[HEARD 1st, 5th, *and 6th March*, 1849—JUDGMENT 14*th* *August*, 1850.]

THOMAS DYKES, *Appellant*.

ROBERT STRUTHERS, *Respondent*.

Liability of a Cautioner or Surety.—Where, by reason of the blunder of a sheriff's officer in executing diligence, his employer is involved in litigation and fixed with damages, he may claim relief from the officer's surety; and it will not avail the surety to show that he had neither intimation nor knowledge of the proceedings. The employer of the officer, when sued for damages by the party injured, may reasonably defend the officer's execution; and for the expense of a reasonable defence he will be entitled to claim compensation from the surety. The surety, in so far as he can show that the defence was not reasonable, will be free from liability.

Practice.—Although the Lords may doubt the soundness of an order made by the Court below, they will not interfere to correct it, unless asked to do so by the appeal.

DYKES was surety by bond for Baird, a sheriff's officer; "that he, Baird, would leally, truly, and honestly use and exer-"cise the office of a sheriff's officer to all and sundry who might "employ him;" and for any damage that might be sustained through the negligence, fraud, or informal executions of the said Baird in his said office, Dykes was by the bond bound to make reparation.

Baird was employed by the Respondent Struthers to execute a process of poinding against one M'Closkie, and in doing so committed a gross blunder, in consequence of which M'Closkie brought an action of reduction, improbation, and damages against Struthers and against Baird.

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Both Defenders resisted the action, and maintained that the execution was formal and regular; or, at all events, was not subject to any material defect.

During the progress of the litigation (which was very long and expensive, considering the insignificance of the point at issue), one of the two Defenders, the Sheriff's officer, Baird, departed this life; and the persons entitled to represent him, having renounced his succession, were in December, 1838, by a decree *cognitionis causa tantum*, assoilzied from the conclusions of the libel.

The action was then carried on against Struthers as sole Defender, who omitted to give any intimation of the proceedings to the surety, Mr Dykes.

On the 9th January, 1840, an issue was sent for trial, which terminated in a verdict for Struthers. This verdict, however, in February, 1840, was set aside, and a new trial granted.

On the 11th July, 1840, a formal intimation by notarial instrument was given by Struthers to the surety Dykes, apprising him of the proceedings, and calling upon him to compensate and make good to Struthers all damage arising from the deceased officer's blunder, and all the expense of the consequent litigation. To this intimation Dykes replied that he had "no recollection" of being surety for the officer, and that, as he had not been made aware of the proceedings, the result of them could not affect him.

The issue between M'Closkie and Struthers was tried again on the 23d March, 1841, when a verdict was returned for M'Closkie, with one shilling damages; and on the 12th June, 1841, a judgment was pronounced applying this verdict, and finding Struthers liable to M'Closkie in costs.

Upon this, Struthers brought an action against Dykes on the ground that he was surety for Baird, and on the ground that Baird, having blundered the execution, whereby loss and

heavy expense had come upon Struthers. Dykes was consequently bound to make adequate reparation.

Dykes put in a defence, stating that as he had never received notice of the proceedings between M'Closkie and Struthers, and as he was in point of fact ignorant of them till the notarial intimation, it was contrary to justice to charge him with the expense of a litigation which, had he been apprised of it in proper time, he would have stopped at the outset.

He further contended that Struthers and Baird ought not to have resisted the action of M'Closkie, for that the blunder committed in executing the process was gross and indefensible.

The question came to be mainly whether Struthers was, or was not, bound by law to give notice of the proceedings to the surety; and whether the want of notice, and the want of knowledge, on the part of the surety, relieved him from a responsibility to which he would otherwise have been subject.

The Lord Ordinary Robertson, by an interlocutor bearing date the 12th February, 1847, found "That the litigation carried on by Struthers in support of the execution, after the "officer had died unrepresented, was *reckless*." He also found that Struthers "was bound to have made the surety aware of "the existence of the proceedings; and that, having made no "such intimation, he was not entitled to reimbursement of ex- "penses so recklessly incurred. But, inasmuch as the execu- "tion of the process was rendered nugatory by the blunder of "the officer, for whom the surety was responsible, and inas- "much as it was to be presumed that the original debt might "have been recovered by virtue of the process, if that process "had been regularly executed,—he decerned against the surety "for 20*l.*, being the amount of the original debt and interest; "and with respect to the expenses incurred prior to the death "of the officer, and until the decree of the 7th December, 1838,

he found that Struthers might have been in *bonâ fide* to incur "these expenses; and, therefore, he found the surety liable in "that portion of the accounts claimed, under certain deductions. "But finally, and generally with respect to the whole of the "subsequent expenses, he assoilzied the surety."

In explanation of this judgment, the Lord Ordinary issued a note, stating that although the surety "was bound for all the "ordinary consequences of the officer's blunder," and although the mere want of intimation to the surety was not sufficient to liberate him; yet, that there were specialties in the case which gave the surety a claim to have the expenses charged against him modified to the extent defined by his interlocutor.

There were reclaiming notes on both sides appealing from this interlocutor of the Lord Ordinary, to the Second Division of the Court of Session; and on the 24th June, 1847, that tribunal pronounced judgment agreeing with the Lord Ordinary in so far as he had held the surety liable for the original debt and interest, but disagreeing with his modification of the subsequent expenses; as to which, the Second Division (being of opinion that the defence to M'Closkie's action was not "reckless," but proper and reasonable), pronounced a final judgment against the surety, charging him with the costs of the entire proceedings, excepting those of the first trial.

Against this judgment of the Second Division, and against the interlocutors of the Lord Ordinary, in so far as hostile to the surety, he tendered to the House of Lords the present appeal.

Mr. Bethell and *Mr. Stuart Wortley* for the Appellant.—By the law of Scotland intimation is necessary to fix the surety with liability. This was decided in M'Pherson *v.* Campbell, 19th May, 1825, IV. *Shaw*, 21; Fraser *v.* Andrew, 28th January, 1831, IX. *Shaw*, 345; Collier *v.* Wilson, 6th Decem-

ber, 1836, XV. *Shaw*, 196; and in Clason *v.* Black, 15th February, 1842, IV. *Shaw*, N. S. 743. The Appellant had no notice of the proceedings. Had he been duly apprized of them, he would have settled the matter at once, and prevented further expense. It is therefore unjust to saddle him with consequences which a proper line of conduct on the part of the Respondent would have averted.

II. The Lord Ordinary has rightly characterized the litigation which occasioned all this expense as unnecessary and "reckless." The execution was grossly blundered, and ought not to have been defended.

Mr. Rolt and *Mr. Anderson* for the Respondent.—I. The cases cited on the other side give no countenance to the Appellant's contention. On the contrary, they favour the Respondent. In particular, the conclusion to be derived from Clason *v.* Black is, that intimation or formal notice of the proceedings was not necessary in such a case as the present. Collier *v.* Wilson is still stronger to the same effect. And Fraser *v.* Andrew, when rightly understood, is an express authority in the Respondent's favour. In Allen *v.* Patterson, 17th June, 1663, *Morr.* 2088, a similar principle was enforced. There, a surety for an apprentice who had deserted his duty, resisted the master's demand for compensation, on the ground that intimation had not been served upon him. But the answer proved triumphant: "That there was nothing to oblige "him to make such intimation." Of what use would intimation have been in the present case? The Appellant, when actually served with notice, did nothing to compose matters. He kept aloof. He refused to intervene; affected to forget his bond, and denied his liability. In Brock *v.* Kemp, 20th February, 1844, VI. *New Series*, 709, it was decided that parties injured by the blunders of sheriffs' officers, are entitled to

full and complete relief as against their sureties, including all the consequential damages.

II. The defence of the execution was reasonable and proper. The Respondent was informed that there was no substantial objection to it. He was himself no lawyer, but an unlettered upholsterer, governed by the advice of his counsel. The expense he incurred, therefore, in maintaining the regularity of the execution, was incurred in good faith; and the Appellant is bound to make him compensation.

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LORD LANGDALE.—My Lords, in this case Lord Cottenham has communicated to me in writing his opinion; and, understanding that the noble Lord *, who heard the case with him, concurs in the opinion he expresses, I will now read it to your Lordships:—

"This is a most important case. The original subject-matter "of dispute was a bill for 20*l.*, which has led to direct and in- "direct litigation for the last twenty-four years, the expenses "of which appear, independently of this appeal, to amount to "1,000*l.* and more. It is not easy to charge either party ex- "clusively with being the cause of so much evil, although the "loss must unfortunately fall upon one, perhaps the least guilty "of any.

"The Appellant became surety for Baird, a sheriff's officer, "who having been entrusted with the execution of process upon "a bill for 20*l.* against M'Closkie, the acceptor, by the Res- "pondent Struthers, committed a gross blunder which rendered

* From the Journals it appears that Lord Campbell, as well as Lord Brougham, heard the argument in this case on the 1st, 5th, and 6th March, 1849. At the date of the above judgment, however, Lord Campbell was on circuit; and it is probable that "the noble Lord" referred to by Lord Langdale, as concurring in the opinion of Lord Cottenham, was Lord Brougham.

" the process unavailing, and led to suits by M'Closkie for sus-
" pension, interdict, and damage, to which Struthers and Baird
" were Defenders. An issue was directed, which was twice
" tried, and led ultimately to a verdict for nominal damages;
" but M'Closkie was held to be entitled to expenses.

" Before the trial of the issue, Baird died (in September,
" 1837), and an attempt was made to substitute his repre-
" sentatives, but those parties having renounced, his interest
" was not represented. But after the second trial, that is in
" July, 1840, an intimation was made to the Appellant, as a
" surety, of the proceedings, and calling upon him to relieve the
" pursuer of all damages and expenses incurred. In answer to
" which he did not admit that he had become security, and de-
" clined interfering. Struthers having been compelled to pay
" M'Closkie's expenses, and having also incurred his own, pro-
" ceeded against the Appellant Dykes as surety for the ex-
" penses so incurred, and the repayment of these expenses;
" and the principal interlocutors appealed from are those of the
" Lord Ordinary of 12th February, 1847, and of the Second
" Division of the Court, of the 24th June, 1847, which have
" held that he is entitled to what was so claimed, with some
" deductions, which will be presently observed upon.

" It must be assumed upon the weight of authority, and
" particularly from the case of Clason *v.* Black, that by the
" law of Scotland, a surety in the situation of the Appellant is
" liable for injury sustained from the conduct of his principal,
" and from the expenses thereby occasioned, although no inti-
" mation was made to him of the proceedings from which such
" expenses arose; but such liability would be limited to ex-
" penses necessarily or properly incurred; and the surety is
" therefore entitled in proceedings against him to examine into,
" and question the necessity and propriety of such expenses.
" Upon this ground, the Lord Ordinary found the Appellant

"liable to the expenses generally prior to the renunciation of "the representatives of Baird, with some exceptions arising "from the nature of the expenses, but not liable for the sub- "sequent expenses. The Second Division of the Court of "Session, however, did not support this limitation of responsi- "bility; but held the Appellant liable to the expenses, sub- "sequent as well as prior to the 7th December, 1838, with the "exception of the expenses of the first trial, as they found that "Struthers ought, in point of prudence, to have made intima- "tion to the surety, and as the first trial had proved unavailing "to the ultimate result of the cause. Now in that first trial, "the jury had found a verdict for Struthers and against "M'Closkie, and in the second, a verdict for M'Closkie and "against Struthers, with one shilling damages. If Struthers "be entitled to the expenses of this contest with M'Closkie, it "does not appear why, fighting the battle of the officer and "his surety as well as of himself, he ought to be deprived of "his indemnity as to that portion of the contest in which he "was successful; but as that distinction is not complained of "in the present appeal, no final opinion is called for upon that "point; and the same observation applies to the other matters "in respect of which the interlocutors as they stand relieve the "Appellant from responsibility.

"All the judges recognize the rule as settled, or rather ap- "proved, in the case of Clason *v.* Black. But the difficulty "they appear to have felt arose from the death of Baird pen- "ding the litigation with M'Closkie (in which the expenses, "particularly as to the period between the date of the renun- "ciation of his representatives, and the intimation to the Ap- "pellant), were granted, with the exception of the first trial. "After Baird's death, his interest certainly was not repre- "sented, though after the intimation, the Appellant might, had "he chosen, have been sisted in his place; but it is not con-

" tended that Struthers, if liable to M'Closkie for the error "committed in the suit instituted by him (and the result of the " trials proves that he was so liable), would not have been en- " titled to compensation and indemnity as against the officer " who had committed the error, because M'Closkie had pro- " ceeded against him alone, not making the officer a party, as " in Clason *v.* Black, and Brock *v.* Kemp; but in fact, the " officer was made a party, and after his death, everything pos- " sible was done to substitute his representatives in his place.

" The error from which the expenses arose, was complete in " the lifetime of the officer. The surety, therefore, was liable " for the consequences of it, and the object of the present suit " is to enforce his responsibility. The utmost benefit which " the surety can derive from the officer's interest not having " been represented, would be the right to question the neces- " sity and propriety of the expenses; that is, to contend that " the damages sustained had not necessarily or properly arisen " from the act of the officer. And of this right he has had the " benefit by the interlocutors appealed from. It appears to me " that they go quite as far as was justifiable in relieving the " Appellant from portions of the expenses; and I cannot find " in that portion which remains, any part as to which it can be " said with truth, that it was recklessly or improperly incurred.

" When the Appellant declined to interfere, and denied his " liability, he made it necessary for the Respondent so to con- " duct his case as to be able at the proper time to negative " such defence. The other interlocutors appealed from are im- " material in the view I take of this case, and do not therefore " call for any particular observation.

" Much as it is to be regretted that a liability which might " originally have been met by a payment of something more " than 20*l.*, should have been increased by litigation to the sum " for which the Appellant must now be held liable, I cannot see

" any ground for relieving him from any part of the liability to " which the interlocutors subject him, and regret to be under " the necessity of proposing that the expenses of this appeal be " added to such loss. The interlocutors appealed from ought, " I think, to be affirmed, with costs."

*Interlocutors affirmed, with costs.**

JAS. DODDS—THOS. DEANS, Agents.

* The above case is reported very fully in the Court of Session Decisions, Second Series; and will be found under the dates 14th February, 1845, 16th June, 1846, 7th July, 1847, and 10th February, 1848.