charged may be committed. The libel we are considering, as I regard it, charges a fraud by the prisoner in such circumstances, and after verdict I must assume that he in fact committed it by surreptitiously removing his property with intent to defraud his creditors to whom he was bound to surrender it. It is suggested that nevertheless, and for aught that appears to the contrary, the property which he so surreptitiously and with fraudulent intent removed and concealed was sufficient to pay his debts in full; in other words, that he may have been solvent. I cannot agree in thinking that this is a favourable suggestion for him, or that he can take benefit from it. I cannot hold that the prisoner is entitled to be acquitted on the law or the fact—because it may possibly be true that his fraudulent act and purpose were so extensive that his victims were cheated, or intended by him to be so, out of the difference, not between one dividend and another, but between a small dividend and full payment, which his fraudulently concealed and withheld estate was able to afford? That he surrendered sufficient to pay his debts in full might have been an answer to the charge on the fact of fraud, but that the amount fraudulently retained would, if honestly surrendered, have afforded full payment, is, I think, very clearly no answer at all. If two debtors, the one solvent and the other not, remove their property, and themselves with it, to a place abroad, or to an obscure retreat in this country, each with intent to defraud his creditors by leaving them unpaid, are we to announce it as law that the one commits a crime and the other not? For my part I can see no distinction between them except this, that the solvent debtor is the greater rogue of the two—not as regards the quality, but only the degree of his roguery. Whether or not the criminal law will reach either must, in my view, depend on considerations to which I have already sufficiently adverted; but assuming no distinction between them except that the one was solvent and the other not, I am clearly of opinion that it extends to both or neither.

I therefore think that the Sheriff was right in holding that the insolvency of the prisoner was not necessary to the offence with which he was charged, and that he properly repelled the objection to the libel, and passed sentence on the verdict.

Lord Justice-General—I concur in holding that this major proposition is irrelevant. My objection is simply to the two words "or other." And if they had not been there I should have held the indictment relevant. I think that the matter has been so settled, and it would be quite in vain now to attempt to upset it. The indictment as it stands amounts to this, that the fraudulent putting away by a debtor of his goods for the purpose of defrauding his creditors is a crime. Now, it may be a very great fraud for a solvent man to put away his goods so as to produce apparent insolvency. But in such a case I should not be disposed to charge it as we have here, because the essence of such a fraud would lie in the pretending to be insolvent, and that element would have to appear in the major proposition. The point seems so clear that it would hardly have required a full bench for its consideration had there not been some doubt expressed as to the relevancy of such indictments, even without the words now objected to, but upon this point also there really seems to be no doubt.

The Court sustained the bill of suspension, and suspended the proceedings, with expenses.

Counsel for Suspender—Moncrieff.

Counsel for Respondent — Solicitor-General Watson—Muirhead.

COURT OF SESSION.

Friday, December 3.

FIRST DIVISION.

ANDREW SYMINGTON (PETITIONER) *v.* MRS EDMONSTON OR SYMINGTON (RESPONDENT).

Diligence—Future Debt—Inhibition—Arrestment—Husband and Wife.

A wife raised an action of separation and aliment against her husband, and obtained decree for a sum of aliment, payable half-yearly. She used the diligences of inhibition and of arrestment (1) upon the dependence of the action proceeding upon the warrant in the will of the summons; and (2) upon the decree of the Court, and maintained that she was entitled to have these kept up as security for future aliment. *Held* that the diligences, being for a future debt, were incompetent where it was not stated that the debtor was *vergens ad inopiam*, or no parallel circumstance was alleged.

Expenses.

The wife was found entitled to the expenses of opposing the husband's petition for recall of diligence.

Opinion per Lord President, that diligence for future debt must proceed by bill, and not upon the warrant inserted in the will of the summons.

This was a petition at the instance of Andrew James Symington to obtain the recall of certain inhibitions and arrestments used by his wife (1) on the dependence of, and (2) on the decree pronounced in her favour in a prior action of separation and aliment at her instance against the petitioner (reported *ante*, vol. xi. pp. 369, 579, and vol. xii. p. 416), and on the dependence of an existing action of payment, also raised by her against the petitioner.

The petitioner, by a judgment of the First Division of the Court in the above-mentioned first action, dated 20th March 1874, had been found liable to pay to the respondent the sum of £100 of yearly aliment, payable half-yearly and in advance, under deduction of such sums of aliment as she had received since Whitsunday 1873. The respondent had been found entitled to the custody of the children of the marriage, five in number, during their pupilarities, so long as the Court made no different order, and the petitioner was ordered to pay £25 of aliment yearly for each child so long as they should remain with their mother. This interlocutor, on appeal to the House of Lords, was affirmed, except that the present

petitioner was found entitled to the custody of the three male children. He was still found liable to the respondent in aliment at the rate of £25 per annum for each of the female children.

On the dependence of the action above referred to, and in virtue of warrants contained in the summons therein, the respondent, on 10th April 1873, used inhibition against the petitioner, and caused arrestments to be used to the amount of £5000 in the hands of several parties; and in virtue of an extract of the decree pronounced by their Lordships in said action, the respondent again, on 1st April 1874, caused arrestments to be used in the hands of the same parties to the amount of £838, 5s. 9½d.

The petitioner stated in the petition that he had paid to the respondent all sums for aliment and maintenance for herself and her children due down to the term of Martinmas 1875. The expenses to her in the Court of Session were taxed at £584, 1s. 8d., which were paid on 25th July 1874; and the sum of £100, to enable her to meet the appeal taken by him to the House of Lords, was also paid. Her expenses in the House of Lords had been taxed at £573, 19s. 4d., in order to pay which (under deduction of the foresaid sum of £100) the petitioner proposed to sell his villa; but on application to his wife she refused, except on condition that the petitioner undertook to pay a claim of £600 made in action raised on 9th October 1875, at the instance of the respondent, with concurrence of Messrs Maclay, Murray & Spens, writers, Glasgow, and others, for payment of sums said to have been incurred by the respondent, her brother, and agents employed by her in this country and in America in relation to the decree pronounced by the Court. Upon the dependence of this action, and in virtue of warrants contained in the summons, the respondent on 12th October again used inhibition and caused arrestments to be made against the petitioner. The petitioner further stated that the inhibition and arrestments used under both actions had occasioned him great hardship and inconvenience, that his whole funds and estate were thereby locked up, and he was practically powerless to make his capital available for the support of himself, his wife, and children, whereby he would inevitably be ruined unless the inhibitions and arrestments were recalled. He prayed therefore that the inhibitions and arrestments should be recalled without caution, but said he was willing, if it was considered necessary, to find caution to a limited extent.

Mrs Symington lodged answers admitting the use of the inhibitions and arrestments, and stating they were the only security she had for (1) aliment at the rate of £100 a year from and after Martinmas 1875; (2) £25 a year for each of the two children committed to her charge from and after Martinmas 1875; (3) the House of Lords expenses, amounting (after deducting the £100 paid to account by direction of the Court), along with the Court of Session expenses, to £473, 19s. 4d; (4) £663, 0s. 3½d. of expenses sued for in the action at her instance, with consent of Maclay, Murray & Spens, and others. She further stated that the property attached was not sufficient to meet the claims against it, and that the petitioner's whole property was not attached by the diligences. She had no objection to the arrestments being loosed and the inhibitions being recalled upon caution, but not otherwise.

In the course of the discussion the petitioner paid the House of Lords expenses, and offered caution for £300 in the second action, which was accepted. The only question which remained was the validity of the diligences in the first action for future sums of aliment.

The petitioners argued—Diligence for debts not due, and that might never become due, was not competent. In any case the Court must grant leave before such a diligence could have effect, and the debtor must be stated to be *vergens ad inopiam*. The aliment was a future debt, and the fact of the Court giving decree did not make a difference. A wife was not entitled to use an arrestment on the dependence of action of divorce. The Personal Diligence Act, 1 and 2 Vic. c. 114, secs. 1 and 16, empowering the insertion of warrants in the will of the summons, had only reference to an ordinary debt.

Authorities—*M'Gregor* v. *Howie*, Feb. 25, 1837, 15 S. 681,, 12 Scot. Jur. 334; *Meres & Ainsworth* v. *York Buildings Co.*, Feb. 27, 1728, M. 800, 1 Pat. App. 10; *Bennett* v. *Fraser*, June 21, 1834, 12 S. 60; Erskine's Inst. iii. 6, 10; Bell's Comm. ii. 144.

The respondent argued — She was entitled to secure future aliment, on the authority of *Macdonald* v. *Elder & Macleod*. No authority was adduced to show that the diligences were incompetent. The debt was not altogether future. It was not a bargain *ex contractu* of the parties upon which the diligence was used, but a decree of the court, containing a warrant. It was not the practice to insert in the will of a summons a statement that the debtor was *vergens ad inopiam*, and the object of the Personal Diligence Act was to introduce a short form. In any case, the addition of *vergeus ad inopiam* was only a circumstance which favored the use of diligence for a future debt.

Authorities—Bell's Comm. (Maclaren's edition) i, 354; *Macdonald & Elder* v. *Macleod*, Jan. 15, 1811, F.C.; *Dove* v. *Henderson*, Jan. 11, 1865, 3 Macph. 339; Act 1 and 2 Vic. cap. 114, secs. 1 and 16; Act 31 and 32 Vic. cap. 100, sec. 18; Balfour's Practicks, 476; Bell's Comm. (Maclaren), ii, 70.

At advising—

Lord President—In this case I understand that all the questions raised in the action have been disposed of, except the validity of the two diligences of arrestment and inhibition for security of future aliment.

By our interlocutor of 20th March 1874 we found the petitioner in the present case liable in payment to the present respondent in the sum of £100 of yearly aliment, payable half-yearly in advance, under deduction of such sums of aliment as she had received since the term of Whitsunday 1873; and in regard to the children, we found that the respondent was entitled to their custody during their respective pupillarities, so long as no other or different order might be made by the Court. We further found the petitioner liable to the respondent in aliment at the rate of £25 a year for each of the children, so long as they should remain in her custody. The only variation which the House of Lords made in our judgment on appeal was in regard to the custody of two of the children. But in all other respects the interlocutor stands. The husband is liable to pay £100 per annum to his wife as long as she

lives apart from him, and £25 for each of the children who remain with her. The question now is, whether the diligence ought to stand as securities for the sums of aliment which are to become due in the future. This is undoubtedly an important question, and I do not think that it has ever been expressly decided. The case of *Macdonald & Elder* v. *Macleod* was not a decision on the point, although, the question was raised, and the Court then were equally divided.

One of the general principles of our law is that diligence cannot be used for security of a future debt unless upon the allegation that the debtor is *vergens ad inopiam*. But in that case diligence merely anticipates what might be done at the time of the decree, so as to secure the debt against other creditors. This seems to have constituted the only difference between arrestment on dependence and arrestment in execution.

The pursuer in the action of separation and aliment has not alleged that the defender is *vergens ad inopiam*. She had no opportunity of making such an allegation, because her warrant for diligence is contained in the summons, and she did not adopt the course of applying by bill. It rather appears to me that if such diligence is to be used on the dependence of an action in security of a debt not then due, the creditor must proceed by a bill, so as to give the debtor an opportunity of answering the allegation of *vergens ad inopiam* instead of proceeding to use diligence simply by warrant obtained on the action itself.

But there being no such allegation here, we must proceed on the assumption that the debtor is not *vergens ad inopiam*. When we pronounced our decision we gave the pursuer all the remedies to which we thought she was entitled, and if we had thought that she was entitled to more, that was the time for us to give them and for her to apply for them. If we had thought that she was entitled to security we would have given her security. That is not an uncommon practice in special circumstances, where the defender has only one source of income. It is not uncommon for the Court to order consignation for his wife's aliment of an annuity or pension on which the husband has to depend for his living. If he had an annuity, we would require him to secure part of it for his wife's aliment. But there is nothing of the kind in the present case. If the diligence is to stand as a security for the whole future aliment of the wife, it must follow that the pursuer of such an action was entitled to create for herself a security which the Court held not to be necessary when they adjusted the rights of the parties at the separation. The opinion I hold is opposed to this view.

I think that a lady who is separated from her husband, as she does not thereby cease to be his wife, must follow his fortunes just as a wife who is not separated must, and if he should by unforeseen occurrences fall into poverty, that is just the misfortune of the whole family. I should be very slow to hold that because a wife is separated from her husband, she is entitled to have her aliment secured, so as to give her a preference for life over all her husband's creditors. That would be a very anomalous consequence of diligence used upon the dependence of an action of this kind. But still more anomalous consequences would follow if the arrestment was to cover future aliment—the debtors in whose hands the arrestments were in would require to keep the money in their hands during the whole time of the wife's life, and to pay her yearly and termly the amount of her aliment. By what means would she enforce her rights? In the present case she would require to bring a furthcoming at Whitsunday and Martinmas yearly, it may be for the next twenty years. This would be a proceeding of an extraordinary character, never seen before, and entirely inconsistent with legal principle. I don't think that a creditor can by arresting money in the hands of his debtor's debtor convert him into a trustee for his interest. Arrestments are often used in the hands of persons such as bankers, who would make very good trustees. But are bankers against their will to be converted into trustees? If the arrestments were used in the hands of traders or mercantile companies are they to continue to act as custodiers and remain in the position of debtors to the husband? Are they to be called upon to pay at every Whitsunday and Martinmas when the wife brings a furthcoming? That would place people in trade in a most extraordinary position. I do not think that they are to be turned into trustees without their own consent. It would interfere with the whole business of life, and the consequences of sustaining this diligence are so anomalous and monstrous that I do not see how we can uphold it. For all that is due and bygone the diligence is competent, but for future debts I think we cannot lay it down too distinctly that the diligence is incompetent unless the debtor is *vergens ad inopiam*, or there be other circumstances of a parallel kind. I can quite conceive circumstances in which the diligence would be fairly used, as if the defender in an action of separation were *in meditatione fugæ*, although quite solvent. He might intend to remove his effects beyond the power of his creditors, but there is no case of that kind here, and I think, therefore, that on the grounds I have stated the diligence ought to be recalled.

LORDS DEAS, ARDMILLAN, and MURE concurred.

MACKINTOSH moved for expenses, on the ground that the respondent was justified in appearing to oppose the petition, and that caution had only been offered at the close of the discussion.

FRASER opposed the motion. The Court had laid down in the case of *Donald* v. *Donald*, 30th March 1863, 1 Macph. 741, that there was no general rule in such matters, and each case must be decided on its own merits. The wife was here seeking to maintain a diligence against her husband in very unusual circumstances. It was only on the ground of necessity that in actions between husband and wife the Court compelled the husband to bear his wife's expenses. There has been no such necessity.

The Court found the respondent entitled to expenses, taxed as between party and party, and pronounced the following interlocutor—

> "The Lords having resumed consideration of the petition with the answers for Mrs Symington, No. 5 of process, and heard counsel, in respect all the debts secured by the diligence used on the dependence of the action of separation and aliment have been

paid, with the exception of sums of aliment to become due in the future, Recal the inhibition and arrestments used by the respondent on the dependence of the said action, and also the arrestments used by her in execution of the decree pronounced in said action: Further, on caution to the amount of £300, recal the inhibition and arrestments used on the dependence of the second action raised by the respondent, and the other parties mentioned in the petition, against the petitioner, and grant warrant for marking both of the said inhibitions as discharged in the Register of Inhibitions, and decern: And find the respondent entitled to expenses, taxed as between party and party, and remit to the Auditor to tax the amount of said expenses and report."

Counsel for Petitioner—Fraser—Scott. Agent—John Galletly, S.S.C.

Counsel for Respondent—Asher—Mackintosh. Agents—Messrs J. & R. D. Ross, W.S.

Friday, December 3.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

PETER *v.* GLASGOW MILLBOARD COMPANY.

Reparation—Master and Servant—Wrongous Dismissal.

The manager of a company, engaged upon a contract of yearly service, applied at a meeting of the directors for an increase of salary. The directors offered a certain increase, which was declined by the manager; he admitted that what he did was equivalent to a resignation of his situation, and imported acquiescence in the directors' suggestion that he should leave at once upon receiving a month's salary. He then left the place of meeting, but returned in a very few minutes, when he expressed his readiness to accept the directors' terms. They told him to come to an adjourned meeting which they were to hold that day, when they would inform him of their final decision. He did so, and was informed that the directors declined to receive him back.

In an action of damages for wrongeous dismissal at his instance—*held* (*dub.* Lord Justice-Clerk) that no damages were due, in respect that the pursuer had voluntarily resigned his situation, and that the directors were not bound to receive him back.

George Peter brought this action against the Glasgow Millboard Company (Limited), concluding for £244, 10s., being the amount of a year's salary and other emoluments, and £100 as damages, the defenders having, as he alleged, illegally and without reasonable cause dismissed him from their service upon the 12th day of May 1874. The defenders pleaded, on the other hand, that the pursuer had voluntarily quitted their service.

The pursuer entered into the service of the defenders as general foreman on 2d November 1866, upon an engagement for six months from 3d December of that year. On 3d July 1867 he was re-engaged upon a written offer and acceptance for a period of twelve months from 3d May, and this engagement appeared to have been continued by tacit relocation from year to year. On 4th January 1872 he was promoted to the post of manager of the defenders' works, and his salary was increased; but while the defenders maintained that this appointment constituted a new engagement, dating from January, and not as formerly from May, the pursuer contended that although his duties had been altered, his engagement still ran from May to May, as fixed by the offer of 3d July 1867. A proof was taken before the Sheriff-Substitute (Cowan) at Paisley, and from the evidence it appeared that upon more than one occasion prior to the 12th of May 1874 the pursuer had brought the matter of his salary before the directors of the Millboard Company. In particular, the defenders deponed that upon the 5th of May in that year he had stated to them that if they did not see their way to increase his salary he would require to look after himself and sell his services in the best market, and the pursuer admitted having made this statement, although not upon that day. His salary at this time consisted of £200 per annum, and an additional sum equal to a dividend upon twenty shares of the Company. He had also a free house.

On 12th May 1874, according to the defenders' evidence, the directors, at a meeting of their board, offered the pursuer an increase of salary in this way—If the dividend of the Company was over 10 per cent. he was to receive £25 for every 2½ per cent. of dividend over and above the 10 per cent. His own account of what took place upon this offer being made is as follows:—"I told the directors that they had so much increased the working expenses of the mill that I did not see my way to making any such profit, and that the increase offered was so paltry that I could not accept it. Nothing was said as to whether or not the dividend upon twenty shares of the Company, which I was at that time receiving in addition to the £200 of salary, was to be taken away. The impression upon my mind was that the offer made to me was in no respects better than I had before. I was then asked to retire, and after a few minutes, on being recalled to the meeting of directors, was informed that the directors had unanimously resolved to dismiss me at once; that I was to receive a month's salary; and at the end of a month I was to leave my house. I said to the directors, 'Well, gentlemen, if that is the decision you have come to, it is useless for me to try to alter it. Good morning,'—and I then left the room. The meeting took place in Mr Hendry's office, 8 Dixon Street, Glasgow. I reflected on what had occurred, and went back to the meeting within five minutes. The directors were still assembled, and I said to them that after reflection I had resolved to accept the offer they had made me. One of them said that I should have thought of that sooner. I said persons had not always their wits about them. After consulting together for a short time, the directors stated that they were going to have a meeting in about an hour and a-half, at Mr Sutherland's office, 97 Buchanan Street, Glasgow, and they would wish me to attend that meeting and receive a final answer. I did so, and was then informed that the directors, on the whole, saw no reason to change their mind, and that they adhered to what they had