Friday, December 22, 1876.

SECOND DIVISION.

PETITION—F. E. VON ROTBERG.

Sequestration—Meeting of Creditors—Intimation in Gazette.

Where *per incuriam* notice of sequestration in the Gazette omitted to give the hour fixed for the statutory meeting of creditors, the Court, upon a petition presented by the bankrupt with concurrence of a principal creditor, *appointed* the corrected intimation to be made in a later number of the Gazette.

This was a petition by Fortunat Edwardo Von Rotberg, and Anthony Watson, a creditor to the extent required by law for intimation of sequestration. The circumstances under which the application was made were as follows:—The Lord Ordinary on the Bills (ADAM) granted sequestration on 18th December 1876, and appointed a meeting of creditors to be held in Dowell's Rooms, 18 George Street, Edinburgh, on Wednesday, December 27th, at 2 p.m., for the election of a trustee and commissioner, that being not less than 6 or more than 12 days from the date of the Gazette notice that sequestration had been awarded. Notice of the interlocutor appeared in the Edinburgh and London *Gazettes*, quite correctly in the latter, whereas in the former the hour of meeting *per incuriam* was omitted. The petitioner accordingly prayed the Court either to appoint the correct intimation to be made in a later number of the *Edinburgh Gazette*, or to discharge and postpone the meeting to Friday 29th December; and to appoint intimation in the Gazettes of the meeting as so fixed.

The Court granted the first alternative prayer of the petition.

Counsel for Petitioner—Thoms. Agents—Drummond & Reid, W.S.

Saturday, January 13, 1877.

SECOND DIVISION.

BUCHANAN *v.* DAVIDSON & STEVENSON.

Process—Defence—Relevancy—Law Agent.

In an action by law agents against a client for payment of an account incurred in defending the client in a former action—*question* as to the relevancy of a defence founded upon alleged breach of instructions committed by the law agents in defending the former action.

This was an appeal from the Sheriff-Court of Perthshire, at Dunblane, in an action at the instance of Davidson & Stevenson, solicitors in Stirling, against Thomas Buchanan, merchant, Callander, concluding for payment of two business accounts—one of £50, 3s. 5d. for law business performed and moneys disbursed for Buchanan in defending certain actions for payment of *legitim*, brought against him and his brother Walter Buchanan as surviving and accepting trustees of their father, the deceased Walter Buchanan, saddler, Callander, or as vitious intromitters with his estate; and another account of £11, 3s. 7d., incurred in defending a process of interdict brought against the same parties by a tenant. The final decision of the action for *legitim* was adverse to Thomas Buchanan and his brother Walter as trustees foresaid. It is reported 7th March 1876—*ante, Buchanan* v. *Buchanan's Trustees*, vol. xiii. p. 353, and 3 Rettie, p. 556. In the present action for payment of the accounts, Davidson & Stevenson averred that they were not the regular agents of the trust, but had been separately employed solely by Thomas Buchanan, who gave them all the instructions they received. In particular, they averred that he instructed them to defend the action for *legitim* by a denial of vitious intromission, in respect the deceased Walter Buchanan had divided his estate previous to his death, and had so left no succession. The action was accordingly defended on these grounds. Thomas Buchanan pleaded, with reference to the first account, that he had given explicit instructions that the action for *legitim* should be defended on the ground that he had not accepted or acted as one of his father's trustees. This was not done, and Buchanan averred that the action was lost in consequence of his instructions being neglected. He also averred gross mismanagement in not having stated the defence, which was the subject of his special instructions. With reference to the second account sued for, Buchanan denied that he had employed the pursuers. The Sheriff having allowed a conjunct proof, Buchanan, the defender, appealed to the Court of Session. The pursuers and respondents objected to the case being sent to a jury, and asked for a proof before answer on the relevancy of the defence, or that the defences should be *de plano* dismissed as irrelevant.

The following issues were proposed by the pursuers in the event of the case being sent to a jury:—"(1) Whether the defender employed the pursuers to perform the services and disburse the outlays charged for in the account annexed to the summons, No. 1 of process, commencing 2d June 1873 and ending 4th November 1875, or any and what part thereof? and whether, in respect thereof, the defender is indebted and resting owing to the pursuers in the sum of £50, 3s. 5d., or any and what part thereof, with interest thereon from the 15th day of July 1876 till payment thereof? (2) Whether the defender employed the pursuers to perform the services and disburse the outlays charged for in the second account annexed to the summons, No. 1 of process, commencing 11th March and ending June 14th, both in the year 1875, or any and what part thereof? and whether, in respect thereof, the defender is indebted and resting-owing to the pursuers in the sum of £11, 3s. 7d., or any and what part thereof, with interest thereon from the 15th day of July 1876 till payment thereof?"

The counter-issues by the defender were:—"(1) Whether the defender instructed the pursuers to conduct his defence to the actions at the instance of his brother James Buchanan, charged in the account first annexed to the said summons, No. 1 of process, on the ground that the defender had not accepted or acted as a trustee under his father's trust-disposition and settlement, dated on or about 16th June 1869, and had

not intromitted with his father's estate? and whether, in breach of said instructions, they failed to conduct said defence on said ground. (2) Whether the pursuers conducted the defence to said actions negligently and unskilfully, in consequence whereof the defender sustained loss and damage to a greater extent than the sum sued for?"

The appellant and defender moved that the case should be sisted until the appeal to the House of Lords in *Buchanan* v. *Buchanan's Trustees* should be disposed of. He further argued—There was here a relevant defence. The breach of instructions was not discovered till late in the action. The failure to lodge a defence, for which special instructions have been given, is equivalent to the failure to enter appearance. The ground of judgment in *Buchanan* v. *Buchanan's Trustees* was the indebtedness of the appellant. But a debtor on his creditor's death does not become a vitious intromitter. Hence the breach of instructions materially affected the result of the case.

The pursuers argued—The House of Lords never give costs to a successful appellant; hence the accounts now sued for are due in any event. In *Buchanan* v. *Buchanan's Trustees* the appellant admitted that he was a trustee; and this was the fact. A law agent is not bound to state in defence untrue and irrelevant facts communicated by a client. The failure to plead in accordance with instructions (assuming these to be given) did not and could not affect the result—*Hill* v. *Finney*, 1865, 4 Foster and Finlason, 616. In any case, the present defence of breach of instructions and negligence (if relevantly stated) is relevant as a defence only to the action as regards the first account—*Burt* v. *Bell*, Nov. 6, 1861, 24 D. 13. The defence of negligence applies only to the account for the particular piece of business in which the negligence is said to have occurred.

The Lord Justice-Clerk was of opinion that no relevant defence had been stated to the action for payment of the first account. Lord Ormidale and Lord Gifford were, however, of opinion that a proof before answer as to the relevancy should be allowed, especially as there must be a proof as to the second account. The Court accordingly appointed a proof before answer to be led before one of the Judges of the Second Division.

Counsel for Pursuer—J. Henderson—Begg—Asher. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defender—Scott. Agents—Walls & Sutherland, S.S.C.

Tuesday, January 16.

SECOND DIVISION.

[Sheriff-Substitute of Aberdeen and Kincardine.

TRAILL *v.* ANDREW.

Process—Reponing—Decree by Default.

Circumstances in which *held* that a defender against whom in the Sheriff Court a final decree by default (in respect of non-appearance) had been pronounced, was entitled to suspension; and remit made to the Sheriff to repone.

This was a suspension brought by James Traill, residing at Tombeg, Monymusk, of a decree for £35 obtained against him on 19th November 1875, in an action in the Sheriff Court of Aberdeen and Kincardine, at the instance of John Andrew, residing at Cove, Aberdeen, laid on an agreement to give the respondent one-third of the proceeds for the season, and also one-third of the price of a horse sold by the complainer; and also of a further decree for expenses. The action was raised on 12th January 1874, and concluded, alternatively, for damages. Defences were lodged to the action, and a record made up; but after great delay (the action repeatedly falling asleep), and before proof had been led, decree by default was on 19th November 1875 pronounced in favour of the pursuer "in respect the defender has failed to appear either personally or by agent." This interlocutor followed on one pronounced seven days previously, by which the Sheriff-Substitute, in respect the complainer's procurator had ceased to act for him, appointed the respondent to intimate to the complainer that he must appear on 19th November 1875 under certification. The complainer averred that on receiving this intimation he communicated with his agent, and understood that the latter would continue the agency and attend on 19th November 1875. The next intimation he received was a charge on the decrees under suspension. He further averred that these decrees were not well founded in law or in fact.

The complainer pleaded—"(7) The decrees sought to be suspended having been pronounced solely in respect of the complainer's non-appearance, and the said non-appearance having occurred through no fault on his part, and the said decrees being contrary to the justice of the case, the complainer is entitled to suspension."

The Lord Ordinary (YOUNG) sustained the reasons of suspension *simpliciter*, without allowing proof of the complainer's averments, some of which were either denied or not admitted, and suspended the decrees and charge complained of.

The respondent reclaimed, and argued—(1) Assuming the complainer's case to be relevant, it had not been proved; (2) but his case was not relevant. In *Mackenzie* v. *Smith*, 23 D. 1201, it was held that decree by default against a defender for failure to lodge a revised paper is a decree *in foro*. Even in the case of a decree in absence it was competent to inquire into the whole circumstances whether or not the decree ought to be opened up; and in *Brown* v. *Sinclair* (2 Sh. and M'L. 143, and under remit, 15 Sh. 770) Lord Brougham strongly observed on the danger of enabling a man with a negligent attorney or a light purse to harass an adversary with a suit and then to withdraw and suffer judgment to pass against him, and then to escape from the effect of that judgment. Poverty and consequent inability to proceed has generally been pleaded against a decree by default. The complainer might have appealed in the case to the Sheriff or to the Court of Session. (3) Stringent conditions as to expenses should have attached to the suspension of a decree properly pronounced. —*Morrison* v. *Walker*, 9 Macph. 902; *Cheyne* v. *M'Gungle*, 22 D. 1490.

The Court unanimously adhered to the Lord Ordinary's interlocutor, but at the same time re-