was presented, the petitioners had not obtained the consent of the Scotch Education Department to its presentation; and yet the petition purported to be presented with the consent of that Department, while, as if to emphasise the consent, the wholly inappropriate words "and concurrence" were added. No expectation of obtaining that consent could warrant the petitioners in making this statement. The consent of the Department is a pre-requisite to any such petition being presented, and we have occasion to know that the consent of the Scotch Education Department is not a formal but a discriminating and highly intelligent act.

It is with some difficulty that I have come to the conclusion that, now that the Department have *pendente processu* consented to the petition going on, we may treat this as entitling us to consider the application as if its origin had been more legitimate.

On the merits, I am entirely satisfied with the recommendations of the reporter. Agreeing with him, I consider that we should not be warranted in extending to New Aberdeen benefits which, according to the directions of the testator, were destined to a different area. The recent changes in the administration boundaries of Aberdeen, and the circumstance that the same testator had made another bequest which, owing to those changes, might now be held to compensate for such an extension, do not furnish any valid reason for the step which the petitioners ask us to take.

I am therefore for remitting to Mr Lee to adjust the scheme in accordance with his report.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court remitted to the reporter to adjust the scheme in accordance with his report.

Counsel for Petitioners—Abel. Agents—Auld & Macdonald, W.S.

Saturday, February 8.

OUTER HOUSE.

[Lord Kyllachy.

FRASER *v.* MALLOCH.

Process—Dominus Litis—Expenses.

Held that to establish the character of *dominus litis*, and thus burden one who was not a party to a suit with liability for expenses, it must be shown that the party on whom it is attempted to impose liability was in reality the principal, disclosed or undisclosed, in the suit, and that the actual litigant was merely his agent.

This was an action at the instance of J. M. Fraser, manufacturer in Govan, against John Macgregor Malloch, writer in Glasgow, concluding for payment of £451, 5s. 7d., being the taxed expenses found due to the pursuer in a previous action at the instance of Messrs Donald & M'Culloch, cloth manufacturers, Govan, against him. The facts are fully set forth in the opinion of the Lord Ordinary.

The pursuer pleaded—"The defender being the true *dominus litis* in the action above mentioned, the pursuer is entitled to decree as concluded for."

The defender pleaded—"(3) The defender not having been the *dominus litis* of the action referred to, should be assoilzied with expenses."

On 8th February 1896 the Lord Ordinary (KYLLACHY) assoilzied the defender from the conclusions of the action.

Opinion.—"The defender in this case is sued for payment of the expenses awarded to the pursuer in a recent action in which he (the pursuer) was defender and was successful in his defence. The ground of the demand is, that the defender was, as is alleged, the true *dominus litis* in the action, and is, as such, responsible for the expenses. It is not said that he was a party to the action. So far as appears he was simply the Glasgow agent of the pursuers. But it is said that he had such an interest in the result of the suit, and had such control over its course as to be the true *dominus litis*. There has been a long proof, but I do not think that the real facts of the case are seriously disputed. In 1891 Messrs Donald & M'Culloch (the pursuers of the action referred to) bought from Mr Fraser (the present pursuer) a factory in Govan with plant and machinery and certain business assets. The price as ultimately paid was about £3500. Messrs Donald & M'Culloch, who had been employed in the factory, had little capital—only about £250—but they obtained a loan on the property for £2000, and the balance was lent them by the present defender Malloch, who was their banker and law-agent in the transaction. The factory was not successful, and in 1892 Messrs Donald & M'Culloch raised an action of reduction against Mr Fraser on the ground of alleged fraudulent misrepresentation. By that time they were indebted to the defender Mr Malloch to the extent of about £1300, and there was another creditor for £400 more. Mr Malloch's firm, who were writers in Glasgow, conducted through their Edinburgh correspondent the litigation, and during its progress he continued to finance the factory business. The action was in the end unsuccessful, with the result that the factory was closed and Donald & M'Culloch were sequestrated. Being unable to recover his expenses, Mr Fraser has now brought the present action, in which as I have said he sues Mr Malloch for these expenses.

"The question which must first be determined is, what in law is requisite to attach to a person not a party to a suit the character of *dominus litis*.

"The term *dominus litis* is of course borrowed from the civil law, but with respect to the particular facts with which we have here to deal, it cannot be said that much assistance is to be derived from the definitions and doctrines of that law. The

expression was used in the civil law in two senses. It was used to denote the formal pursuer as distinguished from the advocate who appeared for him. It was also used to denote the pursuer or defender proper as distinguished from the procurator or mandatory in whose name it might happen that the contract of litiscontestation was entered into. As between and among those parties there were various points which were ascertained. It was held, for example, (1) that no judgment could issue in an action except for or against the formal parties to the action—that is to say—the parties to the contract of litiscontestation; (2) that a procurator who had as such become a party to the contract of litiscontestation had right to be relieved by his mandant or principal of all costs and liabilities thereby incurred, and had a preference for such relief against anything which he recovered; and (3) that judgment being obtained against the procurator (as formal pursuer or defender), an action lay upon that judgment against his mandant or principal as the true *dominus litis* (Code ii., ix. 1; Dig. iii., iii., 10-17, 30, 31; Dig. xlix., i., 4 (5); Dig. xliv., iv., 11; Code ii., xiii., 22, 23; Code vii., xlv., 1; Cujacius ix., 1065, 2 folio ed., 1758). But, so far as I can discover, the civil law did not at all deal with the case of a latent third party lying behind, not only the advocate and the procurator, but also the pursuer or defender proper, for whom the advocate or procurator appeared. As to the liabilities of such a party, the civil law was silent. Still less did it attempt to define what interest in or connection with the suit should be held to bring those liabilities into play.

"Neither is much help to be had from the law of England. Putting aside its doctrine of maintenance and champerty (Blackstone's Com., iv., 10, 12 and 13) with which we are not concerned, the English doctrine of *dominus litis* (or what may loosely be so called) relates exclusively to the question—in what circumstances shall a party to an action who has another party behind him be bound for that reason to find caution for expenses. And all that can be said on that matter is that the English rule—so far as any settled rule exists—goes a good deal further than our Scotch rule on the same subject. It certainly goes a good deal beyond any rule which could be applied to the question with which we have here to deal. It appears to be the result of the English cases that it is enough to justify a demand for caution (*e.g.*, from a pursuer) that some third person has instigated the suit—has some interest in its result—and has contributed to its cost. At least that appears to be so where the third person refuses to sist himself as a party to the suit. That, however, is, as I have said, merely a rule of process which by no means settles the outsider's liability for the expenses of the suit. As to that matter all that has been decided in England seems to be this, that in no case can such liability be enforced in the suit itself or incidentally to the suit. Whether it can be enforced as here by a separate action, and if so on what principles, does not appear to have been considered. In the English law, as also probably in the civil law, that question is, I imagine, left to depend on the ordinary law of principal and agent—*Ball* v. *Ross*, 1 Scott (new ed.) C.P. 217; *Osborne* v. *Pichell* 7 Scott, C.P. 481; *Hayward* v. *Giffard*, 4 M. and W. 894.

"Coming next to the Scotch authorities, there is no doubt that these recognise the proposition that a party outside an action may in certain circumstances become liable for the expenses awarded to the successful party; and may be sued for those expenses as here by separate action. There is also no doubt that this liability has been said to depend on the interest which the outside party has in the subject-matter of the suit, and on the control which he possesses and exercises over the course of the suit. But the practical question always is as to the kind and degree of interest and of control which shall be sufficient for the purpose. And I am afraid that none of the decided cases formulate or ascertain the principle on which that question must be decided.

"There are some classes of cases which are not uncommonly classed under the head of *dominus litis*, of which the principle is perhaps clear enough. For example, when the pursuer of an action alienates or is otherwise divested of the subject of the action so that he is no longer interested in it, the transferee of the subject may be required to sist himself, and failing his doing so the action may be dismissed—*Fraser* v. *Dunbar*, 1 D. 882; *Fraser* v. *Duguid*, 16 Sh. 1130; *Waddel* v. *Hope and Others*, 6 D. 160. The principle here is that the defender is not bound to litigate with a person who has no longer an interest or title to sue, and against whom, therefore, no effectual judgment can be obtained.

"Again, where the pursuer becomes bankrupt, and is divested subject only to a contingent reversion, he has still no doubt an interest and a title to sue; but the immediate interest is in the trustee for his creditors; and if the trustee declines to sist himself, the bankrupt must, as a rule, find caution for expenses. This again is simply an equitable rule of process which settles nothing, *e.g.*, as to the trustee's liability for expenses if the suit proceeds and the cautioner fails.

"Similarly in popular actions, such as rights of way, where a pursuer is put forward who has a sufficiently good title and interest, but whose title and interest is shared by others who supply the funds, the Court will appoint those other persons to sist themselves, and failing their doing so will require the pursuer to find caution—*Jenkins* v. *Robertson*, 7 Macph. 739. At least they will do so if it appears that the pursuer is a man of straw and has been put forward for that reason—*Potter* v. *Hamilton*, 8 Macph. 1064. Here also nothing is involved touching the liability of the outside parties for expenses. They may or may not be liable (if the cautioner fails) according to circumstances—that is to say, according to what may ultimately be found to be their true relation towards the suit—the parties to the suit—and its subject-matter.

"These cases therefore settle nothing really relevant to the present question. It may be right in particular cases that if certain outside parties decline to sist themselves, the action shall be dismissed or allowed to proceed only on caution for expenses, and yet it may by no means follow that those outside parties incur any liability for expenses if the action proceeds. That depends, as I have said, on their attitude to the action, and what that attitude must be to make them liable is the question which has to be solved.

"Neither, again, does the case of *Stevens* v. *Burden*, 2 Sh. 447 (new edition), cited by the pursuer, advance the argument. In that case a father, as part of an agreement by which his son's means were reduced to an alimentary annuity of small amount, undertook to defend and did defend an action of declarator of marriage which had been raised against his son, and in which decree ultimately went out against the son with expenses. The father was found liable at the suit of the pursuer's agent for the expenses decerned for, and was so, as the report bears, on the ground that 'the defender undertook to defend his son in the declarator of marriage, and that he did not allow him sufficient aliment.' In other words, the father was held liable in virtue of the special contract between him and his son, which contract in the particular circumstances the agent for the successful party being the son's creditor for the expenses was allowed to enforce by direct action.

"The only decision really in point is that of *Corsan* v. *M'Lauchlan*, 6 Sh. 505, which is very shortly reported. In that case M'Lauchlan, a heritable creditor, had a dispute with another heritable creditor, Corsan, as to the latter's right to remove the common debtor, Rankine, from the subject of the security. Rankine was bankrupt, but he and M'Lauchlan granted a joint mandate to M'Lauchlan's agent to oppose the removing. The result was a suspension which was brought by M'Lauchlan's agent as it happened in the name of Rankine alone. The suspension was unsuccessful, and Corsan having obtained decree for expenses against Rankine, sued M'Lauchlan therefor. The Lord Ordinary (Meadowbank) assoilzied M'Lauchlan, but 'the Court being satisfied that he was the true *dominus litis*, and that Rankine was merely a man of straw, altered, and decerned in terms of the libel.'

"There is no other case in the books in which decree for expenses has gone out against an alleged *dominus litis*. There are cases where such decree has been refused, but the only one of importance is that of *Mathieson* v. *Thomson*, 16 D. 19, where there are *dicta* by Lord Rutherfurd to which both parties in this case appeal. That distinguished Judge there said—'There may be some difficulty in defining exactly what is a *dominus litis;* but I confess that I very much agree with what has been laid down by your Lordship and with the definition quoted from the civil law by Lord Ivory, that he is a party who has an interest in the subject-matter of the suit; and through that interest a proper control over the proceedings in the action. Now, it will not make a person liable in the expenses of the action that he instigated the suit or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit that while he does both of these things he shall have some ultimate consequent benefit in the issue of the suit. But when you go a step further and find a party with a direct interest in the subject-matter of the litigation, and through that interest master of the litigation itself, having the control and direction of the suit, with power to retard it or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*, and though another name may be substituted the party behind is answerable for the expenses."

"To complete the summary, it must be added that there are certain cases—familiar enough in practice—in which the liability in question has been always recognised. Some examples at once suggest themselves, and there may be others.

"The first is the case mentioned by Lord Rutherfurd of the assignee suing in name of his cedent. There is here probably a double remedy open to the opposite party. If the assignation is absolute, the assignee may require to sist himself, or the cedent to find caution. But it has never been doubted that in such a case the assignee is also liable not only to keep his cedent *indemnis*, but at the suit of the opposite party to implement the judgment, including any award of expenses against the cedent.

"Another case even more familiar is that of a beneficiary or creditor under a trust, voluntary or judicial, who desires to try some question which the trustee or trustees decline to try, but which they agree to allow the creditor or beneficiary to try in their name, at his own expense. In that case it is always understood that the creditor or beneficiary, although not appearing in the suit, and having only an indirect interest in its subject-matter, is yet liable in case of failure for the expenses to the opposite party.

"Again, a third case is also common. A parochial board litigates in a pauper's name in order to recover for the benefit of the rates some debt or asset belonging to the pauper. It has never been doubted that in such a case the parochial board, if unsuccessful, must pay the expenses of both sides.

"Now, all this being so, what is the legal doctrine which underlies and explains these particular instances? In my opinion it is simply the elementary doctrine that a principal, disclosed or undisclosed, must make good the engagements and answer for the acts of his agent acting within the scope of the latter's authority. That, it seems to me, is the true basis of the rule which I have been considering, and supplies the test by which the pursuer's demand in this

case must ultimately be judged. For after all what is the substance of the matter? A person becomes a party to a suit, and by doing so comes under an implied obligation to his adversary to perform the judgment, and, *inter alia*, to pay such expenses as may be awarded against him. That is an obligation in which his adversary is creditor; and it is of no importance whether it arises by contract or *quasi* contract or by force of law. But an obligation so incurred may, like other obligations, be incurred on one's own behalf or on behalf of another. And if the latter be the case, the position simply is that the party to the suit and the party behind him stand to each other in the relation of principal and agent, with all the liabilities towards third parties which that relation involves.

"That being so, the question in each case of the kind and in the present case is not whether the alleged *dominus litis* is interested in the action or has advised it or has financed it or has exercised greater or less control over its progress. The question is, whether in initiating and conducting the action the nominal pursuer (or defender as the case may be) was acting not as a principal but as an agent. And that question must, I apprehend, be determined on the same principles as are applied to other transactions—the ruling consideration always being, what was the true agreement between the parties? In the proof of that agreement, their respective interests, the extent of the control possessed by each, and other like facts may be important elements, but they are at best only elements in the proof.

"Now, applying these principles to the solution of the present case, the facts which have to be noted are shortly these.

"In the first place, there is no evidence—certainly no direct evidence—of any agreement between Malloch and Donald & M'Culloch that the action in question should be raised and prosecuted by Donald & M'Culloch on Mr Malloch's behalf, they giving their names, and being bound to act, so far as they did act, under and subject to his directions. There is, in other words, no direct evidence of a contract of agency. On the contrary, the direct evidence is the other way. Both Mr Malloch and Mr Donald deny that any such agreement existed, and there is nothing in the documents or books produced to instruct anything of the kind. A point was made that in the business account of Mr Malloch's firm—as recorded in their ledger—there is no charge against Donald & M'Culloch for taking their instructions to raise the action. But it is not disputed that meetings took place when the raising of the action was discussed and resolved upon, and I must say that it appeared to me that too much was made of an omission which would probably have been corrected when the ledger entries came in ordinary course to be revised.

"In the next place, it is impossible to say that Mr Malloch had or alleged any right of property in the fund or claim which was the subject-matter of the action. He was a creditor of Donald & M'Culloch, and, as such, he had of course an indirect interest, but it was the interest of a creditor; and it is not, I think, material that that interest was large or even predominant. He was not the only creditor. Donald & M'Culloch were not in any view divested. Nor is it disputed that whatever their financial position they had a sufficient and substantial interest in the success of the suit. Had it succeeded, they would at least have been able to pay their creditors in full or nearly in full. They would have escaped sequestration, and would probably have been able to make a new start under different circumstances.

"Lastly, it is not, I think, proved that Mr Malloch had by agreement or otherwise the command of the litigation. His firm conducted it as Glasgow agents, and provided the necessary outlays. And he no doubt had such oversight and control as belonged to him as agent in the cause, and as a creditor largely interested. But the pursuers Donald & M'Culloch took themselves an active interest in the action, and, so far as I see, never parted with their right to abandon or compromise, or take such other course as they might think their interest dictated. In short, according to the evidence the litigation was in all respects conducted in the ordinary way, with this difference—not I am afraid without precedent—that the pursuers' agents trusted for recovery of their charges to the success of the action.

"I cannot in these circumstances affirm that the defender Mr Malloch was in the position of an undisclosed principal, conducting the suit through nominal pursuers, who were truly his agents. He was no more the true litigant in respect of his interest in and oversight of the suit than he had been all along the trader or manufacturer in respect of his interest in and oversight of the business of the factory. Everything which can be said of his position towards the action may equally be said of his position towards the business. And yet it is now well settled by a well-known class of cases (*Eaglesham* v. *Grant*, 2 R. 960; *Moll, March, & Company*, 4 P.C. App. 419, and cases cited) that a creditor financing a business and supervising it, and exercising over it large powers and authorities, will yet not be held to be the principal or a partner in such business, when in truth and in substance he was only a creditor working out payment of his debt."

Counsel for the Pursuer—Ure—Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

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