died on 13th November 1882, leaving the said last will and testament dated 21st September 1881, and recorded in the Sheriff Court Books of the County of Kincardine 6th January 1883.

The petitioners stated—"The said last will and testament was executed in Scotland. It was not holograph of the deceased. In so far as the first witness, the petitioner Mr Garrett, is not designed except in the body of the deed, where he is nominated one of the executors, and there being nothing to show that the executor and the witness of the same name are the same person, and in so far as the second witness Captain Annesley Garrett is nowhere designed in the body of the deed, or in the testing clause thereof, the deed is informally executed in the sense of section 39 of the Conveyancing (Scotland) Act 1874. It is therefore necessary for the petitioners, under section 39 of the said statute, to present the present petition to have it declared that the said last will and testament was subscribed by the granter or maker thereof, and by the witnesses by whom the said deed bears to be attested. The petitioner Mr Garrett, one of the witnesses, is correctly designed in the said deed. The other witness, Captain Annesley Garrett, Bengal Staff Corps, is Assistant Adjutant-General, Hydrabad Contingent, Bolarum, India."

The petitioners moved the Court to authorise the Sheriff-Clerk of Kincardineshire to deliver to the petitioners or their agents the said deed, for the purpose of exhibiting the same to Captain Garrett, the witness resident in India.

Authorities—*Duncan and Others, Petitioners*, July 14, 1842, 4 D. 1517; *Jolly, Petitioner*, June 25, 1864, 2 Macph. 1288; *M'Laren, &c.*, v. *Menzies*, July 20, 1876, 3 R. 1151; *Inglis, Petitioner*, March 17, 1882, 9 R. 761; *Browne and Others, Petitioners*, Nov. 4, 1882, 20 S.L.R. 76.

The Court pronounced this interlocutor:—

"Grant commission to W. B. Jones, Esq., commissioner, H.M.I.C.S., Lieut-Col. J. G. Bell, judicial commissioner, Lieut-Col. J. T. Bushby, deputy commissioner, Major H. C. A. Izezepanski, deputy commissioner, respectively, all of them being in Her Majesty's Indian Civil Service, and each of them in order failing the other, for examination in India, upon oath, of Captain Annesley Garrett, Bengal Staff Corps, Assistant Adjutant-General, Hydrabad Contingent, Bolarum, India, as a witness for the petitioners; and to Mr W. J. N. Liddall, Advocate, Edinburgh, for examination upon oath of James Hugh Moore Garrett of Saintfield, County Down, Ireland, one of the petitioners, also as a witness for the petitioners—the said depositions to be taken on written interrogatories adjusted in common form: And on the further motion of the petitioners, Grant warrant to and authorise the Sheriff-Clerk of Kincardineshire or his deputy to deliver to the agents in Edinburgh for the petitioners the last will and testament in the petition mentioned, dated 21st September 1881, and recorded in the Sheriff Court Books of the county of Kincardine of date 6th January 1883, that the same may be produced before the commissioners or commissioner aforesaid at the taking of the said depositions or deposition, the petitioners granting caution in common form with sufficient security to the amount of £200 to return the said deed to the said Sheriff-Clerk or his deputy *quam primum*; and previously to the same being delivered to their agents, an extract of the same duly executed being lodged with the said Sheriff-Clerk: The depositions above mentioned to be sealed up by the commissioners or commissioner and transmitted in due course to the Clerk of this process, and to remain subject to the orders of the Court."

Counsel for Petitioners — Guthrie. Agents —John Clerk Brodie & Sons, W.S.

Wednesday, July 11.

FIRST DIVISION.

[Bill Chamber—Lord Kinnear.

(Before Seven Judges.)

BALERNO PAPER MILL COMPANY *v.* MACKENZIE.

Diligence — Imprisonment for Debt — Order to Consign — Decree ad factum præstandum — *Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 4.

An order of Court to consign a sum of money in the hands of the Clerk of Court is a decree *ad factum præstandum*, and the Debtors (Scotland) Act 1880 does not therefore affect the competency of imprisonment for failure to obtemper such an order.

The defender in an action admitted that he was bound to account to the pursuers for a sum of money in his hands, but maintained that he was entitled to retain it pending a full accounting. He was ordered by the Court to consign the money admittedly in his hands in the hands of the Clerk of Court. He failed to do so, and was imprisoned at the instance of the pursuers. *Held*, by a majority of seven Judges (*diss.* Lords Shand and Craighill), that the imprisonment was competent, and that he was not entitled to suspension of the warrant of imprisonment.

George Mackenzie, James Good, and John Thomas Tod Scoular were the partners of the Balerno Paper Mill Company. The copartnery was entered into in 1878. The partners made certain contributions to the capital stock of the company, and were to take certain shares of the profit and loss. Good being a paper-maker by trade took charge of the mill, Scoular kept the books, and Mackenzie acted as traveller. Disputes arose between the parties in the course of the years 1881 and 1882. Good and Scoular alleged that in October and November of that year Mackenzie had begun to retain moneys belonging to the copartnership which were collected by him, that the business was injured thereby, and that he refused to give an account of his intromissions. They brought an action of count and reckoning against him, making these averments, and averring also that he was preparing to leave his house and declined to say where he was going. They concluded, failing an account being produced, for a balance of £1500 as the amount of his intromissions. In defence to this action Mackenzie

averred that he had regularly accounted for and paid over all funds collected by him to Scoular till February 1881, when he discovered that the books were not being properly kept, and had been to some extent mutilated and destroyed; that he obtained a promise that this would be rectified and the books balanced, but finding in July 1881 that this had not been done, he began, while giving a specific note as before of the funds collected by him that they might be entered in the books, to retain them, this being done with full knowledge of both his partners. He averred that the balance would on a just accounting be found to be in his favour. He admitted having collected and having in his hands by list of accounts produced by the pursuers, and admitted to be correct, a sum of £1425, 13s. 11d., and pleaded that he was entitled to retain this sum pending a proper accounting by an accountant, which he desired.

The Sheriff-Substitute, after hearing parties in the debate roll, pronounced this interlocutor—"Decerns and ordains the defender George Mackenzie, within eight days after intimation to him of this interlocutor by an officer of Court, to consign in the hands of the Clerk of Court the sum of £1425, 13s. 11d. which he admits having in his hands by the list of accounts collected, No. 36 of process, with certification: *Quoad ultra* appoints the cause to be put to the roll with a view to further procedure."

On 25th July thereafter, such consignation not having been made, the Sheriff-Substitute pronounced this interlocutor—"In respect of the defender's failure to obtemper the last order of Court, decerns against him for payment to the pursuers of the sum of £1425, 13s. 11d. admittedly in his hands; and allows decree therefor to be extracted *ad interim*.

Mackenzie appealed to the Second Division, who on 17th November 1882 pronounced this interlocutor—"Having heard counsel for the parties on the appeal, recal the interlocutor of the Sheriff-Substitute of date 25th July last; of new ordain the defender to consign in the hands of the Clerk of the Sheriff Court the sum of £1425, 13s. 11d. sterling, and that within fourteen days from this date; find the pursuers entitled to expenses in this Court, and remit to the Auditor to tax the same and report: Remit the cause to the Sheriff, with instructions to proceed therein as accords, with power to decern for the taxed amount of expenses now found due, and decern."

Mackenzie did not obtemper the renewed order to consign. On 12th December 1882, in virtue of an extract of the interlocutor of the Second Division, he was charged to fulfil within fifteen days the order to consign contained in that interlocutor under pain of imprisonment, and not having obeyed the charge he was on 10th February 1883, in virtue of a warrant to imprison dated 28th December 1882, incarcerated in the prison of Glasgow at the instance of the Balerno Paper Co. and Good and Scoular. He presented this note of suspension and liberation, founded on the Debtors (Scotland) Act 1880, which by section 4 enacts that "With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act [1st January 1881], be apprehended or imprisoned on account of any civil debt." The same section further provides—"Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as in *meditatione fugæ*, or under any decree or obligation *ad factum præstandum*." In his statement of facts he repeated in substance the averments made by him in the action already narrated. He also averred that the charge and warrant of imprisonment were illegal and incompetent. With regard to the failure to consign he averred—"The complainer in consequence of having repaid sums borrowed by him, and having expended considerable sums in the litigations before mentioned, is unable to consign any part of the amount contained in the said decree. If he were able he would gladly do so, as he believes that on an accounting it would be found that he was entitled to a large sum out of the said business. The respondents refuse to consent to the complainer's liberation, notwithstanding the illegality and incompetency of the imprisonment. In these circumstances the present note has become necessary."

He pleaded—The said warrant of imprisonment is illegal and incompetent both at common law and under the Debtors (Scotland) Act 1880.

The respondents pleaded, *inter alia*—"(3) The decree complained of being a decree *ad factum præstandum* is not affected by the provisions of the Debtors (Scotland) Act 1880 abolishing imprisonment for civil debt."

The Lord Ordinary on 2d March 1883 pronounced this interlocutor:—"Having heard counsel for the parties and considered the note of suspension and liberation, answers thereto and productions, passes the note and grants warrant for immediate liberation of the suspender."

The respondents reclaimed.

After hearing counsel the First Division appointed the cause to be re-heard before themselves along with three Judges of the Second Division.

The reclaimers argued that the present decree was one clearly *ad factum præstandum*, and as such was specially excepted from the operation of the Debtors (Scotland) Act 1880, sec. 4. This further appeared from the words of the decree, "decerns and ordains"—See Mackay's Practice, i., 596. The order was "to do something," "not to pay something;" it was to consign, not to make payment. A decree like the present proceeded upon the ground that the debtor could do that which he was ordered to do. At the time when it was pronounced the debtor admitted that he had the money, and it was only in the suspension he pleaded inability to consign, but inability would not prevent his liability—See case of *Chisholm* v. *Fraser*, March 8, 1825, 3 Sh. 630. The suspender must have parted with the money subsequent to the raising of the action of count and reckoning. This was not imprisonment for civil debt; it was really imprisonment for misconduct. A certain decree had been pronounced by the Court, and the question was what was the proper diligence to follow upon that decree. Clearly it was imprisonment—1 and 2 Vict. cap. 114, sec. 28; 6 and 7 Will. IV. (Cessio Act), August 13, 1836.

Argued for the respondents—Upon the terms of the statute imprisonment was unlawful, and inconsistent with the Act under construction, for in the circumstances of the present case this was simply an instance of imprisonment for civil debt. The standard to test the case by was the full

demand of the original debtor, and the proceedings on account of which this decree was pronounced were for a civil debt. Obligations were of two classes—(1) for payment, (2) for acts. This was clearly a decree for payment. For the distinction between decrees for payment and *ad facta præstanda*, see Bell's Com., i. 335; Bell's Prin., sec. 29; and Ersk. Prin., iii. 1, 1. If the debtor were to be incarcerated under the present decree, he might never obtain his freedom again, as he was unable to obtemper the decree and consign.

At advising—

Lord President—The suspender in this case complains that he has been charged by the Balerno Paper Mill Company to consign the sum of £1425, 13s. 11d. under pain of imprisonment, and he produces the charge, and further complains that upon the 10th of February 1883 he was incarcerated in the prison of Glasgow in virtue of a warrant of imprisonment.

The Lord Ordinary on the Bills pronounced the interlocutor which is now under review, granting warrant for the immediate liberation of the suspender.

The decree of consignation upon which the charge and warrant of imprisonment proceeded was pronounced by the Second Division of this Court in an appeal from the Sheriff of Midlothian in an action of count and reckoning which was raised by the Balerno Paper Mill Company against the suspender, who was one of the partners of that company, for intromissions with the sums collected by him in his capacity as collector of accounts. The Sheriff-Substitute decerned against the defender, and pronounced an order of consignation, and subsequently on the defender's failure to consign decerned against him for £1425, 13s. 11d., which amount was admittedly in his hands, but on appeal this decerniture for payment was recalled by the Second Division, as having really been in absence, and a new order to consign was pronounced.

Now, the grounds upon which the suspender seeks to have this diligence suspended is that under the provisions of the Debtors (Scotland) Act of 1880 he was illegally incarcerated, and the question therefore which we have to determine comes to be, whether under a decree for consignation a warrant of imprisonment can issue, or, in other words, can a decree of consignation be validly enforced by this means? It is provided by the 4th section of this Act that "no person shall after the commencement of this Act be apprehended or imprisoned on account of any civil debt." Now, the words "imprisonment on account of any civil debt" were frequently commented upon in the course of the discussion, but I do not think that they can be held to apply to anything but to a warrant of imprisonment which had been granted after the debt had been duly constituted and decerned for. But the statute goes on to make certain exceptions to the general provisions already referred to, for it provides that "nothing contained in this Act shall effect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ* or under any decree or obligation *ad factum præstandum*."

It thus appears that *meditatione fugæ* warrants —which proceed on civil debts—are specially provided for by the statute, and are not to be affected by its general provisions, and the rights of creditors remain as they were prior to the passing of the Act. The words, therefore, of this section can only apply to warrants of imprisonment granted after the debt has been duly constituted and decerned for. The question therefore comes to be, whether this is really a case of imprisonment on account of a civil debt? I think that it is not so. No debt is due or has ever been constituted against the suspender, and, as I have already said, until such a decree of constitution was issued under the old law no imprisonment for debt could follow.

This, however, is a decree of a different kind altogether. It is not for payment of a sum of money on account of a debt, but it is an order to lodge the money in Court until it is seen if any debt is due. It is quite possible that on an accounting between the parties there may be no civil debt at all, or it might be that there was a debt due by the suspender of a different amount from that which he had been appointed to consign.

It is plain, therefore, I think, that the provisions of this section do not apply to the present case, and that the decree in question does not fall under the abolishing words of the statute, for it is a decree *ad factum præstandum* and nothing more. The reason why the statute declared that nothing in the Act should prevent a party being imprisoned under a decree *ad factum præstandum* is very clear, and it is simply this, that if the right to imprison were abolished in such circumstances, no other method of enforcing such decrees would remain. It was said that decrees such as this were not within the meaning of the Act. I am of opinion that they are both within the meaning and the spirit of the Act. A decree such as this cannot be enforced without the right to imprison in case of a refusal to obey, and therefore the right remains. As it is impossible to proceed in such a case against the estate of the debtor, the only recourse possible is against his person.

I think, therefore, that this is a decree *ad factum præstandum*, and that no other mode exists of enforcing such a decree except imprisonment. Upon these grounds I am for refusing the note of suspension.

Lord Justice-Clerk—This case was originally before the Second Division, and I think it as well before expressing my opinion upon the legal question before us to narrate shortly the circumstances out of which it has arisen. The complainer and the respondents were the partners of the "Balerno Paper Mill Company," and the duties of the complainer were those of managing partner and collector of accounts. An action of count and reckoning was brought in May 1882 by the respondents against the complainer in order to ascertain the balance due between the partners. A sum of £1425 had admittedly been collected by the suspender, and the Sheriff ordered him to consign the amount. The interlocutor was in these terms—"The Sheriff-Substitute . . . . decerns and ordains the defender George Mackenzie, within eight days after intimation to him of this interlocutor by an officer of Court, to consign in the hands of the Clerk of Court, the sum of £1425, 13s. 11d. which he admits having in his hands." . . . . That order was

pronounced upon the 10th July, and upon the 25th July "the Sheriff-Substitute, in respect of the defender's failure to obtemper the last order of Court, decerns against him for payment to the pursuers of the sum of £1425, 13s. 11d. admittedly in his hands, and allows decree therefor to be extracted *ad interim.*"

The complainer thereupon appealed to the Second Division of this Court, and represented that he had counter claims against his partners, and that he was willing and ready to consign, and I find it stated in the present proceedings, and not denied, that it was stated on his behalf by his counsel that he was prepared to lodge the money as ordered, seeing that he had merely retained it for the purpose of compelling his co-partners to enter into an accounting with him, and that if the Court ordered consignation he would have an opportunity of stating his case for an accounting. In respect of these statements the following interlocutor was pronounced on 17th November 1882—"The Lords having heard counsel for the parties on the appeal, recal the interlocutor of the Sheriff-Substitute of date 25th July last, of new ordain the defender to consign in the hands of the Clerk of the Sheriff Court the sum of £1425, 13s. 11d., and that within fourteen days from this date."

If the defender had stated that he was not in a position to consign we should probably have adhered to the Sheriff-Substitute's judgments, but he all along declared that he was ready to consign. The order which we should have pronounced might have been so limited that in the event of the money not being forthcoming then the Sheriff's judgment was to stand, had the complainer so desired, but no such matter was ever raised. The judgment was extracted, a charge was given thereon, the complainer was imprisoned, and then this process of suspension and liberation was brought. I cannot help regretting that this latter part of the case was not referred to us, as having had the whole matter before us we might more easily have disposed of it, but the complainer was quite entitled to select his own court of remedy.

As to the question whether imprisonment was the proper mode of enforcing this decree, I quite agree with your Lordships that the point is one of very great and general importance.

The first and cardinal question in this suspension is, whether imprisonment was competent on the decree in question? for of course if the extract decree did not warrant apprehension and imprisonment the whole proceedings are null.

The complainer maintains that imprisonment is excluded by the terms of the Debtors Act of 1880, and this raises the first question we have to consider, for if the decree in question does not fall under these provisions it is not disputed that the diligence was competent.

The provision of the statute in question, so far as founded on here, is the following—[*His Lordship here read the section quoted above*]. Has the complainer then been imprisoned on account of a civil debt? Although the question between the parties is not concluded, even if it were so, I am of opinion that the obligation to consign involved no liability for a civil debt, but, on the contrary, implied that it still remained doubtful whether the money ordered to be consigned represented any debt. The words "on account of a civil debt" mean "because of his failure to pay a civil debt." Now, the complainer has not only not failed to pay a civil debt, but it has not been decided that he is owing any debt, and therefore he cannot have been imprisoned on account of a civil debt. He was, no doubt, under an obligation to consign this sum in obedience to the orders of the Court, but that was not because he was a debtor, but because he was a litigant. The question of debt remained over for decision, and this order left the question entirely intact.

It is unnecessary to elaborate this view, although I think it sound and sufficient for judgment, because I think the statute contains another provision which is conclusive. There are certain exceptions from the general enactment, and then follows this provision, which is not an exception but a reservation, as not being within the scope of the Act. The Act proceeds thus—"Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ* or under any decree or obligation *ad factum præstandum.*" It will be observed that this reservation applies even to imprisonment on account of a civil debt, as appears clearly from the provision relative to *meditatione fugæ* warrants, which of course arise out of and are incidental to the recovery of a civil debt. Neither would it be difficult to show that an obligation *ad factum præstandum* may proceed upon and involve a civil debt, as in the instance of an obligation to execute a bond, and other similar instances.

A decree for consignation is, in its essential nature, a decree for depositation, not a decree for payment. That is its essential character, and in the present instance this decree has no other character. No doubt the thing to be deposited is numerate money, but that does not in my opinion render the obligation different in its incidents from that of placing in the hands of the Court a corporeal moveable such as a picture or a statue to await the orders of the Court. It may no doubt happen that the order for consignation may infer payment of a debt, as in the case of the nominal raiser in a multiplepoinding, or a purchaser at a public sale, under the 19th and 20th Vict., on which the consignation entitles the party consigning to the discharge of a debt. How far that element might vary the result in such cases would depend on specialties we need not consider, as none such arise here. The decree here is one *ad factum præstandum* and nothing else, and may be enforced in the manner appropriate to such decrees, and in no other.

Lord Deas—After the very full and careful statement of this case which your Lordships have made, I shall try and confine my observations within very narrow limits. As far as I can see, this decree is not one for payment of a debt, or indeed for payment of anything. It is a decree of consignation, and it does not in any way decide the question as to the person to whom the money so consigned may ultimately be found to belong. That being so, there can be no doubt that this is a decree *ad factum præstandum*—indeed there is no other name by which it can be called.

But it is said that this is a decree on account of or arising out of a civil debt—[*His Lordship here read the section of the Act quoted above.*] Now,

the provisions of this last sub-section were not inserted by way of exception to what precedes it, but were intended rather to be a substantive enactment. No doubt it may be said that a warrant to apprehend a person *in meditatione fugæ* arises out of a civil debt—all such warrants do—but then the Legislature has seen fit to except them expressly from the benefits of the statute. On the whole matter, therefore, I am clearly of opinion that the decree in question is one *ad factum præstandum*, and that there was nothing incompetent in following it up by imprisonment, all the more as it was the only way by which the decree could be enforced

Lord Mure—There can be no doubt that at the date of the passing of the Act 43 and 44 Vict. c. 34, all decrees and obligations *ad factum præstandum* might be enforced by the personal diligence of imprisonment. This is clear from a passage in Mr Bell's Commentaries referred to during the discussion (vol. i., p. 335), and there is other authority to the same effect.

Among decrees *ad factum præstandum* the more important perhaps are those of the orders or decrees pronounced by this Court, and also in the Sheriff Courts, for consignation of money constituting the fund *in medio* in processes of multiplepoinding, and the right to which was in dispute in those processes, in order that the sum so consigned might remain there subject to the future orders of Court.

This is very fully explained in Shand's Practice, vol. ii., p. 594, where orders of consignation are distinguished from decrees of furthcoming dealt with at p. 576 of the same volume. In the former the fund *in medio* is appointed to be lodged in bank "upon a deposit-receipt payable to such person or persons as shall be ultimately preferred thereto, and appoints such receipt to be lodged in the Clerk's hands for behoof of all concerned, and that within days from this date, there to remain subject to the order of Court, and decern against the raisers for consignation. Allow decree of consignation to go out and be extracted *ad interim*." And it is added, that "upon this decree of consignation the ordinary compulsitors of diligence may be used." In the furthcoming, on the other hand, instead of a simple order for consignation in bank, decree is given "to make payment to the pursuer of the sum of £ out of the funds or effects owing by him to the principal debtor."

Now, it has been very generally considered that this proceeding of ordering funds to be consigned subject to the authority of the Court is a very important way of securing the safe custody of funds the right to which may be in dispute, and it has been largely used for many years, both in this and in the inferior Courts, for the benefit of that portion of the community who are unfortunately engaged in litigation. The question, therefore, which we have now to decide is, whether the enforcement of such decrees by imprisonment was prohibited in future by the Act of 1880? It is said that the Act applies, because the order to consign related to a civil debt, and that the words of the Act prohibited imprisonment "on account of any civil debt." No doubt it did, but your Lordships have shown very clearly that there is here no civil debt in the ordinary proper sense of the expression. And even if there had been, it would not necessarily follow on that account that imprisonment was in future to be prohibited. Because by the express provision of this statute a very large class of civil debts are excepted from the prohibition, while, with reference to another class of cases, viz., warrants against parties as in *meditatione fugæ*, which beyond all doubt relate to civil debts, and to decrees and obligations *ad factum præstandum*, the operation of the Act is altogether excluded. As regards these, the phraseology of the Act is peculiar. They are not excepted from the prohibition as decrees for taxes, fines and penalties, &c., are. But they are made subject to the very special provision that "nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being in *meditatione fugæ*, or under any decree or obligation *ad factum præstandum*." This provision, as I read it, is in effect a declaration that the Act shall not apply to such warrants, decrees, and obligations, but that with regard to them the law shall remain as it was at the date of the passing of the Act. I am therefore of opinion with your Lordships that the note of suspension should be refused.

Lord Shand—The complainer George Mackenzie was apprehended and incarcerated in the prison of Glasgow on 10th February last because of his failure to consign or pay into Court a sum of £1425, 13s. 11d. in obedience to an order or decree of the Second Division of this Court pronounced on 17th November 1882. On 2d March he was liberated by the order of the Lord Ordinary, but by the judgment to be now pronounced it will be decided that the imprisonment of the complainer was competent, and he may be again apprehended and imprisoned. I am humbly of opinion that the imprisonment of the complainer under the warrant founded on was and is incompetent and illegal.

The question turns entirely on the meaning and effect of the Act 43 and 44 Vict. cap. 34, the leading purpose of which was to abolish imprisonment on account of debt. The Legislature having resolved that imprisonment on a diligence against the person for the recovery of debt was a remedy which in accordance with modern ideas ought no longer to be allowed except in certain special circumstances, and even then for a very limited time, has, by the leading enactment of the statute, provided in brief, general, and comprehensive terms (section 4) that, "with the exceptions hereinafter mentioned, no person shall after the commencement of this Act be apprehended or imprisoned on account of any civil debt." By the succeeding paragraph an exception is made in the case of two classes of debts only, viz. (1) taxes, fines, and penalties due to Her Majesty, and public assessments, and (2) sums decerned for aliment—but even in regard to these imprisonment for a longer period than twelve months is made unlawful. It must be further observed, that even as regards alimentary debts, by a later statute (45 and 46 Vict. c. 42) the power of imprisonment is limited to the case of "wilful default" in payment—a special warrant must be obtained from the Sheriff, and can be granted for a period of six weeks only; and as regards imprisonment for rates and assessments, the period of imprisonment is also limited to six weeks. The statute of 43 and 44 Vict., in practi-

cally abolishing the use of diligence against the person, provided some compensation to creditors in another form, for a new and stringent diligence or remedy against the property of debtors was thereby introduced by which a creditor may compel his debtor, being notour bankrupt and unable to pay his debts, to execute a disposition *omnium bonorum*, under which his whole means and estate may forthwith be realised and distributed for behoof of his creditors. The only other provision of the statute which it is necessary to notice is the closing part of section 4th, which provides that "nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person . . . under any decree or obligation *ad factum præstandum*."

The question for decision is whether imprisonment be now competent in respect of the failure of the party to a cause to consign a sum of money in obedience to a decree of Court. It is maintained on the one hand that imprisonment in such a case is unlawful as being on account of a civil debt, and on the other, that imprisonment is lawful because the decree is one *ad factum præstandum*. It appears to me that the former contention is sound, and that a decree for the payment of money into Court is no more a decree *ad factum præstandum* than an ordinary decree for payment to a creditor of his debt.

The view I hold of the effect of the statute is shortly this, that the remedy of diligence against the person, subject to the exceptions already referred to, as a means of compelling the payment of money, whether into Court or directly to the creditor, and whether on account of a debt due or an alleged debt which is disputed, has been abolished, and that when the statute refers to decrees or obligations *ad factum præstandum*, what is thereby meant is decrees or obligations other than for the payment of money, being for the performance of some act such as the signing of a conveyance or other deed—an act of a class which, generally speaking, it is in the power of the party to perform, and which it is therefore reasonable that he should be compelled to perform, in fulfilment of his obligation, even by diligence against his person.

It seems to me that the clear purpose and the effect of the statute, while providing increased facilities to creditors for attaching and realising by diligence the whole property of their debtors in payment of their debts, is to take away the remedy of diligence against the person for the payment or performance of obligations to pay money, the reason of the enactment being that leaving the debtor free to earn or gain money for payment of his debts is a more reasonable course than incarceration of his person, which in the great majority of cases will prevent this.

I confess myself unable to see any sound distinction in the present question between a decree for payment in the ordinary sense and a decree for consignation, or any ground in reason for holding that imprisonment should be competent where the decree is in the one form but not in the other. In either case money has to be paid. In the one case it must be paid to the creditor to whom it has been found due. In the other it must be paid into Court, either because it has been found due but is the subject of a competition, or because on a *prima facie* view of accounts stated it appears that the amount is due, and it is reasonable in the view of the judge that it should be consigned. In either case equally the party required to pay may be unable to pay, or he may wilfully withhold money of which he is possessed, and this being so it would be difficult to give a satisfactory reason for saying that imprisonment should be competent in the one case but not in the other. The statute is remedial in its nature, and should be so interpreted as to extend the remedy to the general and extensive class of cases for which it was designed. These it appears to me were in a word decrees for the fulfilment of pecuniary obligations, the only exception to this general term being decrees for fulfilment of the very few and special classes of such obligations as are particularly enumerated in the statute. For the enforcement of pecuniary obligations the statute in substance declares that the creditor shall be restricted to diligence against the property of his debtor or alleged debtor. An order to consign money arises out of a merely pecuniary obligation, and is made to enforce the fulfilment of it, and imprisonment as a consequence of an order to consign money, or, in other words, to pay money into Court, is, as it seems to me, completely within the mischief for which the statute provides a remedy, and according to settled general principles the language of the statute should be construed so as to have this effect if its terms will admit of it. It is conceded that if the creditor has even obtained his ultimate remedy of a decree for payment to himself of a sum which he has satisfied the Court to be due to him, his diligence for recovery must be taken against the property, and cannot be taken against the person of his debtor. The argument for the complainer involves the anomalous—I do not think it too strong a term to say the absurd—consequence, that although under a final decree for money imprisonment is illegal, yet under an incidental decree of consignation, even where the alleged liability is disputed, imprisonment as a diligence is competent. I do not construe the statute as to lead to any such extraordinary consequence; and, as I have said, any reasonable construction of its terms should, I think, be adopted which would avoid this.

An order or decree of consignation is not in any sense or in any case pronounced as for contempt of court; it is an order or decree on account of a civil debt, that debt being the sum claimed as due by the person appointed to make consignation. It is certainly either on account of a debt or of an alleged debt. If not on account of a civil debt, I am unable to say what other class of obligation it is on account of. It surely cannot be that while a person cannot be imprisoned on account of a debt, he may yet be imprisoned on account of an alleged debt. In form also a decree of consignation is substantially the same as a decree for payment; and, what is perhaps more important, it may be enforced by diligence precisely in the same way as an ordinary decree for payment. The law and practice are thus stated in Shand's Practice (p. 594), where the author is dealing more immediately with a decree of consignation in a process of multiplepoinding:—"If the holder do not obey the order to consign, or if it be feared that he will not obey it, a decree of consignation may be obtained instead of an order. In this case, however, care must be taken to allow the decree to go out in name of one of the claim-

ants, and the holder should be found liable in the expense of the extract. In this, as in every other interlocutor ordering anything to be done, the word 'decerns' ought to be used, otherwise a difficulty may arise in using diligence—*Trustees of Agnew* v. *Macneil, &c.*, Feb. 8, 1827, 5 S. 309 (N.E. 287). Upon the decree of consignation the ordinary compulsitors of diligence may be used." And the following is given as the ordinary form of decree where a decree of consignation is required: —"Appoints the fund in *medio* amounting to £ to be lodged in the Bank upon a deposit-receipt payable to such person or persons as shall in this process be ultimately preferred thereto; and appoints said receipt to be lodged in the clerk's hands for behoof of all concerned, and that within days from this date, there to remain subject to the orders of Court, and decerns against the raiser for the consignation: Allows decree of consignation to go out and be extracted *ad interim* at the instance of claimant, for behoof of all concerned, for the purpose of recovering and consigning as before mentioned: Finds the said liable in the expense of extract, and decerns." This form of decree, on which, unquestionably, all usual diligence against the property of the party against whom it has been obtained may proceed, is in all respects the same as a decree for payment, subject to this observation only that the amount when received under the diligence must be consigned by the holder of the decree. A decree for consignation cannot therefore, as it appears to me, be properly characterised, either in ordinary legal language or within the meaning of the statute, as a decree *ad factum præstandum*. The distinction between an obligation for payment and an obligation for performance is stated in Ersk. Inst., iii. 1, 1.—The obligation to pay "relates properly to those subjects which the debtor is bound to deliver to the creditor, and is generally limited to sums of money;" the obligation of performance "includes all articles to which a debtor may be obliged, consisting in fact, as an obligation to do or to procure something to be done in favour of the creditor;" and the distinction between an obligation *ad factum præstandum* and an ordinary obligation for money is referred to in Bell's Com. i. 335 (5th edition), where the author explains that the claims of creditors under obligations *ad facta præstanda* "may be converted into money either in terms of the bond or by a judgment for damages." In one sense all decrees are *ad facta præstanda*, or for performance of an act. An ordinary decree for money is a decree for the performance of the act of payment, but in the proper sense of the term a decree *ad factum præstandum* is a decree for performance of an act other than the payment of money. The term appears to me to be obviously so employed in the statute, and so does not include a decree for payment of money either directly to a creditor or into Court.

In what I have said I have dealt with the general question—whether imprisonment be competent under an order or decree for consignation of money. As to the special circumstances of the present case, I have only to add two observations. In the first place, it is said that the complainer had collected certain sums of money, and that he either was in possession of these, or must be held to have been so when the decree was pronounced. On this I observe, in the first place, that in his 14th statement the complainer avers that he had paid away the sums collected by him, and "is unable to consign any part of the amount," and it cannot be assumed against him that this is not the fact; but, in the next place, it seems to me that the question of competency or incompetency of the use of imprisonment as a diligence to compel payment of money into Court cannot possibly depend on an inquiry into the question whether the debtor or person decerned against is or is not possessed of the funds to enable him to obey the decree? Any such inquiry is of no relevancy even in a case of a decree for payment. Again, it is said that in consequence of the particular form of the decree of 17th November 1882 the respondents could not have used diligence against the property of the complainer. I am not satisfied that this is so, for if the respondents, under the law as it precisely stood, by force of the word "decerns" contained in the decree, had the larger power of imprisonment, this would appear to include a power to do diligence otherwise, the respondents being under an obligation to consign the sums recovered. But even if diligence against the complainer's estate could not competently be resorted to because of the particular form of the decree, this would not, in my opinion, make imprisonment on account of a civil debt lawful, any more than imprisonment would be competent on an order or decree in precisely the same terms in a process of multiplepoinding. It would only show that the respondents acted without due consideration, and should have asked for a decree in another form, which they would at once have obtained—I mean in such a form as that above quoted from Shand's Practice. To a decree in such a form there could be no possible objection, but such a decree would only warrant diligence against the complainer's property and not against his person. On these grounds I am of opinion that the interlocutor of the Lord Ordinary should be affirmed and the note passed.

Lord Craighill—I concur entirely in the opinion of Lord Shand.

Lord Rutherfurd Clark—I am of opinion that the decree which we are considering is a decree *ad factum præstandum*, and therefore that imprisonment may follow on it.

But I would not like to say that there may not be decrees of consignation which are decrees of debt only, as for instance a decree of consignation against the nominal raiser in a multiplepoinding where the fund *in medio* consisting of a sum of money has been admitted or ascertained. The decree is for payment of a debt, and takes the form of a decree of consignation merely because of the competition which makes the creditor uncertain. I would suppose that under such a decree, the debtor could not be imprisoned, and that the ordinary execution for the recovery of a debt would follow upon it. For the existence of a competition should not upon the one hand subject a debtor to a form of diligence from which other debtors are free, nor on the other exempt his property from such diligence as may be used against the property of all debtors.

I say no more than that is my opinion. The decree in question is a decree *ad factum præstandum*, and not for payment of a debt.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to refuse the note of suspension (with power to decern for the expenses incurred in the discussion in the Inner House).

Counsel for Suspender — J. P. B. Robertson —Dickson. Agent—James Coutts, Solicitor.

Counsel for Respondents—Trayner — Rhind. Agents—P. Morison, S.S.C.

Wednesday, July 11.

SECOND DIVISION.

SPECIAL CASE—SMITH'S TRUSTEES AND OTHERS.

Succession — Testament — Legacy — Defeasance— Bequest of Moveables—Resolutive Condition.

It is competent to attach a resolutive condition to a bequest of the fee of moveables so as to make the right defeasible in a certain future event.

A testator made, *inter alia*, the following bequest to his widow—"I appoint that she get yearly during her life £120, to be paid half-yearly . . . and also all the household furniture, &c., and everything in the house at my death, . . . provided she remains unmarried, but in the event she marries, the annual allowance to be reduced to £50, with neither free house nor furniture, nor anything but the £50 per annum." *Held* that she took a right of fee in the furniture, &c., subject to forfeiture in the event of her marrying again.

Succession—Vesting—Payments to Legatee to be in Discretion of Trustees.

A testator directed his trustees that £1000 should be invested or left in stock, and given in such sums and way and times as the trustees might think best for his nephew, "he having no control or right to interfere with the trustees anent the same, under forfeiture of all claim to the same." The nephew survived the testator, but died without having got payment of any sum from the trust. *Held* that no right had vested in him under the will.

A testator directed his trustees that his niece (who survived him) should "receive £1000, to be invested . . . on stock," the interest to be paid half-yearly . . . and also that she should receive a third of the residue of his estate, "to be put under the same arrangement" as the £1000, "to prevent her money going to another family at her death." *Held* that the niece was entitled to have both bequests paid over to her for her own absolute use and disposal.

Charles Smith died on 21st April 1882, survived by a widow but no children. He left the following deed of settlement (dated 6th March 1882), which was holograph and signed by him:—"I, Charles Smith, late merchant tailor, Aberdeen, presently residing at 49 Victoria Street, Aberdeen, being anxious to settle my affairs during my lifetime, I hereby appoint the following persons to be my executors and trustees—Jane Smith, my wife, and Charles Smith, my nephew, and John Black, husband of my niece, and Alexander Ramage, rector of the Free Church Normal College, Aberdeen, with full power to act in all matters arising at and after my death, to arrange for my funeral, and to pay all deathbed and funeral and other expenses; and notwithstanding that we had a marriage settlement, I wish to give my wife a more liberal settlement: I appoint that she get yearly during her life £120, to be paid half-yearly, the first half-yearly payment to be made at the first term six months after my death, with a proportionate sum from the time of my death to the first payment, and that she also get £50 for mournings, and also all the household furniture, beds, bedding, pictures, books, plate, and everything in the house at my death, except my gold watch, chain, &c., and that she also get the occupation of the house 49 Victoria Street we live in during her life, free of rent and landlord's taxes, provided she remains unmarried, but in the event she marries, the annual allowance to be reduced to £50, with neither free house nor furniture, nor anything but the £50 per annum, my house property to remain as security for my wife's payment; and I wish her to act in the letting the houses, keeping in repair, drawing the rents, &c., under and with the advice of the trustees; and I appoint Charles Smith, my nephew, to get £2000 in cash, or in stock at valuation, at the first term six months after my death; and I also appoint my niece Margaret Baird Smith or Black to receive £1000 in cash or stock to that value, at the first term six months after my death, for her own use, and to remain under her own control; and I also appoint that Christina S. Copland, my niece, and teacher, to receive £1000, to be invested or kept invested in stock, the interest to be paid half-yearly, the first payment to be made at the first term six months after my death; and I also appoint that £1000 be invested or left in stock of that value and given in such sums and way and times as the trustees may think best for John Smith, my nephew—he is abroad—he having no control or right to interfere with the trustees anent the same, under forfeiture of all claim to the same. I also appoint that Sarah Lunan or Smith, widow of my late brother John Smith, receive £20 yearly, to be paid monthly in equal sums, the same to include house rent and all other payments, and to be continued during the pleasure of the trustees, or to be paid in such sums and in such manner as they think fit. I also appoint that Charles Lawson Smith, my grandnephew, get, when of age, my gold watch and chain, and £1000, the interest to begin at the death of my wife. And I also appoint that my two grandnieces, daughters of my nephew Charles Smith, and my second-named trustee, get £500 each set apart to them at the death of my wife, and the rest of my residue to be divided as follows:—Charles Smith, my nephew, to receive two equal third shares, Margaret Baird Smith or Black, my niece, one-third part of the residue, and my niece Christina S. Copland, to receive the other third, to be put under the same arrangement as her first-named sum of £1000, to prevent her money going to another family at her death. The above settlement of my affairs, written by me and signed on the 6th day of March 1882 years."

The parties nominated accepted of the offices of trustees and executors, and gave up an inven-