a vast amount of matter absolutely outwith this present inquiry, and of the most private nature. The respondent's agent moved the commissioner to order the production of the books which the haver had deponed were the property of his firm but contained records of transactions made by his firm for the complainers. The commissioner refused the motion on the ground that the specification specified books of the complainers, and did not specify books kept on their behalf by the haver's firm. The commissioner found it unnecessary to deal with the haver's plea of confidentiality, beyond indicating that had the call covered books kept by the haver's firm, whether for themselves or the complainers, and containing the entries sought for, he would have held the said plea inapplicable in the circumstances. . . . Being called upon to produce under article 6 of the said specification, copies of the letters written by his firm on behalf of the complainers between 1845 and 1868, and called for under article 1 and 4, depones, I decline to produce the letter books containing these copies. These books are . . . the books of my firm. The respondent's agent moved the commissioner to order production of the said books. The commissioner ordered the haver to produce the said books, so as to enable him to determine what copies fell within the calls. The haver thereupon

declined to obey the said order. The commissioner adjourned the diet *sine die* in order that the disputed matters might be referred to the Lord Ordinary."

On 29th May 1912 the Lord Ordinary pronounced an interlocutor, the second head of which sustained the commissioner's ruling, and ordained the haver to produce to the commissioner the letter books in question in order that he might excerpt therefrom copies of letters falling under the specification, and granted a further diligence to the respondent for recovery of the books contained in the following specification—"1. All books kept by or on behalf of Hope, Todd, & Kirk, Writers to the Signet, Edinburgh, and of their predecessors in business Messrs Hope & Oliphant, Hope & Mackay, Hope, Mackay, & Mann, and Hope, Mann, & Kirk, all Writers to the Signet, Edinburgh, including ledgers, journals, cash books, day books, account books, letter books, statement books, receipt books, voucher books, and all others, that excerpts may be taken therefrom showing or in any way tending to show the purchase money, compensation, and other moneys paid or payable by the complainers (a) to the proprietors of Woodhouse, their tenants and lessees, and (b) to all other landowners, their tenants and lessees or any one on behalf of any of them, for or in respect of freestone or sandstone within the county of Dumfries acquired, taken, used, or reserved by the complainers or their contractors for or in connection with the construction of the railway and railways referred to in answer 11 for the respondent between the years 1845 and 1868."

The complainers reclaimed, and argued—The haver ought not to be ordained to produce the letter books of his firm under the first specification, and the diligence in terms of the second specification should be disallowed *in toto*. Any evidence which might be contained in the books of the haver could only be secondary evidence, and the respondent was not entitled to recover them, because he had not previously made any attempt to recover the original documents which were the primary evidence—*Smith v. Smith*, December 4, 1869, 8 Macph. 239, 7 S.L.R. 143; *County Council of Fife v. Thoms*, July 9, 1898, 25 R. 1097, 35 S.L.R. 868; *A v. B*, January 20, 1858, 20 D. 407, *per* Lord President at p. 416.

Argued for the respondent—The respondent was entitled to recover the books of the haver, because it might prove exceedingly difficult and in some cases impossible to recover the original documents, and it would impose an unreasonable burden upon the respondent to compel him to attempt to do so. The practice of the Court was elastic, and it was ordinary practice to allow a party to recover copies of documents from a haver if the haver failed to produce the originals—*Sleigh v. Glasgow and Transvaal Options, Limited*, January 26, 1903, 5 F. 332, 40 S.L.R. 313.

LORD JUSTICE-CLERK—I think that this reclaiming note must receive effect. The

ground for so holding is extremely simple, and does not touch many of the points that Mr Constable made in arguing the case for the respondent.

The respondent in this case has obtained a diligence under which he was entitled to recover certain documents if they existed. Without having done anything whatever to endeavour to execute that diligence, which, of course, is a diligence to try and recover principal documents, he asks a second diligence to recover, not the documents themselves, but copies of the documents contained in the books of the complainers' agents, which at best are only secondary evidence, available only on its being proved to the satisfaction of the Court that the principals cannot be obtained. That is so elementary that I cannot see how it could be pleaded that without anything whatever having been done to discover whether the principal documents existed, a diligence should be granted to recover that secondary evidence. I think, therefore, the proper course will be to recal the interlocutor of the Lord Ordinary, refuse the second specification, and find that Messrs Hope, Todd, & Kirk are not required *hoc statu* to produce their letter books in order that excerpts may be taken of the copy letters that are to be found in these books. Even if the production of such books were ultimately to be found necessary, I think that the interests of the agents to whom they belong would require to be very carefully guarded before such a sweeping search could be allowed. The point is certainly a novel one. I never heard of such a case before, and I am not in the least moved by what Mr Constable says, namely, that it is a good many years since these letters were written, and that it would be putting the respondent to great expense to show that he could not recover the letters. The fact that a long time has elapsed may make it difficult to recover the letters, but will make it all the easier to show that the party cannot expect to recover them.

LORD DUNDAS—I agree. In this case a proof was allowed some time ago, the respondent to lead. He thereupon applied for and obtained a diligence and specification for recovery of documents. The last article was the familiar one, "failing principals . . . drafts, duplicates, excerpts, jottings, or copies thereof." I should have thought it was elementary that, speaking generally, under a clause like this there can be no recovery of copies, drafts, and the like, except of consent, unless and until reasonable diligence has been exercised in attempting to recover the principals. But what the respondent did was to cite before the commissioner as the first haver Mr Kirk, a member of the firm who are agents for the complainers in Edinburgh, and to call upon him to produce copies of the letters written by his firm on behalf of the complainers between the years 1845 and 1868, and called for under articles 1 and 4. He declined to produce the letter books containing these copies ;

the commissioner ordered him to produce them; the haver declined to obey the order, and the matter was brought before the Lord Ordinary. The respondents then lodged a second specification of documents, asking for recovery of the books of Messrs Hope, Todd & Kirk, the complainers' agents, and their predecessors in the agency. In that state of matters the Lord Ordinary pronounced the interlocutor now under review, in which, after dealing with a matter which we are not asked to consider, he sustained the commissioner's ruling, and ordered Mr Kirk to make production as ordered, and further granted diligence for recovery in terms of the new specification. I think that is wrong, and I think accordingly with your Lordship that the second branch of the Lord Ordinary's interlocutor ought to be recalled, and that we should refuse *hoc statu* the second diligence, and find that Mr Kirk is not bound *hoc statu* to produce in terms of the order upon him by the learned commissioner. Mr Morison argued strongly that the agents' letters are not evidence against the complainers. I do not know that one need consider that absolute proposition, and I express no opinion upon it; but at the present stage the letter books of Messrs Hope, Todd, & Kirk are not the best evidence, in this sense, that they cannot be got at and recovered until at all events it is made reasonably clear that better evidence is not available. I have a good deal of sympathy with Mr Morison's remark that this is a fishing expedition, prompted apparently in the interests of cheapness. Mr Morison's further contention was upon confidentiality. That would be a matter, if it arose, for the commissioner, and would, no doubt, be safe in his hands.

LORD SALVESEN—I agree. I think the additional specification should not have been granted until the respondents had in some reasonable sense satisfied the Lord Ordinary that it was necessary for them to recover copies of the documents in respect it was impracticable to recover the principals.

LORD GUTHRIE—I agree.

The Court sustained the reclaiming note, recalled the second head of the interlocutor of the Lord Ordinary, and refused *hoc statu* the second specification, as also recalled the ruling of the commissioner appealed against.

Counsel for Complainers and Reclaimers—Morison, K.C.—Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Respondent—Constable, K.C.—Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.