Wednesday, July 15.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

TAYLOR *v.* M'DOUGALL & SONS AND RUTHERFORD.

Reparation—Process—Joint and Several Liability—Separate Case against Different Defenders.

Where a pursuer brought against separate defenders, "jointly and severally or severally," an action for a slump sum of damages for alleged wrongs, one of which was the act of one defender alone—*held*, following *Barr* v. *Neilsons*, March 20, 1868, 6 Macph. 651, that the action was not maintainable.

Process—Record—Amendment.

Where a pursuer, in order to make his action maintainable, proposed to substitute for the conclusions of the summons certain new conclusions, the effect of which was to turn the proceeding into an entirely new action, the Court *refused* to allow the amendments, and dismissed the action.

This was an action of damages for defamation at the instance of Robert Aiton Taylor against "(first) M'Dougall & Sons, wholesale and retail glass and china merchants, 71 and 73 Buchanan Street, Glasgow, and John M'Dougall, residing at Myrtle Park, Cove, and Daniel M'Dougall, residing at Strathlea, Cove, the only known partners of the said firm of M'Dougall & Sons, as such partners and as individuals; and (second) Alexander C. Rutherford, manager and secretary of the Glasgow and West of Scotland Guardian Society, having its office or ordinary place of business at 145 Queen Street, Glasgow, all conjunctly and severally—defenders." The pursuer sought decree against the defenders, "jointly and severally, or severally," to make payment to the pursuer of the sum of £3000.

The pursuer stated that he was in March 1882 (after filling various important situations in insurance companies) appointed as assistant-secretary to the Caledonian Insurance Company at their Glasgow office at a salary of £250 per annum; that he occupied as tenant a house at 91 Claremont Street, Glasgow, which he had rented from the defenders M'Dougall & Sons, and John & Daniel M'Dougall, on a lease for three years; that in April 1884 he was appointed to the higher position of joint-secretary to the Caledonian Insurance Company at their Liverpool office, at which time he owed the defenders M'Dougall & Son a year's rent, and an account for £30 for glass and china; that he received notice to proceed to Liverpool within a very few days after his appointment, and was obliged to leave Glasgow hurriedly, and had no time to arrange his own private affairs; that before leaving he saw Mr John M'Dougall, and obtained his leave to sublet the house for the period of tenancy which had still to run; that at that interview no reference was made to the account for £30, 15s. 0½d.; that being unable to go to Glasgow personally to pay the rent, he sent £50 in payment of it to his brother, who called and paid it on the 24th May, when no intention was intimated by the defenders as to the unpaid account, and no indication given that any diligence was to be used with regard to it; that thereafter Rutherford, who was not a law-agent but a debt collector for tradesmen, and carried on business as The Glasgow and West of Scotland Guardian Society for the Protection of Trade, raised and served an action for the £30 account, and used arrestment of the furniture, which was then in the hands of a carrier for transit to Liverpool, in which action he obtained a decree in absence, which the pursuer as soon as he heard of it caused to be opened up, consigning the sum sued for; that in that process the Sheriff found that the pursuer had not been duly cited, recalled the decree, and dismissed the action. With reference to the proceedings which followed on the decree in absence the pursuer averred—"(Cond. 10) Both the defenders M'Dougall & Sons and Alexander C. Rutherford well knew that the pursuer had left his Glasgow house *animo non revertendi*, and that his domicile was in England, and they knew his address; but notwithstanding such knowledge they caused said summons to be raised and served at said dwelling-house after he had left it, and after his furniture and effects were out of it, and another tenant in possession; and not only used said arrestments, but on 2d June 1884 moved for and obtained a decree in absence against the pursuer for the amount of said account. Pursuer, who knew nothing of all this procedure, and in particular did not know that a decree in absence was being obtained against him, and could not have prevented the same, was unable to leave Liverpool at the time, and his brother having gone to Dublin on business on 27th or 28th May, he was compelled to allow the matter to lie over till his brother's return on the 4th of June, when pursuer received a telegram from his brother informing him that a decree in absence had been obtained against him, and that his name was published as a defaulting debtor in Stubbs & Company's paper of that same date, and in other papers of a similar nature, commonly known as the 'Black Lists.' In particular, publication of the pursuer's name was so made in one of those lists called 'The Commercial Compendium,' purporting to issue from the said Glasgow Guardian Society, which, is already stated, is believed and averred to have existence only in the person of the defender Alexander C. Rutherford. Said Compendium or 'Black List' was and is in reality compiled, printed, and published by or on behalf of the defender Rutherford, for his own behoof and profit; and he, by himself or his employees, furnished the information whereby the said decree in absence against the pursuer was published in said list. The papers referred to contain the names and addresses of debtors against whom decrees in absence have passed, and are well known and extensively circulated amongst and read by tradesmen, and commercial and professional men of all classes, all over the United Kingdom."

In Cond. 12 the pursuer stated that the defenders knew, when they caused the action to be raised, that he had left his Glasgow residence and gone to reside permanently at Liverpool, and they knew his address there. They further knew that a decree being obtained against him in absence, his name would be published in the "Black

Lists," to the injury of his prospects in life. In point of fact he was compelled to resign his position as secretary in the Caledonian Insurance Co., under threat of dismissal, and his credit had been hopelessly injured. "(Cond. 16) The said decree was illegally, wrongfully, and unwarrantably obtained by the defenders. The application therefor was made, and the whole other proceedings complained of were taken, in *mala fide*, recklessly, maliciously, and without any just or necessary cause, by the defenders the said M'Dougall & Sons, John M'Dougall and Daniel M'Dougall, or the defender the said Alexander C. Rutherford; and they are jointly or severally liable to the pursuer for any loss, injury, or damage resulting to him therefrom."

The defenders' answer so far as bearing on the question decided in the case appears from their pleas-in-law.

The pursuer pleaded—"(1) The defenders, while in knowledge of the pursuer's removal from Glasgow, and of his address in Liverpool, having raised the said action, and not having given to the pursuer any citation or intimation of the dependence thereof, the same, and the subsequent proceedings therein, were illegal, nimious, oppressive, and wrongful. (2) The defenders having, severally and respectively, raised said action, and taken decree therein against the pursuer, wrongfully and illegally, to his great hurt and prejudice, the pursuer is entitled to reparation. (3) *Separatim*—The said proceedings having been taken by the said defenders M'Dougall & Sons, John M'Dougall and Daniel M'Dougall, or the defender the said Alexander C. Rutherford, maliciously, and without probable cause, to the loss, injury, and damage of the pursuer, he is entitled to reparation from the defenders, as concluded for."

The defenders M'Dougall & Sons pleaded—"(1) The pursuer's averments are irrelevant. (2) The pursuer's averments, so far as material, being unfounded in fact, the defender should be assoilzied. (3) The defenders' whole conduct in the matters alleged having been within their rights, they should be assoilzied. (5) The pursuer having, in the knowledge of the proceedings, elected to let decree pass, he cannot recover any damage he may have sustained in consequence."

The defender Rutherford, in addition to similar pleas, pleaded—"(3) The proceedings complained of having, so far as this defender is concerned, been conducted regularly, and according to instructions, the pursuer is not entitled to damages from him."

On 30th March 1885 the Lord Ordinary (M'Laren), approved of an issue against M'Dougall & Sons, putting the question whether they had maliciously and without probable cause raised and served on the pursuer at his former residence the summons for payment of £30, 15s., and arrested his furniture on the dependence thereof, and of an issue against Rutherford, putting the question whether he had maliciously and without probable cause inserted the pursuer's name in the *Commercial Compendium* in the form set forth in the schedule annexed to the issue, thereby meaning to represent him as a defaulting debtor.

Rutherford reclaimed. At the hearing M'Dougall & Sons also appeared as reclaimers.

The reclaimers argued that there was no issuable matter on record for either issue.

Counsel for the pursuer craved leave, having regard to the decision in *Barr* v. *Neilsons*, March 20, 1868, 6 Macph. 651, to make sundry amendments to the record. Leave having been granted, the pursuer put in process a minute of amendments, of which manuscripts were furnished to the Court. He was subsequently ordered to print them. These amendments proposed to delete the conclusion of the summons above quoted, and in place to introduce the conclusions—"(First) The defenders M'Dougall & Sons ought and should be decerned and ordained by decree of the Lords of our Council and Session to make payment to the pursuer of the sum of £750 sterling, and the defender Alexander C. Rutherford ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £750 sterling; (second) the defender Alexander C. Rutherford ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £1500 sterling."

"In condescendence 10, above quoted, after the words 'was published in said list,' to introduce the following words—'further, the insertion of the pursuer's name in the said "Commercial Compendium," published as aforesaid by the defender Rutherford, was made by the said defender in the knowledge that the said decree in absence had been illegally and unwarrantably obtained.'

"In place of condescendence 16 (above quoted) to substitute—'The said summons in the Debts Recovery Court, Glasgow, was raised and served on the pursuer on 24th May, the pursuer's furniture was arrested at the Caledonian Railway Station, Glasgow, on 26th May, and decree in absence was obtained against the pursuer in the said Court on 2d June. These several steps of procedure were taken by the defenders M'Dougall & Sons and Alexander C. Rutherford maliciously and without probable cause. The said defenders acted together throughout the said procedure. They were aware before the said action was raised that the pursuer had left Glasgow for Liverpool not to return. They knew he was, and intended he should remain, in ignorance of the said proceedings, and accordingly, though well aware how to communicate with him, they purposely abstained from doing so. Their whole proceedings were taken *in mala fide* and illegally, and they are jointly liable to the pursuer in reparation.'"

Argued for pursuer—He was entitled to amend the record under the provisions of the 29th section of the Court of Session Act by separate conclusions, so long as he did not subject to the adjudication of the Court any larger sum or any other fund or property than such as was specified in the summons—Mackay's Practice of the Court of Session, i. 485.

The reclaimers replied—The amendments fell to be refused. There was no case here of an error which the pursuer was entitled to have remedied by amendment. It was a radical defect in his summons which could not be cured by amendment. There were two unconnected wrongs complained of, and the proposed amendments brought a different fund and a different cause of action altogether into the case. In every stage of the summons a totally new action

was being made. Even if the amendments were allowed there would be no issuable matter on record. The case fell, then, to be ruled by *Barr* v. *Neilsons* (*supra*), and *Paterson* v. *Robson*, November 16, 1872, 11 Macph. 76.

At advising—

The Lord Justice-Clerk read the opinion of Lord Craighill, in his absence, as follows:—

Lord Craighill—This case comes before us on a reclaiming-note by the defender Rutherford against an interlocutor of Lord M'Laren, who approved of two issues for trial by jury. The first of these concerned only the defenders M'Dougall & Sons, the second only Rutherford. At the hearing the first named defenders appeared also as reclaimers, and the question raised for our consideration was whether there was issuable matter in the record for either issue. Parties were heard, but before the argument was closed the counsel for the pursuer, instructed by the decision in *Barr* v. *Neilsons*, March 20, 1868, 6 Macph. 651, became doubtful of the sufficiency of the record as it stood, and asked time to give in sundry amendments, which at this hearing were only faintly indicated. The Court as usual in such circumstances gave the time desired, and in due course the pursuer put into process paper amendments of which manuscripts were furnished to the Bench. The case came again before the Court on 30th June when it was further heard, the proposed amendments being the text of the discussion. The defenders contended that the motions to amend ought to be refused because the action as laid must, on the authority of the case of *Barr*, be held to be incompetent, and also because, even if not absolutely incompetent, the amendments were so sweeping that they made the case in all essentials a new action, and consequently leave to amend would be not a use but an abuse of the liberty to amend. Further, the defenders urged that even if amended as proposed there would not be matter relevant to form the subject of the issues upon which the pursuer desired to go to trial. Decision was delayed till to-day (7th July) that meantime the amendment for their better appreciation might be printed, and in that form laid before the Court for their consideration. This has been done, and we are now to give our decision.

Upon the question whether the proposed amendments should be allowed, there are several things which must be considered, the first of which is the nature of the action. As to this there can be no controversy. It is an action of damages for wrong alleged to have been done to the pursuer by the defenders. In this particular it is identical with the case of *Barr*. The second question is, what is the conclusion and who are thereby to be affected? The conclusion is for a slump sum of £3000 damages, for which decree is asked against the defenders jointly and severally. Here again we have identity with the case of *Barr*.

The third question is, what are the alleged wrongs? These are threefold. The raising of an action against the pursuer, the taking decree in that action though the summons as the defender knew had been served at a house of which the defender had ceased to be tenant or occupant, the arrestment of the pursuer's goods on the dependence of the action, and last of all the publication of the decree in a paper called the Commercial Compendium published by the defender Rutherford. There are four wrongs alleged, but with only three of these were the defenders M'Dougall & Sons said to be connected; the fourth, as set forth, being the act of the defender Rutherford alone, and yet a decree for a slump sum of damages for all these alleged wrongs is concluded for against all the defenders jointly and severally. This is just the flaw on account of which the action *Barr* v. *Neilsons* was dismissed. Such an action is obviously not maintainable. Explanation of the liability of the several defenders on such a record is a thing which could not be accomplished, and consequently if the case is to be judged of as it stands, only one result is possible—the case must be dismissed. But the pursuer says that bad as the record is it may be amended. That liberty, in his view, is secured to all actions however ill they may be shaped. Of course, if in all circumstances the amendments asked must be allowed, there is an end of the matter. The Court, in this view, are at the mercy of every pursuer and defender, but I cannot think that by the Act of 1868, or any other Act, things have been brought to this pass. The giving of leave is a question of circumstances, or, in other words, of discretion, and not of absolute obligation incumbent on the Court. If a new action be as convenient, and only a little more expensive, and if the result of allowing the amendments proposed be to all intents and purposes practically to change the old into a new action, that I think is not a case to which the Act of 1868 has any application. This result becomes the more obvious if there be a doubt whether, great as the proposed amendments are, they are all that would be required to give relevancy to the action. I confess I have such misgiving, but on that point more need not be said. Nor do I say anything as to the absolute incompetency of amending the record in a case which if there be no amendment must be dismissed as incompetent. I proceed on grounds of expediency and propriety—I may add of conveniency also. Justice I am satisfied will be better done in a new action, all parts of which will be well considered, than it could be in the present, even were the proposed amendments to be allowed. Even so amended, the record, I am also persuaded, would be only an imperfect development of what, as far as allegation is concerned, might perhaps be made a perfectly relevant case. This is not said to invite a new action, but that the grounds of our present decision may be more fully explained. The result of all therefore, in my view of the matter, is, that the question to amend should, in the circumstances of this case, be refused, and that the case should be dismissed.

Lord Justice-Clerk—I have Lord Fraser's authority to say that he concurs with Lord Craighill's opinion. I also concur.

The Court disallowed the amendments and dismissed the action.

Counsel for Pursuer—Brand. Agents—W. & F. C. MacIvor, S.S.C.

Counsel for Rutherford—M'Kechnie—Shaw. Agent—P. Thomson, S.S.C.

Counsel for M'Dougall & Sons—Guthrie Smith—Dickson. Agents—Morton, Neilson, & Smart, W.S.