[13*th August* 1832.]

Ex parte.

No. 16. WILLIAM EWING, Appellant. — *Lushington.*

WILLIAM WALLACE, W. S., Respondent.

Process (competent and omitted) — *Expences.* — A party who had allowed the agent of his opponent to obtain decree in the Jury Court for expences in his own name, found barred (affirming the judgment of the Court of Session), by the exception of competent and omitted, from suspending a charge, on the allegation that the agent had no attorney licence for the period when the expences were incurred.

Decision OVER-RULED.

Held, that the case of Robertson v. Strachan, 9th June 1826, 4 Shaw and Dun., p. 772, is ill decided.

1st DIVISION.

Lord Newton.

April 3, 1829.

WALLACE was agent, from April to December 1827, for Wight, in an action in the Jury Court against Ewing, and obtained decree there, in foro contentioso, with expences. These expences were taxed in the Jury Court at 9*l.* 7*s.* 9*d.*, and decree taken for them in the name of Wallace. Being charged on this decree, Ewing presented a bill of suspension, on the ground that the charger had no attorney licence for the period during which the account was incurred. Lord Cringletie refused the bill, adding in a note, "The Lord Ordinary "remembers that in the Jury Court there was much "discussion relating to this and other accounts of "expences. Then was the time for the complainer to "have made his objections, but he omitted it, and the "respondent obtained his decree. Even, therefore, if "the respondent had not obtained his certificates from "the stamp office, which he has, the objection comes "too late. It is competent and omitted." But a

No. 16.

13th August 1832.

EWING v. WALLACE.

July 9, 1830.

second bill was passed by Lord Corehouse.* On the expede letters coming before Lord Newton, his Lordship suspended " the letters simpliciter, reserving any " claim for the expences charged for, which may be " competent to Archibald Wight; finds the suspender " entitled to his expences, both in the process and in the " bill chamber; allows an account thereof to be given " in, &c. Note:—The Lord Ordinary does not hold " the extrajudicial offer to pass from the charge as con- " clusive of the merits of the case, seeing the offer was " accepted of under the conditions on which it was " made; but he thinks the merits are with the sus- " pender. The objection of competent and omitted " was ineffectual in the case of Robertson v. Strachan, " 29th June 1826, where a charge was suspended in " circumstances similar to the present; and the Lord " Ordinary is not aware of any distinction betwixt the " proceedings in the Court of Session and those in the " Jury Court, as to taking out decrees for expences in " name of the agent, which should render that decision " inapplicable as an authority to the present case. He has " made a similar reservation to that which was inserted " in the Court's interlocutor in the case of Robertson." The charger reclaimed to the Court.

LORD GILLIES.—In Strachan's case the exception of competent and omitted seems to have been applicable as well as here, yet the Court did not hesitate to suspend. If, therefore, I felt satisfied of that being a good decision, I would suspend here also. But though

* A correspondence ensued, in which the charger offered, in order to avoid litigation, to give up the amount of his profits on the account (5*l.* 12*s.*); and he afterwards offered also to give up the whole claim, and to pay the expence of the second bill of suspension, under deduction of his expences of the answers to the first bill. The suspender declined the offer, unless the charger would pay the expense of both bills.

No. 16.
13th August 1832.
EWING v. WALLACE.

the charger might have pleaded the exception in Robertson's case, it does not appear that he did so. That exception, however, is pleaded here, and it is a most important plea in the law of this country. I feel a doubt about the implicit adoption of Robertson's case as a precedent, since it appears this plea was never stirred in it. Though the case is not free from difficulty, since Ewing founds on the statute as cutting down the title of Wallace, yet I am disposed to alter the interlocutor of the Lord Ordinary, because I think Ewing is barred from stating this objection to the title. The exception of competent and omitted covers objections to the title as well as to the merits of the action to which it applies. Ewing could have urged his objection in the Jury Court, where it must have received effect, if well founded. He did not do so, and he cannot now be allowed to open up the case upon it.

LORD PRESIDENT.—Wallace is not now properly maintaining an "action or suit" for these expences. He has already been allowed by Ewing to do this, and to recover a decree for their full amount. After that, it is merely legal diligence which is done to enforce the decree of a supreme court recovered in foro contentioso. I think any plea which was open to Ewing to state against Wallace's obtaining decree falls under the rule of competent and omitted, and he is barred from pleading it against the enforcing of that decree.

LORDS CRAIGIE and BALGRAY assented.

Feb. 3, 1831.

The Court therefore altered the interlocutor, found the letters and charge orderly proceeded, and expences due to the charger, &c.*

Ewing appealed. No appearance was made for Wallace.

* 9 Shaw and Dun. 385.

No. 16.
13th August 1832.
EWING v. WALLACE.

Appellant. — The charger had not taken out his attorney's certificate in terms of the acts, 25 Geo. 3, c. 80, s. 1, and 37 Geo. 3, c. 90, s. 7, and was therefore disqualified from following out any diligence for payment of process expences. The latter act revives the former, except as far as expressly altered; and the two must be considered together. The charger is not protected by the 7 Geo. 4, c. 44, s. 3. But even if he had possessed his attorney's certificate the charge would be illegal, as the certificate was not recorded or entered in the court where the expences were incurred. The objection, " competent and omitted," does not apply. Although, no doubt, it is the privilege of the agent to take out a decree in his own name for the expences, most usually decree proceeding in name of the party to the suit. But if the party had taken decree, the want of certificate in the agent would have been of no consequence.—M'Gowan, Jan. 24, 1828, (6 Shaw & Dun. p. 420). If, therefore, before the charger took the decree, the appellant had raised this objection, it would have been thrown away, because the party would have taken the decree. Indeed, until the decree was actually taken by the agent, the objection of " no certificate " did not exist. It therefore could not be " competent and omitted." It is equally plain, that the appellant could not be expected to be prepared with it. He had no opportunity, as he did not know that the agent was to ask the decree, of ascertaining the fact of want of certificate, or of, on that ground, opposing the order. The objection arose with the very motion on which, as a matter of course, decree was given.*

* The charger made no appearance by counsel at the bar of the House of Lords, but his statement in the Court below was, that he took

No. 16.

13th August 1832.

EWING v. WALLACE.

LORD CHANCELLOR:—My Lords, This case has been heard before your Lordships ex parte,—the respondent, from the extremely small value of the matter in contest, not having thought fit, naturally enough, to attend here. But though the matter itself, as far as the question of fact and the amount are concerned, ceases to be of importance, yet the considerations in point of law connected with the question deserve attention; and I have been induced to pay the more attention to it, as it was perfectly evident that the decision in this case in the Court below could not stand, if the case of Strachan v. Robertson is held to be well decided. I take it to be perfectly clear, if this case is well decided, that that case is ill decided; and, vice versa, if that case is well decided, then this case is ill decided. Now, with respect to the first point relating to the certificate, how far a practising attorney comes within the provisions of the 25th and 37th Geo. 3, which two acts, it has been held, are to be construed together, and that the former of those two acts is entirely revived by the latter, except in so far as it is expressly altered, the question is, Whether Wallace was, within the provisions of those two

out two certificates, one in November 1827, and the other in June 1828. There was then no officer appointed by the Jury Court for recording licences. He took out a third certificate in December 1828, recorded by the proper officer of the Court of Session, and got his two other certificates also there recorded in 1829, before the charge was given; and long before 1826 he had passed writer to the signet. Besides, the charger was protected by the statute 7 Geo. 4, c. 44, s. 3. But even if any irregularity had existed, the suspender (appellant) is not in a situation to complain. In the Jury Court he stated many objections to the account of expences, but was silent as to this one, which he had ample opportunity to bring forward if he thought proper. He is therefore barred by the exception of "competent and omitted."—Robertson, June 29, 1826, 4 Shaw & Dun. 772; Napier, Feb. 7, 1828, 6 Shaw & Dun. 500.

No. 16.

13th August 1832.

Ewing v. Wallace.

acts, disqualified from prosecuting any suit in that Court? I cannot take the distinction hinted at by some of the judges in the Court below, of the decree being already obtained; that distinction I take to be untenable on many grounds, and it is against what the Court held in Napier v. Carson, where the question was in reference to the objection of competent and omitted, which forms so large a proportion of the discussion in this case. It is equally clear to me, that the Act of Indemnity, the 7th Geo. 4, does not cover this case. The objection, therefore, was open to the party, and must prevail, of the want of a certificate; Wallace was within the act disqualified, and came not within the Act of Indemnity; and, consequently, if the objection were open, and be now open, it must prevail; but the question is, Was that objection open? In the same case of Strachan v. Robertson, which I have adverted to, and which is so strong in the appellant's favour, that it appears to me the two decisions cannot well stand together, this view appears to have been taken by Lord Gillies, and fairly admitted, on the ground I put it upon. The question then is, Whether Strachan v. Robertson was a sound decision? The opinion I have formed, after much consideration, is in favour of the present judgment, and against the decision in that case. It is plain that the ground taken by the appellant, to get rid of the otherwise fatal objection of competent and omitted, fails. He says he had not an opportunity of stating the objection in limine. But he had that opportunity. I have taken great pains to inform myself as to the practice upon the subject, and I find, that after the account is taxed, the cause must be enrolled, to get a decree for the amount so allowed by the auditor; the appellant must

No. 16.

13th August 1832.

Ewing v. Wallace.

have had notice of that enrolment; he must have known that the most ordinary course was to ask for the decree in the name of the agent, and he might have interposed his objection; and if he had, the Jury Court had jurisdiction to deal with it. Wallace taking the decree in his own name was a competent mode of constituting a debt due to him. It was tantamount to a suit at his instance, and made him quoad hoc pursuer, and he could have had the judgment without any objection. There is no doubt that the Jury Court had power to deal with this objection, and therefore it was pending the proceeding in that Court that this objection should have been made. However, he got his decree; and the suspension of the charge goes on the ground that the objection could not have been made available in that process, or taken advantage of. The case of Napier v. Carson, to which I have already referred, with another view as to the first branch of the case relating to the certificate, bears with still greater force upon this branch of the case, and, in point of principle, in favour of this decision, and against the decision in the former case. I therefore humbly move your Lordships, that the interlocutor now complained of be affirmed, but, under the circumstances, without costs.

The House of Lords ordered and adjudged, "That the "said petition and appeal be, and the same are hereby "dismissed; and that the said interlocutors therein com-"plained of, be, and the same are hereby affirmed."

Butt, — Solicitor.