is not to be considered as a Royal Palace? and if so, whether this privilege, which attaches not to the person or goods, but to the place, should or does afford a protection against the diligence complained of, although the King may not have resided there for a great many years? Now looking to the existing state of the Palace, the ceremonial still kept up there, the royal permission to reside, and the other circumstances all tending to show that it is to this hour viewed as a palace of the King—and considering that this privilege in Scotland is the same as the privilege recognized and sanctioned here, I cannot agree that the privilege does not attach and save the effects in the royal residence from being carried off by poinding. The diligence granted here was actually to force the apartments. As to the permission given by the Baron Bailie of the Abbey, it was a permission to poind, not to use letters of open doors; and it applied to the Sanctuary, and did not bear to extend to the Palace. But here the privilege claimed is not what attaches to the Sanctuary, but to the Palace; and the circumstance of the Palace being placed within the precincts of the Sanctuary cannot affect or impair the privilege of the Palace. In absence, therefore, of all authority to show that this diligence had ever been attempted before—it being unquestionable that Holyroodhouse has not been abandoned as a Royal Palace by his Majesty, and that actual presence of the King is not necessary to preserve the existence of the privilege—however much I may deplore that my opinion does not coincide with that of the Court below, I cannot move your Lordships to affirm the judgment brought before us. I may add, that, although the question was not decided on its merits, I perceive that the Second Division, on advising the Bill of Suspension presented by the Officers of State, entertained sentiments different from what have led to the judgment.

Feb. 22, 1826.

Appellants' Authorities.—Maitland's History, p. 144; Ross's Lectures, v. 1, p. 333—144; 3 Coke, 45, p. 140; 2 Raymond's Reports, 978; 4 Campbell, p. 45; and 10 East's Reports, p. 578; Chitty on Perogative, c. 14.

J. Richardson, Solicitor.

No. 2.

Dr Balmanno, Appellant.—*Keay—Jno. Campbell.*
Duncan M'Nee, Respondent.—*Adam—Abercrombie.*

Prisoner—Indefinite Payment—Bankrupt.—A creditor having drawn a dividend from the sequestrated estate of his debtor upon the sum total of a debt payable by four instalments, of which the two last were not yet due,—Held (reversing the judgment of the Court of Session) that the dividend was not imputable towards the total extinction of the first and second instalments, but was to be considered as a payment of so much on each pound of the whole debt.

Feb. 24, 1826.

1st Division.
Lord Meadowbank.

Dr Balmanno, who was proprietor of a druggist-shop in Glasgow, sold the whole concern in 1820, with its debts, utensils, and stock, to Duncan M'Nee, for £1800. M'Nee, along with two co-obligants, John M' Nee and John Wilson, gave a

Feb. 24, 1826. bond for the price, the principal to be paid by four instalments of £450 each—the first instalment on 1st July 1821; the second on 1st July 1822; the third on 1st July 1823; and the fourth on 1st July 1824; with interest on the whole sum from the 1st of July 1820.

Duncan M'Nee's estate was sequestrated on the 9th February 1822, under the Bankrupt Statute, 54 Geo. III. c. 137. At this date, so far as related to the bond, Dr Balmanno had received £100 towards payment pro tanto of the first instalment, due on the 1st July 1821. By the 47th section of the Bankrupt Statute, it is enacted, 'That in all questions upon this act, persons 'to whom the debtor is under obligation to pay money at a certain future time, shall be accounted creditors de presenti for 'the amount of the money, discounting the interest to the term 'of payment specified in the obligation, and may prove their 'debts in the same way as other creditors, and shall be entitled 'to the rateable dividends accordingly.'

Under this clause, Dr Balmanno ranked on the bankrupt estate for £1840, 3s. 6d., being the whole balance due on the bond, with interest on the sum total (according to the stipulation in the bond) to the date of sequestration. He then put his bond on record, and having raised diligence on it, he incarcerated M'Nee on 21st May 1822, for payment of the first instalment of £450, which was due on the 1st of July 1821, under deduction of the partial payment of £100.

The second instalment of £450 became payable on 1st July 1822, making the amount (deducting the £100) then exigible £800.

On the 17th of May 1823, a dividend was paid from the bankrupt estate of 10s. 2½d. per pound, which, calculated on the ranking of £1840, 3s. 6d., amounted to £939, 5s. 1d. On the 20th, John M'Nee, one of the co-obligants, paid £500 to account of the bond, and John Wilson, the other co-obligant, granted bills at four, eight, and twelve months, for a composition of 2s. 6d. per pound; so that at this time Dr Balmanno had received in cash upwards of £1400, while the debt actually due was only £800, exclusive of two years' interest. Immediately on receiving these payments, Dr Balmanno restricted the diligence, by an indorsation on the caption, to the balance of the principal of the 1821 instalment and the interest which had accrued subsequent to the sequestration, on the principle of applying the whole composition to the whole debt, and, of course, to each instalment proportionally. He made a similar restriction with reference to the compositions paid by the co-obligants.

The second instalment of the bond had been due since July 1822, and for this Dr Balmanno used diligence on 20th May 1823, against M'Nee in jail, restricting the caption to £40, as the balance due after deducting from this instalment the rateable proportion of the composition received.

Feb. 24, 1826.

In November 1823, M'Nee presented to the Court of Session a bill of suspension and liberation, praying for suspension of the diligence executed in relation to the first and second instalments; and in support of his bill, he maintained that he was entitled to apply the whole dividend received by Dr Balmanno, in extinction of the instalments actually payable at the date of the diligence; so that both of these instalments had been more than paid in the month of May preceding.

The bill having been passed without caution by Lord M'Kenzie, on advising with the First Division, and Lord Meadowbank having reported the case to the Court on informations,—

Lord Hermand observed,—Although the statute authorizes a creditor to rank for a future debt discounting interest, and to receive payment of the dividends; yet this cannot entitle him to detain his debtor in prison for a sum not yet payable.

Lord Balgray.—There is at first sight a conflict of legal rules, arising from those established by the common law and those by the Bankrupt Act. When the first caption was executed, there was nothing paid except £100; so that the diligence was at this time lawful. But then Dr Balmanno, in virtue of the Bankrupt Statute, ranked for and drew a dividend on the whole debt. When, therefore, he received that payment, he was bound to impute it to the part of the debt which was actually due; and, at all events, he was not entitled to execute diligence for the part which was not payable, while he had full payment in his pocket of the instalments then due. The question as to the legality of the diligence must be decided by the rule of the common law, and it is clear that, according to it, Dr Balmanno was not entitled to detain M'Nee in prison, and, therefore, that the diligence must be suspended.

Lord Gillies.—This is a question of some difficulty, but my opinion is in favour of M'Nee. The sole object of the Bankrupt Statute was to facilitate and equalize the payment of the debts due to the creditors. This was intended both for their benefit, and eventually for that of the bankrupt. But it is contrary to its spirit to hold that a creditor can incarcerate his debtor in circumstances which he could not do under the common law. Here the debt was payable in four instalments, and after the second fell due, Dr Balmanno received out of his debtor's estate

Feb. 24, 1826. more than he could exact at common law. He ceased therefore to be a creditor to the effect of doing diligence; and it would be a libel on the Law of Scotland to say, that in such a case a creditor might incarcerate his debtor before the term of payment.

Lord President.—I am of the same opinion. This question must be governed by the common law. The rules of the Bankrupt Statute do not apply to it. They relate merely to the ranking of the creditors among themselves, and can have no effect in a question as to the lawfulness of diligence; and therefore, as Dr Balmanno had received more than was payable, he could not lawfully put his diligence in force.

Lord Succoth.—I am of the same opinion.

The Court therefore suspended the letters simpliciter—found Dr Balmanno liable in expenses, and on the 25th May 1824, refused a petition without answers.*

Dr Balmanno appealed against these judgments.

Appellant.—The point is very simple, and resolves into a narrow question of law, Whether or not the dividend paid to the Appellant must be held to have extinguished out and out the first and second instalments then due, or to spread over the whole sum for which the bond was granted; thus leaving at the time when diligence was used a certain portion of the two first instalments unsatisfied. The payment here must be regulated by statute. The act enables the creditor to prove the whole debt, although the term of payment has not arrived; and the dividend on this debt can be held as nothing else than a payment of so much of every pound of the sum proved. Any other doctrine would lead to the greatest injustice. For instance, in the case of the three first instalments being unsecured, but the last being protected by a cautioner, according to the respondent's reasoning, the dividend would extinguish the unsecured instalments, and throw the whole of the fourth on the cautioner. In the same way, in the case of these several sums having been assigned away, or where the instalments had formed the contents of separate bills, and had been indorsed away, the assignee to the last instalment, or the holder of the last bill, would receive nothing, although the dividend is calculated upon the whole amount of the instalments added together. The point has accordingly been settled in the law of England, in Martin v. Bricknell, 2

* See 3 Shaw and Dunlop's Cases, No. 42.

Maule and Selwyn's Reports, p. 39, in the way contended for by the appellant. The appellant could not have incarcerated the respondent for any of the instalments until they actually fell due; nor could he have proved the whole debt, the day of payment not having arrived, except by aid of the statute. But having proved, the dividend is calculated upon the whole debt, and must go, not to extinguish any particular part or portion which happens to be first due, but is a payment of so much in every pound of which the whole is composed.

Feb. 24, 1826.

Respondent.—The appellant was not entitled to impute the dividend in payment of distant instalments—The statute does not countenance such a doctrine—It was enough to allow debts with future periods of payment, to be proved as if already due; but the Legislature did not mean to go farther. The appellant did not raise his diligence under any clause in the Sequestration Statute of Scotland, but exercised a common law right. The application of the dividend must therefore be governed by the rules of the common law, and consequently extinguish totally the instalments which had fallen due. If so, then when the diligence was used, the respondent was not due the appellant the sums for which he was incarcerated. If the payment had come from any other source, the first instalments would have been extinguished, and only the balance applied to the more distant instalments. In the case put of cautioners for the last instalment, distinct and separate debts are created, and the cases no longer remain parallel.

Lord Gifford.—But could you reason the case differently with the cautioner than with the principal? What is the effect of the payment of this dividend? Is it not an extinction of so much of every pound?

Abercrombie.—It does not seem to us that such is the necessary conclusion. Besides, independent of the expressed desire of a party, the application of a payment may be gathered from facts and circumstances; and it is plain that M'Nee must have intended the payments to save him from incarceration.

The House of Lords ordered and adjudged, 'that the inter-'locutors complained of be and the same are hereby reversed, 'and that the letters be found orderly proceeded.'

Lord Gifford.—My Lords, this is a case of considerable importance. It appears that the respondent became insolvent, and that his effects were administered under a sequestration. Dr Balmanno, the appellant, not only came in under that sequestration, but also used diligence against the

Feb. 24, 1826. respondent; and it is admitted that, by the law of Scotland, as it now stands, it is competent for the party coming in under a sequestration, not only to take the benefit of that sequestration, but to use diligence against the party. However hard that law may appear to your Lordships to be, that is the law of Scotland, and your Lordships, sitting in a judicial character, can only administer the law as it stands, without attempting a correction of that law, which correction must be applied, if at all, by the Legislature itself.

My Lords, in this case the facts are briefly these. The respondent, Mr Duncan M'Nee, having purchased a concern which was carried on by Dr Balmanno, as a druggist, in Glasgow, entered into a bond, with two sureties, to secure to Dr Balmanno the sum of £1800. That sum was to be payable by certain instalments, the first to become due on the 1st of July 1821, and the remaining three at the end of the three following years, together with interest upon the whole debt till the instalments were paid. After this bond had been given, Mr Duncan M'Nee became, as I have stated to your Lordships, insolvent. A sequestration was awarded against him, and, as it is stated at the bar, with the concurrence of Dr Balmanno himself.

By the Bankrupt Law of Scotland, a party, to whom a debt is due, which is payable in futuro, may come in as a creditor de præsenti for the whole of his demand, making a rebate for the amount of interest.—(His Lordship here read clause 47th of the Bankrupt Act.)—Under this section of the 54th of the late King, Dr Balmanno proved the whole amount of the debt, namely, the sum of £1800, it being payable with interest. The interest was not proved under the sequestration, but he proved as for a present debt, the whole sum of £1800.

My Lords, a dividend was declared on Mr Duncan M'Nee's effects of 10s. 2½d. in the pound—the amount is not material. Dr Balmanno recorded his bond, and incarcerated Mr M'Nee, after some of those instalments had become due, for those instalments; and then, when he was paid the dividend, he made a deduction from the amount of the debt due by Mr Duncan M'Nee, according to the proportion of the dividend upon the instalment, in respect of which he had used diligence. This gentleman, Mr M'Nee, on the other hand, contended that the dividend declared under the sequestration, to the amount of 10s. in the pound, (speaking in round numbers,) amounting therefore to £900, ought to be applied in the first instance to the total payment of the instalments which had become due; that it was not to be considered as a payment rateably upon the whole amount of the debt, but that it was incumbent upon Dr Balmanno to apply the amount of the dividend in extinction of the instalment which had become due; because it was said, that upon the principles of the common law, according to the law of Scotland, that which a man had received, in the way in which Dr Balmanno had received this sum of money, in part payment of the debt, was to be applied in extinction of the instalment which had become due, and not to be considered as extending itself rateably over the whole amount of the debt.

My Lords, the Court of Session have been unanimously of opinion that the law ought to be considered as Mr M'Nee has construed it, namely, that Dr Balmanno was bound to apply his money in extinction of the instalments as they became due. On the other hand, it was contended, that looking at the sequestration, the payment must be considered not as an extinction of the instalments as they became due, but an extinction of so much in the pound upon the debt, and cases have been put in this House, and have been put in the Court below, which applied to that view of the case. Suppose, my Lords, there had been different sureties on those different instalments, the obligation on the part of the principal being to pay £450 at the end of each of four successive years; that there had been a distinct surety *A* to the first, a distinct surety *B* to the second, a distinct surety *C* to the third, and a distinct surety *D* to the fourth. Under the sequestration law, Dr Balmanno was entitled to come in, and was bound to come in as for a debitum de præsenti, receiving a dividend upon the whole of that debt, namely, £1800. But if he received five shillings in the pound, by way of composition, (which would amount to £450,) if he were bound to apply that in extinction of the first instalment, the effect of that would be that the surety for the first instalment would be entirely exonerated, and the sureties for the other instalments would remain liable for the whole of the debt. I apprehend, my Lords, that was not the intention. The law is, that when a creditor comes in under the sequestration, he is entitled to receive a dividend upon the whole of his debt. What is the dividend? It is 10s. in the pound upon the whole of his debt. Then what he has received is 10s. of each pound which he has proved, by which receipt he has reduced his debt from £1800 to £900. But if he had been paid 19s. in the pound, the argument of the respondent would be, that the surety for the last instalment would be liable for that instalment; whereas, by the effect of the dividend paid, three of the instalments, as well as four-fifths of the other instalment, had been discharged.

My Lords, an English case has been cited at your Lordships' bar. With respect to English cases, though the principle on which they are decided very often applies to Scotch cases, we must be extremely cautious, in deciding Scotch cases, not to be led aside by the effect of English cases. However, my Lords, an English case may be referred to in a case like the present, because the law upon the subject is very much the same in the two countries. That case occurred in the Court of King's Bench, where a question arose as against a surety, and where the same argument was used, as has been used here on the part of the respondent, namely, that the creditor ought to apply the dividend he had received in extinction of the instalments as they became due, and not rateably over the whole amount of the debt. That case was decided while Lord Ellenborough presided in the King's Bench, and the Court were clearly of opinion that was an incorrect view of the case, and that the money was to go, so far as it went, in extinction of the whole debt.

My Lords, the argument has turned upon the principles of the law of Scotland as applicable to this case; for no case has been cited before your

Feb. 24, 1826. Lordships, nor was any one cited in the Court below, in which this question has before occurred. The Court below seem to have proceeded on general principles, conceiving, and I apprehend conceiving rightly, that in trying a common law action the principles of common law were to be applied. They seem to have thought, however, looking at the Sequestration Act, that it had no effect upon the common law question. But it appears to me that the question must be decided with reference to the operation of the Sequestration Act; for if that has the effect of extinguishing so much of the whole debt, by applying the 10s. in the pound of the amount of the whole debt, the Court, when they came, in the proceedings at the instance of Dr Balmanno, to consider whether the instalment had been paid or not, were bound to see in what manner he had received the dividend, and how far it was applied under the Sequestration Act. I must confess, if the question is to turn upon the construction of the Sequestration Law in Scotland as affording the rule in this case, that with all the respect which we are bound to feel, and which no one feels more than myself, for the decisions of the Court of Session, and particularly when we have the unanimous decision of one Division of that Court, and, as it has been stated at your Lordships' bar, with the concurrence of several of the learned judges of the other Division, I feel it, my Lords, due to a decision so pronounced, at least to take a little time for further consideration before I advise your Lordships to reverse these interlocutors. If I were to act upon my present impression, I must confess to your Lordships, considering the general question in the cause, I entertain the strongest opinion against the decision of the Court of Session.

But then it has been urged, particularly by one of the learned counsel for the respondent, that even considering the principle upon which the Court of Session has decided to be wrong, still by a minute examination of these accounts, it will appear that the decision of the Court of Session, although not to be supported on the principles, on which it was supposed to be decided, ought to be supported by your Lordships on the facts of the case. My Lords, with respect to some of the reasonings of the counsel for the respondent, as to the sum paid by Mr Wilson, one of the sureties, and Mr John M'Nee, another of the sureties, it appears to me, on a cursory perusal of the suspension of the respondent himself, that he treats these payments as payments not made in respect of the instalments which had then become due, but as a sum paid, five shillings in the pound I think by one, and two shillings and sixpence by another, upon the whole of the debt, in which case again, according to the very act of the parties, the payment which had been made was not a payment which could, as between the sureties and the principal, be applied in extinction of the particular instalment which had become due, but must be considered as a payment, in respect of the whole debt; and in consequence of that payment those sureties were discharged from any further liability in respect of the future instalments, which might become due. If the payment was made in that manner, as I apprehend it is stated by the suspender (the present respondent) himself, I conceive that this payment must be ap-

plied not in extinction of the instalments that had actually become due, Feb. 24, 1826. but rateably in extinction of the whole debt.

My Lords, there are some other observations which I think it is due to the respondent's counsel to consider further before I proceed to advise your Lordships upon this part of the case; and having made these observations I shall move the adjournment of this case till next Friday morning, and if I find on consideration, that I have in any degree mistaken the general principles of law on which this case was intended mainly to be discussed, I shall state that to your Lordships; or if I find on the investigation that there is any weight or force in the observations made with respect to the mode of accounting between these parties, more particularly as applied (for I think they more particularly apply) to the second suspension, I will, having availed myself of the opportunity between this and Friday morning, of further considering the observations made by counsel, take the liberty of calling your Lordships' attention to these circumstances.

I now move your Lordships that this case stand for further consideration on Friday morning.

Ordered accordingly.

Lord Gifford.—My Lords, there are two cases in which Dr John Balmanno is appellant and Duncan M'Nee is the respondent; and at the conclusion of the argument on Tuesday last, I took the liberty of stating to your Lordships, what my impression then was; and that impression not concurring with the judgment of the Court of Session, and which judgment has been appealed against, I thought it right, out of respect to that decision, and the importance of the result of those cases, to the parties themselves, to ask your Lordships' indulgence, that the final decision might stand over until this day, that I might have an opportunity of duly considering the opinion which I had then formed, and of again looking through the papers, to see that the facts had been correctly impressed upon my mind. My Lords, upon due consideration I still remain of the same opinion which I then took the liberty of expressing.

My Lords, the question at law in this case arose out of the following facts. Dr Balmanno, the appellant, who it seems was a physician, was also the proprietor of a considerable business at Glasgow as a druggist. It appears that he disposed of this business to the respondent, Duncan M'Nee, for the sum of £1800. My Lords, Mr M'Nee, not being able to pay down that sum to Dr Balmanno, entered into a bond as a security to Dr Balmanno with two sureties, dated October 8th, 1820, and by that bond he secured to Dr Balmanno this sum of £1800 by four instalments of £450 each; the first to be paid on the first of July 1821, and the remaining three instalments on the first of July in each of the following years, with interest upon the principal sum from the first of July 1820, until the several instalments were paid.

My Lords, after the respondent had entered into this bond he fell into embarrassments, and finally a sequestration issued against his estate. I should state to your Lordships, that by the Law of Scotland a party, who

Feb. 24, 1826. is a creditor, though he comes in under a sequestration against the debtor, may at the same time adopt against that debtor common law proceedings. In that respect the law of Scotland differs from the law of England, and certainly it may be a question whether it would not be beneficial that the laws of the two countries should be assimilated in that respect; but whatever hardship this state of the law may operate, your Lordships are to decide according to the principles of the law as it at present exists. It has been contended that this is a hard and an oppressive case upon the respondent M'Nee; but this case, my Lords, is not to be decided upon the principles of hardship, but according to the principles of law.

My Lords, by one of the clauses in the Sequestration Act, if a creditor has a claim upon the debtor, which falls due at a future time, he is allowed to come in under the sequestration as for a present debt. Under this statute, Dr Balmanno ranked as a creditor for the full amount of his debt, namely, £1800. He also, as I have stated to your Lordships, proceeded at common law against Mr Duncan M'Nee. After that procedure, the appellant received under the sequestration a dividend of ten shillings and two pence, I think, in the pound. The dividend was paid upon the whole demand, namely £1800. That dividend in amount more than exceeded the first instalment, namely the first payment of £450. It was afterwards contended in the course of these proceedings in the Court of Session, that inasmuch as Dr Balmanno had through the medium of the sequestration received a sum of money more than equivalent to the first instalment, he was bound to apply it in liquidation of the instalment altogether, and consequently that Mr M'Nee ought to be free from the common law proceedings. On the other hand, it was contended by Dr Balmanno that though it were true that he had received more than the first instalment, yet it ought not to go in total liquidation of that instalment in the first instance; for your Lordships perceive that that dividend was a dividend upon the whole demand. In simple language he had received 10s. 2d. in the pound upon the whole of this £1800. The appellant contended that all that M'Nee had liquidated under the commission of sequestration, was, in fact, a dividend to be applied proportionally to the first instalment, and that the remaining part of the dividend was to be applied in liquidation of the other instalments, and presented the case in this way:—Supposing, that instead of there being two sureties for the whole amount of the money due upon the different instalments, A had been security for the first, B for the second, C for the third, and D for the fourth. Was it to be contended on the part of the surety A, who had been surety for the first £450, if Dr Balmanno had sued him for the difference between the first and second instalment, that he was to be free from the whole of the first instalment, and throw the onus of paying the future instalment on the subsequent sureties? It appears to me, my Lords, impossible so to contend. Surety C would have said, that the first instalment had not been paid. It is true that the creditor has received a sum of money greater than that to which the first instalment amounted, but he has received it not in respect of the first instalment only, but in respect of the whole demand—therefore the

first security is only discharged pro tanto, that is, to the extent which that dividend of 10s. 2d. in the pound would liquidate, and not for the remainder.

It appears to me, my Lords, that that argument is quite unanswerable. It must be admitted, that if this payment be a discharge against the principal, it must be against the surety. A similar question occurred in this country; and although no decision under the Law of England can apply to, or govern, a decision under the Law of Scotland, yet in principle the two cases appear to be the same. That case (Martin *v.* Brecknell) is to be found in 2 Maule and Selwyn's Reports, p. 39, where a creditor sued a surety for a first instalment under similar circumstances to the present. It was not for the first, but for the third or fourth; but that makes no difference in the argument. The surety said; 'You proved the debt against 'the principal de præsenti, and the dividend you have received is more 'than sufficient to discharge that instalment, how can you sue me for 'that?' The answer by the creditor was, 'It is true I have received 'that sum of money, which in amount is more than the instalment that is 'due; but that sum of money is composed of a dividend of 10s. in the 'pound, upon *every* pound of my demand;' and it was admitted in that case, that there were no decisions under the Law of England which would apply to that state of facts. It was argued upon principle, that where a sum of money was paid generally, though it was larger than the first instalment, yet it was to be taken as a payment of so much only upon every pound of the sum due, as it would amount to; and therefore, that it only discharged that portion of the debt to which it was applicable. In this case it must be decided upon principle; and in that way the decision in the case to which I have referred equally applies to this, for there is no case in the Law of Scotland to govern that which is now under your Lordships' consideration.

The Court of Session say this is a proceeding at common law; and whatever might be the result under a sequestration, sitting here in a Court of common law, as this is a payment greater than the first instalment, we must apply it according to common law principles. But I think they were bound to see under what circumstances it was paid. It was a payment made under the Bankrupt Statute, and clearly in respect of the whole debt of £1800; so that in fact it was, if I may use the expression, a statutable payment, and was a payment of so much in the pound upon the whole sum of £1800, and not a definite payment of a particular part, as they considered it, and which was bound to be applied to the first instalment. I confess that the impression of the principle which I conceived, on Tuesday, ought to govern the case, has been confirmed by reading the papers, and I think that the Court of Session have erred upon a general principle of law.

My Lords, after this sequestration, it appears that the sureties themselves fell into difficulties, and a composition was agreed to by Dr Balmanno, in consequence of which he received a dividend of 5s. 6½d. in the pound from one of them, and 2s. 6d. from the other. It appears that

Feb. 21, 1826. there was a second proceeding—a second detainer lodged against the respondent Duncan M'Nee, for the balance of a subsequent instalment. A bill of suspension was then presented to stay proceedings against him for the future instalments—upon the same principle, that the dividend which Dr Balmanno had received under the commission, and the sums he had received from the sureties, would more than equal the amount of the instalment then due; and that they ought not to be applied to the future instalments, but to be applied to the past. Now, he states in the bill of suspension, 'that it is admitted under the hand of Dr Balmanno and his 'agent, that on the 17th May 1823, a dividend of 10s. 2½d. had been re'ceived from the suspender's estate upon the accumulated principal and 'interest; 5s. 6d. from M'Nee, the cautioner (that being 5s. 6d. in the 'pound upon the whole debt); and from another cautioner, John Wilson, '2s. 6d. upon the debt; but the complainer was not set at liberty.' In that very bill he states that the appellant had only received 10s. 2d. *in the pound.* The cases coming on together, the Judges of the Court of Session were of the same opinion in this case as they were in the former—that the appellant was obliged to apply the dividends received in discharge of the past instalments, though, I confess, it appears to me, upon looking at the agreement between the principal and the sureties, and all that had taken place, it was a dividend of so much in the pound upon each instalment.

My Lords, it was supposed that there was a wrong computation, which does not appear to me to have taken place in this case at all. It appears to me that there was a sum of money due to Dr Balmanno upon the first proceeding as well as the second; and, therefore, I am under the necessity of proposing to your Lordships that the judgment pronounced by the Court of Session be reversed. I apprehend your Lordships' judgment would be, to reverse the interlocutors, and repel the reasons of suspension. Much as I may regret taking a different view of this case to that which has been taken of it by the Court of Session, I do state, after a very anxious consideration of the case, that I have no difficulty in saying that the principle on which they have decided is erroneous; therefore I must move your Lordships that these interlocutors be reversed.*

FRASER, Solicitors.

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* A separate report of the other case alluded to has been considered unnecessary.