[16*th March* 1841.]

GEORGE CAIRNS, Solicitor at law, Edinburgh, sometime Mandatory for the deceased John Rogers of Well Street in the County of Middlesex, Appellant.[1] (No. 2.)

[*Sir W. Follett—James Anderson.*]

Major ROBERT ANSTRUTHER of Thirdpart, and Messrs. ROY and WOOD, W. S., Edinburgh, for themselves and as Mandatories for the said Major Anstruther, Respondents.

[*Lord Advocate (Rutherfurd).*]

Mandatory — Expenses. — The mandatory of a foreign pursuer applied to be relieved from the situation of mandatory; the usual intimation was duly ordered by the Court, calling on the pursuer to sist another mandatory before further procedure; an impression at this stage of the proceedings arose, originating in a communication from the defender's agents, and adopted by the mandatory, that the pursuer was dead; the defender moved that the mandatory be found liable in the expenses of process hitherto incurred; no proceeding was taken for intimating the process to the representatives of the pursuer; the Court found the mandatory liable in those expenses: — Held, 1, that the mandatory was liable to decree for the expenses up to the date of his application to be discharged; but, 2, that the proper form of proceeding, in the supposition that the pursuer was dead, would have been to have ordered intimation of the process to the representatives of the pursuer, and in the event of their declining to go on with the action, then to have decerned against

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[1] 1 D., B., & M. (New Cases); Fac. Coll., 15th Nov. 1838.

the mandatory for the expenses. — It having been stated to the House, however, by the counsel for the mandatory at the hearing of his appeal, that it was discovered that the pursuer was still alive, judgment of the Court of Session affirmed, on the ground that the proceedings calling on the pursuer to sist a new mandatory were admitted to be regular; and that the result of any remit to the Court would necessarily be the pronouncing of an order precisely the same as that complained of.

1st Division.

Lords Ordinary Corehouse and Cockburn.

Statement.

THIS cause originated in a summons, raised in 1833 in the Court of Session, in the name and at the instance of John Rogers of Well Street in the county of Middlesex, merchant, and George Cairns, solicitor at law, Edinburgh, his mandatory, pursuers, against the respondent as defender. The summons set forth that the respondent was addebted and owing to the said John Rogers the sum of 500*l.* sterling, with interest and charges, in virtue of a bill of exchange, dated 16th August 1831, payable nine months after date, which, it was alleged, had been transmitted to the pursuer, through the hands of several parties (whose names were attached to it as indorsers), and, among others, the respondent.

To this action the respondent pleaded certain defences. A record was thereafter made up. In the course of the years 1835 and 1836, various proceedings took place under commissions granted by the court, for the purpose of examining havers and recovering documents.

In the month of November 1836, the appellant put into process a minute, in which it was stated, "that he "had appeared in this action in virtue of the pursuer's "mandate to him, dated 9th September 1833, and "No. 5. of process, but that he did not intend to act "longer under the said mandate, and therefore craved

" leave to resign the office of mandatory, and to with-
" draw from the process; and that the Lord Ordinary
" would be pleased to authorize notice of his said
" resignation to the pursuer, the said John Rogers, in
" order that an opportunity might be afforded him of
" sisting another mandatory to carry on the process, if
" so disposed, for which purpose, that a letter be ad-
" dressed to him, through the post office, at his last
" known residence in Dalby Terrace, London, contain-
" ing a copy of the present minute and interlocutor
" thereon; and that a similar notice, also containing
" copies of the minute and interlocutor, be addressed
" to Messrs. Herd and Samson, solicitors, Little Argyle
" Street, London, who had acted for Mr. Rogers in
" London."

The cause having been enrolled, the Lord Ordinary, 25th November 1836, pronounced the following order:— " The Lord Ordinary allows this minute to be seen till " next calling." And thereafter, 23d December 1836, the Lord Ordinary appointed " intimation to be made " in terms of the foregoing minute, in order that the " pursuer may have an opportunity of authorizing a " new mandatory in this cause." The cause was again enrolled, and the Lord Ordinary, 1st March 1837, anew appointed " the pursuer to give in a mandate in " favour of a mandatory who is ready to sist himself in " this cause, and that within eight days from this date." Soon after this the appellant was led to believe, from information received from the respondents agents, that the pursuer, Rogers, was dead. The Lord Ordinary was then moved by the respondents to find the appellant liable in expenses; which motion was opposed on the ground that, the principal pursuer being dead, no inter-

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locutor could be pronounced in the cause until another party was sisted in his place. The Lord Ordinary reported the cause verbally to the court, who allowed the case to stand over until 23d December 1837, when the Lord Ordinary, again proceeding upon the instructions of the Lords of the First Division, pronounced the following interlocutor:—"The Lord Ordinary, having "consulted with the Lords of the First Division "of the Court, appoints the parties to prepare and "lodge mutual minutes of debate upon the point re-"ported by the Lord Ordinary by the box-day in the "ensuing recess, to be seen, revised, and relodged by "the third sederunt-day in January next."

Thereafter, 15th June 1838, the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordi-"nary having considered the revised minutes of debate, "appoints the same to be printed and boxed for the con-"sideration of the First Division of the Court, and that "within eight days, and grants warrant for enrolling in "the Inner House rolls." The cause was accordingly reported to the First Division of the Court, who pronounced the following interlocutor:—"15th November

Judgment of Court, 15th Nov. 1838.

"1838. The Lords, having advised the mutual minutes "of debate, find the said George Cairns, as mandatory for the pursuer the deceased John Rogers, liable for "the expenses of process incurred by the defender "prior to 23d day of November 1836, when he, by "minute lodged in process, withdrew from the process "as mandatory, reserving to him any remedy or relief "competent against the estate of the said John Rogers "or his representatives; find the said George Cairns "liable in the expenses of this discussion; ordain both "accounts of expenses to be produced, and remit the

" same to the auditor of court to tax the same, and " report."

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The two accounts of expenses having been lodged and audited, the following interlocutor was pronounced:—" 4th December 1838. The Lords approve " of the auditor's report upon the account of expenses, " as first before mentioned, and decern and ordain the " said George Cairns to make payment to Messrs. Roy " and Wood, writers to the signet, the agents and " disbursers, of the sum of 135*l.* 13*s.* 1*d.* sterling, as " the amount of expenses found due; approve of the " report of the auditor upon the account of expenses " second before mentioned, and decern and ordain the " said George Cairns to make payment to Messrs. Roy " and Wood, writers to the signet, the agents and " disbursers, of the sum of 60*l.* 18*s.* 7*d.* sterling, as the " amount of expenses also found due, with the dues of " extract."

Judgment of Court, 4th Dec. 1838.

Mr. Cairns appealed.

The argument at the hearing was of an alternative kind, in consequence of the appellant's counsel then stating that it was now ascertained that the pursuer Rogers was still alive; the interlocutors having been pronounced under the erroneous belief that he was dead.

Appellant.—The mandate having fallen, and the action having become abated by the death of Rogers the pursuer and mandant, whose representative has neither been sisted nor otherwise made a party, there

Appellant's Argument.

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Appellant's Argument.

was no existing process in which any interlocutors, either on the merits of the cause or on the accessory question of costs, could be competently or lawfully pronounced.

It was therefore premature and illegal to give decree for expenses of process, without determining the merits of the cause, or otherwise disposing of the conclusions of the summons.

And even, although the action had not become abated, the interlocutors under appeal were erroneous and unjust, in respect the condition of the appellant's obligation as mandatory was, that he should be answerable for costs only in the event of their being awarded against his constituent; whereas no such award has yet been pronounced, and the appellant did not, either ex mandato or otherwise, contract any obligation to guarantee or insure the respondent against the contingency of the pursuer's death, or to be responsible in any other event, except that of a judgment for costs against the pursuer.

If the action were to be held as subsisting to the effect of entitling the respondent to ask a decree for costs against the appellant, it follows that it must also be subsisting to the effect of entitling the appellant to show, by trying the cause on its merits or otherwise, that no decree for costs ought to be pronounced against him.

Even on the respondent's own showing, his claim against the appellant is not such as can be competently made effectual by any step in the original process, but requires a separate suit, in which the respondent must instruct his cause of action habili modo, while the appellant, on the other hand, will have the usual privilege of showing cause why decree should not be pronounced against him.

Lord Gillies rested his opinion almost exclusively on the case of Gordon v. Gordon[1], between which and the present his lordship observed that he could draw no distinction. But there was at least this obvious and important distinction, that in the one case the mandant was alive and the instance complete, while in the other he was dead and the suit was abated. In that case the ground of decision was, that in respect of the principal party's failure to sist a mandatory, judgment went against him, and for costs both against him and the mandatory down to the period of the mandatory's withdrawal. In that case, in short, the condition of the mandatory's obligation was purified, because there was a decree for expenses against his principal.

There was this further peculiarity in that case, that the mandatory, who had withdrawn from the process, wished to return to it again, and to show cause why decree for expenses should not be pronounced. But the Court, holding that the proper parties with whom the question of costs fell to be tried were the pursuer and defender in the action, and that after the mandatory had withdrawn he could not re-appear, did not recognize him as a party at all, even to the extent of listening to him on the merits. They, on the contrary, took the party whom they had, being the mandatory's constituent, and they decided against him, and thereby subjected the mandatory, Mr. Gibson Craig, in the costs up to the period of his withdrawal as mandatory.

As to the case of Reoch[2], it is sufficient to observe that in that case the mandant was not only alive, but

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[1] Gordon and Gibson Craig v. Gordon, 11th Dec. 1823, 2 S. & D. 572.
[2] Reoch v. Robb, 14th May 1831, 9 S. & D. 588.

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Appellant's Argument.

the mandatory was assoilzied; so that in so far as that case is a precedent, it makes directly in favour of the appellant's argument; and with respect to the terms of the mandate to the appellant, it is humbly thought to be a sufficient answer that the action was not raised by the appellant as the pursuer's commissioner or assignee, but proceeded expressly in the name of the pursuer himself as dominus litis, and of the appellant merely as his mandatory.

But the pursuer being still alive, the interlocutors have proceeded upon an hypothesis totally at variance with the true state of the case.

The House directed inquiry how far the statement now made was admitted, but the agent for the respondent not having instructed counsel, the hearing was postponed till counsel should be instructed. Upon the 11th March the hearing was resumed; the appellant repeating his former statement, and stating that the respondents had, almost a year ago, been apprized by him of this new state of the facts.

Respondents Argument.

Respondents.—The supposition that the pursuer was dead had created any little difficulty there was about the case. But the appellant having joined issue, and taken judgment on that state of matters, was not now entitled to ask an alteration of the judgment or a remit, in consequence of an alleged fact that ought to have been made known to the Court before that judgment was pronounced. The respondents were not bound to intimate the process to the representatives of the pursuer, indeed there was no form by which they could do so.

The appellant did not, and could not, by his own act, without the consent of the respondent and the express judgment of the Court, withdraw as a party from the process, to the effect of being released from all claims at the respondents instance; and, in particular, from liability for the expenses incurred during the time the appellant acted as the mandatory of the pursuer Rogers; for the mandatory of a pursuer residing beyond the jurisdiction of the Court is the party directly liable to the defender for the expenses of process incurred during his appearance; and for these expenses, when justly due, decree may be pronounced against the mandatory as a party to the process, even although from the situation of the process no decree can be pronounced against his constituent or his representatives.

The Court in all the cases which have come before them, bearing any analogy to the present, have found the mandatory liable. In the case of Gordon and Gibson Craig v. Gordon, the mandatory withdrew. The pursuer, Gordon, was called upon to sist a new mandatory, but no person would undertake the liability of expenses on his account. In these circumstances the defender obtained decree against the mandatory who had previously withdrawn. Now, in that case there was no decree on the merits, but a judgment equivalent to decree by default or in absence, in consequence of Gordon not having a persona or instance in his own individual name capable of sustaining an action. In substance, the decree for expenses was not effectual against the principal, who was not in Scotland, and had no effects or property liable to the jurisdiction of the Court; and although the principal appeared by counsel, and was anxious to carry on the litigation, he was, by fiction, no

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longer a party to the action, as decree was pronounced solely in consequence of his not being represented by a party entitled to insist before a court of law. In the case of Reoch or Maclachlan against Robb, 14th May 1831[1], a foreigner had been cited in an action of transference, as the representative of a deceased defender, and she appeared and pleaded, through the intervention of a mandatory, that she was not liable to the jurisdiction of the Scotch courts. It was ultimately found that she was not liable to the jurisdiction of these courts, and she was assoilzied from the action; but a claim was preferred by the opposing party against the mandatory for the expenses, in consequence of his improper conduct of the cause. The mandatory pleaded that as his principal was not liable to the decreet of the Scotch courts, he could not be found liable in any expenses, because (as is maintained in this case) "the mandatory "had no positive, but merely a relative existence." The Court, however, held the mandatory amenable to the jurisdiction of the Court in the matter of expenses, although his principal was not amenable; but in the circumstances of the case they held that the mandatory had not so misconducted the action as to render himself liable in expenses.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case appeared at your Lordships bar under peculiar circumstances. The course of the proceeding below was to fix a mandatory with the expenses of an action in which he had

[1] 9 S. & D. 588.

joined with the pursuer up to the time of his applying to the Court for liberty to be discharged. Now, that it was competent to him to make that application, cannot be disputed; and it is equally clear, indeed that was not disputed at the bar, and if it had been, the case of Gordon and Gibson Craig v. Gordon[1] would have established, beyond all question, that although he had a right to withdraw from the situation of mandatory, he could not relieve himself from the expenses that had been incurred during the period for which he had continued the mandatory of the pursuer. And it appears from the same case of Gordon and Gibson Craig v. Gordon to be equally clear, that according to the course of proceeding in Scotland, if the principal pursuer have notice that his mandatory has applied for leave to withdraw, and to be relieved from the responsibility of the future expenses, and to have a new mandatory substituted in his place, that the defenders would be absolved from the consequences of the action; and that the former mandatory would have been liable to pay the costs up to the time of his withdrawal. The case of Gordon and Gibson Craig v. Gordon establishes that proposition to the fullest extent.

Now it appears that in this case the mandatory took that course, and made an application to be relieved from the liability to future expenses; and in the second page of the appellant's case the proceedings for that purpose are thus stated:—"And this intimation the "memorialist followed up of this date by lodging in "process a minute withdrawing from the process as "mandatory for the pursuer Rogers. In this minute

[1] Ante, p. 35.

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Ld. Chancellor's Speech.

"the memorialist prayed the Lord Ordinary to autho-
"rize notice of his resignation to be given to Mr. Ro-
"gers, so as to afford him an opportunity of sisting
"another mandatory, and for that purpose to address
"a letter, through the post office, to Mr. Rogers, at his
"last known residence in London, containing a copy
"of the minute and interlocutor. The minute was, of
"this date," that is, November 25th, "allowed to be
"seen at a calling of the cause, attended by the
"defenders counsel, and thereafter, of this date, Lord
"Corehouse, ordinary, pronounced an interlocutor
"appointing intimation to be made in terms of the
"foregoing minute, in order that the pursuer (Rogers)
"may have an opportunity of authorizing a new man-
"datory in this cause."

"Then, under the date of 1st March 1837, the
"Lord Ordinary appointed Mr. Rogers to give in a
"mandate in favour of a mandatory ready to sist him-
"self; but no mandatory having been sisted, the
"defender enrolled the cause and asked a decree of
"absolvitur, and also a decree for expenses of process
"against the memorialist Mr. Cairns as mandatory."

In that state of the cause it appears that a proceeding took place on the part of the defender, and before the matter was ultimately disposed of; it appears that an impression prevailed, which seems to have originated in a communication from the defender, it is true, but adopted without inquiry by the pursuer, the mandatory, that Rogers was dead. Now, the Court had proceeded regularly for the relief of the mandatory from future costs, but he had subjected himself undoubtedly to the expenses already incurred; a new mandatory being to be named by Rogers the pursuer. In that

case the matter came before the Court with a statement that seemed to be admitted and acquiesced in on both sides, that instead of Rogers being in a situation to appoint a new mandatory, he was dead. Now, if he had been dead, the course of proceeding, I apprehend, would have been to call upon his representatives to have gone on with the cause; and upon their declining to go on with the cause which Rogers had instituted in his lifetime the consequences would have been the same, namely, that the mandatory would have been liable to the costs incurred up to that period; but it does not appear that any thing was done calling upon the representatives to adopt that course. Whether there was or was not does not very distinctly appear; there is nothing in the papers showing that any thing was done pursuing that course. It is obvious that some proceeding of that sort ought to have been adopted upon the supposition of Rogers being dead, for this reason, that it was quite possible, perhaps probable, if any representatives had been called upon to prosecute the cause, and had entered appearance, that it might ultimately have been discovered that there were no costs to be paid by the mandatory at all. The result of the suit, whether carried on by the original pursuer or by his representatives, might have established such a case against the defender as would have made the defender liable for the expenses, or at all events have prevented the pursuer from being liable for any part of the expenses, or have prevented the mandatory from being liable to pay any part of the expenses. Notice to the representatives of the pursuer to go on with the cause might, I say, have ultimately produced that effect, if they had appeared and had gone on with the suit, but

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there is in substance no evidence of any notice having been given to the representatives.

If the case had stopped there, it would have been for your Lordships to consider whether the better and safer course would not have been to have remitted it to the Court of Session, for the purpose of seeing that that course was pursued which it appears necessary should be pursued in order to meet the exigency of the case which I have spoken of as likely and possible to exist. But at your Lordships bar the case has taken a completely different turn; for now the appellant who complains of the procedure tells your lordships that the pursuer is not dead,—that Rogers is in fact still alive; although in the Court below the interlocutor appealed from proceeded on the assumption that he was dead. It is stated as a matter of some suspicion, and was so stated at your Lordships bar when the case was first heard some six weeks ago, and that was repeated when an opportunity for investigating the fact had occurred on the last day when the case was in hearing; but your Lordships have to rely on the statement of the appellant that there has been that misapprehension as to the fact of the proceeding below. Whether that misapprehension arose originally from any statement on the part of the defender, or from want of due inquiry on the part of the mandatory, is not very material for the present purpose. I am calling your Lordships attention to it for the purpose of stating to your Lordships what appears to me to be the right course to be pursued under these circumstances. If the cause was remitted to the Court of Session for the purpose of going through the process, that must necessarily end, if Mr. Rogers is still alive, in the same order which has

been pronounced; whatever difference there may be in point of form, it must be in substance the same.

It appears, from what I have stated from the appellant's case, that all the proceeding calling on Rogers to substitute a new mandatory had been gone through, and that he had not done so. The case was in that state in which it was competent for the Court to make the mandatory, the pursuer, pay the costs at the time he applied to be discharged; therefore the obvious result, the necessary result, of this proceeding in the Court of Session would be to obtain an order in substance, if not precisely, the same. That being the case, in point of fact, it appears to me that it would be an idle course of proceeding, and putting the parties to unnecessary expense, that your Lordships should remit the cause to the Court of Session, and then oblige them to obtain the same order, and by an expensive and circuitous proceeding. Under these circumstances, it being, I understand, admitted by the appellant that the pursuer Rogers is alive, and therefore it being admitted that those proceedings were regular in which he was called upon to substitute a new mandatory, and it being admitted that he had not done so, it appears to me, from the case of Gordon v. Gordon[1], that the necessary result of that state of proceedings would be to absolve the defender, and to make the mandatory pay the expenses up to the time when he applied to be discharged, which is in substance the order of which the appellant complains. I conceive your Lordships will be of opinion that you are not bound to put the parties to the expense of being exposed to additional delay and costs for the purpose of arriving at

[1] Ante, p. 39.

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Ld. Chancellor's Speech.

the same end. Under these circumstances, therefore, and on the ground that Rogers is now alive, though the Court below proceeded upon a misapprehension as to the fact, as the reasons for their procedure are in substance proved to be correct, the result must be precisely the same, I think that your Lordships' safest course would be to affirm the interlocutor originally appealed from.

If, however, it be suggested that there is any doubt as to the fact which has been stated at your Lordships bar, that might induce your Lordships to take a different course; but assuming that the appellant is right in stating that Rogers is alive, I think your Lordships, upon the ground of that admission, will be doing that which is best for all parties by affirming the interlocutor.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP — COWBURN and GAY, Solicitors.