

I accordingly concur with your Lordships in holding that the appeal should be dismissed.

The Court pronounced this interlocutor—

“... Alter the interlocutor of the Sheriff-Substitute, dated 29th October 1921, by deleting therefrom the second and third findings in law contained therein, and by substituting the two following findings:—(2) The defenders have failed to demonstrate that no injury would result to the rights and interests of the pursuers from the gangway if constructed in Netherkirkgate, and (3) they (pursuers) have proved that their rights and interests would be prejudicially affected by the presence of the gangway if constructed in Netherkirkgate: With this alteration affirm said interlocutor: Repeat the findings in fact and the first finding in law contained therein, and decern.”

Counsel for the Appellants—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—Alex. Morison & Company, W.S.

Counsel for the Respondents—Mackay, K.C.—Dykes. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, November 10.

FIRST DIVISION.

[Lord Hunter, Ordinary.

M'CARROLL v. M'KINSTERY.

M'CARROLL v. BLACKWOOD.

Process—Suspension—Competency—Suspension of Charge on Decree for Expenses Pronounced in foro of Court of Session—Suspension to Maintain Status quo Pending Decision in Action for Reduction of Decree.

Process—Suspension—Competency—Failure to Exhaust Available Remedy—Withdrawal of Appeal to House of Lords.

In an action brought by A against B and C for declarator that certain shares in a limited liability company belonged to him, the defenders were assoilzied with expenses, and on a reclaiming note the Court adhered. A having thereafter discovered a document upon which he alleged his right to the shares depended, moved the Court for leave to have the proof in his action opened up and additional evidence led. His application having been refused he took his case to the House of Lords, but having failed in an application for the benefit of the poor's roll there, withdrew the appeal. He thereupon brought an action of reduction of the decrees of absolvitor in his previous action on the ground that the decrees had been obtained by fraud perpetrated on the Court. Having meantime been charged by B and C to pay the sums contained in the decrees under reduction, A brought a note of

suspension of the charges. *Held* that in the circumstances stated the suspension was competent, it being brought, not for the purpose of reviewing a decree *in foro* of the Court of Session, but for maintaining the *status quo* and preventing immediate execution of the charges pending the decision in his action of reduction. *Held* further that the suspension had not been rendered incompetent by the complainer's failure to exhaust his remedy by withdrawing his appeal to the House of Lords.

Process—Suspension—Caution—Suspension of Decree for Expenses Pronounced in foro of Court of Session.

In a note of suspension of a charge on a Court of Session decree, pronounced *in foro*, the Court refused to ordain a complainer to find caution as a condition of the note being passed, it being the purpose of the note to maintain the *status quo* pending the decision of an action at the complainer's instance for reduction of the decree on the ground that it had been obtained by fraud perpetrated on the Court, in which action the complainer had shown a *prima facie* case.

Process—Suspension—Bill Chamber—Sist of Process in Bill Chamber—Competency.

Circumstances in which the Court recalled the interlocutor of the Lord Ordinary sisting process in the Bill Chamber, and remitted to the Lord Ordinary on the Bills to pass the note expressly without caution, the process to be sisted in the Court of Session.

Peter M'Carroll, 151 Canning Street, Bridgeton, Glasgow, *complainer*, presented two notes of suspension in which he craved the Court to suspend *simpliciter* two charges to pay the sums of £318, 8s. 11d. and £525, 18s. 9d., which sums were contained in extract decrees for expenses against him in the names respectively of James M'Kinstery, turf commission agent, Johnstone, and Dugald Blackwood, ironfounder, Johnstone, *respondents*, both of whom had been assoilzied with expenses in an action brought by the complainer against them.

The *facts* of the case sufficiently appear from the opinion of the Lord Ordinary on the Bills (HUNTER), who on 17th August 1922 pronounced the following interlocutor—“... Continues the interim sist of execution, and sists process *in hoc statu*.”

Opinion.—“The complainer in these two notes of suspension has been charged to make payment to the respondents of two sums of £525, 18s. 9d. and £318, 8s. 11d. These two sums represent the taxed amount of the expenses payable to the respondents by the complainer under decrees of the Court of Session, dated 13th July 1922 and 16th May 1922. Those decrees were pronounced in an action brought by the complainer against the respondents to have it found and declared that certain preference and ordinary shares in J. Fyfe Donald & Company, standing on the register of shareholders of that company in name of the respondent M'Kinstery, truly belong in pro-

perty to the complainer. From the conclusions of this action the respondents were assilized with expenses.

“At the proof which was led before Lord Ormidale the complainer explained that he received a back letter from M'Kinstery but that he had lost the document. He was unable to give any satisfactory explanation of its disappearance. The case for the respondents was that M'Kinstery held the shares as a security for the complainer for payment of a sum of £1000 advanced to the other respondent, and thereafter for behoof of the latter, to whom they belonged in property. In support of their contention they produced a letter of acknowledgment by the respondent M'Kinstery in favour of the other respondent.

“After the case had been decided against him by the First Division of the Court, who adhered to the interlocutor of the Lord Ordinary, the complainer says that he was informed by a Mr M'Avoy that he had in his safe a document relating to shares and signed by the respondent M'Kinstery. He explains that the backing of the letter erroneously purports that the letter was granted by M'Avoy in favour of the complainer. Owing to that error the letter had been retained by M'Avoy under the belief that it related to certain dealings between him and the complainer. In and since 1916 the complainer had searched in vain in his own repositories for the letter. I have seen the original of the document, and it bears out the explanation given by the complainer. I have also compared the signature thereon with admittedly genuine signatures of M'Kinstery, and the resemblance is very striking. The complainer has now brought an action of reduction of the said decrees on the ground that they were obtained by fraud, and as the respondents have charged him to make payment of the expenses to which they were found entitled thereunder he has brought the present notes of suspension.

“For the respondents it was maintained that the suspension was incompetent. It is settled that a decree pronounced by the Court of Session cannot be set aside by suspension. The object of the complainer, however, is not to reduce the decree in the present process, but merely to maintain the *status quo* pending a decision in the action of reduction raised by him. No authority was cited to me to indicate that a suspension brought for this purpose was incompetent, and I therefore reject the respondents' contention.

“The next question is whether the complainer ought to be ordained to find caution as a condition of the note being passed. In the ordinary case it would only be right to attach this condition. The present case, however, appears to me to be of a very exceptional character. Although the Lord Ordinary, before whom the case was tried, decided in favour of the respondents, he made very strong comment upon the untrustworthy character of their evidence. If the complainer is right in his contention as to the existence of the back letter by M'Kinstery—and there is at all events strong

prima facie evidence in his favour—a gross fraud has been perpetrated upon the Court. If the complainer is ordained to find caution he may be unable to proceed with his action, and the real facts connected with what in any view are extremely discreditable proceedings may not be disclosed. For reasons stated by Lord Ormidale the complainer is not entitled to much consideration. It is, however, not in the public interest that a gross fraud against the Court, which has either been committed by the respondents or is now being perpetrated by the complainer, should go unpunished. I shall therefore meantime sist execution without making any order as to caution.”

The respondents reclaimed, and argued—The notes of suspension being presented for the purpose of reviewing decrees *in foro* of the Court of Session were incompetent. Nor was it competent to suspend a Lord Ordinary's decree which had become final through an error—*Irvine v. Valentine*, 1793, 3 Pat. 287; *Stewart v. Leslie*, 10th December 1811, F.C.; *Scott v. King*, 1831, 10 S. 67; *Young v. List & M'Hardie*, 1862, 24 D. 587. The complainer should have delayed raising the original action until he was in possession of his adminicle of evidence, namely, the back letter upon which his claim depended. Further, he had failed to exhaust the remedy which was properly open to him in withdrawing his appeal to the House of Lords, and accordingly the notes of suspension were incompetent—*Dante v. Assessor for Ayr*, 1922 S.C. 109, 59 S.L.R. 101. There being, further, no irregularity on the face of the decrees upon which these charges were made, the Lord Ordinary should have ordained the complainer to find caution as a condition of his note being passed—*Hardy v. Brown, Barker, & Bell*, 1907, 15 S.L.T. 539. If caution was not to be found, the Lord Ordinary should have dispensed with caution expressly—*Gilbertson v. Ballantine*, 1851, 13 D. 995. Further, it was incompetent for the Lord Ordinary to sist process in the Bill Chamber. The note if well founded should have been passed into the Court of Session, where process could have been sisted—*Mackay's Manual*, p. 610 *et seq.*; *Clippens Oil Company, Limited v. Edinburgh and District Water Trust*, 1906, 8 F. 731, *per* Lord President Dunedin at p. 750, 43 S.L.R. 540.

Counsel for the complainer were not called on.

LORD PRESIDENT—We have before us reclaiming notes in two actions of suspension which form part of what is unfortunately a considerable litigation. Mr M'Carroll claimed to be owner of a group of shares in a limited liability company which were in fact registered in the name of Mr M'Kinstery. His case was that Mr M'Kinstery's registration was qualified by a back letter in accordance with which Mr M'Kinstery acknowledged that he held these shares for Mr M'Carroll. A Mr Blackwood on the other hand maintained that the shares in question were his, and that Mr M'Kinstery's registration was qualified by a back letter in terms of which

his (Mr Blackwood's) shares were held by Mr M'Kinstery in the first instance as security for a loan which Mr M'Carroll had made to Blackwood, and *secundo loco* for Blackwood himself as the true owner. The litigation in which these claims were put forward passed through the Outer and Inner Houses of the Court of Session and went to the House of Lords. Unhappily for Mr M'Carroll the back letter upon which he founded was not forthcoming, and on the parole evidence coupled with the production of the back letter on which Mr Blackwood founded, Mr M'Carroll lost his case. After judgment in the Inner House Mr M'Carroll presented a minute in which he alleged that he had discovered the missing back letter upon which his proprietary rights in the shares depended, and moved this Court, although final judgment had been pronounced in the action, to open up the proof and whole proceedings which had been concluded. That motion was not successful, and although he took his case to the House of Lords we are told that, being refused the privilege of the poor's roll there, he withdrew his appeal. Since then he has raised an action in the Outer House of the Court of Session in which he concludes for reduction of the decrees pronounced in the action which ended as I have just described, and the ground of the reduction is, as we are told, that the decrees of which he complains were obtained by fraud perpetrated on the Court. The action in which that ground is put forward now depends before Lord Blackburn and has actually reached the Procedure Roll, the debate in which I understand was concluded a day or two ago. Meanwhile the decrees under reduction which carry with them the expenses of the action in which they were pronounced are being enforced against Mr M'Carroll, and the object of these two suspensions is to suspend the execution of charges upon these decrees—the ground being that while the issue of the reduction action is in doubt it is not right or proper that the decrees for expenses should be enforced against him, and his capacity of vindicating his rights in the reduction action correspondingly hampered. From what I have said it is clear that the situation is a very unusual one.

In the first place it is argued that these suspensions are incompetent. That argument is based upon the undoubtedly sound principle that a suspension is an incompetent method of reviewing a decree *in foro* of the Court of Session however competent it may once have been to resort to that method of reviewing similar decrees of inferior courts. But the simple answer to that is that these suspensions are not brought for the purpose of review. They are brought for the purpose of preventing immediate execution of those charges and for no other purpose. Even so it is true that to resort to suspension for the purpose of preventing immediate execution of a charge on a decree for expenses is very rare. But as I have said the circumstances of these notes are peculiar, and I see

nothing incompetent in resort to the process of suspension in those circumstances.

Then it is said that on the merits the case for suspension is not well founded. It is said that by persisting in his appeal to the House of Lords Mr M'Carroll might conceivably have induced the House of Lords to open up the proceedings in the former case, to order a new proof, and so open the way possibly to a different judgment from that which was pronounced in the Court of Session. Not having done this Mr M'Carroll, it is argued, failed to exhaust his remedy, and must abide by the adverse judgment which at present stands against him. I think it is in vain to argue thus, and for this reason. The course which the pursuer has adopted is no mere alternative to the course of carrying out his appeal to the House of Lords, but a completely different remedy founded upon entirely different facts. The remedy of reduction is founded upon the alleged fact that they were impetrated from the Court by fraud. That being so I am for affirming both the competency and the propriety of suspending the decrees in question.

The remaining matter in the case has given me more difficulty, and that is as to whether the case is one in which caution ought to be found. I am disposed to acquiesce in what the Lord Ordinary has done, not only by the peculiar circumstances of the case but by the fact that the action of reduction itself is already so far advanced, and by the further circumstance that the Lord Ordinary who arrived at this conclusion about caution had evidently satisfied himself that Mr M'Carroll has at any rate a *prima facie* case. Accordingly, though I admit with some difficulty, I think it is best to follow the same course as that adopted by the Lord Ordinary.

One other matter remains, and that is one purely of form. It is pointed out that what the Lord Ordinary has done involves not only a continuation of the interim sist of execution but actually a sist of the process in the Bill Chamber. I desire to say nothing at all as to whether, or if at all, or in what circumstances, a sist of process in the Bill Chamber is a competent course to follow. I think we should follow what is undoubtedly the ordinary course of procedure, namely, that the note itself should be passed, expressly without caution, and that the process should only be sisted thereafter. If that course approves itself to your Lordships then it will be necessary to make a remit in order that the notes may be passed without caution. The process can then be sisted, not in the Bill Chamber, but in the Court of Session.

LORD SKERRINGTON—These reclaiming notes involve both a question of law and a question of discretion. Upon each of these questions I think that the Lord Ordinary has come to a right conclusion for the reasons stated in his opinion and also for the reasons which your Lordship has summarised. I further agree as to the appropriate procedure which we ought to follow.

LORD CULLEN—I am of the same opinion.

The Court recalled the Lord Ordinary's interlocutor, as also the interim sist of execution, and remitted to the Lord Ordinary on the Bills to pass the notes without caution, and decerned.

Counsel for the Complainer—Morton, K.C.—Scott. Agents—Bowie & Pinkerton, S.S.C.

Counsel for the Respondent, M'Kinstery—Macphail, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for the Respondent, Blackwood—Maclaren, K.C.—Ingram. Agent—John Baird, Solicitor.

Saturday, November 18.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

RODGER v. FIFE COAL COMPANY, LIMITED.

Reparation—Master and Servant—Negligence—Breach of Statutory Duty—Management of Mine—Mine under Control of Manager—Responsibility of Owners at Common Law for Death of Miner—Averments—Relevancy—Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), secs. 49 and 2 (4).

The Coal Mines Act 1911 enacts—Section 49—“The roof and sides of every travelling road and working-place shall be made secure. . . .” Section 2 (4) provides—“The owner or agent of a mine required to be under control of a manager shall not take any part in the technical management of the mine unless he is qualified to be a manager.”

The father of a miner who had been fatally injured in the course of his employment brought an action against his employers for damages at common law, and alternatively for compensation under the Employers' Liability Act 1880. In support of his claim at common law the pursuer averred that the defenders, a mine-owning company, in failing to secure the roof committed a breach of section 49 of the Coal Mines Act 1911, as a result of which contravention his son was killed. The defenders maintained that statutory liability had not been relevantly averred against them, in respect that under section 2 (4) of the Act the mine-owner was debarred from taking any part in the technical management of the mine. *Held* that a case of statutory liability against the defenders had been relevantly averred.

David Alexander Rodger, miner, 83 Nainmyth Place, Kilty, and Mrs Jane Innes or Rodger, his wife, *pursuers*, brought an action against the Fife Coal Company, Limited, *defenders*, whereby they sought to recover payment of the sum of £250 each as damages at common law, or alternatively of the sum of £200 each as compensation under the Employers' Liability Act 1880, in respect of the death of their son Robert

In support of their claim at common law the pursuers averred, *inter alia*—“(Cond. 1) The pursuers are the parents of the deceased Robert Rodger, who was killed on 24th March 1921 as the result of an accident in the Aitken Pit, Kilty, where he was employed by the defenders. (Cond. 2) On said date the said Robert Rodger, who was then fifteen years of age and was employed as a drawer working with his father, was sitting at the foot of No. 4 branch in the Glassee Section, Ramsay's Mine, taking his 'piece,' when a carrying girder across the entrance to the branch gave way and fell on the said Robert Rodger. Immediately after the fall of the girder a considerable portion of the roof also fell on the said Robert Rodger, and as a result he died almost immediately. . . . (Cond. 5) Section 49 of the Coal Mines Act 1911 provides that 'the roof and sides of every travelling road and working-place shall be made secure.' Said No. 4 branch and the level off which it ran were both travelling roads, and in breach of said section the defenders failed to secure the roof at the entrance to said No. 4 branch, and the said Robert Rodger was killed as a result of this contravention. . . . (Cond. 6) The said girder was too short for the purpose for which it was used, and the use of such a girder at the entrance to No. 4 branch was due to defenders having failed to provide proper material for the use of the officials whose duty it was to see that the roof was kept secure. If a bar or girder of the proper length had been provided, *i.e.*, one sufficiently long to overlap the line of the branch, the accident would not have happened. . . .”

The pursuers pleaded, *inter alia*—“1. The defenders having contravened section 49 of the Coal Mines Act 1911 by failing to make the roof at the entrance to said No. 4 branch secure, and the said Robert Rodger having been killed in consequence, are liable in damages to the pursuers at common law. 2. The defenders having negligently failed to provide the necessary material for the purpose of supporting the roof at the entrance to said No. 4 branch as condescended on, and the accident to said Robert Rodger having happened in consequence, the defenders are liable to the pursuers in damages at common law.”

The defenders averred, *inter alia*—“. . . Explained that the roof at the entrance to No. 4 branch was secured in accordance with recognised mining practice, and everything which was reasonably practicable to secure the roof was done. It was not reasonably practicable to prevent the alleged breach. The defenders duly published and enforced all the provisions of the Coal Mines Act 1911 and all the rules enforceable thereunder, and the mine was managed in conformity therewith. The defenders also selected with due care and diligence a proper and competent person as mine manager, and furnished him with adequate materials and resources for the work. In particular, they provided iron girders of sufficient length and strength for use at the foot of said No. 4 heading. Explained further that H. M. Inspector of Mines inspected the *locus* immediately after