with Mr Sandeman's suggestion that they will be excluded from leading the kind of evidence that was referred to in the course of the argument, such as that a piece of a detonator was found of German manufacture, or that a man in the works had been approached by a German to get him to undertake to blow up these works—a request which he refused, but as to which he swore secrecy.

I therefore think that there ought to be a proof here.

The Court recalled the interlocutor of the Lord Ordinary and allowed a proof before answer.

Counsel for Pursuers (Reclaimers)—Lord Advocate (Clyde, K.C.)—Moncrieff, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

Counsel for Defenders (Respondents)—Sandeman, K.C.—Lippe. Agents—Cumming & Duff, W.S.

Wednesday, February 27.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GIBSON *v.* BLAIR.

Right in Security—Bond and Disposition in Security—Maills and Duties—Competency—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 119.

In consequence of a dispute as to the proper rate of interest in existing circumstances, the creditor in a bond and disposition in security in the form prescribed by the Titles to Land Consolidation (Scotland) Act 1868 raised an action of maills and duties against the debtor in the bond one day before the interest on the bond was due and payable. *Held* that as there had been no default the proceedings on the part of the creditor were premature, and that accordingly the action was incompetent.

On 10th November 1917 William Gibson, Writer to the Signet, Edinburgh, *pursuer*, creditor in a bond and disposition in security over certain heritable property situated in George Street, Edinburgh, brought an action of maills and duties against John Sloan Blair, 20 Pitt Street, Edinburgh, *defender*, the debtor in the bond.

On 31st August 1907 the defender had granted the pursuer a bond and disposition, which was recorded on 4th September 1907, over certain heritable property at No. 37 George Street, Edinburgh, in security of the sum of £600 borrowed by the defender from the pursuer. The position of matters between the parties at the raising of the action appears from the following averments.

The pursuer averred—"(Cond. 2) In August 1915 it was arranged between the pursuer and defender that the rate of interest payable on the said sum of £600 should be at the rate fixed by the Commissioners for fixing the rates of interest payable on heritable securities in Scotland from and after the term of Martinmas 1916, whether the rate then should be more or less than 4 per cent., which was the rate stipulated to be paid to Martinmas 1916. The said Commissioners prior to Whitsunday 1917 fixed the rate at 5 per cent. The defender now declines to pay the 5 per cent., alleging that at the time this arrangement was made it was never anticipated the Commissioners' rate would go so high as 5 per cent."

The defender in his statement of facts averred—"(Stat. 1) Prior to the defender's purchase of the subjects of security contained in the bonds and dispositions in security referred to in the condescendence for pursuer the defender was tenant of the shop and premises No. 37 George Street, Edinburgh, forming part of said subjects, at a rent of £200, and carried on therein the business of wine and spirit merchant and restaurateur. In 1907 the defender arranged to purchase the said subjects from his late father's trustees at the price of £12,000. To enable the defender to pay the said price he borrowed £7400 from the trustees of the late Mr Duncan Macpherson on bond and disposition in security, recorded on 3rd September 1907, and £600 from the pursuer on bond and disposition in security, recorded on 4th September 1907. These transactions were carried through after a report and valuation had been obtained for the lenders by Mr W. Allan Carter, C.E., Edinburgh. At the time of the defender's purchase in 1907 the total rental of the subjects was £522, 10s. per annum. (Stat. 2) The defender in 1912 disposed of his said business, and let the premises in which same was carried on, on a lease at a rent of £200 per annum. The defender is not now engaged in business. (Stat. 3) The interest payable on said loans was duly and regularly paid by the defender at Whitsunday and Martinmas in each year down to and including Whitsunday 1917. By letter dated 7th February 1917 the agents for the lenders intimated that from Whitsunday 1917 the rate of interest on the loans would be increased to 5 per cent. Shortly after this intimation the defender submitted to the said agents a statement of the rents and outgoings, representing to them that the defender was not in a financial position either to supplement the free rents to meet the increased rate of interest or to repay the loan, that he was willing to have the rate of interest increased from 4 to 4½ per cent. as from Martinmas 1916, but was unable to undertake the payment of a higher rate through conditions consequent on the war. On 20th March 1917 the agent for defender wrote to the agents for the lenders that the defender would, no doubt, make arrangements for meeting the half-year's interest at Whitsunday 1917, that he could not make any promise to pay a higher rate of interest after that, but that if the defender should find himself able to pay a higher rate he would do so. By letter dated 1st November 1917 the agents for the lenders notified to the defender's agent a

half-year's interest at 5 per cent. to Martinmas 1917 on the £8000 loans, amounting to £200. By correspondence subsequently between the agents for the respective parties further endeavours were made for an adjustment of the rate of interest to be paid by the defender at Martinmas 1917. On 7th November 1917 the agents for the lenders wrote that 5 per cent. must be paid, that if defender was unable to pay that rate he would require to hand over the management of the property to the bondholders, and that if defender was not prepared to do so proceedings would require to be taken with this object in view. While the defender was giving the position his final and anxious consideration the summons in this action was served on him on 10th November, and notices were then issued to the defender's tenants interpelling them after receipt of such notices from making payment of their rents due by them to the defender. In consequence of the action of the pursuer the defender was unable to pay any interest on the term day. (Stat. 4) No formal demand for repayment of the said loan of £600, as required by section 119 of the Titles to Land Consolidation (Scotland) Act 1868, has been made by the pursuer to the defender, and no interest was due and payable on the said loan at the date of raising this action. (Stat. 5) In order that the claim of the pursuer might be settled without further procedure in this action the defender has paid a half-year's interest at 5 per cent. on the loan of £600 under reservation of his defence, but the pursuer's agents have intimated acceptance of this as a payment to account of the interest on the bonds for £7400 and £600, and have refused to withdraw the intimations made to the tenants unless an undertaking is given that interest on the whole loans at 5 per cent. for the half-year to Martinmas 1917 will forthwith be paid. The pursuer also demands payment of the expenses of this action. The defender avers that the action was premature, and is unnecessary and oppressive, and in the circumstances stated incompetent. . . ."

The pursuer *pleaded*—"1. The pursuer being entitled in virtue of the said bond and disposition in security to enter into possession of the said subjects and uplift the rents thereof, decree should be pronounced in terms of the conclusions of the summons. 2. The defender having refused to admit liability for interest at the full rate, the pursuer was justified in raising the action, and is entitled to expenses."

The defender *pleaded, inter alia*—"1. The action is incompetent, in respect that no statutory notice was given and no arrears were due before service. 5. The action being premature, unnecessary, and oppressive, ought to be dismissed, with expenses."

On 8th January 1918 the Lord Ordinary (ORMIDALE) without delivering an opinion dismissed the action.

The pursuer reclaimed, and argued—The defender was in default in payment of the interest due. There was to all intents and purposes no real distinction between a public intimation of the debtor's inability to pay his debts and a private intimation on his part to his creditor that he refused to pay the increased amount of interest demanded—*Ferrier* v. *Dunlop*, (1831) 9 S. 837; *Davidson* v. *Gibb*, (1839) 12 Sc. Jur. 211. The defender had not stated that he would pay the increased rate of interest if possible. The debtor had at any rate not suffered any prejudice, the interest demanded being in excess of the total amount of the rents of the property which was covered by the bond and disposition in security. Counsel also referred to the case of *Saxty* v. *Smiths & Company* (1893), 1 S.L.T. 61, in which case an offer of payment had been made after the summons had been served.

Argued for the defender—As no interest on the bond was due at the date when the action was brought there could not be any default on the part of the debtor. The summons having been served on the day before the interest fell to be paid, and the debtor's estate not having been sequestrated, the present action was incompetent—Graham Stewart on Diligence, p. 514. A creditor was only in a proper position to demand payment of interest due when the time for payment had elapsed, and in the present case that time had not yet arrived. The case of *Ferrier* v. *Dunlop* (*cit.*) was distinguishable, as in that case sequestration had taken place. The following authorities were also cited—*Saxty* v. *Smiths & Company* (*cit.*); *Davidson* v. *Gibb* (*cit.*); *Ferrier* v. *Dunlops* (*cit.*); *Graham's Trustees* v. *Dow's Trustees* (1917), 2 S.L.T. 154; *M'Ara* v. *Anderson*, 1913 S.C. 931, 50 S.L.R. 713.

LORD JUSTICE-CLERK — I am sorry we have not the views of the Lord Ordinary before us, but it seems to me that the conclusion at which he has arrived is right.

The creditor in a heritable bond raised an action of maills and duties on the day before interest on his bond was due. There had been what I would hardly call a dispute, but a correspondence between the debtor and the creditor as to whether the creditor would insist on the full rate of interest which he alleged he was entitled to. The creditor claimed interest at 5 per cent., while the debtor alleged that in existing circumstances not more than 4½ per cent. should be claimed, and the question is whether the bondholder was entitled to raise an action of maills and duties for recovery of the interest on the day before the term at which the interest was payable. It seems to me that in raising the action the creditor took practical steps of the nature of diligence to recover a debt before the debt was due and before the debtor could be called upon to pay. I think it would require a very different condition of affairs from what we have here to justify such a proceeding.

The two cases that were referred to by Mr Pitman do not seem to me to apply at all, but rather by contrast to show that a different result should be arrived at here. In the case of *Ferrier* v. *Dunlop*, 9 S. 31, the debtor was sequestrated and the bondholder had a manifest interest to take steps to secure his money as against the trustee n the sequestration, and as appears from

the report the only ground of judgment was that the bankrupt was divested of his whole estate in favour of the trustee, and that accordingly in these circumstances the creditor was entitled to proceed with his diligence. In the case of *Davidson* v. *Douglas*, 2 D. 159, the diligence was a poinding of the ground which was effective for recovering the principal not merely the interest, the bond according to the form in use at that time had not a clause of premonition, and payment had been demanded regularly and formally from the debtor, and had been in part made but was still to some extent in arrear.

I think neither of these authorities lends countenance to the view that the creditor can do diligence for his debt at any time before the debt is due. In these circumstances, this action having been raised to recover a sum of money which was not due until the following day, I think the Lord Ordinary was right in dismissing the action, and that we should adhere to his interlocutor.

LORD DUNDAS—I agree. I think the Lord Ordinary has rightly dismissed the action. The defender was not in default. It is not said that he was *vergens ad inopiam*, still less that he was sequestrated. I see Mr Graham Stewart lays the law down correctly thus—"The debtor must be in arrear, but if his estate has been sequestrated the action may competently be raised although no interest is due if it be not called in Court until the term of payment is past"—Graham Stewart on Diligence, p. 514. For that proposition he cites the case of *Ferrier* v. *Dunlop*. I think it sufficiently appears from the short report in 9 Shaw that the fact of sequestration was a very material feature in the case, and was founded on as a ground of judgment. And it appears even more clearly from a report of the case which will be found in the 4th vol. of the Law Chronicle Report, p. 216.

LORD SALVESEN—I am of opinion that it is a condition of an action of maills and duties being brought that before service of the action there should have been a demand for payment followed by default of payment. That default may be either default of payment of the principal if it has been demanded, or of interest if the term at which the interest is payable has arrived.

In this case the debtor was not in default on either head. There had admittedly been no claim for repayment of the principal sum contained in the bond. No doubt such a claim might have been made, and upon very short notice, because a heritable creditor can register his bond and give a six days' charge upon it. If after such a charge the principal is not repaid then there is a default in payment which entitles the creditor to raise an action of maills and duties for his own security. I think it would be unduly extending the rights of the heritable creditor—which are already sufficiently strong—if we allowed him to secure the interest due to him by service of an action of maills and duties before the term of payment arrived, and so prevent the tenant paying his rent to the owner of the property, when it is still possible that the owner may make arrangements to pay the interest in full.

If it has become apparent before the service of the action that the debtor is unable to meet his obligations, as when he is divested of his estate by sequestration, then it has been held—and I think most properly held—that the heritable creditor is entitled to treat a declared insolvency or sequestration as a default of payment of both principal and interest, because the debtor is not entitled after sequestration to uplift the rents of his property. The right to uplift them has passed to another, to wit, the trustee for his creditors. But in the circumstances of this case, where there was no sequestration, where it is not even said that the debtor was *vergens ad inopiam* or is in any sense notour bankrupt, I think the heritable creditor was premature in instituting these proceedings, and that he must suffer the consequence of having the action dismissed.

LORD GUTHRIE—I think the summons as laid is not relevant. It is averred that as at the date of the summons, 10th November, the interest on the £600 was due, and it is pleaded that the defender having refused to admit liability for interest at the full rate the pursuer is entitled to raise the action. It now turns out that these statements are mistaken. It is admitted that on 10th November the interest was not due, and the correspondence shows that the defender never refused to admit liability, but admitting liability, urged reasons for regarding the special circumstances of the time as warranting a lower rate of interest being claimed. I agree that the Lord Ordinary was clearly right. There was no default here, and if it be accurate to say there may be exceptions to the rule that there must be default to justify the raising of the action, then it is clear that this case does not fall under any of the exceptions.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer and Reclaimer—Pitman. Agents—Tait & Crichton, W.S.

Counsel for Defender and Respondent—Blackburn, K.C.—Robertson. Agent—Henry Wakelin, Solicitor.