the premises, had agreed with the appellant, who was landlord for the year in question, that the rent was to be £26, 10s., but that £18 thereof was to be in respect of the house and stable, and the remaining £8, 10s. in respect of fittings, and that agreement the Sheriff tells us he assumed to have been proved. If that was proved it is difficult to say that the rent of the premises was £26, 10s., because of that sum (the total sum to be paid by the tenant) £8, 10s. was remuneration or payment for the use of the fittings. If the landlord let the premises in their then condition (that is, with certain fittings thereon) at the rent of £26, 10s., that probably is what should have been returned as the rent of the premises. But if the landlord let the premises at £18, and charged an additional rent or hire for the use of the fittings, then £18 was the rent that should have been (as it was) returned. The difficulty in this case (from the manner in which the case is stated) is to say upon which of these two modes the *cumulo* payment to be made by the tenant was fixed. I am not willing to sustain this conviction, which is practically a conviction of fraud, without having that fact clearly ascertained. That accordingly renders it necessary for us to take the course which your Lordship has proposed, of sending the case back to the Sheriff to be amended.

LORD MONCREIFF—I am of the same opinion. We cannot satisfactorily dispose of this case without knowing exactly what the Sheriff means by the paragraph on page 6. Read one way, it looks as if it contains findings in fact which have led up to the conclusion arrived at by the Sheriff in the following paragraph. I think your Lordship has fully explained the kind of information we desire. We should then know if the Sheriff held it proved that £26, 10s. was the actual rent for the premises as for a heritable subject, or whether £18 was the actual rent paid for the heritable subject, and the rest was for the fittings.

The interlocutor remitting to the Sheriff was in the following terms:—"Remit to the Sheriff-Substitute to state what were his findings in fact, if any, on the evidence adduced upon the following questions:—viz. (1) What was the rent of the house and stable for the year from Whitsunday 1897 to Whitsunday 1898? (2) Did that rent include any payment for the use of the fittings in the house or stable? (3) If so, how much of the said rent effeired to the fittings, heritable or moveable, or both?—the said Sheriff-Substitute to report to this Court *quam primum*."

Counsel for the Appellant—Chree. Agent—J. A. B. Horne, S.S.C.

Counsel for the Respondent — Wilson. Agent—John Wilson, Solicitor.

COURT OF SESSION.

Friday, February 4.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

CAW, PRENTICE, CLAPPERTON, & COMPANY *v.* A. J. CREIGHTON & COMPANY.

Diligence — Charge — Suspension — Arrestment.

Arrestments were used in the hands of A & Company of all sums due by them to B. A & Company were due a sum on an account to B's firm of B & Company, and they intimated the arrestment to them. Notwithstanding this, B & Company sued A & Company for the debt, and obtained a decree, upon which they gave a charge to A & Company. Subsequent to the date of the decree, but prior to the date of the charge, the arrester of new used arrestments in the hands of A & Company of all sums due by them to B as sole partner of B & Company. A & Company brought a suspension and consigned the sum due to B & Company. B & Company maintained that the arrestments were ineffectual in respect that B's wife was also a partner in the firm of B & Company. They produced a contract of copartnery purporting to show this, and they offered to prove that it was so. The Court, without allowing any inquiry, *suspended* the charge *simpliciter*, on the ground that the arrestee was entitled to be kept safe.

This was a note of suspension of a charge given upon a Debts Recovery Court decree, the complainers being Messrs Caw, Prentice, Clapperton, & Company, shipowners and agents for the s.s. "Saint Jerome," Glasgow, and the respondents being A. J. Creighton & Company, licensed grain weighers, Glasgow, and A. J. Creighton and Mrs Jessie Robertson Telfer or Creighton, the individual partners of that firm.

The facts sufficiently appear from the opinion of Lord Low *infra*.

The Lord Ordinary on the Bills (PEARSON), by interlocutor dated 18th December 1896, on consignation, sisted execution, and thereafter passed the note and continued the sist.

On 29th October 1897 the Lord Ordinary (LOW) issued the following interlocutor—"Sists procedure for the period of four weeks in order that the respondents may take such proceedings as they may be advised for the purpose of having the arrestments mentioned in the statement of facts for the complainers set aside: Reserves all questions of expenses and grants leave to reclaim."

Opinion.—"The complainers are indebted to the respondents A. J. Creighton & Company in the sum of £36 odds for work done upon their employment. After the debt had been incurred arrestments were used

in the complainers' hands of all sums of money due by them to A. J. Creighton.

"It is admitted that if A. J. Creighton is the sole partner of A. J. Creighton & Company, the arrestment attached the complainers' debt to that company.

"The complainers intimated the arrestment to the respondents, but the latter brought an action in the Debts Recovery Court, and obtained decree on 30th November 1896 for the sum due but without expenses.

"On 9th December a second arrestment was used in the complainers' hands at the instance of the same arrester, of all sums due by the complainers to 'Andrew James Creighton as sole partner of the firm of A. J. Creighton & Company.'

"On the 15th December the respondents charged the complainers upon the Sheriff Court decree. The complainers then brought the present suspension of the charge, and they have consigned the sum in dispute.

"The respondents have produced a contract of copartnership which purports to show that shortly before the respondents were employed by the complainers Mrs Creighton became a partner of the firm of A. J. Creighton & Company along with her husband A. J. Creighton.

"The respondents argued that that contract is in itself sufficient to establish that the arrestment did not attach the fund in question, but if that is not sufficient they ask to be allowed to prove the partnership.

"The respondents also argued that if the complainers desired to prevent them proceeding with diligence to enforce payment, they (the complainers) ought not only to have suspended, but to have brought a multiplepoinding.

"The complainers, on the other hand, contended that they ought not to be forced to contest the question of the validity of the arrestment in this action, because a decree in it would not be *res judicata* in a question with the arrester. As to a multiplepoinding, the respondents could, if they liked, raise such an action in the complainers' name.

"Now, I do not think that the complainers would have been in safety to pay to the respondents. No doubt the contract of copartnery is *prima facie* evidence that A. J. Creighton has a partner, but I do not know upon what grounds the arrester maintains that the former is the sole partner. There is no suggestion of any collusion between the complainers and the arrester, and the former have shown their readiness to pay the money to whomsoever may be found entitled thereto by consigning it in the present process. All that the complainers desire is to be protected from the risk of being forced to pay the same sum twice over, and I think that upon the authorities they have adopted the proper procedure to effect that purpose.

"In the first place, there is the case of *Mitchell* v, *Strachan*, 8 Macph. 154. There Strachan obtained a decree against Mitchell, and Duthie, a creditor of Strachan, used arrestments in Mitchell's hands. Mitchell then brought an action of multiplepoinding. The Court held that multiplepoinding was incompetent. Lord Benholme, although he did not formally dissent, stated very weighty grounds for doubting the soundness of the judgment, but the important point (for the purposes of this case) is that the opinion of the majority of the Judges was based upon the view that Mitchell's proper remedy was to bring a suspension.

"Again, in *Ferguson* v. *Bothwell*, 9 R. 687, Bothwell obtained decree for a sum of money against Ferguson, charged him to make payment, and proceeded to poind certain of his effects. Subsequently, but before a sale under the poinding, Keith, who had a claim against Bothwell, arrested in Ferguson's hands. Ferguson then brought a multiplepoinding and consigned the sum in dispute. Notwithstanding the multiplepoinding, Bothwell proceeded with his diligence and sold the poinded effects. Ferguson then brought an action of damages against Bothwell for proceeding with the diligence pending the action of multiplepoinding. The Court dismissed the action as irrelevant, holding that Ferguson should have brought a suspension of the diligence.

"The Lord President said—'The mere circumstance that these *quasi*-competing claims exist does not entitle the debtor to remain still and do nothing. He is bound to protect himself, and the obvious way for him to do that is to suspend the charge, and interdict the proceedings in the poinding by suspension and interdict, in the course of which process consignation of the sum may be made.'

"Lord Shand said—'The plain course is, if there are good grounds for not paying to the poinding creditor, to go to the Courts and suspend the diligence. Then the matter can be inquired into, and the probability is that, as a condition of proceeding in the suspension, consignation will be required.'

"Now, under these authorities, the complainers here have taken the proper course in bringing a suspension. But the question between the three parties interested cannot be determined in the suspension, because the arrester is not a party, and cannot be made a party, without her consent. How, then, is the suspension to be disposed of? I think that the complainers have reasonable ground for saying that they might not be in safety to disregard the arrestment and pay to the respondents. Does that entitle them now to have the charge *simpliciter* suspended? The complainers contended that that was the view taken by the learned Judges in the cases to which I have referred, and it may be so. I think, however, that the safer course is not finally to dispose of the suspension without giving the respondents an opportunity of having the arrestment set aside. I shall therefore sist procedure for a limited period, and if within that period the respondents have not instituted proceedings for the purpose of having the arrestment taken out of the way, I shall pronounce decree of suspension."

Thereafter the Lord Ordinary on 30th November 1897 pronounced the following interlocutor—"In respect that it is stated the arrester has brought an action of furthcoming of the sum alleged on record to have been arrested, continues the sist formerly granted, to await the result of said proceedings."

On 14th December 1897 Lord Kincairney, acting for Lord Low, who was absent owing to illness, pronounced the following interlocutor—"Recals the sist granted by interlocutor of 29th October last: Suspends *simpliciter* the charge complained of, and whole grounds and warrants thereof, and decerns: Finds the respondents liable in expenses," &c.

The respondents reclaimed.

It was stated at the bar that some delay had occurred owing to Mrs Creighton having changed her agent, and that the action of furthcoming had actually been raised the day before the date of Lord Kincairney's interlocutor, but that this was not then known to the respondent's counsel, and consequently was not stated to Lord Kincairney. In view of these circumstances counsel for the respondents asked that the interlocutor reclaimed against should be recalled and a sist granted to await the result of the furthcoming, this being the course adopted by Lord Low, the Lord Ordinary before whom the cause depended.

Counsel for the complainers were not called upon.

LORD TRAYNER—I think that this suspension was quite properly brought. A question arose whether a certain arrestment was habile to affect a fund. The complainer had no concern whether the arrestment was good or bad. I think he was clearly entitled to raise the suspension. It was the respondents' duty to clear out of the way the only question which prevented his paying the money.

LORD MONCREIFF—I concur in thinking that the complainer was justified in raising a suspension.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court adhered with additional expenses.

Counsel for the Complainers—Sol.-Gen. Dickson, Q.C.—Aitken. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondents — R. K. Galloway. Agent—F. Campbell MacIvor, S.S.C.

Friday, February 4.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SOMMERVILLE *v.* AARONSON.

Bill of Exchange — Promissory-Note — Protest for Non-Payment — Protest not at Place of Payment—Protest by Householder — Summary Diligence — Bills of Exchange Act 1882 (45 *and* 46 *Vict., cap.* 61), *secs.* 45 (5), 51 (6), 87 (1), 94, *and* 98.

A promissory-note was made payable at Bradford, and was duly presented and noted for non-payment by a notary there, but no protest was extended. Thereafter the note was again presented at a place where the debtor was for the time, and protested for non-payment by a householder under section 94 of the Bills of Exchange Act 1882, "there being," as the protest bore, "no notary-public available." Upon this protest, duly recorded, a charge was given, and ultimately cessio was applied for and obtained. *Held* that the proceedings taken upon the householder's protest were inept, in respect that such a protest was only competent where "the services of a notary cannot be obtained at the place where the bill is dishonoured," which was not the case here, as the bill was dishonoured at Bradford, where it was not alleged there was any want of notaries.

Question—Whether in any case a householder's protest under section 94 can be used for purposes of summary diligence in Scotland.

This was an action at the instance of William Sommerville, blacksmith, Glasgow, against G. Aaronson, money-lender, 15 Thornton Road, Bradford, in which the pursuer sought reduction of (1) a decree of cessio pronounced against him on the petition of the defender by the Sheriff-Substitute at Rothesay, and (2) a decree of the Sheriff of Renfrew and Bute dismissing an appeal brought by the pursuer to set aside the decree first sought to be reduced.

The trustee under the decree of cessio was subsequently, of consent, sisted as a defender.

The petition for cessio presented by the defender bore to proceed upon an extract registered protest of a promissory-note granted by the pursuer in the defender's favour and an expired charge made thereon.

The promissory-note was in the following terms:—"£30. Bradford, November 19, 1895. On demand I promise to pay to G. Aaronson or order at 15 Thornton Road, Bradford, the sum of thirty pounds for value received.—WILLIAM SOMMERVILLE." This promissory-note bore upon it the following note of protest:—"Henry Fison Killick, notary, Commercial Bank Buildings, Bradford, Yorks., noting 2/6, no funds." This note was never extended into a protest, but upon 23rd October 1896 the bill was presented