It seems to me hard to reconcile the present case with the previous decisions; but I do not feel any doubts sufficiently strong to induce me to differ with the opinions of my noble and learned friends, who think, that the interlocutor as to this entail ought to be affirmed.

Interlocutors in both appeals affirmed with costs.

For Appellant, Loch and Maclaurin, Solicitors, Westminster.—*For Respondents*, Dodds and Greig, Solicitors, Westminster.

APRIL 17, 1863.

ANGUS MACKINTOSH, *Appellant*, *v.* HUGH FRASER, DR. GLOVER, and DR. T. G. WEIR, *Respondents*.

Reparation—Wrongous Detention—Insanity—Agent and Client—Malice and Want of Probable Cause—Issues—*In an action of damages against the law agent of the pursuer and his family, for wrongfully causing him to be confined in a private madhouse, under a warrant alleged to be wrongfully obtained by the agent, on an application in name of the pursuer's mother, and there being no allegation of irregularity in the proceedings:*

HELD (affirming judgment), *That it was not necessary to aver malice and want of probable cause in the issue, as want of due inquiry and examination would be a good cause of action.*

Reparation—Privilege—Agent and Client—Wrongous Detention—1. *An agent for a party, who takes steps to get him confined in a lunatic asylum as insane, is not liable in damages, unless he knew him not to be insane, or interfered officiously and recklessly, and without due inquiry.* 2. *Medical men, being qualified practitioners, who, after due examination, believe that a party is insane, and grant a certificate to that effect, with a view to the party being confined in a lunatic asylum, are not liable in damages, although the party should prove to have been sane.*

Process—Jury Cause—New Trial—Lunatic—Counsel—*A new trial is not granted because counsel refused to examine a witness whom the client wanted to be examined: or because the client, insisting on addressing the jury, was prevented by the Court from doing so.*[1]

The pursuer appealed, maintaining in his case, that the judgment of the Court of Session should be reversed, for the following reasons:—1. The first issue ought to have been limited to the inquiry, whether the defender, Hugh Fraser, did wrongfully confine and detain the appellant, or cause him to be confined and detained. 2. The state of mind of the appellant ought not to have been in terms a subject of inquiry in the issue, inasmuch as the appellant might well have been entitled to a verdict, even though it should be proved, that he was of unsound mind at the time. The appellant's state of mind could only become *essential* as a defence; and evidence on the subject, either in answer to the action, or in reduction of damages, would have been admissible for the defender under the form of issue contended for by appellant. 3. The said first issue throws on the appellant the burden of proving, that he was not insane at the time, whereas, if the state of mind of the appellant ought to have been in terms a subject of inquiry in the issue, the burden of proving insanity ought to have been thrown on the defender. 4. For similar reasons, the second issue ought to have been as against the defenders, George Glover and Thomas Graham Weir to the same effect as the first issue, or, at all events, the second issue ought to have been limited to the inquiries whether the defenders, George Glover and Thomas Graham Weir, wrongfully granted the certificate, and ought not to have thrown on the appellant (as it did) the burden of proving, that they did so without due inquiry and examination, or of proving, that the appellant was not then insane, nor in such a state of mental derangement as to require confinement in a lunatic asylum. 5. The issues adjusted by the Court for the trial of the cause were not the proper issues applicable to the case. 6. The appellant was not, as he ought to have been, under the circumstances set forth in the affidavit presented by him to the Court, examined as a witness for himself; and the jury were thus prevented from hearing the most important evidence in the cause, and were told by the presiding Judge to consider the fact of the appellant's non-examination to be an important circumstance against his case.

The respondents, Mr. Fraser and Dr. Glover, supported the judgment on the following grounds:—1. The first three interlocutors appealed against, being interlocutors adjusting, approving of, and authenticating, the issues, were pronounced upon the motion of the appellant

[1] See previous report 21 D. 783: 22 D. 421: 31 Sc. Jur. 309, 761: 32 Sc. Jur. 187. S. C. 4 Macq. Ap. 913: 1 Macph. H.L. 37: 35 Sc. Jur. 457.

himself, and the issues to which they relate are the issues proposed by the appellant. 2. The issues to which the first three interlocutors have relation, are in the form sanctioned by practice, and are well fitted to try the question as to the appellant's sanity raised upon the record; and, further, because the jury by their verdict specially affirmed, that the appellant was insane at the date of the proceedings complained of. 3. The fourth interlocutor complained of, being the interlocutor refusing a rule to shew cause why a new trial should not be granted, cannot competently be appealed from, such appeal being excluded by the provisions of the Acts 55 Geo. III. c. 42, and 59 Geo. III. c. 35. 4. The interlocutor refusing the application for a new trial is well founded in law, in respect that the verdict of the jury was justified by the evidence, and that no sufficient reason was shewn for granting a rule upon any other ground. 5. The appellant's only ground of action having been negatived by the verdict of a jury, regularly obtained, that verdict was properly applied by the fifth and sixth interlocutors appealed from. 6. Under the whole circumstances, justice having been fairly administered between the parties, and a legal result having been attained, there are no grounds, either of fact or of law, to warrant your Lordships in sustaining the appeal in any of its branches; and the same ought, accordingly, to be dismissed, and the interlocutors complained of to be affirmed, with costs.

The respondent, Dr. Weir, supported the judgment on the following grounds:—I. The interlocutors sought to be appealed are final, and not liable to review either under the Statutes founded on or at common law, and more particularly—1. Because the issue upon which a verdict has been returned in favour of the respondent having been the precise issue proposed by the appellant himself, and adopted by the respondent without objection, the interlocutors, approving of or authenticating the same, were interlocutors "by consent," and not liable to be appealed. 2. Because the interlocutor by the Lord Ordinary, reporting the issues "as proposed by the appellant," having been acquiesced in and acted upon by him, and not now being appealed, and, moreover, the Court having, on his motion, ordered these same issues for trial, he cannot now appeal against that final order. 3. Because it being contrary to express Statute, as well as to the practice of the House of Lords, to allow an appeal against an interlocutor refusing a rule for a new trial, and the grounds of appeal now insisted in, other than those in reference to the issues, having been regularly, though unsuccessfully, made the subject of a motion for a new trial, the interlocutor refusing that motion is final, and not liable to be appealed. 4. Because, in the absence of any special question of law duly raised by the appellant, either before or after trial in the Court below, the verdict of the jury, as returned on his own issues, and in conformity with his summons and statements and pleas in the closed record, was final and conclusive, and the judgment of the Court which applied the verdict and assoilzied the respondents, having been the necessary and legal sequence of that verdict, not dependent on any question of law which could then have been competently raised, the judgment is final, and not liable to be appealed. 5. Because the interlocutor which decerned for expenses is not liable to be appealed, except in conjunction with other interlocutors, properly and competently bringing up the merits, or some material portion of the merits of the cause, for review. II. On the merits—1. Looking at the shape of the appellant's summons and his grounds of action as embodied in the record, no other issues were admissible than those which, upon the appellant's own motion, were framed and sent to trial; and in any view, it was essential for the appellant to aver and prove his sanity, at least under the issue directed against the present respondent. 2. The exclusion of the appellant's testimony not having been excepted to at the time, and that and the other matters in the affidavit mentioned having been disposed of by the Court under his motion for a new trial, and the respondent having been in no way accessory to, nor responsible for, the proceedings complained of, the appellant has no ground, either in law or equity, for insisting upon the cause being again tried, more especially as he cannot qualify or substantiate any legal wrong or actual prejudice from the proceedings. 3. Having in view the procedure in the Court below, the appellant is barred *personali exceptione*, and by his own acts and deeds, from challenging the procedure; and, moreover, it would be contrary to established rules of law and equity to subject respondents, who have acted throughout with the most perfect *bona fides* and fair dealing, to proceedings *de novo* in a cause where no miscarriage has taken place, or, in the most favourable view for the appellant, only such miscarriage as is attributable to the appellant himself and his own legal advisers. 4. Under the whole circumstances, justice having been fully administered between the parties, and a legal result arrived at, there are no grounds, either of fact or of law, to warrant this appeal being sustained in any of its branches, and the same ought accordingly to be dismissed, and the interlocutors complained of to be affirmed with costs.

Rolt Q.C., *Sir H. Cairns* Q.C., and *Anderson* Q.C., for the appellant.

The Solicitor General (Palmer), *Selwyn* Q.C., *A. Broun*, and *Milward*, for the respondents.

The points raised in the appeal were not fully argued nor decided, for the reasons stated in the following judgment.

LORD CHANCELLOR WESTBURY.—This is an appeal directed against several interlocutors of the Court of Session, namely, three interlocutors by which certain issues were settled; another, by which an application for a new trial was refused; and another, by which the

verdict, being a matter of course, was applied; and there is also a decree by which the expenses of the respondents were directed to be paid. Now, I think it is by no means necessary, that your Lordships' judgment should involve a determination as to the propriety of the form of the issues that were directed in this case. Your Lordships' judgment, I apprehend, in this matter, will be rested entirely upon the conduct of the appellant himself, and also, I may add to that, upon the very high and most necessary principle to be always observed and strictly attended to, that it shall not be competent for an individual to pursue a particular course without complaint in the Court below, and then to come to the Court of Appeal and make it the subject of complaint, that that was done which he himself had applied for and requested.

By the Statute 13 and 14 Vict. cap. 36, to which reference has been made, the course of procedure with regard to the settlement of issues in the Court of Session was prescribed, and by it an obligation is thrown upon the pursuer to bring forward the issues which he himself proposes, and if the issues can be adjusted before the Lord Ordinary by the agreement of the parties, then they are taken by the Lord Ordinary as finally settled. But if there be a disagreement between the parties with respect to the issues, then the Lord Ordinary reports the matter to the Inner House.

Now the issues in this case were originally proposed by the pursuer, and the second issue remains in the form in which the pursuer originally proposed it. With regard to the first issue, it appears, that it was proposed by the pursuer, the present appellant, in the first instance, without the words "not being then insane." And it is also perfectly clear, that no opposition was made by the defendant, Mr. Fraser, the present respondent, on the ground of the issue not containing those words. But it appears to have been either suggested by the Lord Ordinary or to have occurred to the pursuer's counsel themselves, that those words ought to be included in the issues, and accordingly *ex mero motu* of the pursuer, because there was no objection by his opponent, he desired and obtained leave to introduce into the first issue the words in question, which are accordingly found in a document in the process, No. 25, to have been in the handwriting of his own counsel, and authenticated by the initials of the counsel. The Lord Ordinary, accordingly, in the note appended to his interlocutor, reports, that there was no objection to the issues as proposed by the pursuer, save in the particular point to which the note refers, namely, a contention on the part of the defender, Mr. Fraser, that other words, namely, "maliciously and without probable cause," ought to be inserted in the issue.

The report of the Lord Ordinary then came before the Judges of the Court of Session, and those Judges in their opinions, I believe all, certainly more than one, the Lord President distinctly, (and one or more of the other Judges also,) adverts to the fact, that these particular issues, as they were finally sent to trial, were issues which were actually proposed by the present appellant, and not only proposed by him, but contended for by the appellant as being the proper issues.

It is said by the learned counsel for the appellant, that the contention must be considered as having been directed to the point in controversy, and, that this particular matter, namely, the introduction of the words "not being insane" was not in controversy. Why, that is the very ground upon which I think, that your judgment in this case ought not to proceed. These words were not in controversy, because they were proposed by the appellant himself, and admitted and acquiesced in also by the defender. And the principle to which I have adverted as being that upon which I think your Lordships' judgment should turn is this, that if you permitted a matter to be made the subject of appeal which has not been discussed, considered, and decided upon in the Court below, you would not only permit the party to take a most unfair advantage himself by concealing some matter to which attention had not been directed, but the House would assume a jurisdiction which does not belong to it in determining a question which, so far as it is concerned, would become a question of original jurisdiction, seeing that it had never been raised and made a matter of discussion and of decision in the Court below. There can be no possible doubt, therefore, that the appellant acts in a very unreasonable manner in attempting to make the form of the issues, which he himself thus proposed and contended for in this particular form of words, a subject of appeal to your Lordships.

I must, therefore, humbly submit to your Lordships, that in this particular it is our bounden duty to say, that the appellant has no cause at all of reasonable complaint, and that this part of the appeal ought unquestionably to be dismissed. It is nothing to say, that he submitted without argument or complaint to what he found to be the settled practice. If he thought that practice was *mala praxis*, he should have raised the question, and then the question might have been brought here after having been discussed and decided in the Court below, as a proper matter of appeal for the determination of your Lordships.

Now, if the original issues are found to be correct in so far as the appellant is concerned, and if the appellant be justly regarded as estopped from having anything to say against their accuracy and propriety, then it follows beyond reasonable doubt, that the interlocutor refusing the new trial was in itself perfectly right, or at all events, was a subject from which an appeal cannot be brought to your Lordships.

With regard to the interlocutor applying the verdict, that follows as a matter of course, because

it does nothing more than give effect to the verdict of not guilty, and the decree of *absolvitor* followed upon that, and the other matter followed, therefore, of course.

It is a matter of regret, that the evil which had already originated has been augmented and aggravated by bringing this appeal. I think, that what your Lordships will be bound to do will be to dismiss this appeal with costs. But with regard to the proceedings before the Appeal Committee, I think there was enough to justify the presentation of that petition ; and although undoubtedly in one sense, which, however, was not the sense in which the appellant contended, that all these interlocutors were appealable, they may be included in the petition of appeal, because if the interlocutors settling the issues were reversed, the reversal of the rest of the interlocutors would follow consequently, yet they ought not to have been included in the appeal in the manner and form in which the appellant contended, that they were themselves separately and individually appealable. I would therefore humbly submit to your Lordships, that the proper order will be to dismiss this appeal with costs ; but to give no direction whatever touching the costs, in themselves most insignificant, which occurred before the Appeal Committee.

LORD WENSLEYDALE.—My Lords, I entirely agree with what my noble and learned friend has proposed to your Lordships. I think, that the appellant is precluded entirely by his having consented to the form in which the issue is framed, and that the other questions which have been discussed in the course of this inquiry become immaterial. It is immaterial to decide whether the Sheriff would support the judicial authority or not. The other points of some nicety thus become entirely immaterial. The whole question upon the summing up of the Lord President also becomes immaterial. I entirely concur upon the grounds which have been stated by my noble and learned friend, that in this case the appellant is precluded, by his own proposal and acceptance of the issue, from making any complaint of it.

LORD CHELMSFORD.—My Lords, I entirely agree with the view taken of this case by my two noble and learned friends.

Interlocutors affirmed with costs.

Agents for Appellant, Simson, Traill, and Wakeford, Solicitors, Westminster.—*Agents for Respondents, Hugh Fraser, W.S., and Dr. Glover*, Bircham, Dalrymple, Drake, and Ward, Solicitors, Westminster.—*For Respondent, Dr. T. G. Weir*, Loch and Maclaurin, Solicitors, Westminster.

MAY 12, 1863.

MRS. CHARLOTTE ELIZABETH RICHARDSON HAY AND HUSBAND, *Appellants*, *v.* THE LORD PROVOST AND MAGISTRATES OF PERTH, *Respondents.*

Salmon Fishing—Fixed Machinery—Net and Coble—Bermoney System of Fishing—*In fishing for salmon in a navigable river with net and coble, H. fixed a stake in the centre of the river, and by means of a ring and rope, enabled his boat to take a wider sweep, and so enhanced the chance of capture. This was called the Bermoney boat system of fishing.*

HELD (reversing judgment), *That there was nothing illegal or contrary to statute in this method of using the net and coble, there being nothing in the nature of fixed machinery, nor essentially varying the ordinary mode of using the net by hand.*

HELD FURTHER, *That the alleged illegality of the stake fixed in the channel made no difference as regards this question.*[1]

In 1856 the Magistrates of Perth brought an action against Miss Hay of Seggieden, (now the wife of Lieut. Col. Henry Maurice Drummond Hay,) and the tenants of her salmon fishings on the Tay, with the view of having it determined, whether a particular mode of fishing adopted by them, called the "Bermoney" system, was illegal.

A considerable portion of the revenue of the city of Perth is derived from salmon fishings on the Tay, one of the most important being at Darry Island, immediately adjoining the fishings at Seggieden. The peculiar method of fishing above referred to had been used at some of the fishings on the Tay for some time, the effect of which, as alleged, was an extraordinary increase

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[1] See previous reports 24 D. 230: 34 Sc. Jur. 115. S. C. 4 Macq. Ap. 535: 1 Macph. H. L. 41 ; 35 Sc. Jur. 463.