pursuer, and that the pursuer is not entitled to any further judgment than that which the Lord Ordinary has thought it fair to give him.

The question is this, Whether the pursuer did, as a creditor of the defender, consent to a composition-arrangement agreeing to take a composition on all his claims against Anderson? As to that I have no doubt. He attended the meeting and agreed to the composition. There is no state of claims presented, but the arrangement is, that all the creditors present, for all the claims they have against Anderson, are to take 10s. per pound. What was the position of this gentlemen then? He had a claim against Anderson on two bills, and he was also cautioner for him on a cash-credit bond, and in respect of that bond he knew he would be called on for payment. He was therefore a creditor for relief against Anderson in respect of his cautionary obligation. He consented therefore to take a composition on that as well as on his other claims, and the mere circumstance that that liability was not ascertained and was only contingent, makes no difference. The notion of saying that Reid and Hope did not sign is absurd; they signed without any qualification, and the minute bears that the creditors present who have subscribed agree, and therefore there is a completed composition-contract as far as concerns the creditors present for all their claims against Anderson.

Further, it is obvious that this composition-contract was completed by the consent of all the other creditors. We have that under the hand of this pursuer in his narration of the agreement between him and Hope. We must take it, therefore, that this composition-contract was complete and binding on the whole creditors.

It is said that the Bank did not take the composition, and never agreed to take it; and that may be so, for it was treated as a creditor having full security, and so the cautioner to the Bank came in place of the Bank as a creditor in this arrangement.

The next question is, whether there is any good separate agreement for payment of this debt in full. If that memorandum shown to us in draft had been completed, it might have been in terms an arrangment to that effect; but, in the first place, it is doubtful if it would have been lawful—I give no opinion on that—but besides, the thing was never executed, and it certainly was never acted on. The minute of agreement, which was executed between Reid and Hope and Anderson, makes no provision for payment of the debts of Reid or Hope in full, and therefore there is no separate agreement, and no agreement at all for payment in full.

The next question is, whether, independently of any agreement, the defender Anderson having failed to pay the composition within the stipulated time, the debts of the creditors who have not been paid do not revive, and are not enforceable against the defender in full. As to the general rule in such cases there is no doubt. If a composition is arranged, but not paid, no doubt the creditors may fall back on their original claims. But it is impossible to apply that rule to a case like this, for it is obvious that Reid and Hope contemplated that the trust should subsist for a considerable period, much longer than would be necessary to tide over the time when both instalments would be paid, and therefore they must have contemplated that the right to account must have extended over a longer period than the payment of the other creditors.

The next question is, is the pursuer entitled to maintain this action for payment of his composition, or is he precluded by the arrangement contained in the agreement of March 1863? That is, do he and Hope take the trust-estate thus vested in them as their fund of payment, and, on consideration of getting that, renounce personal recourse against the debtor? That might be a question of some difficulty if it arose in an absolute form, but all the Lord Ordinary holds is that, at least until it appears that the trust-estate will not be available for payment of their debts, in security for which it is vested in Reid and Hope, they cannot have recourse, and I agree with the Lord Ordinary. I think it is the fair meaning of the parties that Hope and Reid should exhaust the trust-estate before recourse against the debtor, and I think the Lord Ordinary saves to the pursuer any right he may have, on failure of the trust-estate, to come against the debtor personally. I am clear that at present the pursuer has no claims under the petitory conclusions of the action.

Agents for Pursuer—Horne, Horne & Lyell, W.S.
Agent for Defender—David Curror, S.S.C.

Friday, May 28.

SECOND DIVISION.

GORDON *v.* SOUTER.

Sheriff—16 *and* 17 *Vict. c.* 80, § 15—*Elapse of Three Months—Diet-Book of Court—Revival of Action—Payment of Expenses—Waiver. Held* (1) that promulgation of an interlocutor in the diet-book of Court is a proceeding in the cause in the sense of the 15th section of the Act 16 and 17 Vict. c. 80; (2) that a minute lodged by the parties, in which one craved after the expiry of three months revival of the action, and the other did not object, was equivalent to a waiver of expenses, which again was equivalent to payment of expenses in the sense of the statute.

This was an appeal from the Sheriff-court of Banffshire, and involved a question as to the construction of the 15th section of the Sheriff-court Act (16 and 17 Victoria, c. 80), which provided as follows;—"Where, in any cause, neither of the parties thereto shall, during the period of three consecutive months, have taken any proceeding therein, the action shall at the expiration of that period *eo ipso* stand dismissed, without prejudice nevertheless to either of the parties within three months after the expiration of such first period of three months, but not thereafter, to revive the said action, on showing good cause to the satisfaction of the Sheriff why no procedure had taken place therein, or upon payment to the other party of the preceding expenses incurred in the cause whereupon such action shall be revived and proceeded with in ordinary form."

The Sheriff (BELL) had in this case pronounced an interlocutor, which was dated 25th May, but which was not promulgated by entry in the diet-book of Court till 1st June. From that time down to the 30th November no proceeding took place in the cause; but on 30th November a minute was lodged by the parties in the following terms:—"Upwards of three months having elapsed since the date of the last interlocutor in this case, it has fallen asleep; the pursuer respectfully craves, the defender not objecting, that your

Lordship will be pleased to waken the same, and to renew the order contained in the interlocutor of 29th January 1868."

The Sheriff-substitute (GORDON) having considered the minute, pronounced the following interlocutor:—"*Banff, 30th November* 1868.—The Sheriff-substitute having considered the minute tendered for the pursuer, and whole process,—Finds that the last interlocutor is dated 25th May 1868: Finds that no steps have been taken by either party in the cause for six months after the date of that interlocutor, therefore Finds that the action stands dismissed, in terms of the Act 16 and 17 Vict. cap. 80, section 15, and decerns. One word deleted.

"*Note.*—The minute for pursuer is of no avail in keeping the process alive. The only argument urged by his procurator was, that he had frequently asked the defender's procurator to return the process, that he had failed to return it, and that it had been returned on 28th current under threat of caption. This is certainly no good cause of delay for six months, and the Substitute could not, even if the minute had been lodged within the six months, have renewed it except under the penalty of paying the pursuer's expenses of process. The process is without doubt out of court."

The pursuer appealed.

The Sheriff (BELL) pronounced the following interlocutor:—"*Edinburgh, 30th December* 1868.—The Sheriff dismisses the appeal and decerns.

"*Note.*—The last interlocutor preceding the one appealed against was pronounced on 1st June 1868. This was a proceeding by the Sheriff, and may, possibly, have been even a proceeding taken by the parties who would be in court and receive the judgment. As to this the Sheriff forms no opinion. But no proceeding followed until long after 2d September. From that date, at any rate, the process stood *eo ipso* dismissed; 16 and 17 Vict. c. 80, sec. 15. Thereafter the question was no longer one of keeping alive, but of reviving the action. This can only be done on payment of full expenses within three additional months, or on showing good cause to the satisfaction of the Sheriff why no procedure had taken place therein. What is exacted is sufficient cause, not why the process should be revived, but why no procedure has taken place. The Sheriff did not formerly think that consent extorted at the last moment was sufficient to establish that there had been sufficient and satisfactory cause existing during nearly the entire period of six months, but he has a difficulty in justifying his previous views since the decision of the case of *Macintosh*, 10th November 1863. He will presently state why he doubts whether he has any power to deal with the present interlocutor at all. But if he had power, he should be inclined to think that the case of *Macintosh* ought not to be pressed beyond what was actually decided. Now, in the case of *Macintosh* there was express consent to revive the process. In the present case full consent was refused until 15th December 1868, before which six months and two weeks had elapsed. On 30th November the partner of the respondent's agent, indeed, signed the minute, No. 9; but he altered it for the very purpose of expressing that, although he did not object, he at the same time did not consent. And upon the appellant's own showing the agent did this just because he knew nothing at all about the case. Thus, on two points the case differs unfavourably from that of *Macintosh*. Consent, which ruled *Macintosh's* case, was here conclusively refused until after the six months had elapsed. The mere non-resistance here conceded was something short of proper consent; and even if full consent had been given by an agent's partner, who at the same moment explained that he knew nothing whatever about the case, the Sheriff cannot understand how anything written by a gentleman who knew nothing whatever about any point in the procedure during the previous six months could possibly be received by any Sheriff, as a sufficient showing of cause why things had gone on in the course they had followed during the whole six months, which that gentleman knew nothing about. If the Sheriff, therefore, had been a judge of the cause shown, he would probably have decided that it was not sufficient. But the Sheriff-substitute has considered this matter amongst others. It is not the sole ground of his judgment, and he has not put it into the interlocutor. But in the note he says, *inter alia*, expressly 'there is certainly no good cause of delay for six months, and the Substitute could not, even if the minute had been lodged within the six months, have revived it, expect under the penalty of paying the pursuer's expenses.' The Sheriff-substitute, therefore, although he has not made it a part of his interlocutor, has assigned it as one of the grounds of his interlocutor that parties had failed to show sufficient cause either beyond or within the six months. And this being so, review is excluded by the decision *Macdowall*, 13th July 1865."

The pursuer appealed to the Court of Session.

SHAND for him.

MACKENZIE and MACKINTOSH in answer.

At advising—

LORD JUSTICE-CLERK—The appellant in this case complains of a judgment of the Sheriff-substitute of Banffshire, affirmed by the Sheriff, by which an application alleging a wrong done by the respondent in relation to a water course was dismissed. The judgment of the Sheriff-substitute finds that, as the process had not been moved in for six months from 25th May 1868, the date of an interlocutor of the Sheriff signed at Edinburgh, it fell to be dismissed under the 15th clause of the Sheriff-court Act 1853. The appellant refers to a proceeding in the act book of the Sheriff-court of Banffshire on the 1st June, when this interlocutor was promulgated, and contends that the period of six months must run from the date of promulgation, and not from the date of signing. If so, the judgment of the Sheriff-substitute is certainly erroneous, because he rests it entirely upon the assumption of a wrong date, and rejects the true date, which, if assumed, would negative the fact that for six months previous to November 30 there had been no step taken by either parties. The terms of his interlocutor are—"The Sheriff-substitute having considered the minute tendered for the pursuer and whole process, Finds that the last interlocutor is dated 25th May 1868: Finds that no steps have been taken by either party in the cause for six months after the date of that interlocutor; therefore Finds that the action stands dismissed, in terms of the Act 16 and 17 Vict. c. 80, § 5, and decerns."

The Sheriff, judging from the statement in his note, is of opinion that the proper date to be taken into computation is not the 25th May, but the 1st June, and he says "the last interlocutor preceding

the one appealed from was pronounced on the 1st June;" yet he has dismissed the appeal, against the judgment of his Substitute, which finds that the date to be taken is the 25th May; and on that ground, and on that ground alone, dismisses the case.

He has done so because the Sheriff-substitute, in a note appended to his interlocutor, intimates an opinion that no sufficient cause had been shown why a six months' delay should have occurred, and because the step taken was not of a nature of itself to satisfy the requirements of the Act. He has, in dealing with the case, omitted to recognise the plain distinction between findings in an interlocutor and opinions and views expressed in the note appended to it. If he thought the 1st June the proper date, he should have sustained and not dismissed the appeal against his Substitute's judgment, and pronounced a judgment embodying his own views of the case.

The first point which we have to determine, is, whether the date from which the commencement of the six months is to be the 25th May or the 1st June. I am very clearly of opinion that the latter date is the one to be regarded. The object of the provision was to impose a penalty upon parties who unduly delayed to take steps in a cause during a particular period. These parties could not be in default while they had no intimation of the interlocutor, nor even possessed means of ascertaining its existence. An interlocutor signed by the Sheriff in Edinburgh on one day might possibly not be transmitted to his county till a good many days thereafter. The interlocutor itself, till placed in the hands of the Clerk of Court or notified, remains subject to the entire control of the Sheriff who proved it, and might be cancelled or altered. To take the date of an interlocutor subscribed in Edinburgh, as to which the parties knew nothing, and could know nothing, till the 1st June, as regulating the computation of a period of delay followed by the penal result of a dismissal of the cause, would be in plain contradiction to the spirit of the provision, and is not in any way supported by its literal construction. The statute does not fix the date of an interlocutor as that at which the currency of the period is to commence to run, but simply provides—"that where neither of the parties shall have taken any proceeding therein during three consecutive months, the process should stand dismissed,"—an expression which, literally read, would make the date anterior to avizandum, and so include the period of the Sheriff's consideration of the cause, but which, sensibly and rationally construed, must be held to mean that parties who fail to take steps when they might and ought to have done so, shall have the process dismissed.

We have the evidence of the date on which the interlocutor was promulgated to the parties in the Act Book of Court, which has been transmitted to us, and in this respect what was done was in accordance with the practice of the Court. The Sheriff deals with it in his note as dated on June 1. I do not find that the Sheriff-substitute attested this particular entry, or any series of entries of which it formed part, but the book is regularly kept, and the entry is in the hand of the clerk, and the entry is that of an act, not a decree of court.

In that view, on the 30th November, and so within the six months, a motion was made by the pursuer to have the case revived. The procurator for the defender subscribed the minute as "not objecting" to that motion. It was not made, so far as the minute bears, on any ground of special cause shown for the delay; though, from the note appended to the interlocutor and the explanations stated to us, it may be gathered inferentially that something had been said as to the process having been transmitted to a process of declarator touching the same watercourse between different parties in the Court of Session. With this special supposed cause of delay we have no occasion to deal, and, indeed, we have no materials for forming an opinion. It is contended that the decision of the Sheriff-substitute, holding that there was no good cause, is as final in such case as his being satisfied as to good cause was found to be in the case of *M'Dowall*. We have here no judgment by the Sheriff-substitute at all upon that matter, and the case, as presented by the appellant, does not rest at all on the supposed existence of a good cause for delay, but on the fact that he made a motion within the six months, which the Sheriff-substitute was bound under a right construction of the Act forthwith to have granted. Six months had nearly elapsed, but the motion was made within that time, and the words of the Act are—(*reads*).

It is only in one alternative that the separate question of good cause of delay to the satisfaction of the Sheriff arises. For the Sheriff, in the other alternative of payment of expenses, must pronounce an interlocutor reviving the cause, if either party pay to the other the expenses incurred in the preceding part of the cause. It is not possible, according to any rational construction of the Act, to say that the right of the party seeking to revive the action shall depend upon the mere fact of payment within the six months. That construction would give an absolute and capricious *veto* to the other party against the revival, because he might decline to let the amount of his expenses be known, or he might refuse to receive payment, though they were ascertained, preferring to get the action dismissed. The actual payment within the six months could scarcely be intended to be indispensable for this reason, also, that however willing both parties might be, delays incident to taxation; the occupation of the auditor of Court, or otherwise, might throw the period of possible payment beyond the six months. It can scarcely be contended that the one party must pay without taxation to the other, whatever may be demanded of him in name of expenses. If actual payment is not within the meaning of the Act, a tender or *bona fide* expression of a readiness to pay expenses, followed out by payment at the earliest possible time, whether within or without the six months, must be sufficient. But if the other party is satisfied to ask no expenses, to waive his clear right to have them ascertained and paid to him, is not the position one in which the Sheriff, who certainly cannot enforce payment of expenses to a party who is unwilling to receive them, is really placed by the parties in the same position as if the payment of the money had been made? That question must be assumed to have been settled between them. Your Lordships, in the case of *Macintosh*, have held that a *consent* to a motion to revive implies a waiver of the claim of expenses, and that, upon such consent being given, the action may be revived. The only distinction in the present case is, that on the 30th November, and within the six months, the motion made for revival was not objected to, full *consent* being given after they had expired; a consent which may throw light upon the previous proceeding.

I do not see that there is any substantial difference in this matter between the consent in the case of *Macintosh* and the *non-objection* of the respondent in this case; as regards a claim for expenses, I think the expression of a waiver of any objection to the pursuer's craving necessarily implied a waiver of the objection that the expenses had not been paid—in other words, a waiver of the claim for expenses as a condition of revival. It is difficult to figure what a party could mean, who stated that he did not object to a motion for revival of the cause *simpliciter*, if he did not mean that his claim for payment of expenses which was his statutory right was not to stand in the way. I view this case as ruled by the case of *Macintosh*. If another view were taken, and the Sheriff were to hold that no waiver was implied; then, as the motion certainly implied a tender of the expenses, the Sheriff might have found the defender entitled to them, and directed an account to be given in and taxed. In either view, there was no case for a dismissal of the process. I propose, therefore, that we sustain the appeal, and remit to the Sheriff to revive the process, and to proceed further therein as may be just.

The other Judges concurred.

Agent for Appellant—A. Morrison, S.S.C.

Agents for Respondent—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday, May 29.

FIRST DIVISION.

SCOTT AND GILMOUR *v.* WINK.

Bankrupt—Discharge—Timeous Objection. A creditor who, although aware of his debtor's sequestration, lodged no claim, *held* precluded from reclaiming against a deliverance of the Sheriff approving of an offer of composition, he having stated no objection to the proceedings until the time for reclaiming against the deliverance had almost expired, and the proceedings in the sequestration being regular.

Buchanan's estates were sequestrated on 21st August 1866. Wink was appointed trustee at a meeting of creditors on 15th February 1869, called by the trustee, with consent of the commissioner, to consider an offer of composition with security. The bankrupt offered a composition of ninepence per pound. The minute bore that the "creditors unanimously resolved that the above offer be entertained for consideration, and instructed the trustee to call another meeting of the creditors, for the purpose of finally deciding on the bankrupt's offer, and the security proposed." A circular letter, dated 1st March 1869, was sent to all the creditors who had lodged claims, or who were given up in the bankrupt's state of affairs, intimating the offer, and calling a meeting to decide on the same. To this letter was appended this note:—"The bankrupt states that he has certain claims against Mr Merry, which have emerged since the sequestration, out of his dealings with the Caol Ila Distillery, and otherwise; the trustee, with advice of the commissioners, has refused to take up and pursue said claim."

At the meeting on 11th March, the offer and security made at last meeting having been considered, it was unanimously agreed to accept thereof, and the trustee was instructed to get the same carried through without delay.

On 22d March the trustee reported to the Sheriff, in terms of the 38th section of the Bankruptcy (Scotland) Act 1856. On 30th March the Sheriff-substitute (MURRAY) pronounced this interlocutor:—"Having considered the foregoing report, with the minutes of meeting of creditors and bond of caution therein referred to, and no appearance being made by any creditor to object, finds that the offer of composition, with the security therein mentioned, has been duly made, and is reasonable, and has been accepted unanimously by the creditors, or mandatories of creditors, present at said meeting; therefore approves of the said offer, with the security; but before granting the discharge, appoints the bankrupt, Norman Buchanan, to appear and make a declaration in terms of the statute."

Scott & Gilmour, coalmasters, Glasgow, creditors to the extent of £7, who, although they were aware of the sequestration, had not lodged any claim, appealed.

The Lord Ordinary (BENHOLME) dismissed the appeal.

SHAND and GLOAG for reclaimers.

FRASER and H. J. MONCREIFF for respondent.

At advising—

LORD PRESIDENT—We have heard a great deal about general principle in this case, but I have failed to extract any general principle from what we have heard. This offer has been carried through regularly under the statute. It is unobjectionable in point of form. The meeting at which it was entertained was a regular meeting of creditors, and the meeting at which it was accepted was also a regular meeting. The circular letter sent in the interval complied with all the requirements of the statute. Mr Gloag says that it does not give sufficient information. That is a question of circumstances, and it is difficult for us to judge of that now, owing to the fault of the appellant, but on the face of the letter it does give information, assuming the trustee to be honest and to be stating the truth. I think it gives proper information for the creditors, to enable them to say whether the offer is reasonable, and ought to be accepted. It also states that, while some other claims have emerged since the sequestration, the trustee, with advice of the commissioners, has refused to take them up. Mr Gloag says that that is another thing for consideration, and it is desirable to know something as to these claims which emerged, and the reason of the sum being reduced to ninepence per pound. That is a good observation, but when ought it to have been stated? Ought it not to have been made at this meeting for consideration of the offer? But these gentlemen, for a claim of £7 for coals, make no appearance in this sequestration, and lodge no claim down to the present date. They might have appeared at the meeting for consideration of the offer, and might have stated this objection and asked information, which I think they would have got on the spot, and such as would have satisfied them. They allow things to go on, and then the trustee makes this representation to the Sheriff, and he, in his absence of any objection from any quarter, pronounces the deliverance of 30th March. All this time, and for seven days more, this account was never heard of, but on the last day for reclaiming against this deliverance this application is presented, and what is said in support of it? Nothing but the vaguest surmises of something being wrong. It is said the composition is not reasonable, or rather that we cannot see