No. 29. WILLIAM and ALEXANDER COOPER and Company, Appellants.

JAMES KERR, (MEEK's Trustee), Respondent.

Relief—Pactum Illicitum.—Certain parties having agreed to defray the expenses of a prosecution at the instance of a procurator-fiscal, and taken active measures in support of it; and having alleged, that in the course of the proceedings they had disclaimed them; and the procurator-fiscal having been subjected in expenses and damages on account of the prosecution; and the Court of Session having found him entitled to relief,—The House of Lords so far affirmed the judgment as found him entitled to relief, but remitted to hear farther as to the amount of the expenses and damages, and as to the liability of the parties subsequent to the date of the alleged disclaimer.

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2D DIVISION. Lord Glenlee.

ON the 6th October 1809, Thomas Meek, procurator-fiscal of the Justice of Peace Court for the Under Ward of Lanarkshire, presented a petition to the Justices, founding on the 28th Geo. III. ch. 17. for the regulation of the manufacture of nuns or ounce thread, by which it is declared, that in reeling or making up that kind of thread, the manufacturers should make use of reels of certain dimensions, and have a certain number of threads in each hank, under the penalty of the reels being destroyed, and of being subjected to any party who should inform upon them in the penalty of L.10 for each pound weight; and setting forth, that several manufacturers (among whom he included the appellants, Cooper and Company) had been guilty of a violation of the statute, and therefore praying for warrant of search, and, on conviction, for payment to him of the penalty. It was alleged by Meek, that the true object of the proceeding was to ascertain whether a thread, called Dozen or Lisle thread, fell under the statute; that the petition had been suggested by several manufacturers of nuns thread, (among whom were the appellants); and that they had verbally agreed to indemnify him, before it was presented, for the whole consequences. This was denied by the appellants, who referred, in support of their denial, to the circumstance of their names having been included in the petition. It however appeared, that on the 10th of October they, with certain other manufacturers, subscribed the following agreement, and that no proceedings were followed up against them:—'We 'agree jointly each to bear a proportion of the expense and 'trouble in making a legal trial, whether Dozen and Lisle thread 'can be brought in as an evasion of the Act of Parliament for 'preventing frauds in the manufacture of nuns or ounce thread. '(Signed) WM. and ALEX. COOPER and Company, G. BELL and

'Son, MATTHEW SHAW, ROBERT SHIRRA, WALTER URE, JOHN 'WALKER and Son, ROBERT EASTON.—Glasgow, 10th October '1809.' A warrant had in the meanwhile been obtained against all the parties complained of, which, it was alleged by the appellants, was subscribed only by one Justice, whereas it ought to have been by two. The warrant was executed only against two of the parties, Mitchell and Company, and John Harper, manufacturers in Glasgow, in whose possession thirty pounds of thread were seized. In defence they stated, that it was Dozen or Lisle thread, which was essentially different from nuns or ounce thread, and therefore did not fall under the statute. A great deal of procedure then took place before the Justices; and on the 11th September 1810 a meeting of the subscribers of the agreement was held, (of which John Ronald, one of the partners of the appellants' house, was preses), the minutes of which set forth, that they were 'subscribers of an obligation to pay the 'expense attending the making a legal trial, whether Dozen and 'Lisle thread is an evasion of the Act of Parliament for prevent-'ing fraud in the manufacture of nuns or ounce thread;' that 'Mr Meek stated to the meeting, that, on the employment of the 'persons before-mentioned, and in consequence of the foresaid 'obligation, he had commenced a prosecution against Messrs 'Thomas Mitchell and Company, and John Harper, thread-'manufacturers in Glasgow, for reeling and putting up Dozen and 'Lisle thread different from the mode pointed out by the foresaid 'Act of Parliament;' that actions of damages had been raised against two of the subscribers by Harper, and by Mitchell and Company, and that the meeting resolved to send one of their number to Paisley, to 'try whether or not he can get any assist-'ance towards the expense of carrying on these prosecutions from 'the trade there,' and that two others should do the same in Glasgow. Two days thereafter a report was made to another meeting, at which Meek was not present, when 'they unanimously 'resolved to proceed in the prosecution before the Justices, and 'instruct Mr Meek to do every thing in his power to bring the 'same to a speedy and successful issue. They farther direct him 'to defend the action of damages before the Court of Session, 'and in general to do every thing in all the prosecutions which 'he may consider necessary. In witness whereof, this minute is 'signed by John Ronald, preses, in presence and by appoint-'ment of the meeting. (Signed) JOHN RONALD.' At last, on the 1st September 1812, the Justices found, that the seizure of the thread was warranted, so as to form evidence in support of

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During the dependence of this appeal, an action was, in February 1813, raised in name of the appellants, and certain of the other subscribers, against Bell and Shirra, for relief; and it being alleged that Bell was in meditatione fugæ, a petition was presented to the Magistrates of Glasgow, in which the appellants made oath to the verity of their claim in the action of relief, and their belief of Bell's contemplated flight, in consequence of which he was ordained to find caution. On the 12th of May 1815, however, their agent wrote to the agent for Meek, that the action against Bell and Shirra was instituted without their knowledge and consent, and that they disclaimed it.

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Actions of damages having been brought against Meek by Harper, and Mitchell and Company, and he having transmitted to Ronald, the partner of the appellants, some of the papers, Ronald, on the 22d May, answered, that neither 'I, nor the 'other gentleman you refer to, conceive that they have any 'interest in the proceedings, and that therefore any communi- 'cation to us on the subject was unnecessary.' Thereafter, Meek having sent to him copies of the appeal cases, Ronald, upon 3d September 1816, wrote to him, 'I received your packet of this 'date, enclosing the appeal cases for the appellant and respon- 'dent in the thread cause to which you allude, and which I return, 'as I have no concern with them, and will not so much as read 'them.' The appeal was afterwards discussed, and the judgment affirmed, with costs. An action was then brought by Meek against the appellants, and the other subscribers of the obligation of the 10th October 1809, in which he set forth, that they 'did, upon 6th October 1809, or prior thereto, enter into an 'arrangement to prosecute the manufacturers of such thread, 'and they employed the pursuer for that purpose, engaging to 'defray the expense, and to relieve him of all consequences:' that they entered into the written obligation of the 10th of that month, which they delivered to him: that on the faith of it, and by their instructions, he carried on the prosecution, 'whereby, and by the obligation before recited, as well as by 'sundry prior and subsequent acts and deeds, the said de- 'fenders, parties to the said obligation, are bound, jointly and 'severally, to sustain and defray the expenses incurred or to be 'incurred in carrying on the proceedings at the instance of the 'pursuer, and defending the said actions raised against him; and 'also to free and relieve the pursuer of all damages and expenses 'awarded, or which may be awarded against him, in any of the 'foresaid actions, or in any proceedings arising therefrom, or 'connected therewith;' and he therefore concluded against them, conjunctly and severally, for relief accordingly. In defence the appellants stated, that so far from having employed Meek, he had actually included them as defenders in the petition: that although it was true no proceedings were taken against them, and they subscribed the agreement of 10th October, yet this was not an obligation in favour of Meek, who had subsequently got possession of it under a false pretence: that he had a deep interest in the result of the proceedings, because he was entitled to a penalty of L.10 on every pound weight of thread which should be condemned; and accordingly, although one pound was

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sufficient to try the question, he had seized upon thirty; that it was true that they had attended the meetings, but the minutes were concocted ex post facto by Meek, and did not express what actually occurred: that he had committed various irregularities during the course of the proceedings; and that supposing the agreement of the 10th October 1809 was to be considered as available to him, still, as the parties merely bound themselves jointly, and not severally, it came to an end by Shirra's disclaimer prior to the advocation, and, at all events, by the subsequent disclaimers of Ronald: that on the same supposition the obligation could not be enforced, because being in favour of a public prosecutor, it was pactum illicitum; but if it were a legal obligation, it only created a pro rata liability; and as Meek had himself a pecuniary interest, he was bound to bear his share of the loss. The Court, on the report of the Lord Ordinary, and Meek being now dead, and Kerr being sisted as trustee for his creditors and representatives, pronounced this interlocutor:—'Find, that the defender Robert Shirra can, in any event, be 'only found liable in expenses and damages incurred anterior 'to the 17th day of October 1812, being the date of his letter 'to the late Thomas Meek; and, quoad ultra, assoilzie the said 'Robert Shirra from the conclusions of this action, and decern; 'and, before answer, appoint the pursuer to put in a minute 'stating the late Mr Meek's interest in the original action libelled 'on, and the extent of the penalties under the statutes which might 'have arisen to him as pursuer in the said action for penalties re-'ferred to in the pleadings, in the event of his proving successful.' Thereafter they pronounced this judgment:—'They sustain the 'action at the pursuer's instance, and find that the representa-'tives and creditors of Thomas Meek, and their trustee, are en-'titled to relief from the defenders of the expenses and damages 'stated in the libel; but that, on account of the private interest 'which Thomas Meek had in the statutory penalties sued for in 'the original action before the Justices, find, that he was liable 'pro rata with the other defenders in a share of such expenses 'and damages, and that the pursuer is accordingly bound to re-'lieve the defenders to the extent of such share: and find, that 'Robert Shirra is only liable in a share pro rata with the other 'defenders and Thomas Meek of such part of these expenses and 'damages as were incurred previous to the 17th day of October '1812, and decern and declare accordingly; but find no ex-'penses due to either party.' The respondent having reclaimed, their Lordships, on the 24th June 1823, pronounced this inter-

locutor:—'They vary and alter the interlocutor reclaimed 'against, to the effect of finding that the petitioners are entitled 'to a total relief from the defenders of the expenses and damages 'stated in the libel, and of finding that the petitioners are en- 'titled to the expenses of this action, subject to modification; 'but, quoad Robert Shirra, adhere to the interlocutor reclaimed 'against, and refuse the desire of the petition: Allow an account 'of the expenses of this process to be put in, and remit the same, 'when lodged, to the auditor of Court to tax and report; reserv- 'ing to the defenders to be heard before the Lord Ordinary as 'to their disclamation of the proceedings in the advocation, and 'the period at which such disclamation was made, and on the 'effect thereof on the claims libelled, and to the petitioners their 'answers thereto; and remit to his Lordship to do therein as he 'shall see cause.'* May 31. 1825.

Cooper and Company appealed.

Appellants.—1. The proceedings before the Justices were at the sole instance of Meek, who had a pecuniary interest to insist in them; and although, no doubt, the appellants and other manufacturers entered into an arrangement, inter se, for the purpose of relieving each other of any expenses they might incur in relation to the prosecution, yet as it was neither addressed to, nor granted in favour of Meek, it could not be available to him.

2. Supposing, however, that he was entitled to found upon it, the obligation was pactum illicitum. By the law of Scotland, popular actions are prohibited, and therefore any arrangement for supporting such an action is contrary to law, but more especially where it is alleged, that it has been made in favour of a public officer, whose duty it is to prosecute all offences on his own responsibility alone.

3. In the course of the proceedings numerous irregularities were committed by Meek; and on the supposition that he is to be regarded as their agent, it is not just that they should be bound to relieve him of the consequences thence arising. But, at all events, if the agreement is to be available to him, it can only be enforced according to its terms. The obligation, however, was merely joint, and not several, and so came to an end when Shirra withdrew. It was terminated by the disclaimers sent by Ronald, one of the appellants; and if a joint liability is to be imposed on

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* 2. Shaw and Dunlop, No. 396.

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Respondents.—1. The evidence is quite conclusive to establish the fact, that the proceedings were truly at the instance, and for the benefit of the appellants and the other subscribers: that they employed Meek to raise and prosecute them, and that they bound themselves to relieve him of all the consequences.

2. It is absurd to characterize the obligation as pactum illicitum. It is the daily and recognized practice in Scotland for public prosecutors to take obligations of relief where offences are prosecuted at the request of private parties: accordingly, this is well known with regard to indictments on behalf of banks at the instance of the Lord Advocate against parties accused of forgery; and indeed, if inferior public prosecutors were not allowed so to protect themselves, it would be impossible for them to prosecute numerous offences, because they are frequently subjected personally in expenses and damages.

3. No irregularities were committed, and none are established to have existed.

4. Independent of the obligation of October 1809, the acts of the appellants were sufficient to constitute against them a joint and several liability; and as the prosecution was adopted for their behoof, they are bound to relieve the respondent of all the consequences. The retirement of Shirra cannot be of any avail to them, and the only letter of Ronald that can be founded upon was not written till the whole expenses had been incurred, and the liability for damages had arisen.

The House of Lords ‘found the respondent entitled to relief ‘from the appellants and the other defenders jointly and severally, ‘(except as to Robert Shirra, as to whom it has been found that ‘he is only liable in a share pro rata with the other defenders of ‘such part of the expenses and damages as were incurred previous ‘to the 17th October 1812), for the expenses and damages in‘curred and paid by Meek and the respondent in and about the ‘proceedings in the libel mentioned, (the same to be ascertained ‘and modified by the Court of Session); subject, however, to this ‘reservation, that is to say, reserving to the appellants and the ‘said other defenders to be heard upon the amount of such ex‘penses and damages, and also upon the disclamation by them ‘of the proceedings in the advocation, and of the appeal to the ‘House of Lords, and the period at which such disclamation was ‘made, and on the effect thereof on the claims subsequent to such

'disclamation; and to the respondent, his answer thereto. And 'it is ordered and adjudged, that the several interlocutors com- 'plained of, so far as they are inconsistent with this finding, be 'reversed: And it is further ordered, that the cause be remitted 'back to the Court of Session, to proceed further according to 'this judgment, and as shall be just.' May 31. 1825.

Respondents' Authority.—2. Hume on Crimes, 132.

J. Butt—J. Campbell,—Solicitors.

Sir Andrew Cathcart, Appellant.

Earl of Cassillis, and Others, Respondents.

No. 30.

Service—Consolidation—Exhibition—Re-hearing.—Thomas having in 1748 executed a deed of settlement of his estates, and of those to be acquired by him, containing a simple destination, and procuratory of resignation in favour of his brother David, and the heirs of his body; whom failing, certain other substitutes; whom failing, his own nearest heirs whatsoever; and the superiority of part of the lands being separated from the property, and having, after making up titles to the superiority, and, in order to consolidate it with the property, given a commission to a third party, who granted to him a charter of confirmation of the base right, and a precept of clare constat for the specific purpose of consolidation, on which he was infeft; and having thereafter purchased certain parcels of lands, on which he was infeft; and for political purposes granted a procuratory of resignation for new infeftment of the greater part of the lands included in the deed 1748, to himself, his heirs and assignees, in fee, on which he expede a charter in 1774, but did not take infeftment; and having died without issue, and been succeeded by David, who obtained a general service to him 'tanquam legitimus et propinquior hæres masculus et 'lineæ,' and been infeft on the precept in the charter of 1774; and David having thereafter executed an entail in favour of a series of heirs, exclusive of the heirs whatsoever of Thomas, and died without issue; and the intermediate substitutes under the deed 1748 having failed, and the heir whatsoever of Thomas having brought an action of exhibition against the heir succeeding in virtue of the entail, and a reduction of the titles made up by David, and of the entail;—Held, (affirming the judgment of the Court of Session), 1. That the service of David to Thomas was effectual to convey to David the personal right of all the subjects specified in the settlement 1748, and contained in the charter of 1774, and entitled him to execute the entail, but not as to lands not included in the charter of 1774: 2. That the terms 'heirs and assignees' under the charter of 1774 did not necessarily imply the same heirs as those called by the deed of 1748: 3. That (without deciding the point of consolidation) as Thomas was vested in the personal right both of the superiority and property, that right was transmitted to David by his service: But, 4. A remit made to consider, whether the right to the lands which had been acquired by Thomas subsequent to the deed 1748, and not contained in the charter 1774, could be transmitted to David by the above service: 5. That the entail was sufficient to exclude the heir of Thomas from insisting in an exhibition of the previous titles: And, 6. That a party who had an opportunity of being heard at the Bar of the House