*Tuesday, July* 19.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

## WISEMAN (SCOTT'S TRUSTEE) *v.* SCOTT.

*Compensation—Balancing of Accounts in Bankruptcy—Recompense—Tutor.*

A father, as tutor and administrator-in-law for his pupil son, borrowed £1500 on the security, primarily, of lands belonging to the son, and secondarily, of lands of his own. The narrative of the bond bore that the money was borrowed for the purpose of being expended in improving the son's estate. The father became bankrupt, and the trustee on his estate paid up the bond and obtained an assignation thereto. The trustee then raised an action to have it declared that the bond was a good and valid security over the son's property for the sum lent, to the extent to which the son had been *lucratus* by the expenditure; that to this extent the pursuer was entitled to require the creditor to proceed first against the son and his estate, on the footing that the obligation of the father was merely cautionary; and that the pursuer was entitled to decree against the son for £1500, or for the portion thereof by which he had been *lucratus*, on receiving from the pursuer a discharge of the bond. A curator *ad litem* was appointed to the defender, who was in minority. It was admitted that by the father's expenditure the son was *lucratus* to the extent of £500, and that the father had drawn rents from the son's lands to the amount of £310. *Held* (1) that the bond and disposition in security, so far as it affected the son's lands, was invalid; (2) that the sum of £500 having been beneficially expended by the father on his son's estate as his administrator-in-law, he was entitled to repayment on the ground of recompense; and (3) (*rev.* Lord M'Laren, *diss.* Lord Shand) that both debts having been due prior to the date of the sequestration, in balancing accounts on the father's bankruptcy the sum of £310, being the amount of the rents drawn by the father, should be set-off against the sum of £500 expended by the father on the son's estate, and decree given for £190 accordingly.

Mrs Scott was proprietrix of the lands of Summerhouse, in the county of Stirling. She died on 25th November 1874 without having made any settlement of her property, and was succeeded by her son William Scott, junior, born on 15th July 1870, as her heir-at-law. Her husband William Scott, who survived, had no right of courtesy, as Mrs Scott had never been infeft.

In 1879 William Scott borrowed £1500 from Matthew Cleland, and granted in his favour a bond and disposition in security dated 23d April 1879. By this bond and disposition in security, which proceeded on the narrative that the said William Scott had deemed it right to borrow the said sum with a view to the improvement of the lands of Summerhouse, and for the purpose of defraying the expense of erecting a suitable steading thereon, the said William Scott, therein described as "merchant in Strathaven, in the county of Lanark, tutor-at-law to my son, William Scott, junior," *inter alia*, granted him as tutor-at-law foresaid, to have instantly borrowed and received from Matthew Cleland, merchant, Cambusnethan, in the county of Lanark, the sum of £1500 sterling, which sum he bound the said William Scott, junior, and himself, as tutor-at-law foresaid, and also himself as an individual, and their respective heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said Matthew Cleland and his heirs, executors, or assignees whomsoever; and in security of the personal obligation thereinbefore written, in the first place, he, as tutor-at-law foresaid, disponed to and in favour of the said Matthew Cleland and his foresaids, heritably but redeemably, as thereinafter mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Whole the said lands of Summerhouse, therein particularly described; and, in the second place, he, for himself, disponed to and in favour of the said Matthew Cleland and his foresaids, heritably but redeemably, as thereinafter mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Haill these six and eight penny lands of Graynes, in the parish of Avondale and county of Lanark, therein particularly described, belonging to the said William Scott himself; and whereas the said sum of money had been borrowed only for the purpose of making the said improvements on the said lands of Summerhouse, and was intended by him to form a charge thereupon, and upon his said son as proprietor thereof, and his personal obligation therefor had only been granted, and the said lands of Graynes had only been disponed as an additional security to the said Matthew Cleland, therefore the said William Scott did thereby declare that the said sum should be and was thereby constituted primarily a burden upon the said lands of Summerhouse, and proprietor thereof, and only secondarily a burden upon the said lands of Graynes, and proprietor thereof, and that in the event of himself or his successors in the said lands of Graynes paying the said sum, or interest thereon, they should be entitled to relief from the said lands of Summerhouse and proprietor thereof, and for the purpose of operating such relief they should, if they requested it, be entitled to an assignation of the said bond and disposition in security from the said Matthew Cleland.

The estates of William Scott were sequestrated in February 1885, and Mr Robert Wiseman, accountant, Strathaven, was appointed trustee. The trustee having an interest to prevent the lands of Graynes being made to bear the burden of the sum borrowed for the improvement of the lands of Summerhouse, at all events to the extent to which the defender William Scott, junior, was *lucratus* by the expenditure, raised an action of declarator against William Scott, junior, William Scott, as his administrator-in law, and Matthew Cleland, for his interest, in which he sought to have it found and declared that the bond formed a good and valid security over the lands of Summerhouse for repayment of the sum of £1500, or to the extent of £1152, 13s. 2d. He averred that the money had been entirely expended in the improvement of these lands, and

that William Scott, junior, their proprietor, was *lucratus* to that amount, or at all events to the extent of £1152, 13s. 2d. Defences were lodged for William Scott, junior, in which he denied that he had been *lucratus*, and averred that William Scott was solvent for a considerable time after the execution of the bond, and that he had drawn the whole rents of the defender's lands since the succession opened in 1874, amounting to £750.

The pursuer pleaded — "(2) The money borrowed under the said bond and disposition in security having been expended on the lands of Summerhouse, belonging to the defender William Scott, junior, and the said expenditure having been necessary and reasonable, the pursuer is entitled to decree that the said bond forms a good and valid security over the said lands, at all events to the extent to which the said defender is *lucratus* thereby."

The defender pleaded—"(3) The said bond and disposition in security not having been executed by this defender, or anyone authorised to borrow money on the security of his heritage, does not form a good and valid security over the lands of this defender, and he ought to be assoilzied with expenses. (4) The said transaction not having been reasonable and necessary in the administration of this defender's estate, this defender ought to be assoilzied, with expenses. (5) As the claim now made in respect of this defender having been *lucratus* by the expenditure libelled on has been extinguished, this defender ought to be assoilzied, or, at least, the pursuer is not entitled to have the said claim sustained except to the extent of the balance ascertained to be due by this defender to his father's estate."

On the 4th November 1885 the Lord Ordinary appointed David Lister Shand curator *ad litem* to William Scott, junior, and on 14th June 1886 he allowed a proof.

Thereafter the pursuer craved leave to amend the summons and record by adding an alternative conclusion that the bond should be found and declared a good and valid security for the sum of £1500, "or such other sum as shall be ascertained in this process was properly expended by the said William Scott in improving the said lands of Summerhouse belonging to the defender William Scott, junior; and that the said expenditure did to the extent of £1500, or such other sum aforesaid, permanently improve the said lands as at the date of said bond and disposition in security; and that the defender William Scott, junior, was thereby *lucratus* to the extent aforesaid; and that to the extent aforesaid the pursuer is entitled to require the defender Matthew Cleland, being the creditor in said bond and disposition in security, to proceed thereunder in the first place against the said William Scott, junior, and his estate, and that to the extent aforesaid the said William Scott, junior, is bound to free and relieve the pursuer, as trustee foresaid, and the said William Scott and his estate, of all obligations undertaken by the said William Scott in said bond and disposition in security, and of all sums paid by the said William Scott or the pursuer to the creditor in said bond and disposition in security," and by adding this conclusion—"And the defender the said William Scott, junior, ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the said sum of £1500, or such part thereof as aforesaid, in so far as the same may have been already paid by the pursuer to the said Matthew Cleland, with the interest thereon at the rate of four per cent. per annum from day of till payment, but that only upon the pursuer executing and delivering to the defender the said William Scott, junior, and at that defender's expense, a valid and sufficient discharge of the said bond and disposition in security, so far as the same shall by decree foresaid be found to be a good security over the said lands of Summerhouse." The pursuer further craved leave to amend his condescendence by adding this statement—"Since the date of closing this record the pursuer has paid the sum of £1500 contained in said bond and disposition in security to the said Matthew Cleland, and has obtained from him an assignation to said bond and disposition in security."

The Lord Ordinary allowed these amendments, and thereafter a joint-minute for the pursuer and for the defender William Scott, junior, and his curator *ad litem* was lodged, in which they stated that they had agreed—"(*First*) that the expenditure . . . by this defender's father William Scott, senior, should be held as having improved this defender's lands of Summerhouse in value (both at the date of said expenditure and at the present time) to the extent of £500; (*second*) that the said expenditure, but only to the extent of the said £500, and interest thereon at £4 per centum per annum from the 15th day of May 1879, forms a proper item of charge against the estate of this defender, in the accounting between this defender and the estate of his said father William Scott, senior; and (*third*) that the balance due by this defender on an accounting between him and the pursuer, as trustee upon the sequestrated estate of the said William Scott, amounts to the sum of £190 sterling as at the date hereof, and they accordingly craved the Lord Ordinary to pronounce an interlocutor disposing of the cause, and to find neither party liable in expenses."

On 26th February 1887 the Lord Ordinary (M'Laren) pronounced this interlocutor—"The Lord Ordinary having considered the cause, Allows the amendments . . . to be made upon the closed record: Finds that Matthew Cleland, therein designed, advanced to the minor defender William Scott, junior, £1500 on the receipt and obligation of the minor's father, and that to the extent of £500 the estate of the minor is permanently improved and increased in value by the expenditure of a part of said advanced money upon it, and that to this extent the said William Scott, junior, is liable in repayment of said advance: Finds that the pursuer has acquired by assignation the right of the creditor in said advance, and that said right is not subject to compensation by any claim arising on the accounts between the said William Scott, junior, and his father, the bankrupt: Therefore decerns against the said William Scott, junior, for payment of the said sum of £500, with interest thereon at the rate of five per centum per annum, from the date of citation until payment, but that only upon the pursuer executing and delivering to the defender the said William Scott, junior, a valid and sufficient discharge of the said bond and disposition in security, in so

far as the same binds, or purports to bind, the said William Scott, junior, and his said lands of Summerhouse: Finds no expenses due.

"*Opinion.*—I think I am now fully in possession of the facts of the case, and the views that have been respectively maintained. The question here relates to the extent to which it is possible to render the estate of a minor liable for money expended in its improvement. In the circumstances set forth in the condescendence the pupil's father resolved to execute improvements on his son's estate, for which he borrowed in the son's name the sum of £1500 from Matthew Cleland. But in consequence of the difficulties which the law interposes towards transactions that may affect a minor's heritable estate Cleland took care to keep himself safe by getting a collateral security from William Scott, the father, over his lands of Graynes, a different estate of course from that of the pupil's estate—the pupil's estate being derived from his mother. It appears that the father's heritable estate affords a sufficient security for the borrowed money. But he has become bankrupt, and in the interests of creditors the trustee on the father's sequestrated estate contends that the debt contracted to Matthew Cleland should in the first instance be paid out of the son's estate, in so far as the money can be shown to have been beneficially employed in the improvement of that estate. He admits his liability, of course, for the balance that arises upon his collateral security—security given in express contemplation of such a result. Now, to obviate a proof the parties have agreed that it may be taken that the money was applied beneficially to the extent of £500. To that extent the son is *lucratus*, and I suppose it follows that if he pays the £500 he has suffered no lesion from the transaction which his father entered into on his behalf. But upon the account between father and son with reference to the rents of the son's estate there arises a balance against the father of £310, which, if it could be set against the £500 to which I have referred, would reduce the sum due to £190. It is contended on the son's behalf, first, that the son ought not to be called on to pay anything; and secondly, that at all events he is only to pay the £190, which is the nett benefit he has got out of the transaction, if you can identify the father with Cleland, the person who advanced the money at his request. On the first point, I am disposed to think it is not necessary for the purposes of this action to consider whether a bond granted by a tutor over the ward's heritable estate is a good security over the estate. That question could only arise here if the son's estate were insufficient to meet his obligations. But there is no question about the solvency of the son's estate, and therefore I do not need to consider the value of the bond as a security. But what I must consider is, in view of the fact that the son's estate has been benefited by the *bona fide* expenditure of money to the extent of £500, whether there is not an equitable obligation on the part of the son to repay the money so expended. I am clearly of opinion that the minor is liable to fulfil these equitable obligations founded on the law of recompense which would attach to any person *sui juris* in the same circumstances. The disability of the minor only arises in regard to matters in which it is necessary that he should form an independent opinion and act upon it, because he is not supposed to be capable of protecting his own interests. But there are other matters as to which there is no difference between the case of a minor and of a person *sui juris*. The claim of recompense is a claim that does not arise in consequence of anything that the party benefited has done, or is called upon to do, but in consequence of something that has been done for his benefit without his consent. I am therefore of opinion that Mr Cleland has a good claim against William Scott, junior, to the extent of £500; and I am further of opinion that the trustee of William Scott, senior, has the right to require Cleland to proceed against the son for that sum, because William Scott, senior, is only a cautioner, and it is the right of every cautioner at common law to call upon the creditor first to discuss the principal debtor. That is the benefit of discussion which is not said to have been excluded in this case, and about which no question has been raised.

"But now let me consider the second point, which is this, seeing that the trustee is the party who has raised the question, whether he ought to be affected by his constituent's obligation to account for the rents. Now, if William Scott, the father, before he became insolvent, had acquired right to the creditor's claim of recompense by making payment in terms of his collateral obligation, I am inclined to think that compensation would have taken effect *ipso jure*, and that William Scott, junior, would have been entitled to set-off his claim for the rents against the father's claim upon the bond. But the result is not necessarily the same when the trustee for creditors acquires the bond. I am not aware that he has acquired it. What he is here asking under the summons is, that Cleland should discuss the principal debtor, and if the principal debtor is discussed and payment obtained, there never could be compensation, because there never was the same creditor and same debtor in the two transactions. But supposing that the trustee has provisionally paid the debt, preserving his right of relief, then I am of opinion that in this case compensation does not take place. No doubt under the rule of the balancing of accounts in bankruptcy, the trustee cannot exact full payment from a debtor to the sequestrated estate, and at the same time require the other to take payment of a dividend upon a counter claim. But this doctrine only applies where the two claims have arisen before the bankruptcy. If the trustee for the convenience of the trust makes a payment whereby he acquires a right of credit against a third party, that is an asset which he holds for the benefit of creditors independently of the bankrupt, and which he is entitled to realise in full, the bankrupt's claim being only a claim in bankruptcy, and inferring a right to a dividend. And therefore upon both points which have been argued, my judgment is in favour of the pursuer.

"I think it will be necessary that the conclusions of the summons should be modified, or that I should only give decree in qualified terms. I cannot hold that the bond and disposition in security formed a good security over the lands, but I may hold that a debt to the extent of £500 was incurred by William Scott, junior, to Cleland."

The defender reclaimed, and argued—That

it was admitted that the father had expended £500 on the estate of the son, by which the latter was *lucratus*, and that he had drawn £310 in rents from the son's property. The one sum should be set off *pro tanto* against the other. Whatever was the position of the father before his bankruptcy was the position of his trustee now. Both claims had arisen prior to the sequestration. Throughout the whole transaction the debtor and creditor were the same, *i.e.*, the father and son, and the father's trustee had incurred no fresh obligation, nor acquired any fresh right.

It was argued for the pursuer—That the case must be taken on the footing that it had been found that the ward's lands were benefited to the extent of £500 out of Cleland's money, and the question was whether the trustee had so acted as to put himself in Cleland's shoes. Both father and son were bound. The bond over the ward's estate was not necessarily bad; there were many cases which showed that the Court would grant authority to burden heritable estate *ab ante*—*Armour* v. *Lands*, 1671, M. 16,284; *Crawford*, July 6, 1839, 1 D. 1183; *M'Millan* v. *Armstrong*, December 6, 1848, 11 D. 191; *Bellamy*, November 30, 1854, 17 D. 115; *White*, March 7, 1855, 17 D. 599. If the father could not pay then, the son was liable so far as he was *lucratus*—*Paterson* v. *Greig*, July 18, 1862, 24 D. 1370. Cleland could trace his money into the ward's hands; the narrative of the bond said that the money was borrowed to improve the ward's estate, and the circumstances were known—Fraser on Parent and Child, p. 256. If that were so, the pursuer was in Cleland's place in virtue of the assignation, and in that case no question of recompense could arise—Bell's Comm. ii. 123, 128; Bell's Prin. sec. 538; *Stewart* v. *Stewart*, November 8, 1878, 6 R. 145.

At advising—

Lord President—This action is instituted by the trustee on the sequestrated estate of William Scott, merchant, Strathaven, and the object is to recover from the estate of the bankrupt's son the sum of £1500, which is said to have been expended by the father, as tutor and administrator-in-law for his son, in improving his son's estate. The son was born in the year 1870, and on his mother's death in 1874 he succeeded to the lands of Summerhouse. His mother had not been infeft, and so there was no right of courtesy; and the effect of the son's succeeding is that he is fiar, and that the rents belong entirely to him. The father, as the son's administrator-in-law, thought it desirable to expend money upon the estate. It is a small estate of about 100 acres, and the sum of £1500 was expended in building a steading, and in fencing and draining. The father had obtained no authority from the Court to make this expenditure. He borrowed the money from Matthew Cleland, and granted the bond and disposition in security, of which the material parts are set out in the third article of the condescendence. The bond proceeds on the narrative that the said William Scott had deemed it right to borrow the said sum with a view to the improvement of the said lands, and he acknowledged that he had "instantly borrowed and received from Matthew Cleland, merchant, Cambusnethan, in the county of Lanark, the sum of £1500 sterling, which sum he bound the said William Scott, junior, and himself, as tutor-at-law foresaid, and also himself as an individual, and their respective heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said Matthew Cleland and his heirs, executors, or assignees whomsoever;" "and in security of the personal obligation thereinbefore written, in the first place he, as tutor-at-law foresaid, disponed to and in favour of the said Matthew Cleland and his foresaids, heritably but redeemably, as thereinafter mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Whole the said lands of Summerhouse, therein particularly described; and in the second place he, for himself, disponed to and in favour of the said Matthew Cleland and his foresaids, heritably but redeemably, as thereinafter mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Haill these six and eight penny lands of Graynes, in the parish of Avondale and county of Lanark, therein particularly described, belonging to the said William Scott himself." And then the bond proceeds—"And whereas the said sum of money had been borrowed only for the purpose of making the said improvements on the said lands of Summerhouse, and was intended by him to form a charge thereupon, and upon his said son as proprietor thereof, and his personal obligation therefor had only been granted, and the said lands of Graynes had only been disponed, as an additional security to the said Matthew Cleland, therefore the said William Scott did thereby declare that the said sum should be and was thereby constituted primarily a burden upon the said lands of Summerhouse and proprietor thereof, and only secondarily a burden upon the said lands of Graynes and proprietor thereof, and that in the event of himself or his successors in the said lands of Graynes paying the said sum, or interest thereon, they should be entitled to relief from the said lands of Summerhouse and proprietor thereof, and for the purpose of operating such relief, they should, if they requested it, be entitled to an assignation of the said bond and disposition in security from the said Matthew Cleland"—that is to say, of that part of the bond which affected the pupil. Now, it is said that all that £1500 was expended beneficially on the estate of the pupil; and assuming that the bond is not effectual as against the pupil's estate, that there is a ground for demanding repayment on the footing of recompense. It is said that the father "proceeded to expend the money so obtained in improving the said lands of Summerhouse, and particularly in the erection of a steading and in fencing and draining. The steading (including house) was appropriate to the size of the farm. The said lands have been greatly improved in value by the said expenditure, which was absolutely necessary for the proper cultivation thereof, and the defender William Scott, junior, as proprietor thereof, is *lucratus* by the said expenditure to the full extent of the sum borrowed, or at all events to the extent of £1152, 13s. 2d."

On the other hand, it is averred by the defender "that this defender's father was solvent at, and for a considerable time after, the execution of the said bond, and that he has drawn the whole rents of this defender's lands since the succession opened in 1874, amounting to £750 or

thereby. He has never accounted to this defender, but it is believed and averred that he received rents and other funds belonging to the estate of this defender more than sufficient to extinguish the amount to which this defender's estate was increased in value by the expenditure on his lands, and this would be made to appear on a proper balancing of accounts between them. These funds were not kept separate and distinct from his proper individual estate. At least this defender is not liable to make payment of the amount by which it may be held that the value of his estate was increased as aforesaid except under deduction *pro tanto* of the sums so due to him by his father's estate."

Now, in that state of the case it would have been necessary to allow a proof for the purpose, firstly, of seeing how far the money was expended for the benefit of the estate; and secondly, of seeing to what extent the rents had been uplifted by the father. But this necessity was obviated by the parties putting in a joint-minute, to the terms of which it is necessary very particularly to attend. The parties state that they had agreed —(*First*) that the expenditure referred to . . . by this defender's father William Scott, senior, should be held as having improved this defender's lands of Summerhouse in value (both at the date of said expenditure and at the present time) to the extent of £500; (*second*) that the said expenditure, but only to the extent of the said £500, and interest thereon at £4 per centum per annum from the 15th day of May 1879, forms a proper item of charge against the estate of this defender in the accounting between this defender and the estate of his said father, William Scott, senior; and (*third*) that the balance due by this defender upon an accounting between him and the pursuer, as trustee upon the sequestrated estate of the said William Scott, amounts to the sum of £190 sterling, as at the date hereof, and they accordingly craved the Lord Ordinary to pronounce an interlocutor disposing of the cause, and to find neither party liable in expenses."

Now, it seems to me on reading this minute that it amounts to a settlement of the case. The trustee sought to recover the amount of money expended to the benefit of the estate, and that was fixed by the minute at £500. On the other hand, the son claimed to set-off the amount of rents drawn and not accounted for, and that was ascertained as amounting to £310. The balance was thus £190. Now, had this case been before me as Lord Ordinary I should have proceeded to decern against the defender for £190, and that would have been an end of the case. But it is now said that the parties did not intend this. What they did intend was to ascertain the facts of the case, and to leave to the Lord Ordinary to dispose of what they call the law of the case. Now, I am unwilling to force a joint-minute on the parties to it when they do not want to be bound by it, and I am the less inclined to do so in the present case, because there appear to me to be, apart from it, sufficiently clear grounds of judgment.

In the first place, the bond is undoubtedly invalid so far as the son is concerned. In the second place, the whole expenditure made by the father was made by him as administrator-in-law. Hence, I think, it is pretty clear that the only person who can claim recompense is the father, for he is the only person who made the expenditure, and I never heard of any party other than the party who made the expenditure being entitled to recompense. This expenditure was made before the sequestration in 1885. On the other hand, it is equally clear that the rents uplifted by the father were all uplifted before the sequestration, and therefore there was before the sequestration a debt of £500 due by the son to the father, and a debt of £310 due by the father to the son. Well, if we apply the ordinary rules of bankruptcy in balancing accounts to these two debts, we have the exact result of the joint-minute. We need not inquire whether both the debts are present or whether both are liquid. For these rules do not apply in balancing accounts in bankruptcy; you can set-off a present against a future debt, or a liquid against an illiquid debt. But it has been said that there is a peculiarity in this case arising from the fact that the money expended by the father was money borrowed, and that on the face of the bond it is made clear to what purpose the money was to be devoted. I do not see that that affects the case. It was not the creditor in the bond who made the expenditure or who can claim recompense. It was made by the father, and the trustee in the sequestration is now in his place. The trustee thought fit to get an assignation from Cleland, but if the security over the pupil's estate is good for nothing the assignation cannot be any better. The fact is, the creditor has been paid his money out of the lands of Graynes belonging to the bankrupt. He and the interest which he represents are out of the case. The father and son are the only parties. I think that the Lord Ordinary is wrong, and that the only sum the son can obtain is the balance to be ascertained by treating the debts according to the ordinary rules of bankruptcy.

Lord Mure concurred.

Lord Shand—Respecting this case I differ in opinion from your Lordships. Of course if the minute put in by the parties is read in the narrow sense which has been suggested, that is an end of the case. It would then amount simply to an agreement that the Lord Ordinary should give decree for £190, and find neither party entitled to expenses. But I think both parties made clear that the agreement was not so to be read, and that it was intended only to admit certain facts in order that the Lord Ordinary should give judgment upon the question of law. That the defender did not intend that the minute was to be taken as conclusive of the action is made clear by that passage in the Lord Ordinary's note where he says—"It is contended on the son's behalf, first, that the son ought not to be called on to pay anything." And I understand the true import of the minute to be, that assuming the defender to be entitled to set-off the rents, then the balance will amount to £190. But there was a question intended to be reserved, and we must, I think, deal with that question. The action as originally raised came to this, the pursuer asked that it should be found and declared that the bond was a good and valid security, and that conclusion was rested on the view that the tutor was entitled to borrow money and to pro-

vide valid security. Now, I quite agree with your Lordships as to that part of the case; and if the case had stood upon that only, I quite agree that the bond could have formed no valid charge upon the estate, and that it was *ultra vires* of the tutor to grant it. But the parties took the view that the case should be used if possible for the purpose of deciding all the questions between them. It was agreed that the record should be amended, and it was amended; so that the case was presented not as founded on the bond, but (while referring to the bond as part of the history of the case) on the footing that £1500 had been advanced by Cleland for the purpose of improving the estate. That that was the purpose of the advance by the creditor is expressly stated. It is contended by Scott's trustee that, although no doubt Scott came under an obligation, still it was practically only as a cautioner that he was bound, and that it was upon that footing that the advance was made. Now, the question is, has that been made out, and if so, what is the effect in law? I think it has been made out. The vital difference between my opinion and that of your Lordships is that I do not think that Scott was the proper creditor for the money, and that I do think that Cleland was directly creditor. Now, what are the averments? In the first place, the bond itself is *ex facie* clearly evidence, bearing as it does expressly that the money was advanced for the improvement of the estate. In the second place, the money being given on that footing, the bond provides that the money borrowed is to form a charge primarily upon the lands of Summerhouse, and only secondarily upon the lands of Graynes. And accordingly we have here an obligation of a cautionary nature by the father. It was denied that the money was expended in the improvement of the estate; but in condescendence 4 it is stated that it was so expended, and that is admitted to the extent of £500 in the first article of the joint-minute. Now, I lay aside the bond entirely as a bond and disposition in security, and I use it only to show the footing on which the advance was made. Suppose the case of a factor, who borrowed money and granted a receipt which bore that the money had been borrowed to be expended upon his constituent's estate, and suppose that the person lending the money saw it so expended, and took the receipt in those terms with the intent of imposing a burden upon the estate. In that case who would be the creditor? I cannot doubt that it would be the person who lent the money. I am very far from saying that if a father borrows £1500, and happens to lay out £500 in improving his son's estate, that the creditor can proceed against the son. But if the lender, as here, has every evidence that the money is borrowed for certain purposes, then I say he is the creditor. The question then comes to be, what is the result where the father is bankrupt? The father was not the creditor; Cleland was the proper creditor, and if the father had demanded payment of the son, the son would have been entitled to say "No; you must clear away the debt." Now, there is nothing better settled than this, that if the trustee acquires a right after sequestration he may plead that in compensation of a debt due by the bankrupt. That is clearly expressed by the Lord Ordinary in his note where he says—"If the trustee for the convenience of the trust makes a payment whereby he acquires a right of credit against a third party, that is an asset which he holds for the benefit of creditors independently of the bankrupt, and which he is entitled to realise in full, the bankrupt's claim being only a claim in bankruptcy, and inferring a right to a dividend." Now, here the trustee is in right of the creditor, and he is in my opinion equally with the creditor entitled to demand that sum.

Lord Adam—I think if the parties who framed this joint-minute did not mean to dispose of the whole case they have made use of very unfortunate language. Under the third head they state that they are agreed "that the balance due by this defender upon an accounting between him and the pursuer, as trustee upon the sequestrated estate of the said William Scott, amounts to the sum of £190 sterling, as at the date hereof, and they accordingly craved the Lord Ordinary to pronounce an interlocutor disposing of the cause, and to find neither party liable in expenses." But we are told that that was not the intention of the minute, and that the object was to ascertain the sum due to both sides, leaving the question of law for the decision of the Lord Ordinary. It is established that the estate was benefited to the extent of £500, and the only question is, whether the defender is entitled to set-off the £310 as against the £500, by which sum he is ascertained to be *lucratus*. Now, we are agreed that the bond is bad in so far as a burden on the pupil's estate was thereby created. It was *ultra vires* of the tutor to burden the lands of his ward, and the latter is under no personal liability. There was *prima facie* no relation of debtor and creditor between the ward and Cleland. But it is said that £500 of the sum which the factor borrowed was beneficially expended on the ward's estate, and that consequently he must be liable. But to whom? The pursuer says to Cleland; the defender says to the father. There was no liability for that sum as between the defender and Cleland, for Cleland had nothing to do with the money. He lent it on the security specified in the bond, and on no other. It is quite true that the bond sets forth the object of borrowing the money, but that merely goes to show the position of the *ex facie* debtor with regard to what was to be done with the money. Cleland had nothing to do with that; and *ex facie* of the bond there is nothing to show that he had any right to interfere with the expenditure of the money. Could it be contended that Cleland had a right to direct the expenditure of the money? Were that so, he would have had a right to be consulted as to the expenditure of every penny in relation to the question, was it beneficial to the estate or not? It is plain there was no such intention, yet that would be the result of the view proposed by Lord Shand. We are quite familiar with the state of matters where there is a stipulation as to seeing the money expended. But there is not a trace of any such provision here, and it is quite a misrepresentation of the state of matters to read the bond as if it contained such a stipulation. And the result shows that Cleland was perfectly safe in lending upon the security stipulated for. He got payment of

the money, and that was an end of his claim. When the £1500 was paid to Scott it became his property, and he could spend it, so far as Cleland was concerned, in any way he pleased. If that is so, that, in my opinion, is an end of the case.

The Court recalled the Lord Ordinary's interlocutor and granted decree for payment of £190.

Counsel for the Defender and Reclaimer—Gloag—Kennedy. Agent—D. Lister Shand, W.S.

Counsel for the Pursuer and Respondent—Darling—W. C. Smith. Agents—Tods, Murray, & Jamieson, W.S.

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*Tuesday, July* 19.

## FIRST DIVISION.

[Lord Fraser, Ordinary.

### BEATON *v.* IVORY.

*Reparation—Wrongous Apprehension and Imprisonment—Sheriff—Malice—Relevancy.*

In an action of damages for wrongous apprehension and imprisonment against the Sheriff of a county, on the ground that the pursuer had been arrested by an officer without a written warrant, under general verbal instructions given by the defender—*held* that the action was irrelevant, because there was no averment of special facts and circumstances from which malice could be inferred.

*Observations* (*per* the Lord President) on the cases of *Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131, and *M'Murchy* v. *Campbell and Maclullich*, May 21, 1887, 24 S.L.R. 514, and on the nature of the averments necessary to support an action of damages for judicial slander.

This was an action at the instance of John Beaton, cowherd, residing at Herbista, Kilmuir, in the Island of Skye and county of Inverness, against William Ivory, advocate, Sheriff of Inverness, Elgin, and Nairn, concluding for £500 damages in respect of wrongful arrestment and imprisonment.

The pursuer's averments were as follows:—"(Cond. 2) On 27th October 1886 the pursuer was engaged in his ordinary occupation of herding cattle on the pasture ground of Peingown, the neighbouring township to Herbista, when he was accosted by two police-constables, one of whom was Constable Grant of Edinbane, near Portree, who demanded his name, which the pursuer gave. Grant then apprehended the pursuer, and marched him down to the township of Herbista, where he gave the pursuer in charge of a body of marines. The pursuer asked Grant the reason of his arrest, but got no reply. The pursuer was then marched (in custody of the marines) three miles to Duntulin Bay, put on board the gunboat "Seahorse," and conveyed as a prisoner to Portree, where he arrived about 11 p.m., and was taken to the prison and confined in a cell. Next day he was brought before Sheriff-Substitute Hamilton, and questioned by the Procurator-Fiscal for more than an hour. He was not again taken before the Sheriff, but was detained in prison until the following Saturday, October 30th, when he was liberated without any explanation for his arrest. No document was served upon the pursuer showing why he was arrested and detained in custody, nor have any further proceedings been taken against him."

"(Cond. 3) Grant possessed no warrant for arresting the pursuer, nor had any information been received either by him or by the defender, or by any of the authorities, charging the pursuer with the commission of a crime. Grant arrested the pursuer in obedience to general instructions given to the police by the defender, who was personally present at the township of Herbista, where he had come with a large body of police and marines for the purpose of apprehending the parties who had (as was alleged) deforced a sheriff-officer near Herbista two days before. The instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place. In order to incite the police to make arrests the defender promised a medal to every constable who should effect an apprehension. The said instructions were illegal and oppressive, and the apprehension of the pursuer in pursuance thereof was wrongful, and was moreover malicious and without probable cause on the part of the defender. The defender had no probable cause for believing that the pursuer had been concerned in the alleged deforcement. In point of fact the pursuer was not present at the deforcement, but was more than a mile away at the time repairing the roof of his house. Both the pursuer and his wife and others informed the defender of these facts shortly after the pursuer's apprehension, but the defender nevertheless persisted in detaining him in custody."

He pleaded—"The pursuer having been wrongfully arrested, and detained in prison by the instructions of the defender, and, *separatim*, the defender having acted maliciously and without probable cause, the pursuer is entitled to decree as concluded for."

The defender pleaded—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons."

On 28th May 1887 the Lord Ordinary (Fraser) found that the averments of the pursuer were not relevant, and dismissed the action.

"*Opinion.*—The claim in this case is for damages against the Sheriff of the county of Inverness, because it is alleged that he wrongfully arrested and detained in prison, maliciously and without probable cause, the pursuer of this action.

"The circumstances, as appearing from the record, are these. The pursuer, who is a herd, was apprehended on the 27th of October 1886, taken to Portree and detained there for three days, when he was liberated. The person by whose orders the pursuer was apprehended and detained was the defender, the Sheriff of the county of Inverness. In this county, and especially in the island of Skye, there had occurred tumultuary proceedings; meetings were held at which resolutions were passed of a very illegal character—pointing to the resistance of payment to the landlords of their rents. The law had been set at defiance by the deforcement of an officer of the law, and it was found necessary to