

not, the committee suggest that should the second course be adopted, members should be asked to cancel their notices only on the express understanding that these cancellings are not to be used unless shareholders representing at least nine-tenths of the amount under notice of withdrawal should cancel their notices within a limited time." The committee added that it was for the shareholders to say which of these two courses should be followed, but the majority of the committee strongly recommended the adoption of the second course. The meeting, the minutes bear, gave a general approval to the committee's report, and the committee were instructed to send out circulars to those unadvanced shareholders who had given notice of withdrawal, inviting them to cancel their notices. Notices were sent out accordingly, many were returned in compliance with the invitation, and among the others were cancellations by Mitchell, and those who along with him are the present appellants.

These being the facts of the case, I am of opinion that the cancellations in question were conditional. The notices were issued by the committee, who had power only to ask for conditional cancellations, and they were returned upon the understanding on which they had been solicited. This is my reading of the proceedings of the society, and I am glad that for the sake of those concerned with the management of its affairs, this is the conclusion at which I have arrived, for anything less creditable to the society than an opposite result could scarcely be imagined. Entertaining this view, I think the decision of the Sheriff-Substitute upon this point should be altered, and that the present appellants, in place of being placed with those who are in Schedule M, should be placed with those, and should have the same rights as are possessed by those, who are in Schedule L of the paper upon which judgment has been pronounced by the Sheriff-Substitute.

LORD RUTHERFURD CLARK and LORD YOUNG concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

"The Lords, having heard counsel for the appellants, and for the respondents James Coutts and John Mitchell, in respect of no opposition, find Schedules G, H, and K entitled to the preference conferred upon them in the scheme of ranking submitted by the liquidators: Find that the balance-sheet for the year ending 31st January 1881, approved on 28th July 1881, is the balance-sheet for said year, in accordance with which members withdrawing after 31st January 1881 fall to be paid, and that such members are entitled to payment at the rate of 60 per cent. upon the subscriptions standing at their credit in the books of the society at 31st January 1881, with bank interest thereon as provided by rule 76, according to priority of their respective notices to withdraw: Find in fact that the cancellation of his notice of withdrawal sent in by the respondent John Mitchell was conditional upon nine-tenths of the members who had given notice of

withdrawal, likewise cancelling their notices: Find further in fact that nine-tenths of the members under notice of withdrawal did not so cancel: Therefore find in law that the cancellations were inoperative, and that the party John Mitchell and other members in the same position are in the ranking entitled to all rights of withdrawing members, as of the dates when their respective notices of withdrawal were sent in: Appoint the expenses of the liquidators and the parties John Crawford Stewart and others, James Coutts, and John Mitchell in this Court as well as the Court below, as said expenses shall be taxed, to be paid by the liquidators out of the funds of the liquidation."

Counsel for J. C. Stewart and Others—J. P. B. Robertson—Shaw. Agents R. R. Simpson & Lawson, W.S.

Counsel for Liquidators—Gloag—Strachan. Agents—Davidson & Syme, W.S.

Counsel for James Coutts—Pearson—Orr. Agents—Irons, Roberts, & Lewis, S.S.C.

Counsel for Mitchell—Guthrie Smith—Guthrie. Agents—Snody & Asher, S.S.C.

Saturday, May 16.

SECOND DIVISION.

[Lord McLaren, Ordinary.

CLARK v. MONTEITH AND ANOTHER.

Process—Diligence—Charge—Appeal to House of Lords—Execution Pending Appeal—Effect of Order of House of Lords on Unexpired Charge on Decree for Expenses.

The unsuccessful party in an action was charged by the agent disburser of the successful party to pay the expenses for which decree had been obtained. Before the charge expired he appealed the cause to the House of Lords, and served his petition of appeal. The respondents having three months thereafter obtained an order for execution pending appeal, proceeded to execute a pouncing without giving any fresh charge. *Held* that no fresh charge was necessary, and that the proceedings were competent.

In an action raised in the Court of Session in December 1883 by Andrew Clark, S.S.C., against Mrs Margaret Jack Field or Monteith for payment of an account alleged by him to be due to him by her, decree of absolvitor was pronounced by the Lord Ordinary in March 1884, and subsequently adhered to by the Second Division in June thereafter. Decree for the defender's account of expenses was thereafter pronounced on 3d July following, in name of William Paterson, solicitor, as agent disburser for the defender. This decree was extracted by Paterson, and Clark was charged on it on 17th July. On 29th July Clark presented a petition of appeal to the House of Lords against the interlocutors of the Lord Ordinary and the Second Division, and obtained an order for service, which was served upon Paterson for himself, and for behoof of Mrs Monteith, on 1st August 1884. Cases were

ordered by the House of Lords to be lodged in February 1885.

On 15th October 1884 Mrs Monteith and Paterson, as agent disburser, presented a petition to the Second Division for execution pending appeal, setting forth that in consequence of the petition of appeal, and the order of the House of Lords to lodge cases, Paterson could not proceed with his diligence without an order from the Court. On this petition the Court allowed execution to proceed to the effect of enabling Paterson to recover payment as agent disburser of the expenses, he and Mrs Monteith always finding caution before extract to repeat the expenses in the event of the decision on the merits being reversed. In accordance with this order Mrs Monteith and Paterson procured a bond of caution, which was lodged with the Clerk.

On 24th November Paterson wrote to Clark saying (in reference to some previous correspondence) that that was the third time that he had sent for payment of his expenses, and that unless he had payment by three o'clock of that day he would be forced to place the extract decree in the hands of a messenger, with instructions to proceed.

On 26th November a messenger-at-arms, instructed by Paterson, proceeded to Clark's dwelling-house and poinded certain of his household effects, and a warrant of sale of these was obtained by Paterson from the Sheriff on 1st December. No charge had been given to Clark upon the extract-decree granting execution pending appeal, but the extract thereof was placed in the hands of the messenger before he proceeded to execute the poinding.

Clark then lodged the present note of suspension and interdict against Mrs Monteith and Paterson to interdict the sale of the poinded effects. He averred that the respondents not having given a charge upon the extract decree granting warrant for interim execution, the poinding was therefore wrongful, illegal, and malicious. He offered consignation of the expenses in the first decree.

The complainer pleaded—“(1) The grounds and warrants of the only charge given by the respondents being under appeal to the House of Lords, the said charge was, until said appeal is disposed of, without valid warrant and of no legal effect. (2) The poinding complained of not having been preceded by any charge which warranted it, the complainer is entitled to suspension and interdict.

The Lord Ordinary on the Bills on 3rd December appointed answers to be lodged, and on consignation granted interim interdict; on 16th December passed the note and continued the interim interdict; and on 27th February 1885 the Lord Ordinary (Lord M'Laren) repelled the reasons of suspension and interdict, and found the charge and procedure orderly proceeded.

“*Opinion.*—By a decree of the Court of Session dated 3rd July 1884 the complainer was ordered to pay the amount of a certain account of expenses to Mr William Paterson, the agent-disburser. The respondents obtained an extract of this decree for the purposes of execution, and on 17th July gave the complainer the usual charge to pay the debt within fifteen days. A petition of appeal was thereafter presented to the House of Lords, praying for a reversal of the judg-

ment of the Court of Session in the case in which the decree for payment of expenses was pronounced. An order of service having been obtained, the appeal was served on the respondents on 1st August, being, as I understand, the last day of the *inducie* of the charge.

“On 15th October the respondents moved in the usual manner for execution pending appeal. On 29th October an order for interim execution pending appeal was made by the Second Division of the Court conditionally on the respondents finding security to repay the amount of the expenses found due by the decree of 3rd July, in the event of the interlocutor appealed from being reversed. Security was found to the satisfaction of the Clerk of Court, and the necessary bond was executed by the cautioner, and is now in the keeping of the Accountant of Court. These preliminaries being accomplished the respondents proceeded to execute their decree. A messenger instructed by them poinded certain household effects of the complainer, his authority being (1) the expired charge to obey the decree of 3rd July, and (2) the warrant for interim execution pending appeal.

“I should have thought that the complainer had by these proceedings received all the ceremonial attentions from his creditor which the most exacting of debtors could desire. But it appears that the complainer conceives himself to be entitled to a second charge upon the original decree for expenses, and, although able, he is unwilling to pay until summoned in proper form. I have not been able to find any good reason why the complainer should be indulged with a second charge. The view of the complainer, if I rightly understand it, is that the appeal followed by service put an end to the charge. I think that the order of the House of Lords only suspended the effect of the charge. When the House of Lords affirms a decree of the Court of Session without variation execution always proceeds upon the original decree, because its effect is only suspended during the prosecution of the appeal, and I cannot understand how the appeal should have a suspensive effect upon the decree, and a rescissory effect upon the proceedings consequent on the decree. The Legislature has empowered the Court of Session to authorise execution pending appeal, and I think this is another proof that the effect of the decree is only suspended. Now, when an order for interim execution is granted the meaning of that order must be that the creditor is to be allowed to proceed as if the appeal were withdrawn or dismissed. In either case the creditor is remitted to his legal remedies exactly as if no appeal had been brought—that is to say, he is entitled to take up the proceedings at the point where they were interrupted, and to go on until he recovers payment. A second charge would, if my opinion is well founded, be a wholly superfluous proceeding, and a proceeding which the debtor would not be entitled to require as a solemnity antecedent to the fulfilment of his obligation to pay. If in this case there had been any sharp practice—any abuse of the forms of legal diligence—it would be competent to the Court in the exercise of its preventive jurisdiction to suspend the execution of its own decree, in order that the complainer should have an opportunity of avoiding the poinding by payment. But I am satisfied that in this case the complainer

had ample notice, and that no injustice has been done. In the note of suspension the complainer does not offer payment, but asks for an unconditional interdict against carrying the pointing into execution. I think that the respondents were within their rights in putting the pointing in force, and that the complainer is not entitled to the interdict which he desires."

The complainer reclaimed, and argued—The service on the respondent before the expiry of the days of charge of the order for service of the House of Lords had the effect of arresting further diligence in the extract decree for expenses of the Second Division. To enable the diligence to be proceeded with, the respondent should have given the complainer a second charge on the extract decree pronounced in the petition for interim execution, for otherwise he could not be judicially certiorated that caution had been found—*Russel v. Scott*, M. 8123; *Shand's Pract.* 50 Geo. III., c. 112, Sched. D; *Beveridge's Forms of Process*, p. 365; *Mackay's Pract.* ii. 479, 1 and 2 Vict. c. 114. He denied that he ever knew that caution had been duly found.

The respondents replied—The extract decree in the petition for interim execution contained no warrant to charge. Besides, the warrant to charge in the decree for expenses was not evacuated, but only sisted in its operation by the order of the House of Lords. A charge once given on an operative decree could be got rid of only, namely, by final decree in a process of suspension—*Lynch v. Buchanan*, July 19, 1857, 13 D. 1402; *E. P. and D. Ry. Co. v. Rowan*, July 13, 1852, 14 D. 1001; *Dick*, M. 15,158. The respondents had taken the only course open to them to enforce their decree for interim execution, and there was no inequity in the proceedings, of which the complainer had ample notice.

At advising—

LOLD JUSTICE-CLERK—Every question arising out of the pursuit of diligence is very properly watched with great care, and therefore I cannot say I am sorry we have had this discussion, but I must own I am rather surprised, because I have always supposed that although the order for service in an appeal stops execution of the decree which has been appealed, it does not in any way affect the jurisdiction of this Court to allow interim execution pending appeal, and that that matter remains under the exclusive jurisdiction of this Court, and proceeds exactly as if there had been no order for service at all. Accordingly, I think the decree for payment of the expenses was perfectly available after interim execution of it had been allowed, and that the case was too clear for argument except for the circumstance that the Court in allowing interim execution made it a condition that caution should be found; but in the meantime the original decree for expenses had been made the subject of a charge, and the Court having thereafter allowed interim execution to be made, the question comes to be whether the original decree and charge stands good as a warrant for the diligence in this case? Now, the order for service had no effect on the decree for expenses as soon as interim execution had been allowed. All proceeds as if there had been no such order, and did in this case so proceed, and the party was bound to know this. I can imagine a case of such undue delay that the party

charged may be able to show that he has been taken by surprise, and the Court may have to interfere to put a stop to the oppressive use of diligence, but there is no case of that sort here, and I can see no ground for setting aside this diligence.

LOLD CRAIGHILL—I concur in the view of the facts and of the law of the case which has been taken by your Lordship and by the Lord Ordinary, and therefore I am of opinion that the interlocutor reclaimed against ought to be affirmed. What we have to decide is the meaning of the interlocutor by which interim execution was allowed. Does it mean that the diligence might be taken up at the point at which it was suspended when the appeal to the House of Lords was intimated, or does it mean that the diligence was to begin *de novo* and the reclamer be charged again as if he had not been already charged for payment of the contents of the decree? The former appears to me to be the true meaning of the interlocutor. It was set forth in the petition for interim execution "that the order issued by the House of Lords having been served on the petitioner's agent, the said William Paterson as agent disburser could not proceed further with his diligence without an order from this Court," and an order authorising execution pending the appeal was therefore asked. Upon this application the Court "allowed execution to proceed on the said extract decree to the effect of enabling the said William Paterson to recover payment as agent disburser of the said expenses with expenses of extract." To proceed further was the thing for which authority was asked. The charge had already been given, and it seems to me to be the necessary implication that the charge which had been given was the point from which the further execution that was necessary was to start. This is, I think, the reasonable interpretation. There is no authority against it, and so far as it appears it is consistent with the ordinary practice upon decree for interim execution. Upon this simple view of the matter my opinion is this reclaiming-note ought to be refused.

LOLD RUTHERFURD CLARK—I am very clearly of opinion that this is a suspension which should never have been brought. I cannot conceive any proper purpose which it can serve, and I am very sorry to see it here. On the merits—if one can use such a term—of the case there is, I confess, some nicety. I do not doubt in the least that the pointing must proceed on the original decree, because there is no other existing decree on which it can proceed. The question is, What is the effect on the diligence of the sist of procedure by the order of the House of Lords appointing service of the petition of appeal? It seems somewhat anomalous that a charge on a decree—I mean the days of charge—should consist partly of days before and partly of days after the allowance of interim execution on caution being found. But I do not think it in the least necessary to go into that question. I see no injustice in what has been done, and I am prepared to throw out the suspension, which, as I said, should never have been brought.

LOLD YOUNG was absent.

The Court adhered.

Counsel for Complainer (Reclaimer)—Rhind—
Gunn. Agent—Party.

Counsel for Respondents—Salvesen. Agent—
William Paterson, Solicitor.

Tuesday, May 19.

SECOND DIVISION.

[Sheriff of Argyleshire.

M'PHERSON v. WRIGHT AND SINCLAIR.

Bill of Exchange—Noting—Protest—Disconformity of Date—Arrestment.

Where a dishonoured bill bore to be noted on 24th September and the protest was dated the 25th, held that the protest, being disconform to the noting, was invalid, and ineffectual as a foundation of diligence.

Retention—Bank—Cautionary Obligation of a Bank Agent for Overdrawn Account of Customer—Arrestment.

A bank agent owed a tradesman a sum of money for goods supplied to his family. The tradesman was a customer of the bank, and had overdrawn his account, and for that overdraft the bank agent was liable to the bank. A creditor of the tradesman arrested in the hands of the bank agent the debt due by him to the tradesman. *Question*, Whether the agent had a right of retention in respect of cautionary obligation, and therefore whether the arrestment was good?

John Sinclair, a flesher in Inveraray, being indebted to James M'Pherson, farmer, Kilblaan, accepted a bill of exchange drawn on him by M'Pherson for £34, 6s. 9d., which ran as follows:—

“£34, 6s. 9d. Inveraray, 21st Aug. 1882.

“One month after date pay to me or my order, within the National Bank of Scotland (Limited) here, the sum of Thirty-four pounds, 6s. 9d. sterling, value received.”

The bill was presented for payment, but not paid. It was then protested for non-payment, and noted by a notary-public as follows—“24th November 1882, A. M., N. P.” The extract registered protest bore, however, as the date of protesting the bill, not, as in the noting, the 24th November (which was a Sunday), but the 25th. Under this extract registered protest M'Pherson used arrestment to the amount of £36 sterling in the hands of Q. M. Wright, agent for the Union Bank at Inveraray, where Sinclair had an account. He thereafter raised this action of furthcoming against Wright as arrestee and Sinclair as common debtor to obtain the sum arrested, stating that the common debtor supplied goods to the arrestee and his family, and that the arrestee was indebted to him (the common debtor) to the amount of the sum arrested. Wright's defence was twofold:—(1) That the protest was not in conformity with the noting on the bill, and was invalid. The noting on the bill was dated 24th November 1882. The diligence following on that protest was inept and illegal. (2) He explained that at the date of the arrestment he owed nothing to the common debtor; that at that date the common debtor had overdrawn his account kept with the Union Bank of

Scotland's branch at Inveraray, which was under his (Wright's) charge as bank agent, to the extent of £39, 4s. 1d.; and he, as agent for the bank, was responsible to the bank for that overdraft; that at the same date the amount standing on the passbook between the common debtor and himself was £25, 15s. 6d., which sum he was entitled to retain, and did retain, as against the larger balance of £39, 4s. 1d., due by the common debtor on his bank account, as above mentioned; that it was quite understood and agreed to between the common debtor and him (Wright) that the balance on the passbook should be set off against the overdraft on the bank account.

The common debtor also defended the action, maintaining that on a proper accounting the pursuer was due him a large sum, and that the bill had been extinguished by payments and counter claims.

The defender Wright pleaded—“(1) The protest founded on being disconform to the materials for the protest noted on the bill is invalid and not entitled to any faith, and the diligence following thereon is inept. (4) This defender being entitled to a right of retention against the common debtor for payment of the balance due by him on his bank account, there was no debt due by this defender to the common debtor which could be attached by the arrestment.”

The Sheriff-Substitute (CAMPION) pronounced this interlocutor:—“Finds (1) that on 15th December 1882 the pursuer James M'Pherson, arrested, conform to extract registered protest, in the hands of the defender Q. M. Wright, all sums of money due by him to the common debtor John Sinclair; (2) that there was admittedly at that date a sum of £25, 15s. 6d. sterling in the hands of Wright, due as per passbook to the common debtor for meat supplied by him; (3) that it is incompetent to set off against that debt for goods supplied a sum due by the common debtor for an overdrawn account to the Union Bank of Scotland, of which the defender Wright is agent; therefore grants decree in favour of pursuer for the sum of £25, 15s. 6d. sterling, together with the expenses of process against the defender Q. M. Wright.”

“*Note*.—The arrestment following upon the extract registered protest is in due form, and it is admitted that there is a sum of £25, 15s. 6d. in the hands of the defender Q. M. Wright, due per passbook to the common debtor John Sinclair.

“Several defences have been set up. The first is against the protest and all diligence that followed thereon, in consequence of the bill having noted upon the face of it 24th September 1882, which was a Sunday. The bill fell due on 21st September, and there is noted on the face of it the third day after the 21st, being the 24th, but all the necessary steps are taken upon lawful and proper days and in proper form. The Sheriff-Substitute therefore repels all objections stated against the bill and extract registered protest. . . .

“There remains then what is really the chief defence to this action stated for the defender Q. M. Wright. Wright is a bank agent, and has allowed the common debtor to overdraw his account to an amount of £39, 4s. 1d. He pleads