[10*th March*, 1845.]

WILLIAM PURVES, Writer in Dunse, *Appellant.*

WILLIAM LANDELL, *Respondent.*

Solicitor and Client.—Damages.—To make a solicitor liable for the consequences of acts done by him in his professional capacity, either in damages or in relief of monies paid by the client, the summons must expressly aver want of reasonable skill or gross negligence, or shew facts necessarily raising an inference of one or other.

THE respondent brought an action against the appellant, setting forth that Margaret Landell was indebted to him in a sum of money; that she had formerly resided at Coldingham in Scotland, but had sometime previously removed to Berwick-upon-Tweed: "That the pursuer, on being informed of this, was "desirous to obtain payment of the foresaid debt, through the "operation of the Courts of Law in Scotland, and with that view "he applied to Mr. William Purves, writer in Dunse, in order "that the latter, as his professional agent, might advise, and "might adopt what legal measures were necessary for making the "said Mrs. Margaret Brodie or Landell amenable to the Scotch "Courts: That the said William Purves accordingly advised "the pursuer to apply for a Border warrant to apprehend the "person of the said Mrs Margaret Brodie or Landell, until she "should find sufficient caution acted in the sheriff-court books of "Berwickshire, that the debt due to the pursuer should be made "forthcoming as accords, and a domicile appointed within the "said county of Berwick, at which she might be cited, and that, "as well *de judicio sisti* as *judicatum solvi:* That the said "William Purves represented to the pursuer that this mode of "procedure was proper and legal, and the said William Purves "being a regular licensed agent or procurator before the sheriff-"court of that county, the pursuer relied, and was entitled to

" rely on the accuracy and correctness of these representations: " That the said William Purves accordingly, as the professional " agent and adviser of the pursuer, with the view of obtaining " said warrant, did lodge with James Bell, Esq., sheriff-clerk of " Berwickshire, (the official person with whom applications of " this kind, in the county of Berwick, fall to be lodged,) the in- " formation to be produced in the course of the process to follow " hereon, relative to the debt due to him by the said Mrs. " Margaret Brodie or Landell, and that nearly in the terms " above narrated, and in addition to said information, the pur- " suer, at the desire of the said William Purves, emitted an " oath in presence of the said James Bell to the following " effect" [here followed the affidavit]: " That the pursuer him- " self was ignorant of the correct mode of legal procedure in " cases of this kind; but the said William Purves obtained a " warrant in favour of the pursuer from, and signed by the said " James Bell, in the following terms."

After setting out the warrant in terms, the summons continued,—" That the said William Purves, as the pursuer's agent, " put the said warrant into the hands of a sheriff-officer for exe- " cution in the usual form." It then set forth the proceedings under the warrant, and went on thus: " That the said William " Purves was cognizant of the whole proceedings above detailed, " and advised, conducted, and directed the same, as the profes- " sional agent and adviser of the pursuer." The summons then stated, that the respondent brought an action against Mrs. Landell—that she objected to the jurisdiction on the ground that she was neither domiciled within Scotland, nor had any property within it: That Purves acted in the prosecution of that action: That it was terminated by an interlocutor dismissing it, with expenses: That Mrs. Landell then raised an action of damages against the sheriff-clerk who had signed the Border warrant, and against the respondent, and that in that action she succeeded in obtaining a verdict against the respondent for 500*l*., and against the

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sheriff-clerk for 300*l.*: That the respondent had incurred liability for costs to his own solicitors, and was subject to pay the 500*l.* and the costs of Mrs. Landell. The summons then continued:—"That "as all the expenses before mentioned incurred by the pursuer in "reference to the foresaid process at his instance against the said "Mrs. Margaret Brodie or Landell, have been occasioned solely "by the foresaid illegal warrant, applied for and procurred by the "said William Purves, professional agent and adviser as aforesaid, "and granted by the said James Bell: And farther, as the "foresaid action of damages raised by the said Mrs. Margaret "Brodie or Landell, and the said sum of 500*l.* found due under "the same, together with the expenses which she may be found "entitled to therein; and together also with the expenses already "incurred, or which may yet be incurred by the pursuer in "reference to the said action, have also all been occasioned solely "in consequence of the foresaid illegal warrant, applied for and "obtained as aforesaid, the pursuer is entitled to be reimbursed "by the said William Purves of the said expenses incurred in "reference to the said action at his instance against the said "Mrs. Margaret Brodie or Landell, and also to be freed and "relieved by the said William Purves of the foresaid sum of "500*l.* of damages, found due by the said verdict, or of whatever "sum of damages, if any, may ultimately be found due by the "pursuer to the said Mrs. Margaret Brodie or Landell in the "aforesaid action of damages; and also to be freed and re-"lieved by the said William Purves of the expenses, if any, "which the said Mrs. Margaret Brodie or Landell may be "found entitled to, in regard to the said action of damages; and "also to be reimbursed by the said William Purves of the "expenses which the pursuer has himself incurred, or may yet "incur in reference to the said action of damages; and generally "to be freed and relieved by the said William Purves of the "whole consequences and effects of the said action of damages "itself."

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Upon these statements the summons concluded that the appellant should be decreed to pay the expenses which the respondent had paid to his own solicitor, in respect of the above actions, and those also to which he was subject to be made liable for to Mrs. Landell, and for relief of the 500*l.* of damages, which he had been decreed to pay to Mrs. Landell.

The record was made up on summons, defences, condescendence, and answers. The respondent added to the averments in the summons a statement in his condescendence, in these terms:

"The whole of the foresaid expenses, and all other expenses "which the pursuer may yet incur, or in which he may be found "liable, and also all the loss and damage in which he may yet "be involved, have arisen solely from the rashness or ignorance "of the defender, Mr. Purves, in applying for, and obtaining "and giving directions for putting in force a warrant which "has been decided to be utterly illegal and incompetent. The "defender, Mr. Purves, undertook, as the pursuer's law agent, to "obtain a valid and legal warrant, and being a regular procurator "also, all the loss and damage in which he may yet be involved, "have arisen solely from the rashness or ignorance of the defen-"der Mr. Purves, in applying for and obtaining, and giving "directions for putting in force a warrant which has been "before the sheriff court of Berwickshire; and holding himself "out as qualified to conduct, in a proper manner, any legal pro-"ceedings with which he might be intrusted, the pursuer relied "upon his obtaining a proper and sufficient warrant, and upon "his adopting the legal means for this purpose. The pursuer "himself being entirely unacquainted with legal proceedings, "was obliged to rely upon those who held themselves out to be "qualified for advising and conducting law proceedings in a "proper manner."

The respondent's plea in law, in support of his action, was as follows:—

"The pursuer having employed the defender as his profes-

" sional agent to conduct the proceedings above mentioned, the " defender is bound to repair to the pursuer, and to indemnify " him against any loss or damage which has arisen from the " illegality of the warrant above mentioned, or from his ignorance " or want of skill."

The appellant pleaded in defence the following among other pleas:

" Even on the supposition that the pursuer's statements were " correct, the summons does not set forth any facts *relevant* to " subject the respondent in liability in terms of its conclusions. " It is not alleged that he exhibited gross neglect in the conduct " of the judicial proceedings adopted by the pursuer against Mrs. " Landell, or that he violated any law or regulation of the Court " before which he is said to have acted in the matter as the " pursuer's agent."

The Lord Ordinary (*Cockburn*) remitted the cause to the issue clerks for the preparation of an issue to be tried before a jury; but the clerks having intimated that they were unable to frame an issue on the matter in the record, the cause returned to the Lord Ordinary, who, on the 19th March, 1842, pronounced the following interlocutor, adding the following note:

" The Lord Ordinary having heard parties, and considered " the process, sustains the defence of irrelevancy, and assoilzies " the defender, and decerns: Finds the defender entitled to ex- " penses; appoints an account thereof to be lodged, and remitted " to the auditor to tax and report.

" NOTE.—The Lord Ordinary sent this case to the Issue " Chamber, because he thought that any unavoidable question of " law that might arise would be disposed of more satisfactorily at " a trial. But it having been brought back without an issue, " and both parties preferring to have the relevancy settled now, " he gives his judgment on it.

" If all the matter in the condescendence and answers, and " still more in the defences, could be competently taken into view, " a trial of the facts could not be avoided; but, correctly speaking,

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" the sole point is, does the summons present a relevant case for " the relief sought?

" The Lord Ordinary thinks it does not, and this simply, because it neither sets forth negligence nor ignorance, nor any " other ground for making a law agent responsible to his em- " ployer for a legal error. The responsibility of one party to " another party is a different affair, and depends on different " principles, but all that an employer has a right to expect from " his agent is due skill and care. This principle was distinctly " recognised in the two important and well considered recent " cases of Rowand and of Lang, particularly in the House of " Lords, where it was laid down that a solicitor is not answer- " able for every mistake in point of law, when he does not take " it upon himself to 'depart from the *ordinary and beaten course.*' " Not only is nothing of the kind alleged here, but at the Bar " everything of the kind was expressly disclaimed, and the action " was maintained merely on the fact that the warrant, said in " the summons to have been recommended, obtained, and exe- " cuted by the defender, has been found to be '*illegal and* " '*irregular*.' So it has. But its having been so is not of itself " inconsistent with the defender's having the best possible reason " for believing that it was regular and lawful. Now the pursuer " does not say that the defender acted unskilfully or negligently. " He says the reverse. In this situation, though it be hard on " the pursuer to have to pay such a sum to the party he was the " cause of injuring, it would be much harder that this misfor- " tune should be laid on the agent from whom he purchased " nothing but adequate skill and care, both of which he does not " deny that he had.

" The pursuer endeavoured to distinguish the case of *an* " *infringement of personal liberty by a warrant* from other cases. " In so far as the agent's responsibility is concerned, the Lord " Ordinary sees no ground for any such distinction. Can an " agent be required to do more, even in cases of warrants and of

" personal liberty, than to give his client due intelligence and " due caution?"

The respondent reclaimed against this interlocutor, and on the 27th of May, 1842, the Court altered it by an interlocutor in these terms. Vide 4 *B. M.* & *D.*, 1300.

" The Lords having advised the reclaiming note for the pur- " suer, and heard counsel for the parties, alter the interlocutor " complained of, find the summons relevant, and remit to the " Lord Ordinary to proceed farther in the cause, reserving all " questions of expenses."

As it was not certain whether the Court had been unanimous in giving this interlocutor, the appellant presented a petition for leave to appeal. The Court superseded giving any interlocutor on the petition until after issues should have been adjusted; and for this purpose the cause was again sent to the issue clerks, who again reported to the Lord Ordinary that they were unable to frame an issue. The respondent himself drew out an issue and submitted it to the Lord Ordinary, (now *Lord Jeffrey*,) who reported it to the Court. That issue was in these terms:—

" It being admitted that the warrant referred to in process " was issued upon the 6th July, 1836, and was thereafter put in " execution.

" And that in an action raised in the Court of Session at the " instance of the present pursuer, against Mrs. Margaret Brodie " or Landell, the person named in the said warrant, the follow- " ing preliminary defences were stated by the said Mrs. Margaret " Brodie or Landell,—' That the defender neither being domi- " ' ciled in Scotland, nor having any property or effects in it, is " ' not within the jurisdiction of the Court of Session, and the " ' irregular and illegal proceedings' (meaning the said warrant " and the execution thereof) ' which were adopted to force the " ' defender within the jurisdiction of the Scotch Courts, are " ' altogether ineffectual for that purpose.'

" And that Lord Jeffrey, as Ordinary, having reported this

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" cause to the Court, and issued a note, in which it was stated " that the said proceedings were illegal and irregular, the Court, " on the 26th January, 1838, pronounced the following inter- " locutor:—'The Lords, on the report of Lord Jeffrey, having " 'advised the cases for the parties, and whole proceedings, and " 'heard counsel, sustain the preliminary defences; dismiss the " 'action, and decern: Find expenses due, and allow the account " 'to be given in and audited in common form;' and that decree " was thereafter pronounced in that action against the present " pursuer, Mr. Landell, for 119*l.* 0*s.* 7*d.* of expenses, and for " 2*l.* 5*s.* 1½*d.*, as the expense of extract; and that he also paid to " his own agent, as the expenses in the said process, the sum of " 69*l.* 8*s.* 8*d.*

" And it also being admitted that an action of damages was " thereafter raised by the said Mrs. Margaret Brodie or Landell " against the present pursuer, and also against James Bell, " sheriff-clerk of Berwickshire, in which action the following " issues were adjusted and sent to trial.

" 'It being admitted, that by a final judgment of the Court, " 'of date 26th January, 1838, the warrant, No. 5 of process,' " (being the warrant above referred to) 'was decided to be illegal " 'and irregular,—1st, Whether, at Dunse, on or about the " '6th day of July, 1836, the defender, James Bell, being " 'Sheriff-clerk of the county of Berwick, granted or issued the " 'said warrant, to the loss, injury, and damage of the pursuer? " '2nd, Whether the defender, William Landell, applied for " 'and obtained the said warrant, to the loss, injury, and damage " 'of the pursuer? 3rd, Whether, by virtue of the said warrant, " 'the pursuer was, on the 7th day of July, 1836, apprehended " 'and imprisoned in the jail of Greenlaw by the said defenders, " 'or one or other of them, and was detained therein from on or " 'about the 7th day of July foresaid, till on or about the 12th " 'day of the said month, or during any part of the said period, " 'to her loss, injury, and damage?"

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" And that the jury, at the trial of the said issues on 13th " March, 1840, returned a verdict for Mrs. Landell, on all the " issues, and assessed the damages against the present pursuer, " William Landell, at 500*l.*, and against the said James Bell " at 300*l.*

" Whether the pursuer employed the defender as his law " agent to adopt legal measures for making the said Mrs. Mar- " garet Brodie or Landell, the person named in the said warrant, " amenable to the Scotch Courts; and whether the defender " advised the pursuer to apply for said warrant, and represented " the same to be legal and proper; and whether the defender " thereafter, acting as agent aforesaid, obtained the said warrant, " and after he obtained the same from James Bell, sheriff-clerk " of Berwickshire, gave instructions to the sheriff-officer for " putting the said warrant into execution against the said Mrs. " Margaret Brodie or Landell, by imprisoning her in the jail of " Greenlaw, whereby the pursuer was to his loss and injury " subjected to the expenses and damages, of which he demands " to be relieved by the defender?"

Upon this issue being reported to the Court they granted the prayer of the appellant's petition for leave to appeal. Vide 4 *Bell & D.*, 1543.

Lord Advocate and *Mr. Turner*, for the Appellant.—If all that is stated in the issue were found for the respondent it would not infer liability against the appellant. The grounds of a Solicitor's liability to his client, for anything done in that character, are gross negligence, ignorance, or want of skill. There must either be breach of duty or breach of contract, but neither is alleged. The gist of the action is that the warrant applied for and obtained by the appellant has been found to be illegal, but if that, *per se*, were sufficient to subject the appellant, the principle, if applied in every case, would go the length of subjecting not only counsel for the result of their opinions, but inferior

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Judges for their judgment, on their being reversed by the Superior Courts. So long as a Solicitor follows the beaten track of the profession, and does nothing which is fairly imputable to gross neglect of duty, or to gross ignorance of ordinary professional rules, he is entitled to the same immunity from the consequences of his professional acts as the other branches of the profession, and therefore, without an averment of something amounting either to such negligence or ignorance, the respondent had no case which could go to a Jury.

It seems to be admitted that the respondent's action would not lie for the debt due by Brodie, but a distinction is made because it is for relief of the sums he has had to pay, but no ground is shown for any such distinction.

Mr. Kelly and *Mr. Anderson* for the Respondent.—In the action of damages at Brodie's instance every act which is alleged in this to have been taken under the advice of the appellant was held to be illegal, and so grossly so that it ought to have been known to every practitioner; the allegations show that Brodie was not resident in Scotland, or subject to the jurisdiction of the Courts in that respect, and yet that, instead of a *meditatione fugæ* warrant having been applied for, a Border warrant was resorted to, and that every step taken under it was illegal. On the assumption, then, that the Judges below were cognisant of the law, they were entitled to take into consideration the notorious illegality of these acts in judging of the relevancy of the allegations. It is not necessary, by the rules of Scotch pleading, that negligence or want of skill should in words be averred when the case stated shows that these are to be inferred.

In Graham *v.* Allison, 9 *D. B.* & *M.*, 130, the proceedings adopted by the Solicitor having been erroneous, he was ordered to repay the money which had been paid to him. That judgment was affirmed—5 *W.* & *Sh.*, 101—and shows, that though the circumstances may not be sufficient to infer liability in

damages, they may be sufficient to subject the Solicitor in repayment of what has been rendered useless through his negligence. So far, therefore, as regards recovery of the expenses at least it cannot be necessary to aver negligence.

[*Lord Chancellor.*—In Allison's case it was held that the money paid to the Solicitor himself might be recovered, but that is not the case here.]

In substance the case is the same, and indeed if costs may be recovered, it is difficult to see why damages may not. In Rowand *v.* Stevenson, 4 *Wil.* & *Sh.*, the liability of the Solicitor was sustained without any averment of negligence.

[*Lord Campbell.*—The averments showed a duty and a breach of that duty.]

Undoubtedly, but in what form, and in what terms,—not expressly but in equivalents,—that case is therefore an authority of this House that an averment of negligence in terms is not necessary if the statements raise it inferentially. In Lang *v.* Struthers, 2 *Wil.* & *Sh.*, 563, the averment was, "through the "said John Lang having *improperly omitted* or *neglected*;" but "improperly" is not a legal averment of negligence.

LORD BROUGHAM.—My Lords, in this case I move that your Lordships proceed to reverse the interlocutor of the Court below, without hearing the learned counsel for the appellant in reply. I never saw a case which stood, in my opinion, upon clearer grounds. The learned Judges of the Court below were very much divided in opinion upon this case. It is a great mistake to represent it as a case in which there was no very great difference of opinion; Lord Cockburn clearly expressing an opinion, and the Lord Ordinary, Lord Jeffrey, leaning the way in which we have heard at the Bar; Lord Moncreiff going a great deal further than merely expressing a doubt or an inclination of opinion, because Lord Moncreiff's opinion upon the very point, the main point and pivot upon which this case turns, was that

the Court was wrong, and he differed with the Court, and thought there ought to have been on the record an allegation of negligence.

My Lords, I apprehend it to be by no means a technical question here depending upon the rules of pleading, but it is of the very essence of the action; that this action depends not upon a miscarriage in point of fact, not upon the party having been advised by a solicitor or attorney in a way in which the result of the proceedings may induce the party to think he was not advised properly, and in fact may prove the advice to have been erroneous—not upon his having received, if I may so express it, in common parlance, bad law from the Solicitor; nor upon the solicitor or attorney having taken upon himself to advise him, and having given an erroneous opinion, which the result proved to be wrong, and in consequence of which error the parties suing under that mistake, were deprived and disappointed of receiving a benefit. But it is of the very essence of this action that there should be a negligence of a crass description, which we call *crassa negligentia;* that there should be gross ignorance, that the man who has undertaken to perform the duty of an attorney, or of a surgeon, or an apothecary, (as the case may be,) should have undertaken to discharge a duty professionally for which he was very ill qualified, or if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer, or deprive him of the benefit which he had a right to expect from employing him. That is the very ground Lord Mansfield has laid down in that case to which my noble and learned friend on the woolsack has referred a little while ago, and which is also referred to in the printed papers. It was still more expressly laid down by Lord Ellenborough in the case of Baikie *v.* Chandless, which is reported in my noble friend's Reports, 3 *Camp.* 17; because Lord Ellenborough uses the expression, according to my recollection, "An attorney is only liable "for *crassa negligentia.*" Therefore the record must bring

before the Court a case, either by stating such facts as no man who reads it will not at once perceive to be, although without alleging it in terms, *crassa negligentia*, something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that it was *crassa negligentia*.

I will not go so far as to say, that if it were for some very gross case, such, for instance, as a man advising his client that his eldest legitimate son was not his heir-at-law, or any other thing which upon the face of it shews gross ignorance of the A B C of his profession, and the most crass negligence in the performance of his professional duty, in such a case it is not necessary to go so far as to say, that that would not be equivalent to that which is wanting, namely, an averment in terms of impropriety, of breach of professional duty, or want of sufficient knowledge, or gross and crass negligence. It is not necessary to proceed upon that whether in England it would not, or whether in Scotland it might be, sufficient. For aught I know it might; but that is not the case here. It is merely set forth that a Border warrant was issued, and it is further stated that a personal damnification took place. That is all. There is no statement of the facts which at once explains itself, so that he who runs may read. Nor is there a statement in terms that there was gross negligence. The case is wholly a blank upon these two matters, one or other of which ought to appear on the record, otherwise the action does not lie.

Now that being the case, I cannot go into the alarming doctrine laid down by the Lord Justice Clerk, which I hold to be quite erroneous, and which I think is not accurately reported. It is said it is unnecessary to allege that Mr. Purves was guilty either of want of skill or of negligence. It is enough to allege that what he had done was a nullity.

Now the mere allegation and proof of such a fact as that could never be sufficient; because, unless a great deal more is proved, you may just as well say, that every nonsuit, or every

action that failed, or every case in which what is called an unfructious proceeding has taken place, even though the attorney should really be successful in the case, yet if, notwithstanding that, there should not be a beneficial result from the action, that would make the attorney liable. No man can possibly conceive that such is the liability of an attorney. There must be considerable mismanagement, considerable ignorance, and the absence of attentive conduct in general. Unless it is gross, the law holds that it is sufficient.

Now it is said there are these cases here, the case in Murray's reports and others, and the case before me in 1833, in which it is said there was a clear averment; but that although the negligence was not sufficiently proved to entitle the party to damages, it was sufficiently proved to entitle the party to the restitution of the money paid; that there is something different in the proceedings in England and Scotland in those respects: that is not the case. But if there were, the argument would only go to shew, that because there is a difference in one respect, that therefore there must be a difference in the other, which is a very unsatisfactory mode of reasoning.

Now it is alleged in the summons that Mr. Purves had notice of Lord Jeffrey's interlocutor, which was against him, and that therefore he was bound to indemnify his client from the consequences of his having advised him, in the teeth and in the face of that interlocutor, to reclaim to the Inner House. It would be his bounden duty to do so; it would be his bounden duty to advise him not to rest satisfied with the first unfavourable opinion, and to see whether it was well founded. If it were not so, you might just as well say, that in every case in the Courts below where the decision is against a man, and from which he appeals here, that if it is affirmed upon appeal there is crass negligence, or at least, a case entitling the party who has lost the appeal to an indemnity; because, the man who was served with the notice in the course of the business, was aware

that there had been a decision against his client below, and therefore he ought to have known that his clients could not succeed upon appeal. Such a doctrine never could be maintained.

I am of opinion, upon all these grounds, that there is no reason to support the interlocutor of the Court below, and that it must be reversed.

LORD CAMPBELL.—My Lords, I am extremely sorry for the situation in which Mr. Landell is placed; but we must not be carried away by feelings of compassion, we must be bound by the principles of law, and upon those principles I have no doubt at all, that Lord Cockburn and the Lord Ordinary took a just view of this case, and that we are bound to follow their decision.

Now, what is the action we are to determine upon? It is the action of Landell against Purves; and in this case William Landell complains, that he having brought an action against Margaret Landell, and having retained Mr. Purves as his professional adviser, that in the proceeding of that action against Margaret Landell, Mr. Purves, his professional adviser, was guilty of misconduct, whereby an action was brought against him by Mrs. Margaret Landell, and damages and costs were recovered which he was obliged to pay. Well, my Lords, what is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence, or with gross ignorance. It is only upon one or other of those grounds that the clients can maintain an action against the professional adviser. And thus far it is quite unnecessary here to look at the case that has been referred to, which came on in this House in the time of Lord Mansfield; because there the action was to recover back money which had been paid by the client to the professional adviser. It was a totally different proceeding from that which we have now to determine upon.

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Now, in an action such as this, by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries, where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. I am sure I should have been very sorry when I had the honour of practising at the Bar in England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was Mr. Justice Heath who said that it was very difficult to call upon a gentleman at the Bar to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been determined. Well, then, this may happen in all grades of the profession of the law. Against the barrister in England, and the advocate in Scotland, luckily no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent, and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee and bind themselves, in giving legal advice, and conducting suits at law, to be always in the right.

Then, my Lords, as *crassa negligentia* is certainly the gist of this action of Landell against Purves, the question is, whether in the summons that negligence must not either be averred or shown? This is not any technical point in which the law of Scotland differs from the law of England. I should be very

sorry to see applied, and I hope this House would be very cautious in applying technical rules which prevail in England to proceedings in Scotland. But I apprehend the summons ought to state, and must state, what is necessary to maintain the action. Then, if negligence is necessary to maintain the action, this summons must either allege negligence, or must show facts which inevitably prove that this person has been guilty of gross negligence. Now here it is not at all pretended that there is any allegation of negligence.

Then, what is the fact shown from which negligence is necessarily to be inferred? Why, there is a warrant which was sued out by Mr. Purves, by his advice, against Margaret Landell, while she was living at Berwick, upon the borders of the kingdom of Scotland, she not being domiciled in Scotland, but being domiciled in England. It was held that upon that ground that warrant was void. It might have been subject to other objections for anything I know to the contrary; but it was held void upon that ground that she neither had property in Scotland, nor effects in it, which was necessary *ad fundandam jurisdictionem;* nor was she domiciled in Scotland, and so was not liable to be sued in the Courts of Scotland. It was upon these grounds that the warrant was held to be insufficient, and that the action of Landell against Margaret Landell failed, namely, that Margaret Landell was not liable to be sued in the Courts in Scotland. And why? Because she was not domiciled in Scotland, and had no land and no property or effects *ad fundandam jurisdictionem.* Was that sufficient to make a case, when the question was, was he guilty of negligence? It might have been proved that she had large property in Scotland. He might have been told that she had been domiciled in Scotland. He might have been told that she had been living so long away from England—that she had abandoned all thoughts of returning there, and had removed her household gods to Scotland, and represented that as her domicile. It is possible he might have been told that that was the fact,

although it turned out that she was not domiciled in Scotland, and had no property in Scotland.

How then can we inevitably infer from the simple fact of the warrant being found bad, that Purves was guilty of gross negligence? He may have been. I know nothing one way or the other. It is possible that he may have been guilty of gross negligence. He may have been informed that Margaret Landell was domiciled in England. He may have been informed that she had some property in Eglannd, and he may have been guilty of gross negligence in suing out the warrant. But it is not here alleged. If it had been, and he had denied it, then the issue would have been plain, and a trial before a jury could have taken place, and then the evidence would have shown whether he was guilty of negligence in suing out the warrant, or whether he had acted with due care and caution, and the warrant had turned out to be bad, notwithstanding all the care and caution he could exercise.

It seems to me, therefore, my Lords, that upon principles as to which there can be no doubt, this summons is defective, because it neither alleges what is necessary to maintain the action, nor does it shows facts that raise a necessary inference that any gross negligence did exist.

We were referred to a case to show that, by the law of Scotland, it is not at all necessary to show in the summons that there has been negligence. But that was where there had been a breach of duty. The strongest case is that of Rowand *v.* Stevenson. Now, when we examine that case, as set out by the appellant in his printed case, it appears that it was upon that summons abundantly set out, because the action is brought for the breach of a specific duty, which duty is set out upon the face of the summons. There is upon the face of the summons an allegation "that Stevenson did not complete the said security in a "legal manner, by obtaining from the superior any confirmation "of the said bond and disposition in security, or of the aforesaid

" instrument of sasine following thereon. That it was incumbent " upon the said Nathaniel Stevenson to procure a legal and valid " security for the said Henry Wardrop and the pursuer, so as to " render it complete and effectual against all subsequent deeds; " and as the pursuer has sustained much loss, damage, and " expense, in consequence of the said Nathaniel Stevenson having " drawn and completed the said heritable security in such form " and manner as has postponed the same to a posterior security " and burden over the said lands and others, he is bound in law, " justice, and equity, to free and relieve the pursuer from such " loss, damage, and expense."

Now what does that mean? It is a plain allegation that it was the duty of Stevenson to have procured the security there stated to be framed in a particular manner, and that he had not procured it to be framed in that particular manner, whereby a loss had accrued to the party who complains. Upon this it would have been the easiest thing in the world to frame an issue whether it was incumbent upon Stevenson to do it, and whether he had failed in the discharge of his duty. But upon the summons here it would be impossible to frame any issue, because the only issue that could be framed has been framed by the clerk who discharges that duty. He has looked at the summons, and he has framed the best issue that the summons would admit of; because, upon the face of it, we find the issue avers a finding in favour of the pursuer, which would not have been found by the special finding of the Jury, because although the warrant might have been wrong, he still might have acted with the greatest care.

There is no attempt whatever to show that in such an action, by the practice of the law of Scotland, it is not necessary for a man to allege negligence, or to show facts from which negligence must inevitably be inferred.

As to the distinction between actions affecting the liberty of the subject and other actions, it has been very properly observed

by my noble and learned friend that that learned and most laborious judge must have been inaccurately reported with respect to that distinction; because, if the report is accurate, it seems that upon all other actions negligence must be alleged, but that when there is any proceeding that touches the liberty of the subject, then, without any allegation of negligence, the professional adviser is liable, if there has been any mistake. Now it is enough to say that there is no authority for that distinction in the law of Scotland, and there seems to me to be no principle for it, and there being neither principle nor authority, and it having been abandoned by the counsel for the respondent, I should not say a word about it, except that it seems to me that there must have been some mistake in the report, because, although some proceeding may have taken place, whereby the liberty of the subject may be affected in the course of a judicial proceeding, yet no one could be liable but the professional adviser, and he cannot unless he has been guilty of some negligence, as he does not guarantee the correctness of the advice which he gave in that instance.

For these reasons, my Lords, I think the reasoning of the Lord Ordinary, in his note, is perfectly satisfactory, and I regret that it came before the Second Division of the Inner House, and that Lord Moncreiff's doubt or opinion did not prevail. I regret that there has been this distinction attempted to be made, because the distinction does not rest upon principle or authority, and therefore I apprehend that this interlocutor of the Second Division must be reversed, and that the interlocutor of the Lord Ordinary should be affirmed. And I presume now that the judgment of this House should be that Mr. Purves be assoiled from the conclusion of the summons, and the interlocutor be recalled.

LORD CHANCELLOR.—My Lords, I am of the same opinion that has been expressed so fully and so ably by my noble and

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learned friends in this case. It is quite unnecessary for me, after the detailed manner in which they have adverted to the particular facts of the case, to go over the same ground. Therefore I will state, in a very few words, the principle upon which I think this question should be decided, and in fact it is nothing more than a repetition of what has been stated by my two noble and learned friends.

It is quite clear that the summons must state a sufficient cause of action. When an action is brought against a solicitor, he is liable merely in cases where he has shown a want of reasonable skill, or where he has been guilty of gross negligence. The summons, therefore, I apprehend, must state either a case of want of reasonable skill or a case of gross negligence, or a case of breach of duty. Now it is quite clear in this case that upon the summons there is no positive statement of any want of reasonable skill, or any express statement of negligence; and I am of opinion that upon the other facts stated in this summons there is nothing equivalent to this averment. It follows, therefore, that the summons in this respect is defective, and I think that the interlocutor of the Court below ought to be reversed.

Ordered and adjudged, That the interlocutor of the 27th May, 1842, complained of in the said appeal, be reversed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary of the 19th March, 1842, (mentioned in the appeal,) and to proceed further therein, as shall be just and consistent with this judgment.

SPOTTISWOODE and ROBERTSON—ALEXANDER DOBIE, Agents.