has been in fact generally discontinued. It cannot, I think, be said that the omission to adopt this double furnace amounted to a non-adoption of the pursuer's process, the process being truly adopted in all its substance and materiality.

I am therefore of opinion that on the question of liability the Lord Ordinary's interlocutor should be affirmed. On the point of damages, I think it should be only altered to the effect of correcting the *error calculi* made in taking £14, 10s. per ton as the price of soda, in place of the £16 of the contract, and of deducting the £60 paid to account.

I think it only fair to the defenders to say, in conclusion, that I see no evidence to warrant the inference that they consciously and intentionally broke their agreement with the pursuer. I am satisfied that they believed, in good faith, that the contract was no longer binding. They simply acted, as I believe, under a misapprehension. Their misapprehension probably arose either from supposing that the double furnace was an essential part of the pursuer's process, or from supposing that unless the process was a new and original invention, the contract did not hold good. In these respects, I conceive them to have been mistaken, and in consequence to have incurred pecuniary responsibility. But I consider the question to involve mere legal obligation, and in no wise moral character.

Agents for Pursuer—G. & H. Cairns, W.S.
Agents for Defenders—J. & R. Macandrew, W.S.

Friday, February 9.

CAMERON *v.* MORTIMER.

Reparation — Wrongful Apprehension — Diligence — Agent and Client—Jury—New Trial.

An issue was sent to a jury—"Whether, on or about the 27th July 1871, the defender wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July, to the loss, injury, and damage of the pursuer?" The pursuer's case was that the agreement to give delay had been made by an agent, who, being resident at the seat of the Sheriff-court, was employed by the defender's agent to take the usual steps of diligence to enforce payment of a bill. The jury found for the pursuer. *Held*, by the majority of the Court (*diss.* Lords Deas and Ardmillan), that there was no evidence to show that, in the circumstances, the agent had authority, express or implied, to bind the defender to delay diligence; and further, that although he had taken upon himself to grant delay, he had intimated to the pursuer his doubt of his power to do so,—and the verdict set aside as contrary to evidence.

Opinions that the question, whether an agent, employed to recover payment of a debt, has or has not an implied discretionary power to grant delay, is one of circumstances.

This was an action of damages for wrongful apprehension and detention at the instance of Captain Colin Cameron, a retired Indian officer, now resident in Forres, against John Mortimer, Forres, a traveller for Messrs Usher & Co., brewers in Edinburgh.

On the 29th December 1870 Captain Cameron accepted a bill at six months for £10, 15s. 4d. Shortly before the bill became due it was bought by Mortimer for £10. From the evidence in the case it appears that Mortimer was offended with Cameron in consequence of a letter which the latter had written to Messrs Usher complaining of him, and that he avowedly acquired the bill for the purpose of doing diligence upon it against Cameron, who was understood to be not in very good circumstances.

The bill became due on 2d July 1871. Mortimer had instructed his agent Mr Alexander Mackenzie, solicitor in Forres, to enforce diligence without delay if the bill was unpaid when due. The bill was not retired when due, and Mr A. Mackenzie, not being resident at the seat of the Sheriff-court, employed Mr Alexander Morrison, solicitor in Elgin, to take the necessary steps to enforce diligence. The bill was protested on the 2d July, and the instrument of protest recorded in the Sheriff-court Books of Elgin on the 22d, and the usual decree interponed, in virtue of which, on the same day, Cameron was charged to pay within six days.

During the currency of the charge, on Thursday the 27th July, Cameron, by his agent Mr Robert Peat, solicitor, Forres, applied to Morrison to delay a settlement of the bill till Monday the 31st, when Cameron would be in funds to settle the same.

A conversation took place between Morrison and Peat, which is thus related by the latter:—"I called on Mr Morrison, or rather I saw him in court, and so did not need to call for him. I said I understood he was Mortimer's agent. He said he was. He said the bill had been sent to him to do diligence on it. I said to Mr Morrison that I had seen Captain Cameron at the station, and he wished a few days' delay to get the bill settled. Mr Morrison said he had been instructed by the agent in Forres to carry out the diligence. I understood him to say by Mr Alexander Mackenzie, Forres; and he did not know whether he could grant the delay or not. I said I thought the bill would be paid in a few days, as they were doing well in the hotel where Captain Cameron resided. Mr Morrison hesitated to grant delay. I said he had better consider and let me know. We had some talk. He said Captain Cameron might go out of the way. I said this was not likely. We parted on the footing that he was to consider and let me know, and he was to send me a state of the debt. He said nothing about granting the delay conditionally if the Forres agent consented. I asked for a state of the debt, and he said he would send it. All this was on Thursday, 27th July, at twelve o'clock. Next day I received the letter of 27th July. Before that, and on 27th July, I saw the Captain, and told him that Morrison was to consider and let me know as to granting delay. I received the letter on Friday morning—(*letter read*). I sent the pursuer a copy of this letter immediately."

The letter referred to was as follows:—

"*Elgin, 27th July* 1871.

"*Mortimer* v. *Cameron.*

"Dear, Sir—I enclose state of debt as requested,—amount, £11, 14s. 9d. I must have a remittance by Monday morning's post.—Yours truly.

Amount of bill, dated 29th December 1870, ...	£10	15	4
Interest, ...	0	1	0
	£10	16	4
Expenses, ...	0	18	5
	£11	14	9"

Morrison's evidence in regard to the conversation was as follows:—"On Thursday, 27th July, we had a court-day in Elgin. Peat was in court. Mr Peat spoke to me at the bar just as I was standing there. He said—'By the way, you have a diligence against Captain Cameron.' I said I had. He said he was acting for Captain Cameron in a way. He asked me to grant indulgence till Wednesday or Thursday of the next week. I told him plainly I had no power to grant time. I told him I had instructions from Mr Mackenzie of Forres. I thought he knew that. He seemed to know that Mr Mackenzie was the defender's agent. I told him that my orders were to give no delay; and I said I was sure I would be instructed to send on warrant when the charge expired. Mr Peat pressed me. He said he was arranging the debt. I said—'Suppose I were to give delay, Captain Cameron would bolt and defeat diligence.' Peat said—'Nothing of the kind.' I said—'Well, I have no objections. If I do not receive instructions to send on the warrant I will delay doing so till Monday morning. Personally,' I said, 'I will do nothing till Monday, if I get no orders and there is no change in the circumstances.' Mr Peat then said—'Very well; send a state of debt, and I will remit you on Monday morning.' I said I would send the state of debt; but I told him that if I got instructions to send on warrant I would do so,—that I must follow instructions. I merely personally agreed to do nothing if no instructions came. Mackenzie had told me to give no delay, and I told Mr Peat that at the first. I told him that I had express orders to give no time. Mr Peat then left. When I came back to office I wrote with state of debt. I wrote the letter. The letter does not detail the understanding as to my abstaining from sending on the warrant, unless ordered to do so; but I quite understood it in my own mind. The letter was written in reference to what I had said to Mr Peat. I did not communicate the result of my meeting with Mr Peat to Mr Mackenzie or to the defender, and I had no authority from them."

Meanwhile Mortimer urged Mackenzie to lose no time in obtaining a warrant of imprisonment. Accordingly, on Saturday the 29th July, the day after the charge had expired, Mackenzie telegraphed to Morrison to get the warrant and send it to Forres. The warrant was accordingly sent to Forres that evening, and placed in the hands of a sheriff-officer, who proceeded to the Station Hotel, where Cameron resided. This was between eight and nine o'clock in the evening. When the Captain was informed of the presence of the sheriff-officer and his assistants, he went out by the back door, and took refuge in an out-house. The door was forced open, and the Captain dragged out, and taken along the street in custody, amidst an increasing concourse of persons. At the request of Mr Peat, who seems to have been sent for, Cameron was taken to Mr Alexander Mackenzie's house, in Forres, instead of being at once driven to Elgin in a dogcart, which had been provided. According to the pursuer's evidence, the defender Mortimer walked along with them, saying that he did not care about the bill—he would put him in jail, and make him a better man—he would teach him to write letters—he would have his revenge, and so forth. The defender did not call himself as a witness.

The result of the visit to Mr Mackenzie's house was that the bill was paid, and the Captain liberated.

On the 20th September Cameron raised the present action against Mortimer and Morrison, concluding against them conjunctly and severally for £1000. The action was abandoned as against Morrison on his paying £25 and £12 of expenses for a settlement of the case.

The case against Mortimer was tried before Lord Gifford and a jury.

The following issues were sent to trial:—

"1. Whether, on or about the 29th July 1871, the defender John Mortimer wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, without any legal warrant, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about the 29th July 1871, the defender John Mortimer wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July 1871, to the loss, injury, and damage of the pursuer?" Damages laid at £975.

The pursuer abandoned the first issue, and Lord Gifford directed a verdict for the defender upon it, and left the second issue to the jury, upon the evidence.

The following is taken from Lord Gifford's notes:—

"Counsel for the pursuer asked that the following directions in point of law be given to the jury:—(1) That although the agent Mr Morrison was employed by Mr Alexander Mackenzie, yet Morrison must be held to be agent for the defender in the same way as if he had been employed directly by the defender to raise and enforce diligence. (2) That if the jury be satisfied that Morrison was the agent of the defender to raise and enforce diligence against the pursuer, he had, in law, authority to grant to the pursuer a stay of diligence from Thursday the 27th July till Monday the 31st July 1871. (3) That although the jury be satisfied, on the proof, that special instructions were given to Morrison not to stay diligence till Monday, 31st July 1871, yet if these instructions were not communicated to Mr Peat, as agent for the pursuer, and if Morrison did agree to stay diligence till Monday, the defender was bound by the undertaking of Morrison.

"I refused to give these directions in the terms asked, but I did so with special reference to what I had already told the jury, and I again repeated to the jury the explanations and charge in reference to the special directions sought.

"In particular, I refused to give the first direction in the terms sought, because it would imply that Mr Morrison's powers and instructions were the same as the powers and instructions of Mr Mackenzie, and I told the jury that this was a matter for them upon the evidence; and I explained that Mr Morrison, though not employed directly by the defender, was in law the defender's agent for the purposes for which he was actually employed.

"I refused to give the second direction as sought, because I had left it to the jury to say upon the evidence what Mr Morrison's instructions were, and whether these instructions were communicated to Mr Peat, the agent of the pursuer, and the direction, if given in the terms sought, would mislead the jury.

"I refused to give the third direction in the terms sought, because it was inapplicable to the circumstances of the case, there being no evidence to go to the jury that Mr Morrison was only em-

ployed as sub-agent for a limited purpose, and that this was known to Mr Peat, the pursuer's agent.

"Jury retired, and returned with a verdict unanimously for the defender on the first issue, and for the pursuer on the second issue, and assessed the damages at £150, less £25 already paid to the pursuer—£125."

The defender moved the Court for a rule on the pursuer to shew cause why a new trial should not be granted, in respect that the verdict of the jury was against evidence. A rule was granted.

SHAND and REID, for the defender, argued that there was no evidence to shew that Mortimer had authorised his agent to grant delay; and further, that there was no sufficient evidence even to shew that Morrison had agreed to delay diligence.

FRASER and STRACHAN, for the pursuer, founded on the letter by Morrison to Peat, of 27th July 1871, and other circumstances, to shew that Morrison had agreed to give delay till the 31st July, and argued that Cameron was entitled to deal with the agent, as having an implied mandate from his principal; *Macara*, Dec. 9, 1825, 4 S. 296; *Sanderson*, May 17, 1833, 11 S. 623; Story on Agency, sect. 126, 139, 452.

At advising—

LORD PRESIDENT—The first issue in this case was abandoned, and the jury were asked to return a verdict on the second issue only. The defender moves for a new trial, in respect that the verdict was against evidence. The issue was—(*reads*). The fact of apprehension and detention is not disputed, but its wrongful character is denied. The wrongful character alleged by the pursuer is, that the apprehension took place on Saturday the 29th July 1871, after the defender had agreed to delay diligence till the Monday following. The important question is, Was there evidence that the defender did agree to defer diligence till Monday? It is not said that the defender personally agreed to give time, but it is said that he did this through his agent Mr Morrison. Two questions arise—*first*, Did Morrison agree to give delay? *Second*, Had Morrison authority, express or implied, to give delay? If the pursuer's case breaks down on either of these points, the fact of giving delay, or Morrison's authority to give delay, the verdict cannot stand. Mr Morrison says he did not give delay, and this is in accordance with Mr Mackenzie's evidence. On the other hand, Mr Peat, the pursuer's agent, says, that on the 27th July there was a sort of agreement to take the question of delay into consideration, and that thereafter Morrison wrote the letter of that date which is produced. That is all the evidence in fact. But it is necessary to attend a little more to the character of the agent. Mr Mackenzie was the agent of the defender. He resided at Forres, while the Sheriff-court is at Elgin. Mackenzie therefore employed Morrison to record the protest, give a charge, and on the expiry of the charge to obtain a warrant of imprisonment. The charge was given on the 22d July, and being a six days' charge, expired on the 28th. Morrison's duty then was to obtain the warrant of imprisonment. It was on the day before, viz., the 27th, that the conversation took place with Peat. If no conversation had taken place, all that Morrison had to do was to send the warrant to Forres. In regard to the conversation, Mr Peat says Morrison did not assent to his proposal of delay, but that he wrote the letter of 27th July—(*reads letter*). That has been construed as an agreement on the part of Morrison not to do anything till Monday. I am disposed to assume that this is the meaning of the letter. But then the question comes, Had Morrison authority to bind the defender by that letter? Did he even profess to bind the defender, and did he leave the pursuer's agent under the impression that he had power to bind the defender? Morrison is positive that he did not. Peat's evidence is as follows—(*reads*). It rather appears to me that Morrison did not convey to Peat the impression that he was entitled to bind his client. But there remains behind the question, Whether Morrison had power to bind the defender? The question is one partly of fact and partly of law. It would be a question entirely of fact if there was any evidence of express authority. But there is none, and there remains the question, whether there was implied authority. Looking at the nature of his employment as a practitioner in the Sheriff-court to record the protest, give a charge, and on its expiry to apply for a warrant of imprisonment—looking, I say, to the limited scope of his employment, I think there was no implied power to grant delay. If he did agree to give delay, he did what was beyond his power. I am of opinion that the verdict cannot stand.

LORD DEAS—This is a singular case, and it is extremely fortunate, for the credit of the human race, that it is so. Mortimer and Cameron both live in Forres. The latter does not seem to have been in very flourishing circumstances. Mortimer had a determined hostility against him, and bought up this bill at almost full value, not for the purpose of recovering the debt, but for the pleasure of sending him to prison. It is evident that he, at any rate, had no intention to give delay, but the reverse. Mackenzie was his agent, and Morrison was his sub-agent, employed to give the charge on the bill, which for that purpose he had in his possession. He was in quite a different position from a messenger-at-arms, who has not even a right to discharge the debt. However his mandate may have been limited as between him and his principal, as between him and third parties it was a very different matter. If the debtor got delay from Morrison, he was entitled to think that he was getting delay from Mortimer. The letter of 27th July, to say the least, warranted the jury in coming to the conclusion that Morrison had agreed to give delay. Having got the letter the Captain considered himself safe for the Sunday; but it appeared that, in consequence of a telegram from Mr Mackenzie late on Saturday night, such was not the case. How it was expected to get into the prison, which I infer to be at Elgin, at that late hour on the Saturday evening, I do not know. Nevertheless, Captain Cameron was transferred, not into a close carriage, but into an open dogcart. Mr Mortimer was now told of the delay granted by Morrison, and he answered that he was not proceeding for the purpose of getting the debt settled; and when it was paid, expressed great disappointment. The jury have given Cameron £150 damages; but, though I think that sum too large, I understand that we are all agreed that the verdict should not be set aside on that ground. But then the question is, whether it should be set aside as against evidence. It is not a question of law at all, and if it had been, this would not have been the form in which it ought to have come before us. The Lord Ordinary gave the following directions—(*Reads directions*). So that the whole matter is one of evidence whether the

instructions of Morrison were sufficient to limit his power so far as to incapacitate him from granting the delay referred to. Your Lordship suggests that it is a matter of law whether there was any implied authority. But this seems to me more a matter of fact for the jury than direct authority, which might be construed by the Court, would be. An agent unquestionably has a discretion, and in absence of express instructions not to grant delay, has a right to grant it. He is to act on the supposition that his client really wants payment of his debt, not the gratification of revenge, and delay may be the most judicious policy in certain circumstances. Moreover, we are not to set aside the verdict merely because we would have given a different one. I do not see that the jury has gone so extravagantly wrong that we are entitled to set aside their verdict. The whole circumstances must be taken into account. Had it not been for the malicious motive on the part of the creditor, this would not have happened. It is to be observed that Mortimer does not venture to put himself into the witness-box.

Lord Ardmillan—In this action of damages, at the instance of Captain Cameron against the defender Mr Mortimer, two issues were sent to the jury. On the first issue the verdict was for the defender, and no question is now raised in regard to it. The second issue is in the following terms—(*Reads second issue*). On this issue the Jury returned a unanimous verdict for the pursuer, with £125 of damages.

The defender has challenged this verdict, and Mr Shand has very ably and earnestly supported his application for a new trial, on the ground that, if a right view of the law be taken, the verdict will be found to be contrary to evidence. The law laid down by the Judge at the trial has not been in any respect objected to. We have not the whole charge before us. We must assume it to have been correct in point of law, and in so far as the directions given by Lord Gifford are disclosed on the proof, they appear to me have been extremely sound and appropriate. There was undoubtedly a conflict of evidence, and the Judge left the disposal of that question to the jury, and withdrew from their consideration no point calculated to aid them in coming to a right conclusion.

It is not necessary for me to explain in detail the facts of this case. There are three matters of fact, however, which I consider most important, and about which I do not myself think that there is room for doubt, and even if there were some room for doubt, the unanimous verdict of the jury should now be held as conclusive.

The first point is, that Mr Mortimer was not himself a creditor of Captain Cameron. The bill had been granted by Cameron to a Dr Mackenzie, and was purchased by the defender Mortimer in order that he, as the holder of the purchased bill, might enforce it against Cameron. That this bill was purchased by Mortimer and proceeded on by him, not to enforce a debt which had arisen in business, but to gratify spiteful and revengeful feelings against Cameron, is clearly brought out on the proof,—so clearly that it was really not disputed at the bar. The defender said, in the presence of the witness Peat "that he would have his revenge," and Mr Peat adds,—"There had been a previous quarrel, and I knew this was what he alluded to." Again the defender said to Peat, that "he would rather have Captain Cameron in jail than have the money." He again said, after the bill had been paid, "that it would not signify though the Captain paid it. He would get others." Mr Peat adding, "I understood him to mean he would buy up another debt and enforce it. He said so." After all was over, he again said to Mr Peat that what he had done was "to get his revenge and put the Captain in jail." Now, Mr Peat's evidence on this point is confirmed. Captain Cameron himself swears that Mortimer said "he did not care about the money, he would have his revenge." Rebecca Robertson says, that Mortimer stated that "he wished Captain Cameron in jail, and to have his revenge." Mary M'Lellan says that she heard the defender say that "he had his revenge, and would have the Captain in jail." Even Mr Mackenzie, the defender's own agent, speaking of the payment of the debt, says, "Mortimer said he was rather vexed it was paid,"—the creditor vexed that he had been paid the debt. But all this receives additional corroboration from the fact that, after the whole of the proceedings was over and the money paid, the defender is stated to have proposed to advertise for claims against Captain Cameron, in order that he might still further proceed against him. Now I am not imputing motives of which I imagine or suspect the existence. The motive is plain and avowed.

The first fact, therefore whatever your Lordships think of its importance, is, that the defender is not here as a creditor of Captain Cameron in a debt arising from any transaction with him, or as the holder of a bill acquired in the course of business, but as the purchaser of a debt and a bill, and enforcing it for the purpose of gratifying revenge against a man with whom he had a previous quarrel.

The second fact to which I advert is, that Alexander Morrison, solicitor in Elgin, was the agent of the defender Mr Mortimer. These two stood to each other in the relation of agent and client. In the answer for the defender to the second article of the condescendence it is admitted that Morrison "acted as the agent of the defender Mortimer in raising and enforcing the diligence aftermentioned." Again, in the answer to article six of the condescendence, the defender speaks of Morrison receiving "instructions from his client Mr Mortimer." There can, I think, be no doubt that, through the intervention of Mr Mackenzie, the defender's ordinary agent in Forres, but who was in delicate health, Mr Morrison was employed to act, and did act, as the defender's agent in Elgin, in the proceedings for enforcement of this diligence on the purchased bill. In that matter, and so far as his agency extended, Morrison represented the defender, and Captain Cameron's agent dealt with him as agent for the defender. Morrison was, as agent, in possession of the documents of debt. The bill and protest were recorded by Morrison as agent, and the charge was given by him. He did indeed speak of having instructions to proceed without delay, but he spoke as agent, and he acted as agent, and he could have accepted and discharged the debt.

The third point of fact is one on which there was a conflict of evidence. I mean the question of fact, whether Morrison did agree to Mr Peat, the pursuer's agent, to delay diligence till the Monday.

On this question we must hold that the jury have decided for the pursuer—or, in other words, have decided that Morrison did agree to delay.

Viewing this as a question of fact depending on testimony, and a fact on which there is conflicting testimony, I am of opinion, with Lord Deas, that it was a proper question for the jury. They have disposed of it, and even though I doubted their verdict, or personally differed from it, I should not be disposed to disturb the verdict. But I cannot say that I have arrived at a conclusion different from the jury. I think that, on this matter of fact, the preponderance of evidence is on the side of the pursuer. The letter of Morrison to Peat of 27th July 1871 is important, and is not easily reconciled with the view maintained by the defender, and I am quite as much impressed by the testimony of Mr Peat as by that of Mr Morrison, though I see no reason to impute wilful falsehood to either. I am satisfied that Morrison did agree to delay diligence till Monday, and that he, as agent for the defender, and Peat, as agent for the pursuer, parted on that footing, both of them contemplating that the bill, with interest and costs, would be paid on the Monday.

On the evening of Saturday, 29th July 1871, Captain Cameron was apprehended at the defender's instance, on the same diligence which Morrison had agreed to delay till the Monday. Of the circumstances attending the apprehension and detention of the pursuer I need say nothing. The witnesses are not agreed about these. Two remarks, however, I must make on them. The first is, that immediately after the apprehension, but before the removal and detention of the pursuer, the defender who was, as Lord Deas has said, personally present, was told by Peat that Morrison had agreed by letter to delay the diligence till Monday, and the defender, in the passage of the hotel, said he was determined to have Captain Cameron in jail that night, and that he would have his revenge; and accordingly, after receiving this communication, he directed the officer to proceed. This is distinctly sworn to by Mr Peat, confirmed by Captain Cameron, and the defender withheld his own evidence.

The second remark is, that the debt is not proved to have been in danger. The money was paid on the Saturday, and it has not been maintained or suggested, and cannot be assumed, that the money would not have been paid on the Monday as agreed on. I see no reason to doubt it. The defender has not said that he doubted it. He did not venture to come forward as a witness. If payment of the bill was what the defender wanted, there is no reason to suppose that he would not have received payment, according to promise, on the Monday. The interest of the creditor, the only true and just interest of the creditor, never was imperilled. It is not pretended that it was. I would have been content to view the case as a question of fact, and to leave it as decided by the jury; and, indeed, the motion before us is for a new trial as contrary to evidence, which I do not think it is. But it is said that there is a rule of law in respect of which, applying it to the evidence in the cause, this verdict must be set aside. It is said that Morrison, as agent for the defender, had only limited powers, and could not bind the defender to delay diligence till the Monday, and that, notwithstanding Morrison's agreement, and Morrison's letter of 27th July, and Peat's notice to the defender that he had got the letter, the defender was entitled, on Saturday the 29th of July, to apprehend Captain Cameron, and to detain him under apprehension.

On this point I have the misfortune to differ from your Lordship in the chair. I think there is no inflexible rule of law upon the subject, apart from the circumstances of the case; and I think that, under the very peculiar circumstances of this case, the defender, after the agreement and the letter of Morrison, was not free to apprehend Captain Cameron, and after receiving notice from Peat was not free to detain him after apprehension. It is the fact that he did so, and did so under the influence of his avowed feeling of revenge, and in fulfilment of his declared intentions to gratify that feeling by the apprehension and imprisonment of Captain Cameron. I think that the defender could not honourably or in good faith, morally, or fairly, or justly, apprehend Captain Cameron and detain him under apprehension as he did on the Saturday; and therefore I think that he could not do it legally.

I do not think it is possible to shut out of this case the element of motive. It is a most important fact and feature of this case. Motive is the spring of conduct, and gives to conduct its true character. If, at close of day, I dig a pit-fall across a path in my own grounds, knowing that the man I hate is to visit me at night, the motive is manifest, and cannot be ignored, for it gives a character to the act. Shakspeare's wonderful delineations, such as those of Hamlet, of Prospero, of Hermione, of Iago, and of Shylock, are only intelligible if we connect the spirit with the conduct, and the motive with the act. It is a mistake to suppose that a Court of Justice will not look to motives. The moral quality of acts and conduct cannot be set aside as irrelevant, and motive is essential to the morality of conduct. In the case of *Stewart and Menzies* the fact that certain letters, founded on as instructing marriage, were truly written to deceive another party, was held as conclusive against their effect in the question of marriage. The motive gave a character to the act. Again, in a case of *Johnston* v. *Alston*, decided by Lord Ellenborough in 1808 (1 Camp. Rep. 176), an attorney prosecuted for payment of his account, The client maintained that the agent had done him a wrong by failing to put in a certain plea which he had been directed to state. The Court found that the plea was not sound or true, and was suggested for delay only. Therefore the attorney did no wrong in omitting it, for Lord Ellenborough, who decided for the attorney, obviously considered the motive of the client as giving a character to his direction to the attorney. The disappointment of that motive the Court could not look on as a wrong.

I put the question to the defender's counsel Mr Shand, whether he maintained that Morrison, as agent for Mortimer, had no discretion whatever, but was restrained by a rule absolutely inflexible, so that he could not have agreed to delay for two hours till money could be procured—so that he was bound to apprehend a man in fever, or a dying man. I cannot say that the answer to the question was distinct, no admission was made, so I must consider the point under both views.

To hold, as I think the defender's counsel at first did, that no discretion whatever exists in the agent; to hold that no concession, no mercy, can be wrung from the humanity of the agent even by the most heartrending, and most extreme combination of circumstances, and where there is no ground to suspect absconding or evasion of the debt, would be to introduce into the law and practice of Scotland a cruel severity, which I humbly think does not now exist. If that is the view taken by the defender,

I for one am prepared to negative it. Great strictness has been enforced in the case of messengers, but in the case of an agent there is no unbending rule excluding all discretion.

If again, the defender's view is, that the rule of law is not inflexible, but that under certain circumstances a reasonable concession, not extreme not imperilling the debt, but fairly required by the justice and humanity of the case, may be permitted, that leads us to consider the peculiar circumstances of this case, including the nature of the wrong said to have been done to the defender by the humanity of his agent.

I do not wish to revert again in detail to what I think the painful and not creditable circumstances of this case. If recovery of the debt had been the real object of the defender Mortimer—as of course it was the ostensible object, and the only object which the law can aid in promoting—then the concession of a brief delay to the pursuer on promise of payment, and with no doubt raised that payment would have been made, was no injury to him. It is not suggested, and certainly it has not been stated by the defender, that between the 27th of July and Monday the 31st of July, till which day delay was given, the debt was in any peril, or that it would not have been paid. As a means of obtaining payment, it occurs to me that Morrison's arrangement, though merciful, was not unreasonable, and would almost certainly have been successful. If he had any discretion at all, which I now assume, then it does not appear to me that he exercised it unreasonably, or to the injury of the defender, supposing the defender to have desired payment, and to have no unworthy motive.

But, then, it is true, and may be maintained on behalf of this defender, that he sought not the money, but the imprisonment of Cameron; that he did not desire payment but revenge; that Morrison was employed, not to recover the debt, but to put the old officer in prison; and that, even though Morrison had by his humane agreement facilitated or promoted payment of the debt, he did the defender wrong by disappointing him of his revenge. Though the putting Captain Cameron into prison might not be required to obtain payment, it was desired to obtain revenge. Now, I am humbly of opinion that the gratification of personal revenge, when clearly brought out and avowed, as it is in this case, is not an aim, or end, or motive of action, which a Court of Justice, sitting in a Christian country, ought to recognise as deserving to be promoted or protected in dealing with the rights of parties standing in the relation of creditor and debtor. If this motive had not existed, there would have been no apprehension of Captain Cameron; and it is only in respect of this motive that any injury can be suggested as caused by the delay. The case seems to me to turn upon this point. If there is an inflexible rule of law, in respect of which the agents' hands are absolutely tied, so that he has no discretion whatever, but must apprehend and cast into prison every debtor against whom he has diligence, even though the debtor's life be in danger, and the debt be not in danger, then this case is at an end, and I have no more to say, except to express my regret that the law of this Christian country should be so inexorable and unmerciful. I do not, however, think that that is the state of the law. Some reasonable discretion, suited to the circumstances, and meeting the justice of the case, does, in my opinion, rest with the agent; and if, in the reasonable and humane exercise of that discretion he does not imperil the debt, he does no wrong to his client..

In the present case I think that the debt was not imperilled by any proceeding of the agent. It was paid under pressure on the Saturday, and I have no doubt that it would have been paid, according to promise, on the Monday. Nothing was lost to the defender, but the satisfaction of imprisoning Captain Cameron, on a bill purchased for the purpose of attaining that end. We cannot say, and I think we cannot presume, that incarceration was here necessary to obtain payment. We know that it was desired, but not desired for that purpose. The creditor openly regretted when payment was made. He preferred the imprisonment of his enemy to the payment of his debt. I hope he will live to regret, and be led by reflection to regret, that he cherished such feelings. I at least am not prepared to recognise them as deserving protection in this Court. They cannot be ignored or set aside. They have been avowed by the defender. They are patent on the face of the case, and necessary to its explanation. If the disappointment of this revenge was not a wrong, no other wrong was inflicted on the defender by the humanity of his agent. I consider the defender's proceedings against Captain Cameron to have been vindictive and oppressive; and, on the whole matter, I cannot say that the verdict of the jury is wrong, and I do not concur in allowing a new trial.

Lord Kinloch—I am of opinion that the verdict in this case should be set aside, as against evidence and against law, meaning thereby the legal result of the evidence. By the terms of the issue, which embodies the whole question in the case, the pursuer was bound to prove that the defender had wrongfully apprehended him after he, the defender, had given him time for payment of the debt. The pursuer did not prove that the defender personally had given such time. The utmost which he proved (and this in itself is debateable matter) was, that time had been given by Mr Alexander Morrison, writer in Elgin, professing to act as the defender's agent. But I think it clearly established that Mr Morrison had no authority to act for or bind the defender in this matter. Mr Morrison did not stand in the position of an agent employed generally for the recovery of a debt, and vested with a certain discretion by the very nature of the employment. He was a sub-agent employed to no other effect than that of taking out and transmitting the legal warrant. He was so employed simply from the circumstance of his residing at Elgin, the seat of the Sheriff-court; whilst Mr Mackenzie, the agent primarily employed, had his residence at Forres. Whether Mr Mackenzie, the agent employed generally for recovery of the debt, possessed such authority, it is unnecessary to inquire. It is enough for the decision of the present case that Mr Morrison did not possess it. It is to me so clear that Mr Morrison had no authority to give time for payment of the debt that I think it was not open to the jury to come to any other conclusion. In coming to the conclusion to which they did, they acted, as I think, directly in the teeth of the evidence; and therefore the verdict cannot be sustained.

To hold Mr Morrison to have possessed the authority claimed for him, would be, I think, to throw utter confusion into our law on the subject of principal and agent.

I would only add that I think the evidence not only shows that Mr Morrison had no authority from the defender to give time to the pursuer; but further, that Mr Peat, the agent who acted for the pursuer, did not think that he had such authority; and, whilst taking his letter for what it was worth, took his risk of what would happen. If no authority to give time was possessed, the apprehension was not wrongful. No more was the detention; for after Mr Morrison's letter was made known to the defender he was entitled to say that it was unauthorised, and to proceed exactly as if it never had been granted.

In deciding the question before us I can pay no regard to the alleged revengeful spirit displayed by the creditor, which in no way bears on this question. I wholly disapprove of this spirit; but it is not my present function to visit it with a penalty. The only ground on which the creditor, the defender, is here sought to be made liable in damages is, that he executed his warrant after giving time to the debtor. If it is shown that he did not give time, he is entitled to absolvitor from this action; and I have no right to set up against him, directly or indirectly, any other ground of damage.

Lord Gifford—I entirely concur with the Lord President and Lord Kinloch that the rule should be made absolute. In common with all your Lordships, I have some regret in disturbing the verdict, but I am compelled to come to the conclusion that the verdict is against evidence. The sole fact in issue is, Whether the defender wrongfully apprehended the pursuer, or caused him to be apprehended *after* having agreed to delay diligence? If the question of motive were in the case, I do not see how that motive would not have been equally to be condemned had no agreement been alleged. Now, Mr Mortimer might give the delay either personally or by another authorised by him. It is not said that he consented personally, and the improper motives which actuated him come in as excluding the idea that he had consented to delay. He had two agents. Where one agent is employed by the other, it becomes a delicate question how far the sub-agent has power to bind the principal. Morrison was only a sub-agent for a limited purpose. Had the question only been, to what extent had power been delegated by Mackenzie to Morrison to delay diligence, I should not perhaps have interfered, assuming that Mackenzie could delegate the power. But the question next arises, Did Morrison give delay? On this there is a conflict of evidence. It is a matter which the jury were entitled to take into their own hands. Assuming these points in favour of the pursuer, comes the great question, Had Morrison, in the circumstances, power to bind Mortimer to give delay, without his knowledge, and to the effect of making him liable in damages if he proceeded to execute the diligence? Here arises a question of importance in law. There is no absolute rule of law, what an agent can do, and what he cannot do. I am not prepared to say that, wherever an agent at the Sheriff-court town, or in Edinburgh, is employed to carry out diligence, that he is empowered to give delay. It is a question of circumstances in each case. I think Morrison had no power to tie Mortimer's hands. That is enough. But the verdict cannot stand on another ground. Captain Cameron, or his agent, had notice of Morrison's doubt of his want of power to grant delay—(*reads Peat's evidence*). When an agent says that he does not know whether he can grant delay or not, that is fair notice, even although he does take upon himself to grant delay. He may bind himself, but not his principal.

On these grounds, I consider the verdict against evidence—viz., that Morrison, in the circumstances, had no power to grant delay; and 2*dly*, that he had intimated this defect to Peat.

Rule made absolute, and new trial granted, reserving all questions of expenses.

Agent for Pursuer—W. R, Skinner, S.S.C.
Agents for Defender—Philip, Laing, & Monro, W.S.

Friday, February 9.

THE EARL OF ROSSLYN *v.* MRS MARY CUNNINGHAM OR LAWSON.

Process—Constitution, Action of—Executor.

Where an action was brought against an executrix for a debt due by the deceased,—*Held* that, expenses being concluded for in the usual way, and not "in the event only of the defender appearing and opposing," the action was not an action of constitution merely, but petitory, and against the defender personally as executrix, and that therefore it was a valid defence that the executry funds were not sufficient to meet the demand; and proof of their amount allowed accordingly.

In this action Lord Rosslyn sued the defender Mrs Lawson for the value of coal supplied to her deceased husband from his collieries at Dysart, and concluded in the ordinary way for expenses. It was admitted that the defender was executrix of her deceased husband.

The Lord Ordinary (Gifford) allowed parties a proof of their averments. But though the defender averred the insufficiency of the executry funds, and pleaded that she was ready to hold count and reckoning with all interested, proof of the amount of said funds was not held included in the said order, and the Lord Ordinary, on 3d November, pronounced an interlocutor, finding the pursuer's claim against the defender, as executrix *qua* relict of her deceased husband, established, and therefore decerned against her in terms of the libel, with expenses.

Against this interlocutor the defender reclaimed.

Taylor Innes for her.

Watson and Trayner for the pursuer and respondent.

Authorities — *Gairdner*, Nov. 28, 1810, F.C.; *Cook* v. *Crawfurd*, 11 S. 406; and *Lamond's Trs.* v. *Croom*, March 8, 1871, 8 Law Rep. 412.

At advising—

Lord President—There can be no doubt as to the true character of this summons. In it the pursuer demands decree against Mrs Lawson as executrix dative *qua* relict of the deceased James Lawson, her husband, and concludes for a sum of £100, 9s. 1d., with interest from the 30th April 1871, "when the same fell to have been paid, until payment, together with the sum of £50 sterling, or such other sum as our said Lords shall modify as the expenses of the process to follow hereon." Now, a creditor in a summons of constitution is not entitled to expenses except in the event of the defender appearing and opposing the action. If, therefore, this was intended as a summons of con-