

business as if it belonged solely to him. Now at this time the trustees would have been perfectly entitled to apply to the Court for an *interim* remedy, for example to apply for the appointment of a factor. But, instead of such a proceeding, they allowed Mr Boak to continue in possession of the business as owner, pending the decision of the question whether he was really owner or not. Then, after a year's delay, while the cause is still depending, they present this note, craving the Court to ordain Mr Boak to allow Mr Carter, as acting for them (the trustees), access to the premises, &c., in order that he may take such supervision of the business as he may consider necessary for the protection of the interests of the trust-estate. We cannot entertain an application of this sort, seeing that there is no insolvency, or supervening inability on Mr Boak's part, and that the only thing which the trustees can show to support their application is a judgment of the Outer House in their favour.

LORD DEAS—I have no doubt at all that during the dependence of a process of this kind it is competent to apply for a factor in the usual way if good cause can be shown, and the factor is an officer of, and responsible to, the Court. Whether the same thing can be done in a depending cause by a mere motion I am not prepared to say. I have never seen it done, and at all events it would require very strong reasons to justify any such proceeding. It is not pretended that there is any statutory authority for such application, and I think that there are statutory enactments against it. The note craves that the Court should ordain the pursuer, Allan Boak, to give the said Frederick Hayne Carter, as acting for the trustees, access to the premises in the West Port, and to the stock and business books therein, for the purpose of enabling him to inspect the same, and take such measures in regard thereto, and such supervision of the business, as he may consider necessary for the interests of the trust-estate. Now, I am not prepared to give the least countenance to the competency of this application. A similar application might have been competent in a regular form, but not in this incidental form, and there is no reason why the application should have been made in such an unusual manner.

As to the merits of the cause, I entirely agree with your Lordship.

LORD ARDMILLAN—I do not say that it would be incompetent in a case of great emergency to apply to the Court in a going process for an order to effect an interim arrangement, and regulate the possession and temporary administration of the subjects of litigation. But such a proceeding is very unusual, and requires a very strong case, which that under consideration certainly is not; and I am of opinion that it would be out of the question to grant the prayer of this note.

LORD KINLOCK—I agree with your Lordship, both as to the competency of this application, and the merits of the case. I think it is quite competent for the Court to arrange for the interim possession of the subject of a litigation, and I do not think that this is confined to the appointment of a judicial factor. But here Mr Boak is in possession of the subjects of litigation, and it is not proposed to dispossess him; but what is proposed is, to appoint what is nothing else than a

judicial spy, and the result of such an appointment would be that no appreciable good would be done, and the person appointed would inevitably quarrel with Mr Boak. I think that, to say the least of it, it would be inexpedient to make this appointment.

Agents for Pursuer—Henry & Shiress, S.S.C.
Agents for Defenders—G. & H. Cairns, W.S.

Wednesday, June 19.

ROY v. THOMSON PAUL.

Compensation—Interest.

A obtained decree for expenses in the English Court of Chancery against B, and B obtained decree for expenses in a Court of Session action in Scotland against A. A then brought an action against B in the Court of Session for the English expenses, with interest, and B pleaded compensation. *Held* that B's plea of compensation was sufficient to warrant the Court in superseding consideration of the cause until A had an opportunity of stating in a competent form his objections to the claims of B.

In 1835 a loan of £10,000 was agreed to be made by Mr Wood of Leith to Major Anstruther of Thirdpart. The loan was negotiated by Mr Thomson Paul, W.S., as agent for Mr Wood, and Mr Robert Roy, W.S., as agent for Major Anstruther. The loan was made on the security of Major Anstruther's life interest, as heir of entail in the entailed estate of Thirdpart, and of certain policies of insurance on Major Anstruther's life. The transaction was guarded by certain agreements to secure the application of the loan to the payment of existing encumbrances on the estate—which was already burdened with various securities,—and to prevent any part of it going into the hands of the borrower or his personal creditors till the estate had been made perfectly clear from all burdens, and an undoubted security for the loan. In order so far to carry into effect the conditions of the loan, Mr Wood agreed to apply the sum of £7900 in redeeming certain heritable annuities over the estate, and in paying off other heritable and preferable debts. As this left a sum of £2100 applicable to other purposes specified in the agreement, it was arranged that the money should in the meantime be placed in the Bank of Scotland in the joint names of Messrs Paul and Roy, and this was accordingly done. At the date of this deposit, Messrs Dickson & Stewart, W.S., were personal creditors of Major Anstruther in the sum of £433, 13s. 5½d. due on open account, and they proceeded thereafter to raise an ordinary action in the Court of Session against the debtor to compel payment. Upon the dependence of the action they raised letters of inhibition and arrestment against Major Anstruther, and on 18th June 1835 they executed an arrestment against Messrs Paul and Roy as debtors to Major Anstruther. This arrestment was followed by an action of forthcoming against Mr Roy and Mr Paul, and in it the Lord Ordinary pronounced an interlocutor, allowing the defenders to raise an action of multipointing, calling all parties interested. Accordingly, Mr Roy and Mr Paul, in 1840, brought a summons of multipointing against Major Anstruther, Messrs Dickson & Stewart, Mr Wood, and

others, which summons was conjoined with the action of furthcoming. In these actions disputes arose as to the amount of the fund *in medio*, which was the balance of the £2100 consigned in bank by Messrs Roy and Paul, as above narrated; and the amount having been judicially ascertained, the Court appointed Messrs Roy and Paul to consign the same in bank, and found them liable for the expenses of the discussion relative to the amount of the fund. As Mr Roy had gone to reside in England, Mr Paul was compelled to consign the whole balance of the fund *in medio*, amounting to £1357, 12s. 9d., and to pay the whole expenses, to the amount of £270, 2s. 11d. In these circumstances, Messrs Dickson & Steuart, and others, the parties in right of the foresaid decree of consignation and expenses, assigned the same and their whole rights thereon to Mr Paul, in 1846, who thereupon raised letters of horning and poinding, and also warrant or letters of caption and imprisonment, against Mr Roy. Mr Paul was also sisted as assignee of Mr Wood in the above-mentioned actions of multiplepoinding and furthcoming, and these actions ultimately came to depend between him, as assignee foresaid, and Mr Roy. Mr Paul, as in right of Mr Wood, claimed the whole fund *in medio*. The Court held this claim to be well founded, and also found Mr Paul entitled to his expenses as against Mr Roy, to the amount of £110, 13s. 8d.

In 1846 Mr Paul had filed a bill in Chancery against Mr Roy, praying for relief against him for the loss he had sustained through his (Roy's) absence in the action of furthcoming and multiplepoinding, as above narrated. The Right Honourable the Master of the Rolls dismissed this bill, and found Mr Paul liable in expenses to the amount of £203, 0s. 1d. Mr Paul not having paid these expenses, Mr Roy raised the present action against him for the amount, and interest from the date of decree.

The Lord Ordinary (MACKENZIE), pronounced this interlocutor:—

"*Edinburgh, 21st February 1872.*—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and process, repels the seventh plea in law for the defender, and remits to Mr William A. Brown, advocate, to prepare a case with reference to the question between the parties in regard to the interest claimed by the pursuer upon the sum sued for, in respect of the order in Chancery of the Right Honourable the Master of the Rolls in England, and relative certificate of costs by the Taxing-Master of the said Court libelled on, in order that the same may be laid before counsel learned in the law of England, for opinion.

"*Note.*—The defender does not challenge the validity or regularity of the order or judgment in Chancery of the Master of the Rolls, and of the relative certificate of costs of the Taxing-Master; and while he does not dispute the pursuer's claim for the principal sum sued for, he denies liability for interest thereon.

"The Lord Ordinary is of opinion that the question whether interest is due to the pursuer upon the order of the Master of the Rolls and certificate of the Taxing-Master, must be ruled by the law of England, and he has therefore repelled the defender's seventh plea in law.

"The defender pleads compensation, and he

maintained in argument that, as the pursuer was indebted to him in the sums of expenses, amounting to £135, 11s. 7½d., including one-half of the dues of extract, with interest; and to £110, 13s. 8d., with interest, as set forth in the revised defences, and as the sum due in respect of these expenses and interest exceeds the amount for which the pursuer concludes in his present action, there ought to be no inquiry into the question whether, according to the law of England, the pursuer is entitled to interest at the rate of five per cent. per annum on the amount of the costs sued for from the date of issuing and filing the Taxing-Master's certificate. But the Lord Ordinary cannot adopt that view. The pursuer is entitled to have the amount due to him clearly ascertained, so that if the defender can compensate the same, the difference between the two debts may be fixed. This is all the more necessary where the defender claims to be a creditor of the pursuer for sums exceeding in amount the sums sued for, and has letters of horning and poinding, and of caption, under which he can do immediate diligence against the property and person of the pursuer. In order that the plea of compensation may be received and obtain effect, the amount of the debts on both sides must be clearly beyond dispute, so that the amount of the debts extinguished, and the amount remaining unextinguished and due, may be known when compensation is received, 'he who owed the greater sum is afterwards debtor in no more than the balance or difference between the two debts.'—Erskine, 3, 4, 11 and 16.

The defender reclaimed.

DUNCAN and JOHNSTONE, for him, pleaded that, as the pursuer owed the defender the sum of £135, 1s. 5½d., being half the expenses found against them in the conjoined actions of furthcoming and multiplepoinding, and also the sum of £110, 13s. 8d., as the expenses found against the pursuer in a later stage of the action, the pursuer's claim was extinguished by compensation. Also, that as the defender had used diligence against the pursuer for a greater sum than that concluded for in the summons, the pursuer was not entitled to prosecute the action against him, but that he (the defender) was entitled to have the amount due by him to the pursuer imputed to the debt owed by the pursuer to him.

MILLER and GUTHRIE SMITH for the defender.

During the dependence of the cause parties agreed that interest was due on the expenses given to the pursuer in the Court of Chancery under 1 and 2 Vict. c. 110, sec. 17.

At advising—

LORD PRESIDENT.—The pursuer in this action got decree for expenses against the defender in an action brought by him against the pursuer in the Court of Chancery in England. But the defender not being resident in England, and not having any property there, the decree could not be enforced against him in that country, and could only be enforced in Scotland, the domicile of the defender. That is the reason why the pursuer has raised this action. He asks for decree for £203, 0s. 1d., with legal interest. So far as regards the sum of £203, 0s. 1d., he is merely asking for a decree conform. But so far as he asks for decree for interest, he raises a question not settled by the English decree, viz., what interest runs upon the sum found due. On this point parties were at issue. They are now

agreed that it is settled by statute, and that interest at 4 per cent. is payable from 13th July 1852. But for the defences, the pursuer would be entitled to decree, but then the defender says that the pursuer is owing him a much larger sum than is contained in the conclusion of the summons. He therefore pleads, in the first place, compensation, a relevant and good plea. Further, he pleads that the pursuer, being under ultimate diligence at the instance of the defender for payment of sums greatly exceeding the amount concluded for in this action, is not entitled to prosecute the same, and the defender is entitled to have the amount due by him to the pursuer imputed to the debt owing by the pursuer to him. He further pleads that decree should not be allowed to go out until the claims on the other side are settled. I think there is a great deal of weight in these defences. If the pursuer obtained decree in terms of his summons, he would be able to do diligence against the defender, and compel him to pay the sum of £203, 0s. 1d., with interest, while the defender would be unable to make his diligence effective against the pursuer. The true mode of disposing of the case is to allow the pursuer an opportunity of stating objections to the claim of the defender. That can hardly be done in the present process; but until the pursuer shall in some way or other take steps for ascertaining the state of debt between him and the defender, I do not think he should be allowed to take decree in this action. As the parties are now agreed that the sum bears interest at 4 per cent., I propose that we should recall the interlocutor of the Lord Ordinary, and supersede consideration of the cause until the pursuer has an opportunity of stating in competent form his objections to the claim of the defender.

LORD DEAS—The pursuer has obtained decree in the English Court for £203, 0s. 1d., and parties are now agreed that it bears interest at 4 per cent. The debt is sufficiently constituted; it is not therefore for the constitution of the debt that the pursuer brings this action. The only object of the pursuer is to get a decree which shall enable him to do diligence for that debt. The answer of the defender is that he holds a decree against the pursuer, on the face of it unobjectionable, for a much larger sum. The order upon Paul and Roy in this Court was jointly and severally to consign. The whole sum was consigned by one. The natural result is, that there is a liquid claim against the other for consignment of the other half. Mr Paul thus produces decree for that larger sum, and says, "You are not entitled to take decree against me while I can show an unreduced decree against you for a larger sum." This is not exactly a plea of compensation. The proper remedy of the pursuer is to bring an action to have it determined what is the state of accounts between him and the defender. There is no incompetency in bringing such an action, still less is there any incompetency in bringing a reduction to set aside Mr Paul's decree. I think the right way is to dismiss the action in respect of the circumstances.

LORD ARMILLAN—I agree with your Lordship in the chair as to the way this action should be disposed of. So far as regards the principal sum, it is an action for a decree conform. In addition, it was an action to ascertain interest, but that is now settled. The action is met by Mr Paul by a reference to a decree which he obtained for a larger

sum. The practical effect of giving decree in this action to the pursuer would be to enable him to do diligence in this country against Mr Paul, whereas Mr Paul has no means of doing diligence against Mr Roy, though he holds a decree for a much larger sum. I agree with Lord Deas that compensation is not the proper character of the defence. It is rather that the present is not a fair and legitimate action. But then Mr Roysays, "That decree obtained by Mr Paul was obtained in an action in which I was not a party." We shall best meet the justice of the case by doing nothing in the present action, and giving Mr Roy the opportunity of challenging the decree in favour of Mr Paul.

LORD KINLOCH—I concur in the course suggested. There can be no doubt of the competency of the action. It is an action for enforcing payment. If there was no defence, decree would go out against the defender. The defence is substantially that the debt, for which decree is sought, has been paid already, and a plea of compensation is stated. I think there is, *prima facie*, compensation, arising from the mutual relief between two co-obligants to the extent of one-half. It may turn out that there is no relief, or relief to a smaller extent. The course which your Lordship suggests is the right course, not to give decree, because *ex facie* there is compensation; on the other hand, not to dismiss the action, because the compensation is only *prima facie*.

Agents for Pursuer—Macrae & Flett, W.S.

Agents for Defender—Millar, Allardice, & Robson, W.S.

Thursday, June 20.

WILLIAM DUNCAN (CLERK TO THE CITY OF EDINBURGH ROAD TRUST) v. COUSIN AND OTHERS.

ID. v. LORD CLINTON.

Edinburgh Roads and Streets Act, 1862 (25 Vict. c. 53) 33 and 34—Assessment.

Held that the owners of lands and heritages on one side of a private street within the City of Edinburgh District of Roads, which was intended to consist, and did consist, of a single row of villas—the other side of the street not being available for building purposes—were liable for the whole expense of making up and constructing the carriage-way of the street.

The first of these actions was one at the instance of William Duncan, clerk to the City of Edinburgh Road Trust, and, as such, authorised to sue under the Edinburgh Roads and Streets Act, 1862, against George Cousin, Henry Graham Lawson, and the trustees of the late Andrew Jameson, concluding for payment from the several parties of the sums of £100, 11s. 4d., £45, 18s., and £45, 18s., being the proportions respectively allocated on the defenders of the expense of making up and constructing the carriage-way of Brunsfield Terrace.

Section 33 of the Edinburgh Roads and Streets Act, 1862, provides that "In the case of such private streets as are or may be within the district, and as are not specified in schedule (C) (annexed to the Act), where the carriage-way shall not have been made up and constructed, nothing