would be for the personal benefit of the lunatic, and if she were to recover, it is not by any means clear that she would exercise it in favour of her legal rights. I think it probable she would not. Her husband has been liberal to her to excess, and it is not natural for a widow in that situation to do anything contrary to what has been done for her by her husband. Both the elements necessary to the success of the pursuer's present case are thus wanting, and that being so, I am prepared on these grounds alone to adhere to the Lord Ordinary's interlocutor.

Lord Mure—If it were necessary now to decide the question whether or not the curator is entitled or bound to make the election on behalf of his ward, I should have some difficulty in doing so satisfactorily to my own mind. If the interests of the estate under his care were alone to be considered, there would be strong grounds for saying the election should now be made. But the interests of the lunatic herself must also be taken into account, and we must see they are duly secured. Now, I have always understood the rule to be that the curator had to preserve the estate in as nearly as possible the same condition as it was in when he was appointed to manage it. This lady may recover, and may prefer the large annuity settled on her by her husband to taking the half of his moveable estate, and if the curator were allowed to elect now in favour of the latter, could she on her recovery repudiate that election? I offer no opinion on that point, but the question might arise, and I am of opinion that we should not allow the curator by electing at present to put his ward in a position to which in the event of her recovery she might be opposed. I am therefore for adhering.

Lord Shand—I agree with your Lordships in holding that the *curator bonis* is not entitled to exercise his ward's right of election on her behalf at present, and that the action should be dismissed, and in doing so I adopt entirely the grounds stated by your Lordship in the chair. If I were of opinion that the representatives of this lady, in the event of her dying without recovering, would be at her death precluded from exercising the right of election, I could not have concurred in the judgment, for in that case, if the curator failed to elect, the right to elect would have been lost to the lady, and her representatives I should then have held entitled and bound to make the election. The only question is, What is for the benefit of the lunatic? The pursuer in judging for another is bound to elect so as to enlarge the estate, for that is for the benefit of his ward. In the present case, if the right of election were now exercised, this lady would simply have a legal claim for half her husband's estate, about £40,000, but she might, if she chose, accept provisions of less value, adopt her husband's will, and renounce her legal rights. The curator, however would not be entitled to do so, and if his actings were to preclude her right to elect I could not allow him to make the election now. Of course, she might adopt the terms of her husband's settlement, but that would require an exercise of will on her part which the curator could not make on her behalf, and the Court cannot assume that she would do so without more information as to the relations which subsisted between husband and wife. But I agree with your Lordship in the chair, that on the authorities her representatives have the right of election at her death, and that confirms the view that the law regards it as for the benefit of the lunatic that her estate should be enlarged. No other principle could give her representatives that right, but they have it because the lunatic herself had the right to enlarge her estate. There is, moreover, no necessity for the right of election here being exercised. There are no interests of families involved. Had there been so, I should have been inclined to say it should have been exercised under the direction of the Court, and in the direction of increasing the ward's estate.

The Court adhered.

Counsel for Pursuer and Reclaimer—Kinnear—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders and Respondents—J. G. Smith—Gebbie. Agents—Adamson & Gulland, W.S.

Tuesday, November 30.

FIRST DIVISION.

[Lord Craighill, Ordinary.

LE CONTE *v.* DOUGLAS AND RICHARDSON.

Reparation—Wrongous Use of Diligence—Persons Liable—Poinding—Small Debt Act (1 *Vict. c.* 41), *sec.* 20.

A poinding under a Small-Debt decree and subsequent sale of goods, consisting of articles of household furniture, pictures, prints, and engravings, slumped together in the report of poinding and valued at various nominal sums, to make up the amount of the debt and expenses, *held* in the circumstances to be illegal and oppressive, there having been no serious or substantial valuation by the appraisers of the effects poinded, and the officer who executed the poinding, as well as the poinding creditor, who had adopted the actings of the officer, found liable in damages.

Question, Whether it is necessary to put the appraisers in a poinding of this nature on oath?

The pursuer Le Conte on 19th June 1879 raised an action against the defender Douglas, in which he sought reduction of (1) an execution or report of poinding dated 20th May 1879, following upon a decree of the Sheriff Small-Debt Court of Midlothian obtained against him on 12th July 1876 at the instance of the said defender; and (2) an execution or report of sale following upon said poinding, dated 23d May 1879; and to have the goods thereby said to have been legally poinded and sold restored, or £195 paid to him as the value thereof; and further, to have a sum of £300 paid to him in name of damages. Thereafter on 27th October 1879 he raised another action containing similar conclusions against the defender Richardson, the sheriff-officer who carried through the said poinding and sale, and sought to have this conjoined with the former action. This was done accordingly, and a proof allowed in the

conjoined actions, from which it appeared—"(1) That the defender Richardson, on the employment of the defender Douglas, pointed effects belonging to the pursuer. (2) That the effects thus pointed were, under a warrant of the Sheriff of Midlothian, afterwards exposed to sale, and no person having appeared to offer the appraised value, being £12, 4s. 1d., these were declared to belong to the pointing creditor, the defender Douglas, as set forth in the report of the pointing and sale. (3) That the said effects were not appraised on oath, the appraisers not having been sworn; and that the statement in the said report that the same had been duly appraised on oath was false. (4) That the said effects were appraised without reference to their value, and, especially in the case of prints, engravings, and oil paintings in portfolios, without reasonable knowledge on the part of the appraisers of the things which were pointed."

The Lord Ordinary (CRAIGHILL) accordingly found that the pointing and sale were irregular and illegal, and that the defenders were liable to make good to the pursuer the loss thereby occasioned, which the Lord Ordinary estimated at £100, for which sum he decerned against the defender Richardson, under deduction of any sum that might be paid by or recovered from the defender Douglas, and similarly decerned against the defender Douglas for the said sum of £100, less any sum paid by or recovered from the defender Richardson.

He appended this note:—"The pursuer here seeks to recover reparation for loss, injury, and damage said to have been caused by the irregular and illegal pointing and sale of his property, carried through by the defender Richardson on the employment of the defender Douglas. Both defenders maintain that the proceedings were regular and legal. The defender Douglas also pleads, that even if there were irregularity or illegality in the proceedings, he as the employer is not answerable to the pursuer for the consequences. The Lord Ordinary is of opinion that the pointing and sale were irregular and illegal—(1) because the appraisers were not put upon oath, and (2) because the appraisement was conducted without reference to the value of the articles pointed, and, especially as regards the contents of the portfolios, without reasonable knowledge on the part of the appraisers of the things which were included in the pointing. On the first point the defenders contend that the administration of an oath to the appraiser is not requisite. And this contention is maintained upon two grounds. In the first place, it is said that the provisions of the Small Debt Act (1 Vict. c. 41) do not prescribe the administration of an oath, but reading section 20 of that statute and the relative Schedule G together the Lord Ordinary thinks that this contention is unsound. The report of the pointing and sale, which sets forth that the effects had been 'duly appraised on oath,' points certainly to this conclusion. It is further maintained on the part of the defenders, that even if by the Small Debt Act the administration of an oath had been prescribed, this solemnity was taken away by the Promissory Oaths Act 1868 (31 and 32 Vict. c. 72). The parts of this statute which are relied on are sec. 12, sub-sections 4 and 5. These, however, must be read in connection with the 'saving clause,' section 14, sub-section 12, and so reading them the Lord Ordinary thinks it must be held that the oath in question has not been abolished.

"On the second point the Lord Ordinary thinks it proved that those concerned in the execution of the diligence were indifferent to the interests of the debtor, and that the values which were put upon the pursuer's effects were hardly, if at all, influenced by any consideration of their real worth. What was done, and the way of doing it, may have been similar to what frequently occurs, as the defenders have suggested; but the Lord Ordinary considers that this is not a reason for deciding in favour of its validity, but rather the contrary.

"The defender Douglas has a separate plea in defence. He contends that the irregularities in execution of the pointing are not things for which he as employer is answerable. The pursuer, he argues, must look to the sheriff-officer who did the wrong, and to his cautioners, and cannot come upon the creditor for redress. The Lord Ordinary, however, thinks that this point has already been judicially determined—*vide Macdonald* v. *Bank of Scotland*, July 21, 1835, 13 S. & D. 701; *M'Lellan* v. *Neilson*, June 29, 1846, 8 D. 930; and *Struthers* v. *Dykes*, July 7, 1847, 9 D. 1437—and consequently that it is his duty to overrule the plea maintained on the part of this defender.

"The point upon which the Lord Ordinary has experienced most difficulty is the assessment of the damage. The prices obtained when the effects were subsequently sold for behoof of the defender Douglas came considerably nearer, but, as the Lord Ordinary thinks, did not reach to the true value. Taking everything into account, the Lord Ordinary is of opinion that the £100 which has been awarded is not more than fair reparation to the pursuer for the loss, injury, and damage which he has suffered.

"The reasons for which the expenses are to be modified are, that the alleged concert and conspiracy between the defenders, of which proof was not even attempted, and the attempt to prove that things not pointed were carried off by Mr Douglas, have both been causes of expense which ought not to be cast upon either of the defenders."

The defender Richardson reclaimed, and argued—The decree and proceedings being *ex facie* regular and valid, the pursuer's remedy was interdict, and at anyrate the reductive conclusions were incompetent against him, he being bound in respect of his office to execute said decree upon the instructions of his employer. Having acted throughout in *bona fide*, and the pursuer not having through his actings suffered loss, he could not be held liable in damages. There was here no reckless use of diligence; a party was entitled to point even in excess of his debt—*Hamilton*, 1868, 7 Macph. 173; *Bell*, 21 D. 1008; *Aitken*, 1837, 15 S. 683; *Struthers* v. *Dykes*, 1847, 9 D. 437; *Henderson*, 1871, 10 Macph. 104; *Kennedy*, 1866, 4 Macph. 852.

Argued for both defenders—The proceedings were unchallengeable, although the usual or judicial form of oath was not administered to the appraisers, that not being now required by law or in accordance with common usage. The Small Debt Act 1837 (1 Vict. c. 41), sec. 20, although most minute in its directions as to pointing, does not mention oath—merely says goods pointed

must be 'duly' appraised, and the mention of the oath in the schedule is not sufficient to incorporate it into the statute—see *Aitchison* v. *Aitchison*, Jan. 21, 1876, 3 R. 388; and *Baines*, 12 Ad. and E. 226. The Promissory Oaths Act 1868 (31 and 32 Vict. c. 72), sec. 12, sub-secs. 4 and 5, covers the office of appraiser, and the saving clause in sec. 14, sub-sec. 12, refers only to proceedings of a judicial nature, while this is purely executional. The Personal Diligence Act 1838 (1 and 2 Vict. c. 114), sec. 23, has also impliedly abolished oath—see also Ross' Lect. i. 430; *Bell* v. *Presbytery of Meigle*, 1869, 7 Macph. 1083; Tait's Office of J.P. 4th ed. 369.

Argued separately for Douglas—He was not liable on the rule of *respondeat superior* for the actings of his sheriff-officer, in respect he was not an ordinary employer, but bound to select out of a small number of individuals—*Brodie*, 14 S. 983. Pursuer must look to the sheriff-officer and his cautioners for redress—see *Beattie* v. *M'Lellan*, 1844, 6 D. 1048.

Replied for pursuer—The defender Douglas is liable on the authority of the cases cited by the Lord Ordinary in his note. The proceedings are irregular in respect of no oath having been administered to the appraisers. The schedule of poinding is *ex facie* invalid, in respect that the articles are merely slumped together without regard to their intrinsic value, showing at least negligence for which the defenders are responsible. Cases cited—*M'Knight*, Jan. 27, 1838, 13 S. 342; *Robertson* v. *Galbraith*, 19 D. 1016.

At advising—

Lord President—The poinding here complained of was used upon a Small-Debt decree for £12, with 4s. 1d. of expenses, obtained by the defender Douglas against the pursuer in the Sheriff Court of Midlothian, and the Lord Ordinary has found it illegal, on the grounds, first, that the appraisers were not previously put on oath, and second, that the circumstances show it to be an oppressive use of diligence. I shall consider first the latter ground of judgment, which arises, in my opinion, upon the face of the report of poinding itself. There appear there a great variety and quantity of effects, and among others a number of pictures, prints, and engravings, which are all included in the goods poinded and appraised in the schedule of poinding at very small values. And the last entry in the report is in these terms:—"A large mahogany table, an old table, a chair, a stool, a piece carpet, an easel, four drawing boards, ten unframed oil-paintings, five oil-paintings in gilt frames, six portfolios containing a large quantity of engravings, oil-paintings, and water-colour drawings, at £3, 11s. 7d." Now, it is quite apparent that this sum is put in just to make up the amount of the debt and expenses, and that appears to me a very objectionable mode of making an appraisement. And the impression thus made is confirmed on looking into the evidence advanced as to the manner in which the poinding was executed. Articles of very various description, furniture, and works of art contained in six large portfolios, are slumped together without any further specification of their value and contents than the words I have just read. Now, in the evidence led, one of the appraisers, who is examined as a witness for the pursuer, gives this account of the proceedings. After a general examination, which seems to have been slight, of the house and its contents, he says:—"During the whole time we were there I did not leave the room excepting when we surveyed the house previous to going into the parlour. When we surveyed the house we went from one room to another. We just had a look at the place and then sat down at the table. We valued the articles. Richardson called out so many things, and we put them down at so much. We had no other examination of the articles than what I have mentioned. We just went into the room and looked at what was in it. We never took much notice. We did not look inside any of the portfolios. I cannot say if they were locked up tight. I did not know what was inside them. I afterwards knew that there were paintings and sketches and scraps. Richardson did not name the value of the articles. When he called them he would say, 'How much are they worth? Are they worth four shillings, or five shillings, or what?' We considered, and we might put them down as he said, or if the value was too low we altered the sum. (Q) Did Richardson not mention the value of every lot he called out?—(A) No. (Q) What are the other lots the value of which he did mention?—(A) I cannot say. He might say 'mahogany table in two halves, is it worth ten shillings?' We might say "No; put it down at 7s. 6d." We took the values into our own consideration. If we did not think the sum Richardson asked as the value of an article sufficient, we put it down at what we thought proper. I cannot mention any articles that were put down in the schedule at a smaller sum than that suggested by Richardson. I cannot say if there are any. (Q) Is it not the case that there was a sum mentioned by Richardson, and that that sum was the one you took as the value?—(A) There might be in one case, but I cannot swear. That certainly was not the case with all the articles. Richardson did not say exactly what the value of any article was. He merely asked us. (Q) Can you tell me one article that you valued?—(A) No. 7 for example, which was valued by myself and by Lauder. I had seen the articles before I sat down at the table. I made up the 7s. 6d. by a rough calculation of what we thought the articles would fetch at a sale. We made the calculation for the whole lot. I cannot state what sum we put on each article in that entry No. 7. Lauder and I valued the last item, No. 11, 'large mahogany table.' The portfolios were in pursuer's work-room. Ten unframed oil-paintings and five oil-paintings in gilt frames were in that room if I mistake not. (Q) How did you come at the value, £3, 11s. 7d?—(A) Richardson asked pursuer what was the value of the things in the portfolios, and the pursuer said, 'merely rubbish.' (Q) Then you put no value upon them?—(A) No; they were just included in the whole lot. I did not look at any of the oil-paintings that were there. I don't know who examined them. (Q) Then it is not your valuation, is it?—(A) I suppose it must be. (Q) Who put the value upon them?—(A) Lauder and I. (Q) You never looked at them?—(A) We put the value on them for all that. We saw that they were paintings, but I did not see what was inside the portfolios. I did not examine the paintings on the walls minutely. (Q) How could you put a value

on them?—(A) I put them down at £3, 11s. 7d. I came to that by a rough calculation. *By the Court*—We both made the valuation. Nobody else made it but ourselves. (Q) Can you not tell what part you took in the calculation?—(A) I took no part further than the other witness. (Q) Is not this the case, that when you came to value lot No. 7, there was just £3, 11s. 7d. required to be made up, and you put that in in order to get the amount of the debt?—(A) Yes, that might be so."

The other appraiser is examined for the defenders, and his account of the proceedings is not substantially different. He is asked—"Were there more than six portfolios in the place?—(A) I could not say. (Q) Did you see six?—(A) I did not count them. (Q) You surely counted six, did you not?—(A) No; Richardson said there were six. (Q) You saw the portfolios that were there, did you not?—(A) Yes, but I did not count them. Before we began to value the things Richardson told us to put a fair valuation on the articles to the best of our knowledge. (Q) Did you agree to do so?—(A) Yes, we said we would do it. (Q) Was what was said and done that day in accordance with your usual practice in the execution of poindings in Small-Debt decrees?—(A) Yes. Cowan wrote a copy on the back of the Small-Debt decree the same as mine. (Q) When Richardson pointed out the things to you, and you entered them in your schedule, did you put a value upon them?—(A) Yes. (Q) You and Cowan did?—(A) Yes; Richardson put no value upon them. (Q) Did he ever say, when you were doing your work upon any occasion, that you were ever putting too low or too high a value upon the things?—(A) No; I am not a judge of the value of engravings; but I did my best in putting a value on Le Conte's pictures and engravings. *By the Court*—(Q) Did you see a great number of engravings?—(A) I saw some portfolios, but they were tied up, I think. I did not see the engravings that were inside the portfolios. (Q) How could you do your best to put a value upon them if you never looked upon them?—(A) The £3, 11s. 7d. was to make up the amount of the debt, and what was required when we came to the last lot was to bring the value up to the amount of the debt."

Now, the question comes to be, whether this mode of executing the diligence of poinding is legal or not? and I entertain no sort of doubt that it is eminently illegal, and for this reason, that the goods were never appraised. It is essential to the validity of a poinding that the goods appraised should be reported on by the officer executing the diligence, and thereafter they are exposed in terms of the report and put up to auction at the appraised value. This shows the appraisement to be an essential part of the process. But to take an unknown quantity of goods and put a value upon them simply to make up the sum of the debt and expenses is not an appraisement. It is quite true that a critical valuation is not to be expected, but the appraisers are bound to use their best skill and care to come to a proper idea of the value of the articles. Here, however, all idea of an appraisement seems to have been abandoned, and from other parts of the evidence we see the officer simply made a clean sweep of the debtor's premises. It seems to me unnecessary to go further in order to concur with the Lord Ordinary that the proceedings complained of were illegal and oppressive. But it is contended on the part of the creditor in the decree that he is not answerable for the mode of execution, having employed a proper and responsible officer. Whatever may be the merits of that question, however, when it occurs purely, I am clearly of opinion that the creditor cannot take benefit from such a plea in the present case, for he adopted the actings of the officer in the knowledge that they were illegal. He was duly warned, but took the goods adjudged to him by the officer and sent them to an auction-room to be sold. This necessarily conducts me to the conclusion that the pursuer here is entitled to prevail, and that it is unnecessary in the present case to decide the question whether the appraisers in such a proceeding must be formally put on oath or not.

Lord Deas—A question of this kind occurred in the case of *Mackinnon* v. *Hamilton*, June 21, 1866, 4 Macph. 852, where a poinding was executed for a debt of £13, the value of the effects poinded being £72, 19s. The Lord Ordinary said—"The poinding of effects of an appraised value upwards of five times the amount of the debt sought to be recovered is in the opinion of the Lord Ordinary of itself a very questionable proceeding." It was observed by myself—"The poinding was perfectly unjustifiable, for it appears to have involved a total displenishing in order to pay a debt of £13. If we were to sanction such a proceeding we should be making the diligence of poinding the means of gross injustice and oppression." Lord Curriehill said—"I am of the same opinion. If this poinding were sustained on the ground now pleaded, it might as well be maintained that if a debtor's estate were burdened with an heritable debt for which a poinding of the ground might be executed by the heritable creditor, which would be preferable to the diligence of personal creditors of the owner, it would follow that any personal creditor of the owner poinding for payment of a personal debt, however trifling in amount, might poind all the moveable effects on the ground in order to guard against the possible contingency of the heritable creditor happening to use his remedy under his real security?" It was only a question of passing a note of suspension, but the opinion of the Court was quite explicit, and the poinding was abandoned. Your Lordship has stated the grounds upon which the present poinding should be held excessive, and these are clearly *a fortori* of that case in 1866. I do not think it necessary to go beyond this for a decision of the point. I see no ground for interfering with the discretion of the Lord Ordinary as to the amount of damages, and the case raises no general question of the liability of employer and officer, for this employer lay by and adopted all the officer's actings.

Lord Shand—It appears to me that the question here is substantially that raised in the issue which was settled by the Court in the case of *Robertson* v. *Galbraith*, July 16, 1857, 19 D. 1016. In that case the landlord was alleged to have proceeded to see effects poinded by him oppressively and illegally, and the Court allowed the issue—"Whether the defender on or about the 16th of

March 1855, in selling part of the sequestrated effects under the said warrant, did illegally and oppressively sell the same in disregard of the interests of the pursuer, and in a manner to produce loss, injury, and damage to the pursuer?" The question here is, Whether the defender Douglas, having procured a warrant to poind, did, in carrying out that procedure act illegally and oppressively in disregard of the interests of the pursuer? The statute no doubt provides for a summary mode of carrying out such a poinding, and I do not mean to say that, particularly where the debt is small, and the articles poinded of trifling value, we can require a minute and detailed valuation. But it would be a serious thing if the officer were to be allowed to include every article in the house so as to inventory and have the power of selling all the debtor possesses. There must be reasonable procedure in the way of valuing the effects, for the valuation is only a step towards transferring to the creditor the property of the debtor at the amount of the valuation. The statute provides for a notice of two hours before the goods are exposed for sale by the officer, and if no one appears to offer the appraised value, the property is handed to the creditor at that value as his own. It therefore is clear that there must be a substantial, if a rough and ready, valuation of the goods poinded. But here the evidence shows that no serious attempt was made to put a fair value on the effects. I shall only add, in addition to the item already referred to by your Lordship in the chair, that in article 5 of the report of poinding we have "Twenty pictures in gilt frames, five oil paintings, at £5." These works appear to have been of substantial value, and we find that the articles realised upwards of £36 at the sale, and were thought by the purchasers to have been bought at a bargain. As to the oath which should have been administered to the appraisers, the officer appears to have thought it a mere matter of form, but whatever was his motive in omitting it, there can be no doubt that the proceedings were illegal and oppressive, in disregard of the interests of the debtor, and to his loss, injury, and damage. And I am not disposed to interfere with the Lord Ordinary's valuation of that loss. As to the responsibility for it, which the Lord Ordinary has found conjunct and several, the employer maintained he was not liable, but I think it unnecessary to give any opinion on the general case, for in this case the creditor was duly warned of the nature of the proceedings, and must be held to have adopted them. The other defence, that the pursuer was not entitled to lie by and allow the articles to be sold, but should have brought a suspension, I am not prepared to sustain, as in my opinion he was not bound to involve himself in a dispute at that stage. The case discloses a very loose practice in regard to sales of this kind. The defence practically amounts to this, that the defenders were only doing what other people did. If that be so, all I can say is that the sooner such practices are put a stop to the better, by regulations issued by the Sheriffs, in virtue of their powers under the statute, or from the Crown office if necessary.

Lord Mure was absent.

The Court adhered to the interlocutor of the Lord Ordinary, finding the defenders liable to the pursuer in three-fourths of the expenses in the Outer, and the whole of those in the Inner House.

Counsel for Pursuers—Scott—Shaw. Agent—P. Morison, S.S.C.

Counsel for Defender Richardson—Lord-Advocate (M'Laren, Q.C.)—J. C. Smith.

Counsel for Defender Douglas — Dean of Faculty (Fraser, Q.C.) Agent for Defenders and Reclaimers—Daniel Turner, S.L.

Wednesday, December 1.

FIRST DIVISION.

IRELAND (IRELAND'S EXECUTRIX) AND FLEMING *v.* THE NORTH OF SCOTLAND BANKING COMPANY.

Deposit—Account-Current—Title to Sue.

A bank having funds in its possession on account-current belonging to an executry estate, sufficient to meet the sum contained in a cheque signed by the executrix and her agent, in whose name the funds were lodged for behoof of the estate, and who was also her cautioner, *held* bound to honour the cheque, although the agent and cautioner had executed a trust-deed for behoof of his creditors and the executry estate had subsequently been sequestrated.

Certain moneys were lodged in the defenders' branch bank at Dundee on account-current in the name of "A. G. Fleming, for behoof of the representatives of the late William Ireland, hardware merchant, Dundee." The amount standing at Fleming's credit on 30th January 1880 was £413, 5s. 3d., and on that date he presented a cheque, as factor and agent for Mrs Ireland and the executry estate, and countersigned by her as executrix foresaid, for £100, payment of which was refused, and the present action was raised in the Sheriff Court of Forfarshire at Dundee for payment of that sum with interest from that date. The defenders resisted the action, on the ground that the late Mr Ireland died indebted to them in £130, and his estates were sequestrated at their instance on 29th April 1880, and that the pursuer Fleming having executed a trust-deed for behoof of his creditors, they were entitled to retain the funds in their hands until payment, or as security for the payment of their debt or the dividend effeiring thereto, or at least until the pursuers were able to give them a valid and sufficient discharge. They also pleaded that the pursuers had no title to sue, and that the petition was incompetent, in respect that Fleming being insolvent should be required to find caution for expenses. The Sheriff-Substitute (Cheyne) repelled the defences and decerned in favour of the pursuer Fleming for the contents of the cheque with interest and expenses. "*Note.*—As the balance in defenders' hands is upwards of £400, and as their agent admitted at the discussion that their claim against the estate of the deceased was not above £130, there is plainly nothing in their plea of retention, and that plea being out of the way, I fail to see any excuse for their refusal to honour the cheque, or to find any