

ment for a composition, all the other creditors having been paid in terms of that agreement, as appears from the letter of date May 30th, and the respondent, who had signed that agreement, having refused to accept the amount due to him under it in full of his claim, or to discharge the inhibition, what was the petitioner to do but make the present application? Accordingly this petition was presented about a fortnight after the letter of 27th June had been received. It asks for recal of the inhibition with expenses. I think the conclusion for expenses was altogether reasonable. The inhibition might have been discharged, as was proposed by the petitioner, without any expense to the respondents. But this the respondents refused to do, and no other course was left open to the petitioner but to present this application. I think the conduct of the respondents has been most unreasonable and nimious, and that the petitioner is entitled to his expenses.

I may say that I have formed this opinion after reading the opinions delivered in the case of *Roy v. Turner*, March 18, 1891, 18 R. 717. It is not necessary to make any observation on that case further than to say that, after reading the opinions of the learned Judges who took part in the decision of it, in this case I am of opinion that the respondents should be found liable in expenses.

The LORD JUSTICE-CLERK, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

“Recal the inhibition referred to in the petition, and grant warrant for marking the same as discharged on the Register of Inhibitions, and find Messrs Park, Dobson, & Company liable in the expenses of this application,” &c.

Counsel for the Petitioner—Shaw, Q.C.—Constable. Agents—Wallace & Pennell, W.S.

Counsel for the Respondents—C. J. L. Boyd. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, October 22.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MARSHALL *v.* CALLANDER AND TROSSACHS HYDROPATHIC COMPANY AND OTHERS.

(*Ante*, July 18th 1895, 32 S.L.R. 693, 22 R. 954.)

*Appeal—House of Lords—Effect of Appeal on Decree for Specific Implement within Limited Time—Extension of Period.*

An interlocutor having been pronounced ordering specific performance of certain work which was to be commenced within three months of the date of the interlocutor, the defenders

appealed to the House of Lords. The appeal was dismissed of consent, and the interlocutor was affirmed *simpliciter*. The period within which the work was to be commenced had then expired, but no motion was made for an extension of the period. Held that the period of three months did not begin to run till the date when the interlocutor was affirmed by the House of Lords.

This was an action at the instance of Mr William Marshall against the Callander and Trossachs Hydropathic Company and others. The summons concluded for declarator, *inter alia*, that the defenders were bound to rebuild certain subjects which had been destroyed by fire. The Lord Ordinary on March 1st 1895 pronounced the following interlocutor:—“... Decerns and ordains the whole defenders, jointly and severally, forthwith to proceed to rebuild the buildings of the hydropathic establishment, which were erected on the subjects contained in the feu-contract referred to in the summons in terms thereof, and which were on or about 7th November 1893 destroyed by fire, and that to the extent necessary to maintain said buildings as of the total value of £15,000—said rebuilding to be commenced within three months of the date hereof, to be duly proceeded with to the satisfaction of John Dick Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof: *Quoad ultra* continues the cause.”

The defenders having reclaimed, the First Division on 18th July 1895 pronounced the following interlocutor:—“... *Quoad ultra*, adhere to the interlocutor with this variation, that the rebuilding is to be commenced within three months from the date of this interlocutor.”

The defenders appealed to the House of Lords, but on the 8th May 1896 consented to the appeal being dismissed, whereupon the interlocutors complained of were affirmed *simpliciter*, and the appeal dismissed.

No motion was made by either side to vary the interlocutor by extending the time within which building was to be commenced.

Building not having commenced on 18th July 1896, the Lord Ordinary, on the motion of the pursuer to insist in his alternative conclusions for damages, pronounced the following interlocutor:—“The Lord Ordinary having heard counsel, in respect the defenders have failed to implement the order to rebuild contained in the interlocutor of 18th July 1895, afterwards affirmed by the House of Lords, Finds therefore that the pursuer is entitled to damages: Allows the pursuer a proof of his averments in regard to the amount of damages, and the defenders a conjunct probation thereanent, the proof to be taken on a day to be afterwards fixed.”

The defenders reclaimed, and argued—The interlocutor was premature inasmuch as the defenders had been preparing, and had fully

intended to commence operations before the specified time elapsed. That time ran from the date when the interlocutor became final on the dismissal of the appeal by the House of Lords. The fact that they had inadvertently omitted to have the date altered by the House of Lords did not affect the case. Accordingly the defenders had made preparations to build after the dismissal of the appeal, and would have begun to do so but for the pronouncing of the interlocutor now reclaimed against. There had been no want of good faith on the part of the defenders, such as has been attributed to them by the Lord Ordinary, and on which he based his judgment.

Argued for respondents—The defenders had all through exhibited an absence of *bona fides*. Their appeal to the House of Lords did not necessarily suspend the running of the period for commencing to build, and it was their duty to ask the House of Lords to extend the time. As they had failed to do this the Lord Ordinary had done rightly in view of his doubts of the defenders' good faith, to refuse to extend the time, even if he had the power to do so.

The LORD PRESIDENT—When this case was withdrawn by the appellants' counsel from the consideration of the House of Lords, the parties omitted to advert to the fact that the interlocutor to be affirmed specified a date for the commencement of the work which was already passed. This seems to me to have been the fault of the respondent as well as of the appellants, for the pursuer of an action *ad factum prestandum* is interested, and it is his duty, to obtain a decree plainly specifying what is to be done.

The order of the House of Lords, however, does not present any practical difficulty in construction. In affirming the interlocutor of this division the Lords decided that there was to be re-building, that this was to be forthwith, and that from the date of final judgment three months were to be given for beginning, and two years for finishing the work. That I think is the fair reading of the order, as applied to the pleadings and statements before the House.

Now, the orders of this Court fixing the dates of commencement and completion having been orders of an executory nature, they might have been modified to meet any change of circumstances; and the affirmation by the Lords would probably not have rendered them the less flexible, no question having been raised on them specifically. Neither party, however, came to the Court proposing such a change; and accordingly, when the case came before the Lord Ordinary, the proper footing was that the three months were current from 8th May, the date of the judgment of the Lords. The Lord Ordinary, however, on 18th July 1896, much within the three months, found that the defenders had failed to implement the order to re-build and allowed a proof of damage.

I do not think that this judgment can be supported, and that on the ground that

the time allowed for commencing had not expired.

The pursuer by making this premature motion may have slightly complicated the question of the time of commencement by interrupting the currency of the permitted period and virtually calling on the defenders to stop preparing to build and to pay damages. But the defenders must remember that their primary duty was and is to commence forthwith, and that whether any allowance is to be made for the intervention of the pursuer or not, more than two months of the time of grace had expired before this intervention took place. None of these questions require present decision; nor do I think it necessary that we should do more than recal the Lord Ordinary's interlocutor.

LORD M'LAREN—I concur. I think it is perfectly clear that the true date of the interlocutor considered by the House of Lords is the date on which it was affirmed, the effect of the interlocutor having been suspended by the appeal to the House of Lords. Accordingly, the meaning of the order contained in the interlocutor that the defenders should commence to build within three months is that they must begin to build within three months of the interlocutor taking legal effect, that is, within three months reckoned from the date of the judgment of the House of Lords. It follows, therefore, in my opinion that the Lord Ordinary has been premature in holding that the defenders were in default at the time when his Lordship came to consider the cause.

LORD ADAM and LORD KINNEAR concurred.

The Court recalled the interlocutor reclaimed against.

Counsel for the Pursuer—Sol.-Gen. Dickson—J. Wilson. Agents—J. & J. Turnbull, W.S.

Counsel for the Defenders—H. Johnston—W. Campbell. Agents—Simpson & Marwick, W.S.

## HOUSE OF LORDS.

Monday, July 27.

(Before the Lord Chancellor (Halsbury),  
Lords Watson, Herschell, Morris and Shand.)

METCALFE v. COX.

(*Ante*, vol. xxxiii. p. 405.)

University—*University (Scotland) Act 1889*  
(52 and 53 Vict. c. 53), secs. 16, 15 (3), and  
21 (2).

An Ordinance of the University Commissioners under section 16 of the University (Scotland) Act 1889 incorporating the University College of Dundee with the University of St Andrews, is not