liable for an accident to a workman on the sole ground that the scaffold which the workman had erected for himself proved to be insufficient for the purpose for which it was to be used. That, however, appears to me to be the only ground of claim established by the proof in this case. I agree with the opinions of both the Sheriffs when they say that this scaffold was erected by the workmen in the usual way, and as there is no suggestion that the materials supplied by the master for the erection of the scaffold were otherwise than perfectly suitable, I fail to see any ground on which the present claim against the defender can be sustained.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the appeal, affirm in fact and in law the judgments of the Sheriff and Sheriff-Substitute appealed against: Dismiss the appeal, and decern."

Counsel for the Appellants—W. Campbell—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondent—G. R. Gillespie. Agents—Macpherson & Mackay, W.S.

Saturday, May 28.

OUTER HOUSE.

[Lord Stormonth Darling.

THE SCOTTISH PROVIDENT INSTITUTION *v.* W. A. ROBINSON & NEWETT AND ANOTHER.

Assignation—Foreign.

A domiciled Irishman insured his life with a Scottish Life Insurance Company. He then deposited the policy with a creditor, also a domiciled Irishman, in security of debt. Subsequently he executed in Ireland an assignation of the policy in favour of another creditor, also a domiciled Irishman, and this assignation was intimated to the company, who had at that time no knowledge of the deposit of the policy. The assignee at the time he took the assignation knew that the policy had been deposited with the first creditor.

The insured died and a competition took place for the contents of the policy in the Courts of Scotland, between the depositary and the assignee.

Held that the validity of the transference must be determined by the law of that contract, *i.e.*, by the law of Ireland, and after admission as to that law, that the depositary must be preferred.

This was a competition for the proceeds of a policy of assurance granted in 1877 by the Scottish Provident Institution on the life of Thomas Thompson, a merchant in Belfast, and the competing claimants were Messrs Robinson & Newett, stockbrokers, Belfast, with whom the policy was deposited by the insured on 3rd March 1890 in security of debt, and Hugh Thompson, merchant, Belfast, to whom the policy was assigned by deed of assignment on 19th December 1890, also in security of debt. This assignment was intimated to the Institution on 2nd February 1891 (the day before the policy-holder died), and on the 13th of the same month Messrs Robinson & Newett intimated to the Institution that the policy had been deposited with them.

The parties obviated proof by a minute of admissions, from which it appeared that the claimant Hugh Thompson had notice at the time when the policy was assigned to him that it had been previously deposited with Robinson & Newett, and, further, that "by the law of Ireland the deposit by the party insured of a policy in security of a loan advanced on the faith of such deposit, or in security of sums due at its date, operates as an equitable mortgage in favour of the lender or creditor, which will be preferable to the right of a person acquiring right by a subsequent assignment, if such subsequent assignee have notice of the deposit." It was conceded that the insured was indebted to Robinson & Newett in a sum considerably exceeding the amount of the policy, and that they relied on the deposit in their dealings with him.

The claimants W. A. Robinson & Newett pleaded—"(1) The claimants' right to the contents of the said policy falls to be determined by the law of Ireland. (2) In respect that the claimants have by the law of Ireland a valid and effectual security over the said policy, preferable to all the other claimants, they are entitled to be ranked and preferred in terms of their claim."

The claimant Hugh Thompson pleaded—"(1) In respect of the said assignment and intimation of the same, the claimant is entitled to be ranked and preferred in terms of his claim. (2) The claimants W. A. Robinson & Newett not having a preferable right, or one that can compete with the right of the claimant, the claimant is entitled to be ranked and preferred in terms of his claim."

Argued for the claimants Robinson & Newett—The question was whether the law of Ireland or that of Scotland ruled, for if the former ruled the present claimants must succeed. It approached absurdity to say that in transactions concluded in Ireland by Irishmen, the law which parties had in view was the law of Scotland. But the intention of parties was the primary guide in such matters, and unless the other claimants were prepared to maintain that proposition their argument was lame. Two possible solutions of this difficulty there were, either of which would suit the present claimants. The law of the contract, *i.e.*, of the transference of the *jus crediti*, might rule—Barr's International Law (2nd ed. p. 603)—and that was Irish law. Or the law of the domicile of the creditor in the policy, the cedent in

the assignation, might rule—*Scottish Provident Institution* v. *Cohen*, November 20, 1888, 26 S.L.R. p. 73, 16 R. 112—and that again was Irish law.

Argued for the claimant Hugh Thompson—The law of Scotland was at once the *lex fori* and the law of the *situs* of the debt in question, for its situation was determined by the fact of its having been brought into Court in the multiplepoinding. Now moveables in Scotland could only be validly transferred by the law of Scotland—*Connal & Company* v. *Loder & Company*, July 17, 1868, 6 Macph. 1095, and 40 Scot. Jur. 624. That was no mere rule of Scotch law, but was good law internationally also—Westlake, sec. 150; *Lee* v. *Abdy*, 1886, L.R. 17 Q.B.D. 309; *Queensland Mercantile and Agency Company*, 1891, L.R. 1 Ch. 536, and 1892, 1 Ch. 219. The domicile of the cedent could not prevail, for then no Scotsman residing in London could give a bill of sale over his furniture there, which was absurd. The true principle, viz., the law of the *situs* had been recognised in a series of cases—*Strachan* v. *M'Dough*, June 19, 1835, 13 S. 954; *Donaldson* v. *Ord*, July 5, 1855, 17 D. 1053, and 27 Scot. Jur. 625; *Scottish Provident Institution* v. *Cohen*, *ut supra*. In the latter case it had no doubt been recognised that the *lex loci contractus* would determine the validity of the transference; so it would here. But admitting the validity of the transference, the transferee coming to Scotland to do diligence on his transference found the subject of it attached in a way with which he could not compete. The result of the authorities was correctly stated by the translator of Bar, at the passage referred to, although he had misapprehended the principle. The question was one of remedy, and such questions were determined by the *lex fori*—*Don* v. *Lippman*, May 26, 1837, 3 Sh. and M'L. 682.

The Lord Ordinary preferred the claimants Robinson & Newett to the fund.

"*Note.*— . . . It thus appears that if the law of Ireland is to rule the question the claimants Robinson & Newett are preferable to the claimant Hugh Thompson; if, on the other hand, the law of Scotland applies, it is equally clear that Hugh Thompson is preferable, because he is the holder of an assignation duly intimated on 2nd February 1891, while Robinson & Newett have no assignation, but merely possession of the policy, which our law does not recognise as a sufficient means of transferring the right to it, and even that fact was not intimated to the insurance office till after intimation of the assignation. The question, therefore, is which law is to rule?

"I say the law of Ireland. I shall assume that the policy of insurance was a Scottish contract, and that all questions connected with its constitution and fulfilment would be regulated by our law. But the transference of the right of credit in the policy was a new contract distinct in all its particulars from the contract constituted by the policy itself, and the moment that the insured transferred his right of credit in a manner recognised as sufficient by the law of the country where the transaction took place, I think he became divested of his right, and incapable of transferring it to anybody else, or at least to anybody who had notice of the prior transfer. It seems to me that a competition between parties both deriving their rights from the creditor in the policy is not necessarily to be decided on the same principle as that which would regulate a question as to the liability of the debtor. If the debtor were in good faith to pay the proceeds to a person holding an assignation *ex facie* valid according to the law of the place of payment, I do not for a moment suggest that he would be liable to pay over again to a person producing a right preferable according to the law of the country where the right was conferred. But where the competition arises before payment is made, I do not see that the law of the debtor's domicile has anything to do with it. It was urged that the question was truly one of remedy, and that *Don* v. *Lippman*, 2 Sh. & M'L. 682, applies. That case would apply if the question were one of process, or evidence, or limitation of action, or subsistence of the original contract of insurance. But the present question is none of these. It is simply one of priority in acquiring the *jus crediti* created by the policy, and admittedly subsisting in the person either of the insured or of some one deriving right from him, and that is a question which I think must be regulated by the law of the place where the *jus crediti* was first validly transferred. So far as the intention of the parties is an element in deciding the question (and it has always been regarded as an element of weight), it is tolerably certain that the parties had in view the law of Ireland, and not the law of Scotland, for all of them—the policy-holder and both claimants—were domiciled and resident in Belfast.

"None of the cases quoted to me precisely meet the case in hand. The nearest is that of *Scottish Provident Institution* v. *Cohen & Company*, 16 R. 112. But the competition there was between a claimant in England with whom a policy had been deposited, and the trustee on the sequestrated estates of the insured in Scotland, and the depositary had intimated his deposit to the insurance company before the date of the sequestration. At the same time the opinion of Lord M'Laren in the Outer House went the whole length of the judgment which I am now pronouncing, and the decision certainly recognised (to quote the words of the late Lord President) that 'the constitution of the creditors' right must be determined according to the law of the country where the transaction took place, that is, the law of England.' No doubt in that case it was not necessary to state the law of England as going further than this, that the deposit of the policy, if followed by notice to the insurance company prior to notice of the bankruptcy of the party insured, conferred a preferable right in competition with the trustee. But here I have to deal with an admission of

the law of Ireland, which clearly establishes a priority in the depositary over a subsequent assignee with notice of the deposit, altogether apart from any question of priority of intimation to the insurance company. It was pleaded for the claimant Thompson that while the law of Ireland might make a deposit equivalent to an assignation, intimation was required in order to complete the right in Scotland. But that is to make the question depend, not on the *lex loci contractus* or the *lex fori*, but on both. I know of no warrant for such an invocation of two laws. I say again that it might be necessary to appeal to the *lex fori* if the question were one as to the liability of the insurance company to make a second payment, but not where intimation of both claims has been made before payment, and where therefore the question is simply one of competition between rival transferees. The distinction is recognised by Dr Bar at pp. 302-3 of the 1st edition of Mr Gillespie's Translation.

"The case of *Strachan* v. *M'Dough*, 13 S. 954, was quoted as an authority for the claimant Thompson. But that was a decision turning entirely on the law of Scotland, and the question whether the law of England ought to have ruled was dismissed in a sentence. If that case were to be treated as an authority for the proposition that the validity of the transferee's right ought not to be determined according to the law of the country where the transaction took place, I should hold it overruled by the case of *Cohen & Company*."

This judgment was acquiesced in.

Counsel for the Claimants Robinson & Newett—Dickson—Ure. Agents—J. & J. Ross, W.S.

Counsel for the Claimant Thompson—Johnston—Gillespie. Agents—Mackenzie & Kermack, W.S.

Tuesday, May 31.

FIRST DIVISION.

[Bill Chamber.

CAIN *v.* M'COLM.

Aliment—Arrears of Aliment—Imprisonment for Non-Payment—Civil Imprisonment (Scotland) Act (45 and 46 Vict. c. 42), sec. 4.

Held that it is competent for a sheriff to grant warrant of imprisonment against a person who has failed to pay arrears of aliment.

Observations upon the case of *Tevendale* v. *Duncan*, March 20, 1883, 10 R. 852.

Aliment—Non-Payment of Aliment—Warrant to Imprison—Procedure—Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. c. 42), sec. 4, sub-sec. (2).

Held that when an application for warrant to imprison for non-payment of aliment is presented to the sheriff, it must be either granted or refused, and that it is incompetent to continue consideration of the application for a lengthened period.

The Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. c. 42), by sec. 4, enacts that "Subject to the provisions hereinafter contained, any sheriff or sheriff-substitute may commit to prison, for a period not exceeding six weeks, or until payment of the sum or sums of aliment, and expenses of process decerned for, or such instalment or instalments thereof as the sheriff or sheriff-substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him in any competent court, provided— . . . (2) That the application shall be disposed of summarily and without any written pleadings; (3) that the failure to pay shall be presumed to have been wilful until the contrary is proved by the debtor; but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the sheriff or sheriff-substitute that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the sheriff or sheriff-substitute shall consider reasonable."

Upon 23rd January 1891 a petition was presented in the Sheriff Court of Dumfries and Galloway at Stranraer at the instance of Maggie M'Colm, residing at Logan, in the parish of Kirkmaiden, against John Cain, Yearlyman, Auchness, Kirkmaiden, praying for a warrant to commit him to prison for a period not exceeding six weeks or until he paid certain sums for the aliment of an illegitimate child, and for expenses which he had been charged to pay on 15th January 1891, the days of charge having expired. The Sheriff-Substitute heard the application on 29th January, and on 5th February granted the warrant to imprison as craved, unless the debtor paid £12 within ten days thereafter. That sum was duly paid, but upon 3rd September 1891 the creditor presented another petition, founded upon the original charge to pay, for a warrant of imprisonment. Upon 1st October 1891 the Sheriff-Substitute having heard parties continued "the consideration of the foregoing complaint until the lapse of twelve months after the 5th day of February last, and appointed the case to be again enrolled on the first Court day after the lapse of said twelve months," and upon 24th March the Sheriff-Substitute granted "warrant to officers of Court to apprehend and commit the said John Cain, defender, to the prison of Maxwelltown, therein to be detained for the period of six weeks from the date of his imprisonment, unless the further sum of £10, in part payment of the balance of the sums specified and contained in the decree and charge therein referred to in the peti-