

power of the trustees to apply one farthing to the payment of the debts. My Lords, having looked at this case most anxiously, because it is certainly not to be concealed that it is a case of hardship on the part of Lady Montgomerie, it is plain that the single question is, what is the contract between the parties? In judging of this your Lordships must confine yourselves to the instruments; you cannot go out of the instruments themselves, and cannot be influenced by any circumstances of hardship operating on the one party or on the other, in consequence of the contract they have entered into. My Lords, upon the whole, after the most deliberate consideration, I cannot bring myself to coincide with the opinion of the Court of Session. I am of opinion that the true construction of this instrument is, that the surplus rents were to be applied till the debts were extinguished. I am of opinion, therefore, that that part of the interlocutor which is complained of should be reversed; and I shall therefore—not at this moment, for it will require some little attention as to the manner in which your Lordships' judgment shall be drawn, because, in this view of the subject, the case must go back to the Court of Session; but I shall certainly propose to your Lordships, the next time I have the honour to attend your Lordships, a minute of the judgment, the effect of which will be to alter that part of the interlocutor of the Lord Ordinary, and the subsequent interlocutor of the Court of Session, as to the construction of the instrument. Of course, the case must then be remitted to the Court of Session, to apply your Lordships' judgment to the circumstances of the case.

April 15. 1825.

*Appellants' Authorities.*—3. Ersk. 3. 89. ; Hog, Nov. 30. 1749, (1390.); 1. Bankton, 9. 8. ; 14. Vesey, 273.

*Respondents' Authorities.*—3. Ersk. 3. 87. and 92. ; French, Feb. 18. 1669, (6366); Duke of Lauderdale, Dec. 14. 1684, (6379.)

J. CAMPBELL—A. MUNDELL,—Solicitors.

ALEXANDER COOPER, of Failford, Appellant.

No. 15.

MARGARET CAMPBELL, and Others, Children of the late JAMES CAMPBELL, and ALEXANDER HAMILTON, Writer in Mauchline, Respondents.

*Reparation—Damages.*—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a party was not entitled to damages for the alleged illegal execution of diligence.

THE late James Campbell, the father of the respondents, was a tenant on the estate of Failford, in the county of Ayr, belonging to the appellant Cooper. In 1793 Cooper raised an action

April 18. 1825.

2D DIVISION.  
Lord Cringletie.

April 18. 1825. before the Sheriff against Campbell, for alleged violations of his lease; from which the Sheriff assoilzied him; and the Court of Session adhered, and found Cooper liable in L.79 of expenses. Against this judgment Cooper entered his appeal to the House of Lords; but he afterwards withdrew it, in consequence of the parties having agreed to submit the decision to Mr Professor Davidson of Glasgow, and Mr Reddie, assessor and town-clerk of that city. In the meanwhile Campbell had died, and the submission was entered into with his widow and children, without any objection being made to their title. After a long litigation, the arbiters, on the 1st November 1818, issued notes, finding Cooper liable in L.107. 11s. 3d. with interest from that date.

Previous to the death of Campbell, and during the dependence of the above action, Cooper raised another against him, for the statutory penalties of destroying trees upon his property; and upon the 27th May 1803 he obtained a decree from Lord Woodhouselee for L.10 of damages; to which sum his Lordship was induced to modify them, in respect that the injury had been done 'by children far under the age of pupillarity, and ignorant of the mischief they were doing.' No proceedings were adopted under this decree, which remained unextracted, nor was it founded upon before the arbiters.

On the 12th January 1819, the agent of Cooper addressed this letter to Mr Hamilton, writer in Mauchline, who acted as the country agent of the Campbells:—'As agent for Alexander Cooper of Failford, Esquire, I am ready to pay the sums decerned for by the arbiters, as in the submission betwixt Mr Cooper and the representatives of the late James Campbell, on Mr Cooper being allowed deduction of the sum of L. 10 sterling, contained in decret obtained by Mr Cooper against Campbell before the Court of Session, dated 27th May 1803; also of the sum of L.2. 10s. 4d., being half of expense of drawing and extending said submission, with the legal interest due on these sums. It will be necessary for Campbell's representatives to expedite confirmation of the sums decerned for, before they can grant a valid discharge to Mr Cooper: therefore, as Mr Cooper is willing to pay the sums decerned for, under the above deductions, on such discharge being granted, he will hold Campbell's representatives as liable to him for any further expenses that may be incurred in the submission after the date of this intimation.' At this time Hamilton had gone to London, and his clerk returned an answer on the 18th, stating, that the sum decerned for was L.107. 11s. 3d.; that he had no doubt that in

April 18. 1825.

that sum was included. the expenses of drawing and extending the submission, but as to which he would make inquiries: ' With respect, however, to the L. 10, said to have been contained ' in a decret of the Court of Session so long ago as the 22d ' May 1803, I have no doubt that it was paid long ago; but as ' the sum is not considerable, I shall advise my clients to allow ' it, provided Mr Cooper will take his oath in presence of a Ma- ' gistrate here, and give Mr Hamilton or me three days' notice ' that we may attend his examination, that the foresaid sum of ' L.10. was not paid to him or his agents. You say it will be ' necessary for Campbell's representatives to expedite a confirma- ' tion before they can grant a valid discharge to Mr Cooper for ' the money. But in this I apprehend you will find yourself ' mistaken. Their title is ascertained and acknowledged by the ' submission. The arbiters have decided the sums found due to ' be paid to them; and in virtue of this decret I will find no diffi- ' culty whatever in obliging Mr Cooper to pay the money, for ' which they will of course give a discharge.' No notice was taken of this letter; and, on the 20th, Hamilton's clerk again wrote to the agent of Cooper, informing him that he had ascertained that credit had been given to Cooper by the arbiters for one-half of the expense of drawing the submission; that there was no necessity for a confirmation; that the Campbells were not liable for interest on the L.10, as they had never been denounced on a horning; that they were ready to give credit for the L.10, on the conditions formerly mentioned; and that if the matter were not settled within eight days, he would have recourse to diligence. On the following day, being the 21st, the decree-arbitral was signed; and still no notice being taken of the above letters by Cooper or his agents, Hamilton's clerk again wrote on the 4th February, requiring an explicit answer. No answer, however, was sent, and Hamilton having returned from London, addressed the following letter on the 26th February to Cooper's agent:—' I have ' seen your letter of the 12th ultimo (January), intimating, as ' agent for Alexander Cooper of Failford, Esquire, that you are ' ready to pay the sums decerned for by the arbiters in the sub- ' mission between the late James Campbell's representatives and ' Mr Cooper, under deduction of L.10, said to be contained ' in a decret at Mr Cooper's instance against James Campbell, ' 27th May 1803, and the sum of L.2. 10s. 4d., being the half ' expense for drawing the submission, with the legal interest due ' on these sums. You will observe, that the arbiters have de- ' cerned for the total sum of L.107. 11s. 3d., after deducting the

April 18. 1825.

‘ half expense of drawing the submission, and every other claim  
 ‘ of deduction which Mr Cooper could make in the submission,  
 ‘ with interest since the 1st of November till the sums are paid.  
 ‘ With regard to the sum of L.10 now claimed by Mr Cooper,  
 ‘ and which, in the whole course of all the vexatious pleadings in  
 ‘ this hard case, was never before heard of, I am satisfied that this  
 ‘ sum has already been paid to Mr Cooper or his agent; but as  
 ‘ I still want a little more information upon the point, which I  
 ‘ may not recover for some time, I will allow Mr Cooper the sum in  
 ‘ the mean time; and should I ultimately be right in what I allege,  
 ‘ I shall prosecute him for repayment. I will, however, positively  
 ‘ refuse any demand of interest upon this sum. My clients can-  
 ‘ not be liable for this until they have been regularly denounced  
 ‘ on a horning, which has never been done against them or their  
 ‘ late father. I may add, that as I am now ready to give credit  
 ‘ for the sum, without interest, under the above reservation, that  
 ‘ I shall hold Mr Cooper responsible for any expense that may  
 ‘ be incurred in attempting to recover this debt after this offer.  
 ‘ I suppose you have discovered that it will not be necessary for  
 ‘ my clients to confirm. Under all these circumstances, I must  
 ‘ insist that the account below noted be paid to me on or before  
 ‘ the 3d of March, or Mr Cooper may blame himself for the after  
 ‘ steps for recovering the sums, and the consequent expense.

‘ Amount contained in the decret of Messrs Da-

‘ vidson and Reddie,

L. 107 11 3

‘ Interest thereon from 1st November 1818 to 1st

‘ March 1819,

1 15 10

—————  
 L. 109 7 1’  
 —————

To this letter no written reply was made, but it was stated by Cooper, that his agent had verbally informed Hamilton that he did not mean to insist on confirmation, but that he did not depart from his claim for interest on the L.10. About fourteen days thereafter, letters of horning were raised upon the decree-arbitral, which were put into the hands of a messenger on the 13th of March, to charge Cooper, along with a letter from Hamilton, in which he informed Cooper, that as he had learned from his agent that his letter had been delivered to him, he begged to refer to it; and stated, that he was ready to adhere to the terms there mentioned, and therefore, if he thought fit to suspend the charge, he must do so at his own peril. On the

April 18. 1825.

17th, Cooper presented a bill of suspension, which Lord Hermand on the same day refused, without answers, except as to the L.10, and interest thereof, as to which he ordered answers and sisted execution. A second bill was presented on the following day, in which Cooper contended, that the respondents were bound to confirm. This bill Lord Cringletie appointed to be answered, observing at the same time, 'that the sum decreed for 'is part of the funds that belonged to the father of the chargers,' and inquiring whether it had 'been given up in the inventory 'of his personal estate to the Commissary Court of the district 'where he died.' On the 19th, the agent of Cooper offered payment to Hamilton of L.92. 2s., being the sum decerned for, under deduction of the L.10, and interest, 'provided you deliver me a full and complete discharge in favour of Mr Cooper, 'which will relieve him of all after charges;' and stating, that he would be ready to pay the money at any time on such a discharge being produced; but he did not explain that he did not intend to insist on confirmation, nor did he withdraw his suspension, which was rested mainly on that ground. On advising the bill with answers, Lord Succoth, on the 29th, refused it, except as to the L.10, and interest, 'in respect that confirmation appears not to be necessary in this case, the sum charged for, being that decerned for by the decret-arbitral between 'the parties, never having belonged to the deceased James 'Campbell.' A prorogation was granted till the 8th of April, being the box-day, to enable Cooper to reclaim to the Court; but no petition being lodged, the respondents, on the 10th of April, obtained a certificate of refusal, and on the 11th and 12th they executed arrestments in the hands of Cooper's tenants. On the 17th a petition against Lord Succoth's judgment was lodged, and on the 19th the respondent caused Cooper to be denounced, and letters of caption to be raised. But at this time nothing farther was done. The petition was refused by the Court on the 18th May, without hearing the Counsel for the respondents, who intended to have objected to its competency. Four days previously, Cooper had loosed the arrestments by consignation in the Bill Chamber, and he alleged, that of this the respondents were aware. The debt not having been paid, the letters of caption were transmitted to Hamilton, who put them into the hands of a messenger, on the 21st, to execute them. Accordingly, some time between seven and nine o'clock of the evening of that day, the messenger went to Cooper's house, situated near Mauchline, and apprehended him. Instead

April 18. 1825. of carrying him off as a prisoner, the messenger indulged Cooper with time in order to send to Ayr, about eleven miles distant, for his agent. In the course of the night his agent arrived, and by his advice Cooper gave a draft upon his banker for the sum contained in the diligence, but under protest; and he refused to take a receipt, or to do any thing to indicate that he had paid the debt voluntarily.

In the month of September thereafter, he raised an action of damages against the Campbells, and also against their agent Hamilton, which, after setting forth that he was an extensive landed proprietor, a Justice of the Peace, a freeholder, and deputy-lieutenant; that he had long been in bad health, of which the respondents were fully aware, and narrating the proceedings which had occurred; he alleged, that the diligence had been executed against him, 'not for the necessary purpose of recovering payment of the sum due by the pursuer, but in order to harass and oppress him; to insult his feelings, and to degrade him in the estimation of the class of society to which he belongs; and that all the oppressive and illegal proceedings took place in consequence of instructions given by the said Alexander Hamilton.' There was, however, no allegation in the summons that Hamilton was influenced by malicious motives against Cooper. In defence the respondents admitted, that they had executed the diligence under the circumstances above mentioned; denied that they had been actuated by any other motive than that of recovering payment of a debt which had been due for a long period of time; stated, that they had given every reasonable indulgence to Cooper, and that they were entitled in law to do that which they had done. The Lord Ordinary appointed Cooper to lodge a condescence, and at the same time issued the following note:—'The Lord Ordinary has attentively considered this cause, and thus expresses his ideas, that the pursuer may consider well before he goes farther. The grounds for damages seem to be,—1st, That arrestments were used in the hands of his tenants for more than the debt due by the pursuer to the arresters; that such arrestments were wanton and nimious, because he had found ample caution in the suspension; that he loosed the arrestments on consignment, which was full security to the arresters. And, 2dly, That notwithstanding this, they illegally obtained letters of caption, which they executed against the pursuer. Now, the Lord Ordinary desires the pursuer to advert, that caution in the Bill-Chamber is conditional, only depending on the bill being passed; and, of course, if the bill be

' refused, the caution is null. The pursuer's bills of suspension April 18. 1825.  
 ' were both refused by Lords Hermand and Succoth, and a cer-  
 ' tificate of refusal was issued from the Bill-Chamber on the 10th  
 ' of April, two days after the box-day, when no petition was pre-  
 ' sented for the pursuer, and two days after the sist by Lord Suc-  
 ' coth had expired. Arrestments were thereon used, and lawfully  
 ' used for security, since the caution was at an end; and as for  
 ' their exceeding the amount of the debt, that is a matter of style  
 ' and common practice, although, like other customs, more  
 ' honoured in the breach than the observance. A certain excess  
 ' above the debt is, however, necessary to cover expenses of a  
 ' forthcoming, &c. Caption, too, was legally taken out, after  
 ' the certificate of refusal, and subsequent arrestments; it being  
 ' quite clear that the application for suspension was at an end.  
 ' If the loosing of the arrestments on consignation was intimated  
 ' to the respondents before they used their caption, the Lordordi-  
 ' nary thinks the conduct of the respondents was reprehensible,  
 ' since they had immediate access to the money, and might have  
 ' got it, by desiring the pursuer's consent to uplift it. If the pur-  
 ' suer refused that consent, the execution of the caption was rea-  
 ' sonable and fair. On the other hand, if the loosing of the arrest-  
 ' ments on consignation was not intimated to the respondents, and  
 ' the pursuer does not say that it was till the night when the cap-  
 ' tion was executed, the Lord Ordinary thinks that measure was  
 ' both warranted and legal, since the respondents were not bound  
 ' to know that their arrestments had been loosed, and were not  
 ' obliged to wait the event of a forthcoming for recovery of their  
 ' money.' On the 24th of May his Lordship ordained Cooper ' to  
 ' revise his condescendence, and state pointedly whether he offers  
 ' to prove that he intimated, or caused to be intimated to the res-  
 ' pondents, the fact that he had loosed their arrestments on con-  
 ' signation, and to produce the evidence thereof, if the same be in  
 ' writing.' Thereafter, on considering the revised condescendence,  
 his Lordship assoilzied the defenders, and found them entitled to  
 expenses, ' in respect that the pursuer has not offered to prove,  
 ' which he was called on to do by the interlocutor of Court dated  
 ' 24th May last, and in respect of the reasons given in a note  
 ' prefixed to that interlocutor.' And he refused a representation,  
 ' in respect of the reasons contained in a note prefixed to the in-  
 ' terlocutor of 24th May last, and also that the offer of L. 92. 2s.  
 ' was minus the sum the defenders were entitled to demand by  
 ' no less than L. 17; and that offer was only made, provided " you  
 ' deliver me a full and complete discharge," which was compelling

April 18. 1825.

‘the defenders to give up L. 17, to which they have been found  
‘entitled.’ ‘The representer complains grievously of the con-  
‘duct of the defenders to him, but he should take a retrospect  
‘of his own to them, and he will see that he has been not a little  
‘litigious.’ The L. 17 here alluded to consisted of the L. 10,  
with interest, as to which Cooper subsequently got the letters  
suspended simpliciter. He then reclaimed, but the Court, on  
advising his petition with answers, on the 4th June 1822, adhered;  
and again, on considering another petition with answers, their  
Lordships, on the 23d May 1823, adhered.\*

Cooper appealed.

*Appellant.*—The proceedings subsequent to March 1819  
were illegal, because on that day the appellant tendered the  
whole sum which it has been found he was compellable to pay.  
It is not true that the offer was qualified with the condition that  
the Campbells should confirm; and the appellant was ready to  
establish that there was no such condition. Besides, as the pe-  
tition operated as a writ of execution, it was illegal to denounce  
the appellant as a rebel, and raise letters of caption against him,  
while it was undisposed of. He had also consigned the full  
amount of the debt in consequence of the arrestments before the  
petition was refused; a fact of which he offered to prove the res-  
pondents were aware, and yet nevertheless they apprehended  
him upon a caption, and compelled him to pay the money a  
second time. The whole of the proceedings were resorted to  
for the purpose of harassing and oppressing the appellant, who  
was then known to be in bad health.

*Respondents.*—So far as the respondents Campbells are con-  
cerned, the appellant has not stated a relevant case, because he  
has not shewn that they have done any thing which was incon-  
sistent with the law; and so far as the respondent Hamilton  
was concerned, he acted as their agent; and therefore, unless  
the appellant could shew, not only that the proceedings were  
illegal, but that Hamilton acted under the influence of malice,  
he could not obtain damages from him. But in the summons  
there was no allegation of malice; and therefore the only question  
was, whether the proceedings were illegal, and which question  
could refer only to the liability of the Campbells. Instead of  
having done any thing illegal, the respondents had given the  
appellant more indulgence than he was lawfully entitled to.

---

\* See 2. Shaw and Dunlop, No. 316.



They had a valid decree against him for a sum of money, which he refused to pay, unless the respondents expedite a confirmation, which they were not bound to do. No diligence was raised on that decree for several weeks after it was issued; and the judgment of Lord Hermand, sisting execution as to the L.10 and interest, gave the appellant every thing he was lawfully entitled to demand. Nevertheless he still insisted that the respondents were bound to confirm; and while he was maintaining this plea, he made the offer of the 19th March, requiring a complete and valid discharge, which could only mean that for which he was contending in Court. He did not renew his offer after Lord Succoth had found that he had no right to require confirmation, but, on the contrary, reclaimed to the Court upon that point. His petition was incompetent, because a certificate of refusal had been issued and execution done by arresting, and therefore the respondents were entitled to raise letters of caption. They were not, however, executed till three days after the petition was finally refused; and, while no obstacle whatever to execution existed, the loosing of the arrestments and consignation could not prevent the respondents from executing the caption, even although they had been aware of it; because they could not get up the money without the appellant's consent, and this they could not obtain except by the compulsitor of the law. Every indulgence was given to him when he was apprehended; and if their proceedings were legal, it is not relevant to say that he was either a rich man or in bad health.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L.100 costs.'

LORD CHANCELLOR.—My Lords, There is another case which stands for your Lordships' judgment to-day, which is the cause which was last heard at your Lordships' Bar,—the cause in which Alexander Cooper is the appellant, and Margaret Campbell, and others, are respondents. Your Lordships were pleased to indulge me, after the close of the argument at the Bar, with a short time for the purpose of looking into the several cases.

My Lords,—Where it is the intention of the individual moving your Lordships to propose that the judgment shall be reversed, it is proper that he should state fully the grounds of the opinion he has formed; but where it is his intention to recommend to your Lordships an affirmance of the judgment, it is not the custom to give his reasons very much at large. It is sufficient for me on the present occasion to say, that when the question is put that this judgment be reversed, I

April 18. 1825. shall feel it my duty to vote for its being affirmed; and when one looks at the nature of the case, I think we certainly cannot affirm it without giving the costs occasioned by the respondents having been brought here. I would therefore move your Lordships that this judgment be affirmed, with L.100 costs.

*Appellant's Authorities.*—A. S. June 14. 1799; Taylor, Dec. 1820; A. S. Nov. 9. 1590.

J. CHALMER,—Solicitor.

No. 16.

JAMES WEMYSS, Appellant.

HUGH HAY, Esq. of Morton, Respondent.

*Writ—Testing Clause.*—1681, c. 5.—Held, (affirming the judgment of the Court of Session), That a testing clause, naming and designing certain persons who signed as witnesses, but not expressly stating that they were witnesses to the subscription of the granter, was effectual.

April 19. 1825.

2D DIVISION.  
Lord Pitmilley.

THE late John Hay, Esq. of Morton, in the county of Fife, executed a deed of entail, by which he conveyed his estate to his nephew, John Hay, whom failing, a series of substitutes. The entailer died in 1775, and was succeeded by his nephew, who made up titles in virtue of the entail, and possessed the estate till his death in 1799. The respondent, Hugh Hay, was his son and heir, and thenceforth enjoyed possession, without interruption, as his heir-apparent, till 1815. On the 26th of May of that year the appellant, James Wemyss, the grand-nephew and heir-at-law of the entailer, brought an action of reduction of the entail, in respect of the testing clause being defective, and that the deed had been executed on deathbed; but this latter question did not enter into the present discussion. The testing clause was thus expressed:—‘ In witness whereof (written on this and  
‘ the eleven preceding pages of stamp paper by David Fraser,  
‘ writer in St Andrews) I have subscribed these presents, con-  
‘ sisting of this and the said eleven preceding pages, and marginal  
‘ note on the fourth page, and to the deleting of part of a word  
‘ in the ninth line, and another part of the said word in the tenth  
‘ line of the fifth page, counting from the bottom, before signing;  
‘ John Bower, son to Patrick Bower, bookseller in St Andrews,  
‘ and the said Patrick Bower and David Fraser. (Signed) JOHN  
‘ HAY. John Bower, witness, Patrick Bower, witness, David  
‘ Fraser, witness.’ The defects in this clause which were mainly relied on were, 1st, That neither the place nor date of the granter’s