

Appellants' Authorities.—Livingstone, July 13. 1666, (10,433.); Charters, Feb. 15. June 28. 1825. 1687, (5650.); Mason, Nov. 15. 1821, (1. Shaw and Bal. No. 173.); Burgesses of Inverury, Dec. 14. 1820, (F. C.); 1. Ersk. 4. 23.; Cowan, June 23. 1782, (16,133.)

Respondent's Authorities.—3. Ersk. 3. 47.; Archbishop of St Andrews, March 12. 1784, (5699.); Chalmers, Feb. 27. 1668, (5698.); Bell on Election Law, p. 491.; Guild, Dec. 21. 1809, (F. C.); Anderson against Magistrates of Wick, Feb. 17. 1749, (1842); Anderson against Magistrates of Renfrew, June 30. 1752, (16,123.)

J. CAMPBELL—A. MUNDELL,—Solicitors.

PATRICK PEARSON, Writer in Edinburgh, Appellant.

No. 49.

WILLIAM JACK, with concurrence of his Majesty's Advocate,
Respondent.

Delict.—The Court of Session having in general found a party guilty of various charges made against him in a petition and complaint; a remit made ex parte to review the judgment, and state in what respects he had been guilty.

THE appellant, Patrick Pearson, writer in Edinburgh, was originally an agent in the Sheriff Court of Fifeshire, and in that capacity he was employed by Thomas Malcolm to recover from one Meldrum a debt of L. 121. He obtained decree against Meldrum for that sum and expenses, which, with those of diligence, enlarged the debt to L. 169. 17s. 3d. For payment of this sum Meldrum, along with other parties, accepted a bill, drawn and indorsed by the respondent William Jack, merchant in Cupar Fife, and which was thereupon delivered to Pearson as Malcolm's agent. The bill was discounted by Pearson, and it having been dishonoured, diligence was raised upon it against all parties, and a partial payment was made, which reduced the debt to L. 103. 17s. For this sum a second bill was drawn and indorsed by Jack, accepted by the other parties, and delivered to Pearson. This bill was also dishonoured, duly protested, and notice given to all concerned. Letters of horning were then raised, in the recital of which Jack's name was mentioned, but it was omitted in the will. The letters were thereafter transmitted to a messenger of the name of Millie, whom Pearson was in the practice of employing, and for whom he was cautioner, to execute them against all the parties. At this time Pearson was abroad, and the matter was attended to by his partner. No execution was returned by the messenger; but he had begun one on the back of the diligence, which he had left unfinished. He

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June 28. 1825. afterwards rendered an account to Pearson, in which there was a charge made for 'executing horning, Pearson v. Jack.'

Some time thereafter, a dispute having taken place between Malcolm the creditor and Pearson, the former raised an action, alleging that Pearson by his conduct, and particularly by taking the bills, and not doing sufficient diligence, was liable for the debt, and therefore concluding accordingly. In defence, Pearson denied his liability, and (on the supposition that he was responsible) pleaded certain counter-claims, arising out of accounts of business. After some proceeding, the Lord Ordinary decreed to a certain extent against Pearson, who lodged a representation, contending that he was not liable for the debt; and his agent wrote to the messenger, requiring him to return an execution against Jack. Before, however, any answer was received, the omission of Jack's name in the will of the letters had been discovered by the counsel for Malcolm, who founded upon it as conclusively establishing that no diligence had been done against Jack. On the other hand, Pearson alleged, that, so far as he was concerned, he had performed his duty, and that in point of fact Jack had been charged. The Lord Ordinary, on the 13th June 1822, pronounced this interlocutor:—'In respect that a demand is now
' made by the pursuer, for having the defender found liable for the
' whole sum of L. 169, contained in the bill by Jack and Meldrum,
' and that the defender alleges he is not liable for that debt, in consequence of his having done due diligence against the parties by
' whom it was due; appoints the defender to give in a condescen-
' dence, in terms of the Act of Sederunt, of the facts and circum-
' stances he avers and offers to instruct, in order to shew that such
' diligence was done by him; and to accompany said condescen-
' dence with production of any execution of the said diligence
' against Jack which may be in his possession.'

On the 17th Pearson wrote to Jack, desiring him to 'send me
' the charge of horning served upon you 16th November 1815
' for the debt;' and at the same time he wrote to the messenger to return an execution of that charge, which formed an item of his account, and stated to him, 'There is no doubt you gave a
' charge to Jack. But as his name is not in the will of the horning,
' you seem to have stopt short with the execution. You will de-
' termine how far you are at liberty to send me a separate execu-
' tion still. It may assist our argument on the point of expenses.
' It cannot hurt you; for I will guarantee you against all injuri-
' ous consequences.' The messenger accordingly transmitted an execution; but he stated in his letter, 'that the execution against

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‘ Jack can have no faith in judgment, as I had no warrant for executing it against him, he being kept out of the will.’ He, however, afterwards deponed, that he had actually given a charge to Jack on the 16th November 1815, being the date stated in the execution. It was then produced in process, and on the 9th of July Pearson sent a notice to Jack, intimating, ‘ that the charge given you for this debt upon the 16th November 1815, (or of whatever date the said charge may have been given), is hereby departed from; it having been discovered, since said charge, that your name is in the body of the letters of the horning then raised and executed, but not in the will, whereby the charge is inept.’

Malcolm, alleging that Pearson had been guilty of an irregularity in obtaining the execution from the messenger, threatened a petition and complaint to the Court, and Pearson, in order to buy his peace, paid the full claims with expenses. As indorsee of the bill, Pearson then raised new letters of horning against Jack, and executed arrestments. Jack thereupon notified to him, that unless he abandoned all claim against him, he would immediately present a petition and complaint to the Court, founded on the circumstance of having obtained the execution. In this matter the same agent who had acted for Malcolm was employed by Jack. Pearson having refused to submit to the proposed terms, Jack, with concurrence of the Lord Advocate, presented a petition to the Court, setting forth, ‘ That the petitioner feels himself called upon to bring under the view of your Lordships certain proceedings, which have been held upon the part of Mr Patrick Pearson, lately writer in Cupar-Fife, now writer in Edinburgh, the object of which appear to be, by means of a false execution of a charge of horning, which the respondent Mr Pearson prevailed upon one Millie, a messenger, (for whose faithful execution of his duty he is cautioner), to fabricate and grant, for the purpose of being founded on as evidence of the existence of a debt alleged to be due by the private complainer to the respondent Pearson.’

These allegations were denied by Pearson, who stated, that he was not aware of the omission of Jack’s name in the original letters of horning till the discussion took place with Malcolm; that it then became of importance, in relation to the question depending between them, to ascertain whether, in point of fact, a charge had been given to Jack; and that with that view, and not for the purpose of following up the diligence, the execution of the messenger, stating what had actually occurred, was procured; and accordingly that an intimation was immediately made to Jack

June 28. 1825. that the charge was departed from. On advising the proceedings, the Court (Feb. 11. 1824) ‘sustained the petition and complaint; ‘repelled the defences, declared the conduct of Patrick Pearson ‘was unwarrantable and illegal, and decerned accordingly; found ‘the said Patrick Pearson liable in full expenses, and further, or- ‘dained the petition and complaint, with the present deliverance ‘thereon, to be engrossed in the books of sederunt.’ To this interlocutor they adhered on the 10th February 1824, and thereafter decerned against him for L. 238. 17s. 4d. of expenses.*

Pearson appealed, but no Case was lodged by Jack; and although he appeared, he was not heard, as he declined to pay the costs of the day, and to lodge a Case.

Appellant.—By the interlocutors of the Court of Session, the appellant has suffered, as a professional person, the severest punishment, short of actual deprivation, which the forms of Court can allow. By leaving undefined the extent of the irregularity imputed to him,—by sustaining, in general terms, a complaint containing charges the most calumnious and ill-founded,—by ordaining the petition and complaint containing these charges to be entered in the records of the Court, unaccompanied by any explanation on the part of the appellant,—by omitting to state specifically the true nature of the irregularity of which the appellant was found to be guilty,—the interlocutors have, in truth, convicted him of various offences, of which the appellant, according to every rule of evidence, must stand acquitted, and of which he has no reason to think that the Judges of the Court believed him to be guilty. Add to all this, the appellant has been punished, at the suit of a private party, who had no conceivable interest in the matter at issue,—who originally threatened the appellant with this complaint for purposes of extortion, and afterwards, when disappointed in that scheme, persevered from motives of malignity.

The House of Lords ordered, ‘that the cause be remitted back ‘to the Court of Session, to review the interlocutors complained ‘of, and particularly to consider whether the whole of the charges ‘in the petition and complaint were sustained; and if the Court ‘should be of opinion that the whole were not sustained, then to ‘consider in what respect the conduct of the said Patrick Pearson ‘was unwarrantable and illegal; and after so reviewing the interlocutors complained of, the said Court do and decern in this ‘cause as may be just.’

* See 2. Shaw and Dunlop, No. 657.

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LORD GIFFORD.—My Lords, There was a case heard the last time I had the honour to attend your Lordships, in which a person of the name of Patrick Pearson was appellant, and a person of the name of Jack was the respondent. The respondent did not appear to support the interlocutor which had been pronounced,—he had not put his Case upon your Lordships' table, and declined to accede to the terms of paying the costs of the day. When the appellant appeared it was proposed that the appeal should be adjourned, which he declined, and therefore it was heard *ex parte*.

My Lords,—This case arose upon the respondent's preferring a very serious complaint against the appellant as to his professional character. The petition of complaint contained a variety of charges affecting the appellant:—first, That he had, by undue influence over the messenger, produced a false execution of a charge of horning; secondly, That that execution was procured in order to be used as evidence of a debt due by Jack to the appellant; and, thirdly, That no such debt was truly due: and there are a variety of allegations in the petition of complaint in confirmation of those charges. My Lords, a variety of proceedings had taken place in the Court below, with respect to the recovery of a sum of money by the appellant, due to a person of the name of Malcolm, for which Mr Jack, the respondent, was one of the parties liable. The proceedings have extended to a very considerable bulk; but the Court of Session finally were of opinion that this interlocutor should be pronounced:—‘The Lords having resumed consideration of and advised the petition of William Jack, with answers, duplies, productions, and whole cause, sustain the petition and complaint, repel the defences, declare the conduct of Patrick Pearson in the premises was unwarrantable and illegal, and decern accordingly: find the said Patrick Pearson liable in full expenses; remit to the auditor of Court to tax the same and to report; and further, ordain the petition and complaint, with this present deliverance thereon, to be engrossed in the books of sederunt.’

My Lords,—I think no one who has heard this case, or read these papers, can doubt that the conduct of Mr Pearson was certainly not to be justified in some particulars stated in this petition of complaint; but he complains of this sentence, because the Court have sustained the whole of the petition of complaint, containing charges the most calumnious and ill-founded, and because the Court have ordered the petition of complaint to be registered in the books of sederunt, unaccompanied by any explanation on the part of the appellant. Now, my Lords, as to a great variety of the charges in the petition of complaint, first of all, the appellant has denied them, and has offered to go into proof to negative them; and he contends, that under these circumstances the Court could not with propriety affirm the truth of all the allegations in this petition of complaint; and he contends, that even if his conduct was unwarrantable and illegal in certain particulars,—and (if I am to give an opinion) I have no hesitation in saying it

June 28. 1825. was,—that those particulars, as an act of justice to him, should have been specified in the interlocutor which the Court pronounced, which was to be engrossed among the Acts of Sederunt, there to remain as a perpetual record of this charge against him. I should also state to your Lordships, that with respect to the conduct of Mr Jack, the respondent, very considerable animadversions were passed upon him for his conduct in this case; but the Court have said, although his conduct was very reprehensible, yet having brought the conduct of a professional man before them, the only question for them was, whether the petition and complaint was supported or not? This interlocutor goes to support the whole petition of complaint, and directs it to be engrossed upon the books of sederunt.

My Lords,—Every one must be sensible how important it is in Courts of justice to watch over the conduct of the professional persons concerned in them; and when they are found conducting themselves improperly, how absolutely essential it is that they should receive the censure of the Court: the only difficulty I have in considering this case is, whether the Court of Session have not gone too far in sustaining the whole petition. It is well known to many of your Lordships, and those particularly who have had any experience in the consideration of causes from the Courts of Scotland, that it does very frequently happen that they affirm the general conclusions of a petition of complaint by the terms of the interlocutor, where there has not been an intention to confirm all those conclusions. In this case I think the Court themselves should point out the distinct allegations that they think have been proved against the party. I should be very unwilling to advise your Lordships to make any alterations in an interlocutor of this description, but I think that that should be done in order to do justice to the conduct of this person. Looking at the whole of the circumstances of this case, I would suggest to your Lordships, whether it would not be desirable that the Court of Session should review this interlocutor, for the purpose of embodying in it such parts of the charges as they think are proved. I see it is said by one of the learned Judges, whose dissent appears to be founded upon the conduct of Mr Jack, that Mr Jack's conduct was such as not to entitle him to come into a Court of justice to complain. With your Lordships' permission I would therefore propose, that this case should be remitted to the Court of Session to review the interlocutor complained of, and particularly to consider whether the whole of the charges in the petition of complaint were sustained; and if the Court should be of opinion that the whole were not sustained, then to consider in what respect the conduct of the said Patrick Pearson was unwarrantable and illegal; and after so reviewing the said interlocutor complained of, the Court do decern in this cause as may be just. It is very difficult to discover by this interlocutor, comparing it with the notes I have of their judgment, whether they meant to affirm all the charges in the petition of complaint, or whether they did not mean to confine themselves to some of those charges.

Under these circumstances, if that was the case, I would suggest, whether it would not be justice towards the individual that the specific charges considered proved should be specified, with respect to which they considered his conduct deserving of that censure which the Court has passed upon it. Under these circumstances, I should propose to remit this cause in the terms I have stated, June 28. 1825.

J. RICHARDSON,—Solicitor.

JAMES FORBES, and Others, Appellants.

No. 50.

FRANCIS SMYTH, Respondent.

Salmon Fishing—Property.—A party holding a right of salmon fishing, found, in a question with an adjacent heritor, (affirming the judgment of the Court of Session), to have no right to erect sights and towing-paths on the alveus of the stream: But the House of Lords remitted to the Court of Session to inquire, whether a bulwark or embankment, built by the adjacent heritor against the stream, was so constructed as to be injurious to the right of fishing in the water, and in a manner not necessary to its utility as a bulwark or embankment.

THE river Findhorn runs into the Moray Frith. Before reaching the estuary, it divides into two branches, passes the lands of Waterford, leaving, for a space, Waterford on the east of the eastmost branch. Twenty years ago, the river forced, for a short distance, a third branch through a portion of the Waterford lands, and then rejoined the centre stream: thus creating an island partly out of that property. This new course was shut up, but again broke out; and the proprietor of Waterford embanked his lands against farther encroachment. He had no right of salmon fishing. That belonged to Forbes of Echt, whose right, however, was solely of the fishing, having no property on either side of the river. Smyth bought Waterford, and found there the embankment raised against the east stream.

From the nature of the channel, the river, it was said, could not be advantageously fished without certain erections to facilitate the operations of the fishermen. These consisted, 1st, Of sights, *i. e.* subaqueous ridges thrown across, which, rendering the water shallow at that spot, disclose the salmon passing over,—or which, in the language of the old conveyancers, ‘market the fishes kyth ‘above the said fords;’ and, 2d, Towing-paths to give the fishermen solid footing in drawing the nets. Accordingly, Forbes and his lessees made a towing-path across the mouth of the centre

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