Counsel for the Third Parties—Ingram. Agent—David Philip, S.S.C.

Counsel for the Fourth Parties—Paton. Agents—Ross & M'Callum, S.S.C.

Counsel for the Fifth Party — Laing. Agent—J. Ferguson Reekie, Solicitor.

Friday, March 16.

SECOND DIVISION.

[Lord Johnston, Ordinary.

WOLFE *v.* ROBERTSON.

Process—Misnomer—Jurisdiction—Review—Small Debt Court—Diligence—Suspension—Misnomer of Party Obtaining Decree—Finality of Decree—Attempt to Suspend Diligence following Decree — No Distinction between Suspension of Decree and Diligence following it — Action of Damages for Wrongful Poinding—Justices of the Peace Small Debt (Scotland) Act 1825 (6 *Geo.* IV, *c.* 48), *secs.* 14 *and* 15.

By secs. 14 and 15 of the Justices of the Peace Small Debt (Scotland) Act 1825 it is provided that small debt decrees shall not (except in cases not here in point) be "subject to advocation, nor to any suspension, appeal, or other stay of execution . . . nor . . . reduction before the Court of Session."

A, registered under the Moneylenders Act 1900 as carrying on business at X under the name of "the Exchange Loan Company," lent a sum of money to B and took in exchange a bill drawn by himself in the name of "The Exchange Loan Company, Limited," payable at X and accepted by B. B having failed to repay the advance, A raised an action against him on the bill in the Small Debt Court under the Act of 1825 in the name of "The Exchange Loan Company, Limited," and obtained a decree in the following terms:—"Find the above-designed B liable to the also above-designed Exchange Loan Company, Limited, in the sum of . . . and hereby decree and ordain . . . execution to pass hereon by poinding . . ." B throughout knew that A was the Exchange Loan Company, Limited, and, although present in Court, raised no objection to the instance of the action. A proceeded afterwards to poind B's effects. B brought a suspension on the ground that it was incompetent to do diligence on the decree because of the inaccurate addition of the word "Limited" to A's registered name. He also brought an action for damages for wrongful poinding.

The Court, *holding* that all objections to the decree and diligence were foreclosed by secs. 14 and 15 of the Act of 1825, *refused* the suspension and *assoilzied* the defender in the action for damages.

The Justices of the Peace Small Debt (Scotland) Act 1825 provides, sec. 14—"The decree given by the said justices in any case competent to them by this Act shall not be subject to advocation, nor to any suspension, appeal, or other stay of execution, excepting only in the case of consignation, as hereinbefore provided for the purpose of a rehearing before the justices, nor shall be set aside or altered in an action of reduction before the Court of Session on any other ground except that of malice and oppression on the part of the justices, nor shall any such action of reduction be at all competent after the expiration of one year from the date of the decree of the justices."

Section 15 provides that in case of a reduction being brought on the ground of malice and oppression the pursuer must find sufficient caution.

Andrew Robertson was under section 2 of the Moneylenders Act 1900 (63 and 64 Vict. cap. 51) registered as carrying on business as a moneylender at 429 Lawnmarket, Edinburgh, under the name of the "Exchange Loan Company" (without the addition of the word "Limited"). On 13th February 1904 he advanced a sum of money to Manuel Wolfe and two others, who in return accepted a bill in the following terms:—

"Edinburgh, 13th February 1904.

"£3, 0s. 0d.

"One day after date pay to us or our order, within our office at 429 Lawnmarket here, the sum of three pounds sterling, for value received.

"*To* Freda Funk, broker, 18 South Richmond Street, Edinburgh.
Walter Funk, broker, 2 Pleasance, Edinburgh.
Manuel Wolfe, rag merchant, 13 Richmond Place, Edinburgh."

Exchange Loan Co., Ltd.
Freda Funk.
Walter Funk.
Manuel Wolfe.

Being unable to get payment of his advance, Robertson, under the name of the Exchange Loan Company, *Limited*, brought an action against Wolfe and the other two debtors in the Justice of Peace Small Debt Court, Edinburgh. When the case was called in Court the two other debtors allowed decree in absence to go out against them. Wolfe was present in Court and consented to decree and took no objection to the instance of the action. Decree was accordingly given on 31st October 1904, finding the defenders liable to the "above designed Exchange Loan Company, Limited, pursuers, in the sum of three pounds ten shillings with six shillings and seven pence of expenses," and decerning and ordaining "instant execution of arrestment, and also execution to pass hereon by poinding after a charge of ten free days." Throughout the whole transactions there was no doubt that Wolfe knew that Robertson was really the person with whom he was dealing, and that the Exchange Loan Company, Limited, was simply a business name assumed by him. On the 15th of June Robertson executed a poinding of Wolfe's effects under the above decree. After the poinding was partially executed Wolfe paid £2 to account

of the amount in the decree, taking no objection either to the decree or the diligence which had followed upon it. Subsequently, however, he brought a note of suspension and interdict in the Court of Session against Robertson, in which he sought to interdict "the respondent and all others from proceeding in any manner of way with any diligence whatever against the complainer upon or in virtue of an alleged or pretended decree obtained at the instance of a pretended company styled the Exchange Loan Company, Limited, 429 Lawnmarket, Edinburgh, against the complainer."

In his averments he stated—"(Stat. 2) There is no such company as 'The Exchange Loan Company, Limited,' nor has there ever been such, and the complainer is not indebted in any way to any such company. Although the said pretended company is non-existent and fictitious, yet the respondent is executing the said decree with the view of putting the money which is said to be the property of said non-existent company into his own pocket. He has already extorted a sum of £2 from the complainer, which he has appropriated to his own uses."

He pleaded—"(1) The pretended decree in question being at the instance of a non-existent pursuer, and the respondent having illegally and unwarrantably threatened, and still threatening, to put the said decree into force without lawful authority, interdict should be granted as craved, with expenses."

Subsequently, when the case was before the Inner House, the complainer added an amendment, in which he stated that he had ascertained and averred that there was already an "Exchange Loan Company, Limited," registered under the Companies Acts, and carrying on business in England.

Simultaneously with the note of suspension and interdict Wolfe brought an action against Robertson in the Court of Session in which he sued him for the sum of £250 as damages for wrongful and illegal poinding.

In his answers the defender stated, *inter alia*—"Admitted that in raising and following forth said action under which said decree was pronounced, the defender represented 'The Exchange Loan Company, Limited.'" In the Inner House he added the following amendment:—"The defender is registered under the Moneylenders Act 1900 under the name 'The Exchange Loan Company,' of which company he is the sole partner. The addition of the word 'Limited' to the name of said company was made by the defender in the *bona fide* belief that he was entitled to do so. Throughout the transactions condescended on, the pursuer was well aware that the defender was really the person with whom he was dealing, and that the Exchange Loan Company, Limited, was simply a business name assumed by him."

The defender pleaded in the action for damages, *inter alia*—"(1) The action is incompetent and untenable in respect that the small debt summons, decree, and warrant following thereon, are *ex facie* regular and valid, and are not liable to be challenged or set aside in the present action. (2) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (4) The decree libelled on, and the whole proceedings following thereon, having been legal and regular, can afford no ground for damages against the defender."

On 19th January 1906 the Lord Ordinary (JOHNSTON) pronounced (1) an interlocutor in the note of suspension and interdict granting the interdict craved; (2) an interlocutor in the action for damages repelling the first, second, and fourth pleas-in-law for the defender, and assigning a day for the adjustment of issues.

Opinion.—"There are here two actions arising out of the same circumstances—a suspension and an action of damages. They must I think be separately considered. And the suspension is first in order.

"It is a suspension, or rather a suspension and interdict, against any diligence proceeding against the complainer in virtue of a certain Justice of Peace Small Debt decree, of date 31st October 1904. It is not a suspension of the decree itself. The decree proceeds on a small debt summons at the instance of the Exchange Loan Company, Limited, 429 Lawnmarket, Edinburgh, against Freda Funk, Walter Funk, and Manuel Wolfe, the latter being the only complainer, and on the summons decree went out against the defenders for £3, 10s. and 6s. 7d. of expenses, and containing the usual warrant to poind after a charge of ten days. The action proceeded on a bill for £3, all as set forth in the account annexed to the summons. There is no objection to the regularity of the procedure.

"The person against whom the suspension and interdict is brought is a certain Andrew Robertson, moneylender, 429 Lawnmarket, Edinburgh, and the ground of suspension is that there is not, and never has been, any such company as the 'Exchange Loan Company, Limited,' that the company is non-existent and fictitious, that the complainer is not indebted to such company, that in suing the complainer along with the two Funks, and obtaining decree against them, the respondent made use of the name of this fictitious company, and that he is now using the decree so obtained for his own behoof.

"I read the defences as an admission that there is no such limited company as the 'Exchange Loan Company, Limited.' The defender was bound, on the complainer's challenge, to give specific information as to its constitution and registration, and I do not understand the averment that the respondent represented the 'Exchange Loan Company, Limited,' as anything but an admission that he illegally used the name of a fictitious limited company to represent himself in a transaction in which he was really principal, and in the action which he raised upon it.

"The decree itself is protected under the Justice of Peace Small Debt Act 1825 (6

Geo. IV, cap. 48), section 14. Except under the provision for re-hearing there is no possibility of review except by reduction, and reduction must be brought within a year from the date of the decree, and can proceed only on the ground of malice and oppression on the part of the justices. It was open to the complainer when cited, or on an application for re-hearing, to take an objection to the instance—in fact, a double objection, viz.—(1) That a descriptive firm cannot sue without the addition of three of its partners, or the whole if less than three—*Antermony Coal Company*, 4 Macph. 1017, per Lord President Colonsay; and (2) that the Exchange Loan Company, Limited was non-existent and fictitious. But the opportunity passed, and whether any other remedy is open, review under the statute cannot now be had, and the decree must stand for what it is worth—*Bell* v. *Gunn*, 21 D. 1009, and similar authorities.

"The question remains whether, standing the decree, the complainer has any remedy. The Act, section 14, *supra cit.*, says that the decree shall not be subject to advocation, &c., 'or any other stay of execution.' But I do not think that that stands in the way of the relief sought. It is true that the Court refused to interfere with diligence proceeding where a trifling and innocent mistake had been made in the Christian name of a defender in a small debt summons *dummodo constabat de persona* (*Spalding* v. *Valentine & Company*, 10 R. 1092), but *cf.* the second part of *Gray* v. *Smart*, 19 R. 692. But here there has been no innocent mistake. An act has been committed which the Court will utterly discountenance, viz., the unauthorised assumption of the style of a limited company. I cannot find that there is any penalty imposed by the Companies Acts on such assumption, but it is nevertheless a fraud on these Acts, and may well be an element in fraud at common law. But one thing is certain, that at any step the Court will stop an individual using the name of such a fictitious limited company. The decree may stand. I may not be able to suspend diligence upon it by the company in whose name it proceeds. But as there is no such company that is immaterial. But the statute puts no obstacle in my way in stopping the use by an individual of the decree which he has obtained in the name of a fictitious company. The decree is not his warrant, and he has no right to use it, though he has deceived the justices into granting it.

"I shall therefore make the interdict perpetual, with expenses.

"In the matter of the action for damages for wrongful and illegal poinding in the circumstances above narrated there are certain preliminary pleas which require to be considered. . . .

[*His Lordship discussed pleas* 1, 2, *and* 4 *for the defender.*]

"I shall therefore repel the 1st, 2nd, and 4th pleas for the defender, and appoint issues to be lodged, reserving to hear the parties as to whether the case should not be sent to proof."

Robertson reclaimed in both actions.

Argued for the appellant—The respondent's case was without substantial foundation; admittedly he was the appellant's debtor, and admittedly it was really the appellant who had poinded his effects, so that there was no room for the suggestion that any injustice had been done or was going to be done to the respondent. Undoubtedly, however, the instance in the small debt action was technically bad, and if timeous objection had been taken the action would have been dismissed. But the decree was now unchallengeable—Small Debt Act 1825, sections 14 and 15; *Bell* v. *Gunn*, June 21, 1859, 21 D. 1008—and further, the diligence authorised by the decree was also unchallengeable, there being no distinction under the Small Debt Acts between a suspension of the decree itself and of the diligence following it—Act of 1825, section 14; *Wilson* v. *Scott*, November 21, 1890, 18 R. 233, 28 S.L.R. 127; *cf.* also *Graham* v. *Findlay*, February 22, 1845, 7 D. 515. Diligence could therefore be done by the respondent as representing the Exchange Loan Company, Limited, and it was absurd to say that the addition of the word "Limited" affected the question; it was a mere nominal misdescription, which was a matter of no moment—*Spalding* v. *Valentine & Company*, July 4, 1883, 10 R. 1092, 20 S.L.R. 724; *Turnbull* v. *Russell*, November 15, 1851, 14 D. 45; *Keene* v. *Aitken*, February 15, 1875, 12 S.L.R. 308. On the assumption, however, that the Exchange Loan Company, Limited, was a fictitious person the bill fell to be treated as payable to bearer, and the respondent as such could do diligence on it—Bills of Exchange Act 1882, section 7 (3); *Bank of England* v. *Vagliano Brothers*, (1891) A.C. 107. As to the action of damages, no damage had been suffered, but the decree being unchallengeable damages could not be awarded against a party who had proceeded under it—*Crombie* v. *M'Ewan*, January 17, 1861, 23 D. 333.

Argued for the respondent—The Lord Ordinary's view that this was a fraud against the Companies Acts was a sound one. The Court would do nothing to further such a fraud. If there was a real company in existence known as the "Exchange Loan Company, Limited," it alone could proceed upon the decree; if there was not, clearly the appellant could not avail himself of the fiction. The cases cited by the appellant were all cases of mere error in description. This was an error *in persona*, and therefore *in essentialibus*. He referred to *Brown* v. *Rodger and Another*, December 13, 1884, 22 S.L.R. 225; Kerr on Fraud and Mistake, 300.

Lord Kyllachy—In this case as presented to the Lord Ordinary the ground of suspension was this, that the respondent being registered as a moneylender, as carrying on business under the name of the "Exchange Loan Company," and having drawn under that name, with the word "Limited" added, a bill which the complainer accepted, and under the same name

and with the same addition sued the complainer in the Justices Small Debt Court and obtained decree for the amount of the bill, it was incompetent to do diligence on this decree by reason of the said inaccurate addition to the respondent's registered name.

It was conceded that if objection had been taken in the Small Debt Court it must have been found that the instance was defective, and that the action must have been dismissed, not indeed because the word in question was added to the respondent's trade name, but upon the broader ground that a person suing under the descriptive title of a firm or company of which he is the sole partner must conjoin with the descriptive name his own proper name as such sole partner. That is a rule of process about which there can be no doubt.

On the other hand, it was also conceded, and is also not doubtful, that no objection being taken to the instance, and decree having gone out, such decree is absolutely protected from challenge or from stay of execution except upon certain special grounds, and then only if the challenge is brought within one year after the date of the decree. That is the effect of the 14th and 15th sections of the Small Debt Act of 1825, 6 Geo. IV, cap. 48—the Act under which the action was brought.

Accordingly, it is common ground—and the Lord Ordinary has so held—that this decree, as a decree in favour of the respondent under the name of "The Exchange Loan Company, Limited," is absolutely unchallengeable, and, moreover, that the summons and decree setting forth correctly the respondent's address in Edinburgh, there can be no question as to the identification of the respondent as the person to whom, under the name in question, the decree belonged.

The Lord Ordinary, however, seems to have been of opinion that although the decree is unimpeachable and there is no question as to whom it belongs, the respondent is yet debarred from enforcing it by reason of the addition in the summons of the word "Limited" to the trade name under which he is registered, his Lordship's view apparently being that the said addition involved a representation that the respondent was really a corporation under the Companies Acts, and that such a misrepresentation, although of no materiality in the circumstances, and involving no prejudice to the complainer, yet somehow put the respondent beyond the pale of the law, making the decree as a foundation for diligence a dead letter, and thus warranting a stay of execution.

I am unable to concur in this view of the situation. It is not, it will be observed, suggested that if the decree had been taken simply in favour of the Exchange Loan Company, or of the Exchange Loan Company Registered, or with the addition of some other purely fanciful designation, there would have been any difficulty. Any objection to the instance being foreclosed (as decided in the case of *Bell* v. *Grieve*, 21 D. 1008) by the finality of the decree under the statute, it is of course equally excluded as against the diligence which the decree authorises, and authorises without charge or other procedure. That is expressly provided by the 14th clause of the statute, which declares that, except as therein mentioned, the justices' decree shall not be subject, *inter alia*, to any stay of execution. In other words, as pointed out by the Lord President in *Wilson* v. *Scott*, 18 R. 233, there is no room under the Small Debt Statute for any distinction between a suspension of the decree itself and of the diligence following upon it. And that being the rule generally as regards all objections to the "instance," as other objections all go to the validity of the decree, I am quite unable to see why the objection now urged should be in a different position. In particular, I am, I confess, unable to see why an absurd but quite irrelevant assumption of corporate status should, more than any other unfounded assumption, involve such disabilities as the Lord Ordinary assumes. It may be very wrong and very absurd for either a pursuer or a defender to design himself in an action as possessing a status, social or legal, which he does not possess. But I do not know of any enactment or rule of law which attaches to such a proceeding the supposed penal results.

I am therefore of opinion that the stay of execution asked in the suspension should be refused, and I think for the same reasons that the action of damages should be thrown out. I may add that I have not overlooked the amendment made by the complainer the other day, which was that he had ascertained and averred that there was already an "Exchange Loan Company, Limited," registered under the Companies Acts, and carrying on business in England. It was said that this brought into the case an element not merely of assumption of title but of personation. But it appeared, and appears to me, that apart from other considerations—considerations with which I have already dealt—this particular objection is quite sufficiently met by the fact that upon this summons and decree there was no room for doubt as to the respondent's identity. He is described under his registered trade name, and his correct address is set forth as I have already said.

LORD STORMONTH DARLING—I concur.

LORD JUSTICE-CLERK—I am unable to agree with the result at which the Lord Ordinary has arrived. The respondent in this suspension holds a decree of the Small Debt Court for a debt found due to him, and I agree so far with the Lord Ordinary that that decree cannot be reviewed by this Court, it being impossible to review a Small Debt proceeding. But I am unable to see how it can be rendered nugatory by a suspension of diligence upon the decree. The claim of the respondent in the suspension when before the Small Debt Court was for payment of the amount of an acceptance which he held, and which it is not disputed and cannot be disputed was an acceptance by the complainer in respect of a loan

granted to him, the amount of the loan being paid to him by the respondent in exchange for the accepted bill, which thus became the property of the respondent. The ground of the complainer's suspension is that the drawer of the bill is on the face of it a company—The Exchange Loan Company, Limited—and that there is no such company. The respondent's averment is that he did business under that name, that this was well known to the complainer, and that no objection was taken in the Court when his summons in that name was raised, although the complainer was present when the case was before the Court and consented to decree.

It is plain that the decree went out against him on his acceptance on the face of the bill, and if he was to object to the instance he had opportunity to do so, and allowed decree to pass. Thereafter he paid £2 to account to prevent the sale of his goods under a poinding, and no diligence was pressed further against him.

I am unable to see how it can be objected successfully in a suspension to the rights of the holder of a bill for value, that the lender of the money has used a particular name as drawer. He is claiming his debt in respect he holds the bill, and unless it can be alleged that the acceptance was obtained by fraud, or that the holder of the acceptance has obtained possession of the document illegally, there can be no defence to the diligence used upon it. There can be no stay of execution upon such a decree in the ordinary case, and I see no ground for holding that the assumption of a name, whatever it may be, shall entitle the debtor on a bill to suspension of diligence.

It was urged that the complainer has ascertained that there does exist in England a company of the same name as that adopted by the respondent. I am unable to see how this can affect the question. A bill may be drawn in a name which is quite common, and there may be a question of fact who the actual individual who used the name was. But that cannot affect the obligation of the acceptor to meet his obligation when it falls due to the holder of his acceptance, for the holder has it as a warrant for diligence, and unless his right so to hold it can be impugned on some special ground, he is entitled to the assistance of a law court to enforce the obligation under it.

I therefore agree with your Lordships in recalling the judgment of the Lord Ordinary.

LORD LOW was absent.

The Court recalled the interlocutors in both actions, refused the suspension, and assoilzied the defender in the action for damages.

Counsel for the Reclaimer—M'Lennan, K.C.—Forbes. Agent—Robert Broatch, L.A.

Counsel for the Respondent—Trotter. Agent—Francis Green, Solicitor.

Friday, March 16.

SECOND DIVISION.

BROWN *v.* BROWN.

Poor's Roll—Circumstances Warranting Admission.

A porter earning 23s. a week, with no children, who had been found to have a *probabilis causa litigandi, held* entitled to admission to the poor's roll in order to defend an action of adherence and aliment brought against him by his wife, and to raise an action of divorce on the ground of adultery against her, she having been already admitted to the poor's roll.

The Lord Justice-Clerk *dissents* from the opinions expressed by Lord Young in the following cases—*Stevens* v. *Stevens*, January 23, 1885, 12 R. 548, 22 S.L.R. 356; *Anderson* v. *Blackwood*, July 11, 1885, 12 R. 1263, 22 S.L.R. 865; *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826, 25 S.L.R. 601; *Macaskill* v. *M'Leod*, June 30, 1897, 24 R. 999, 34 S.L.R. 752.

John Cunningham Brown, porter, 16 Archibald Place, Edinburgh, applied for admission to the poor's roll in order to defend an action of adherence and aliment brought against him by his wife, and to raise an action against her for divorce on the ground of adultery. She was on the poor's roll.

On 24th January 1906 the Court remitted the application to the reporters on *probabilis causa litigandi* to report whether the applicant had a *probabilis causa litigandi*, and also whether, in the circumstances of his application, he was otherwise entitled to the benefit of the poor's roll.

On 2nd March 1906 the reporters reported that the applicant had a *probabilis causa litigandi*, but that they did not think him entitled to admission to the roll.

The facts were as follows:—The applicant was a porter, thirty-seven years of age, married, without children, employed at the General Register House, Edinburgh, at a salary of sixty pounds a year or twenty-three shillings a-week. He had no means whatever beyond his salary.

Brown moved to be admitted. His wife opposed the motion on the ground that his circumstances did not warrant his admission.

Argued for the applicant—He was entitled to admission, the test being, could he, looking to the whole circumstances of the case, bear the ordinary costs of litigation. He could not—*Miller* v. *Gordon*, March 8, 1828, 16 S. 812; *Robertson*, July 8, 1880, 7 R. 1092; *Stevens* v. *Stevens*, January 23, 1885, 12 R. 548, 22 S.L.R. 356; *Anderson* v. *Blackwood*, July 11, 1885, 12 R. 1263, 22 S.L.R. 865; *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826, 25 S.L.R. 601; *Macaskill* v. *M'Leod*, June 30, 1897, 24 R. 999, 34 S.L.R. 752. See especially Lord Young's opinion in the last four cases. The following special circumstances were strongly in his favour—his wife was already