

spirit of the statute that we should review their decision or disregard it. The petitioners have been unable to show that they stand in any different position as regards interest or danger from the tradesmen of their class who have voted against them. As I am not a creditor, and do not sit here to criticise the action of the creditors, I have no occasion to say which side I think had the best of the argument in the question of expediency.

As the argument of the parties often touched the question of reconstructing this company, I think it right to say that if your Lordships continue the voluntary liquidation, subjecting it to supervision, that will not in the smallest degree prejudice the question of reconstruction one way or the other. Whatever their impressions may have been at an earlier stage, the liquidators will now enter on their duties with fresh responsibility and in the spirit of the Court under whose supervision they are to act. It may however reassure the petitioners against any apprehension that the Court will allow this matter, should it ever arise, to be treated as a foregone conclusion, if, following the analogy of the *City of Glasgow Bank* case, we insert in the supervision order an order that unless and until it shall be otherwise directed and ordained by the Court, the liquidators shall not take any steps towards the reconstruction of the company except with the special leave of the Court. With this proviso I think that we should pronounce the usual supervision order and send the liquidation to Lord Stormonth Darling, the petition for an official liquidation being refused.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship that, other things being equal, the wishes of the preponderating majority of the shareholders and creditors ought to be decisive in a question of the kind; but of course if there were any reasons for supposing that the majority of the creditors had interests adverse to the minority, and that they were likely to use those which they possessed to the detriment of the minority, then their convenience ought not to outweigh the obvious justice of the case. In the present case I have not been able to discover any tangible ground for supposing that differences of this kind would exist between different classes of creditors. It is, no doubt, true that the British Linen Company and the Clydesdale Bank are very large creditors, representing perhaps something like the interests of all the others put together; but in the absence of any specialty—and none such was brought to our notice—I must assume that the interest of those banking companies is just the same as that of all the other creditors; that is to say, that it is their interest to get as much as they can out of the estate of their insolvent debtor, and it is no disadvantage, but quite the contrary, that the two powerful commercial companies, deeply interested, should have recommended voluntary liquidation, and should be prepared to take an

active interest in the affairs of this concern.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

“Direct and ordain that the voluntary winding-up of Pattisons Limited, resolved on by the extraordinary resolutions passed at an extraordinary general meeting of the said company held on 19th January 1899, be continued, but subject to the supervision of the Court, in terms of the Companies Acts 1862 to 1898; confirm the appointment of the said John Scott Tait and Robert Alexander Murray as the liquidators of the said company, in terms and with the powers conferred by the said Companies Acts; confirm the appointment of “certain persons” as a committee to advise with the liquidators any matter arising in the liquidation, with power to communicate with the creditors and shareholders generally; and declare that any of the proceedings in the said voluntary winding-up may be adopted as the Court may think fit; declare that the creditors, contributories and liquidators of the said company are to be at liberty to apply to the Court as there may be just occasion; direct and ordain that unless and until it shall be otherwise directed and ordained by the Court, the liquidators shall not take any steps towards the reconstruction of the company except with the special leave of the Court; and further direct and ordain that all subsequent proceedings in the winding-up be taken before Lord Stormonth-Darling, Ordinary, and remit the winding-up to his Lordship accordingly in terms of the sixth section of the Companies Act 1886,” &c.

Counsel for the Petitioners—Lord Adv. Murray, Q. C. — Campbell, Q. C. — J. G. Stewart. Agents—Davidson & Syme, W.S.

Counsel for the Respondents—D. F. Asher, Q. C.—Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, February 3.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

MACKAY *v.* PARISH COUNCIL OF RESOLIS.

Process — Suspension — Caution — Charge
“Under Pain of Imprisonment.”

A party against whom decree had been pronounced at the instance of a parish council for payment of advances made by them for the support of his illegitimate child, and of expenses of process, raised a suspension of a charge given upon the decree “under the pain of imprisonment,” on the ground that the charge was bad, imprisonment

being competent only for alimentary debts, and his debt to the parish council not being alimentary, according to the decision in *Tevendale v. Duncan*, March 20, 1883, 10 R. 852.

Held (rev. judgment of Lord Pearson) that the complainer was entitled to have the note of suspension passed without caution.

This was an action of suspension of a charge and of interdict of diligence following thereon, raised by John Mackay, labourer, against the Parish Council of Resolis.

The facts of the case were as follows:—In an action raised in the Sheriff Court by the respondents against the suspender for payment of advances made by the latter for support of an illegitimate child, of which they averred that the defender was the father, the Second Division, on 5th April 1898, ordained the suspender to make payment to the respondents of £1, 6s. 5d., and subsequently decerned against him for £46, 19s. 2d., being the amount of the respondents' expenses.

Following upon these decrees the suspender received a schedule of charge at the instance of the respondents, charging him to pay the aforesaid sums to them within fifteen days "under the pain of poinding or imprisonment."

The suspender averred—“(Stat. 5) The said charge is irregular and inept. The complainer is charged to pay the various sums set forth in it under the pain of . . . imprisonment. Imprisonment cannot competently follow on a charge given in the circumstances in which the said charge was given. Reference is made to the Civil Imprisonment (Scotland) Act (45 and 46 Vict. c. 42), secs. 3 and 4. The charge is therefore incompetent, and falls to be suspended.”

The respondents, in answer, referred to the charge, and averred—“(Ans. 5) The respondents have no intention of imprisoning the complainer in order to enforce the decree, and undertake not to do so.”

The suspender pleaded, *inter alia*—“1. The complainer is entitled to suspension as craved with expenses, in respect (1) that the charge sets forth a penalty which is incompetent.”

On 14th December 1898 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—“The Lord Ordinary having heard counsel upon the note of suspension and interdict, and answers thereto, on the complainer amending his note to the effect of offering caution or consignment for the amount of the sums charged for, passes the note,” &c.

The Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. c. 42), sec. 4, enacts that “Any sheriff or sheriff-substitute may commit to prison for a period not exceeding six weeks . . . any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process for which decree has been pronounced against him by any competent court.”

The suspender reclaimed, and argued—

The Lord Ordinary had in effect insisted upon the suspender finding caution before the note was passed. He was wrong in doing so. The penalty specified in the charge was poinding or imprisonment. But imprisonment for debt was restricted by section 4 of the Civil Imprisonment Act of 1882 to cases of aliment, and a debt incurred by a father for advances made by the parochial authority for the support of his illegitimate child was not an alimentary debt—*Tevendale v. Duncan*, March 20, 1883, 10 R. 852; *Cain v. M'Cohen*, May 31, 1892, 19 R. 813. These cases decided that a quasi-assignee of an alimentary claim could not inflict the penalty of imprisonment, and consequently the charge was radically bad. The suspender having made out a *prima facie* case, was consequently entitled to have the question tried on the merits without finding caution. To compel him to do so would be to place him, a poor man, in a most disadvantageous position.

Argued for the respondents—It must be admitted that imprisonment was not a penalty available to the Parish Council against the pursuer. But the charge here was in terms of the Personal Diligence Act 1838; it merely echoed the language of the extract-decree on which it proceeded, and the suspender would suffer nothing by it, for if the respondents applied to the Sheriff for warrant to imprison him, he would have an opportunity of convincing the Sheriff, within whose jurisdiction the question properly and exclusively lay, that the debt was not alimentary. The suspender had stated no valid reason why he should not find caution.

LORD ADAM—The interlocutor in this case, which is submitted for review, is in these terms—[*His Lordship quoted the interlocutor, and proceeded*]—The reclaiming-note is presented by the reclainer, and, as I understand, he did not propose to amend his note. The result that was to follow was that the note of suspension would have been dismissed, and the complainer now comes here and says, I am entitled to have my note passed without caution.

The suspension is of a charge on a decree pronounced by the Second Division of this Court, ordaining the complainer to pay the sum of £1, 6s. 5d., and also the sum of £46 odds. The former sum represents the sum advanced by the respondents to the mother of an illegitimate child, and no doubt as between the father and mother it was a sum of aliment. But it was not disputed by Mr Chree that that is not the true nature of the amount due in this case. Therefore the principal debt and the debt for expenses are not alimentary debts, the result being that in no case is imprisonment of the complainer competent to the respondents.

The charge given was “on pain of poinding or imprisonment,” and it appears to me to be perfectly clear that imprisonment for this debt was utterly incompetent. Therefore a charge in these terms is quite improper and irregular. That being so, I think the complainer being served with such a

charge was quite entitled to go to the Bill Chamber and have it suspended in so far as it threatened him with imprisonment.

In these circumstances, and it being a matter of diligence where we all know the law is particularly strict, I am clearly of opinion that the complainer is entitled to have the question tried without finding caution. I express no opinion on the merits of the case. All I propose to say is that the complainer has stated a case which he is entitled to have tried, and I think that in a case of this kind he should not be compelled to find caution. I am therefore for recalling the interlocutor reclaimed against.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to pass the note without caution.

Counsel for the Complainer — Munro. Agents—Ross, Smith, & Findlay, S.S.C.

Counsel for the Respondents — Chree. Agents—John C. Brodie & Sons, W.S.

Tuesday, February 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

WOOD v. NORTH BRITISH RAILWAY COMPANY.

Reparation—Liability for Wrongful Act of Servant—Assault and Illegal Arrest by Railway Company's Servants—Railway—Railway Regulation Act 1840 (3 and 4 Vict. c. 40), sec. 16.

In an action of damages brought by a cabman against a railway company for assault and illegal arrest, the pursuer averred that he was driving a hire to the defender's station; that while still in the approach he was blocked by other cabs in front, and that his hire consequently got out; that he was ordered to move on by one of the railway constables in the defenders' employment, who told him that only certain cabs were allowed to ply for hire in the station; that he moved off accordingly, but that when he was passing round to the exit lane from the station he was hailed for a hire; that he accepted the hire, and got down to put on a box; that thereupon one of the railway constables knocked the trunk out of pursuer's hands; that while the pursuer was remonstrating with the railway constable for doing this, the hire who had hailed the pursuer got into another cab, and that then the pursuer got on to his box and was driving off, when he was seized by two railway constables, dragged violently to the ground, and without a warrant taken in custody to the police office, and charged by them with committing

a breach of the peace, upon which charge he was subsequently tried and convicted. The pursuer averred that the railway constables "in acting as they did were acting in the course of their employment, although they grossly exceeded what was necessary or proper." The defenders pleaded that the pursuer's averments were irrelevant, on the ground that the acts complained of, as alleged by the pursuer, were not within the scope of the railway constables' employment, but also pleaded that they were justified in what they actually did by the conduct of the pursuer, and by the terms of the Railway Regulation Act 1840, section 16. *Held* that the pursuer's averments were relevant.

Res judicata — Conviction on Summary Prosecution not a Bar to Court of Session Action of Damages.

Held that a conviction for breach of the peace, although not submitted to review, and still standing, did not bar the person so convicted from bringing an action of damages for assault and illegal arrest, founded upon the conduct of the persons who made the charge on which he was convicted, when arresting him for that offence.

Gilchrist v. Anderson, Nov. 17, 1838, 1 D. 37, commented on.

Issues—Assault and Illegal Arrest by Railway Constables.

Form of issue *approved* in an action of damages against a railway company for assault and illegal arrest by railway constables in the employment of the company.

This was an action at the instance of David Wood, cabman, Edinburgh, against the North British Railway Company, in which the pursuer concluded for payment of the sum of £100 as damages for being assaulted and illegally arrested by the servants of the defenders while acting in the course of their employment.

The pursuer averred that on the evening of Saturday, 10th September 1898, he was engaged to drive a hire to the Waverley Station, of which the defenders were proprietors; that when the pursuer was driving down the approach to the station he found he could not get into it because of some cabs in front; that the hire thereupon left the pursuer's cab; that cabs were bound by the rules regulating vehicular traffic entering and leaving the station to leave by an exit lane parallel to and to the south of the entrance approach; that in terms of the Edinburgh Hackney Carriage Bye-laws 1887, sec. 55 (20) the north side of the entrance approach was a public cab stance; that when the hire left him the pursuer's cab was at this stance, and there were other cabs in front of and behind him; that it is usual for cabmen who have driven a hire to the station to take up a position on the stance in hope of getting a hire; that immediately after the pursuer's hire had left him "a person named Walter Wilson, in the service of the defenders in the capa-