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-

tion and condescendence annexed thereto, past due, and still unpaid, is paid within ten days from this date, and grants warrant to the keeper of said prison to receive and detain the said John Cain accordingly, all in terms of the Civil Imprisonment (Scotland) Act 1882."

The debtor presented a note of suspension and interdict to have this last interlocutor and warrant suspended and proceedings under it interdicted.

He pleaded—"(1) The warrant of imprisonment complained of is incompetent and *ultra vires*, and suspension and interdict should be granted as craved, in respect, 1st, that the complainer is due no sum in respect of aliment incurred since the date of the decree against him; 3rd, the Sheriff-Substitute having previously, on 5th February 1891, found that £12 was the sum which fell to be paid by the complainer as the condition of his escaping imprisonment, and the complainer having paid said sum of £12, and the whole sums of aliment which have subsequently fallen due, the warrant of imprisonment complained of was outwith the powers of the Sheriff-Substitute; 4th, the proceedings under the second petition for imprisonment were irregular and incompetent, and the warrant following thereon null and void."

Interim interdict having been granted, the Lord Ordinary on the Bills (RUTHERFURD CLARK) upon 25th April 1892 recalled the interdict and refused the note.

The complainer reclaimed, and argued—(1) It was not competent to grant warrant of imprisonment for non-payment of arrears of aliment. The sanction of imprisonment was to enforce the alimenting of a person during a period then current. If the period for which the aliment was due had elapsed, the debt ceased to be alimentary and enforceable by imprisonment—*Tevendale* v. *Duncan*, March 20, 1883, 10 R. 852; Dove Wilson's Sheriff Court Practice (4th ed.) pp. 381, 382. (2) The proceedings had been irregular. The Sheriff was bound under the Civil Imprisonment Act 1882, sec. 4, sub-sec. (2), to proceed summarily, and either to grant or refuse the application upon the circumstances at the date of the application. Instead of that he has continued consideration for four months, during all which time a possible warrant of imprisonment had been unjustifiably kept hanging over the debtor's head—see observations in the case of *Strain* v. *Strain*, June 26, 1886, 13 R. 1029.

Argued for the respondent—(1) The Act contemplated imprisonment for non-payment of sums decerned for as aliment. No distinction could be drawn between aliment for a current period and arrears of aliment. The case of *Tevendale, supra*, was not in point. That was a case of reimbursement of a parochial board by a third party. (2) The proceedings had been regular. The Sheriff might have reasons for thinking that the debtor would be in a position to pay in four months, although he could not be expected to do so at the date of the application. It was a proper course to keep the application in Court and not put the creditor to the expense of a new application.

At advising—

LORD PRESIDENT—The first ground upon which the reclaimer relied was that it was not competent for the respondent to make an application for an order of imprisonment under the statute, because the monies due were payable, not for aliment to be furnished in the future, but for sums expended in the past. The reclaimer rested his argument upon the case of *Tevendale*. I am of opinion that the case of *Tevendale* does not sanction such a limitation of the statute. That was the case of a parochial board which, having disbursed certain sums by way of aliment for a pauper, turned round and asked decree for reimbursement from the pauper's son, and then sought to enforce that decree by imprisonment. The Court held that the remedy of imprisonment was not applicable to a claim of that sort, because the sums were not decerned for as aliment for the holder of the decree or the holder's child, and therefore were not decerned for aliment in the sense of the statute. The statute which abolished imprisonment for debt made an exception of the case of non-payment of aliment—that is to say, enabled a person who was legally entitled to be alimented by another or have her child alimented by another, to enforce that duty, which brooks no delay, by imprisonment. That ratio did not apply, the Court thought, to the case where the aliment had been supplied by a third party, and that third party sought reimbursement. That was quite a different case from the present, and I am of opinion that the first ground of suspension is not a sound one.

But another objection was stated to the Sheriff's interlocutor of a very different kind and quality. The interlocutor complained of, which contains a warrant of imprisonment, was pronounced upon 24th March 1892. That warrant was granted upon an application for summary imprisonment presented upon 3rd September 1891. Now, consider the procedure contemplated by the statute in dealing with applications for warrants of imprisonment as showing their serious and peremptory nature. It is careful to provide that they "shall be disposed of summarily and without any written pleadings." The Sheriff here, taking up consideration of the complaint upon 1st October 1891, continued consideration of it until the lapse of twelve months from 5th February 1891. That is, he dealt with the case by saying he would resume consideration of it after the elapse of four months. I do not think he was warranted in so dealing with the matter, or that that was a proper way to treat an application for warrant of imprisonment. If a proper case had been made out before him for granting the warrant, he should have granted it at once, after satisfying himself that the debtor had no sufficient excuse for not paying. As he did not grant the warrant, it is plain that he did not consider

the circumstances then justified his complying with the application. But then he seems to have made the conjecture that in four months the circumstances might justify the granting of the warrant, and he continued the cause accordingly. That is a somewhat odd way of summarily disposing of such an application, and I think it was an incompetent way. The Sheriff might no doubt have continued the cause for a few days to give the debtor an opportunity of explaining his position. But the long continuation is fatal to the respondent, for it shows the Sheriff thought the warrant of imprisonment would not be justified by the facts as they then stood. His expectations as to the future were entirely speculative; and I do not think it right to keep a possible warrant of imprisonment hanging over a debtor's head for four months. There being no grounds for the warrant at the time, the application should have been dismissed. If the debtor's circumstances altered, the respondent could have presented a new application. That would entail none but the most infinitesimal trouble or expense upon the respondent.

I think the adjournment was incompetent, and upon that ground I am for granting suspension as craved.

LORD ADAM—Imprisonment for alimentary debts was abolished generally by the Act of 1882, but it is still competent in certain exceptional circumstances. Imprisonment for non-payment of aliment is regulated by section 4 and its sub-sections, and upon the application of these sections this case arises. The first question is one of fact, whether the debt the reclaimer was decerned to pay was a debt for sums of aliment or of expenses of process for the recovery of aliment or not. If it was, there can be no question that a warrant of imprisonment might have been pronounced upon non-payment. I have no doubt that the sum which was decerned for at the instance of a mother of an illegitimate child was for an alimentary debt, and therefore so far I agree with the Lord Ordinary.

But I agree with your Lordship that the procedure adopted was not justified by the Act, which, as your Lordship has pointed out, contemplates summary proceedings without written pleadings. The parties are to appear, and the Sheriff is there and then to consider whether warrant of imprisonment should be granted or whether the person decerned against has any good grounds of excuse. If the Sheriff thinks the circumstances justify warrant of imprisonment he should grant it, and if not he should refuse the application. The Sheriff here did not follow either course, but continued the petition for four months. Where was his warrant for doing that? What was the view of the Sheriff? Did he think he was to consider the state of the circumstances at the date of the application or the state of the circumstances which might exist in four months? I do not think there was any foundation for his procedure in the statute. He had no justification, if there were no grounds for then granting the warrant, for keeping the application hanging over the debtor's head for months. There would be unfairness also to the person in whose favour the decree for aliment has been pronounced. She has a right at any time to apply for a warrant of imprisonment, and the application ought to be considered according to the circumstances at the time when the application is made. If this procedure were countenanced, that right would not exist, for suppose she applied and her application was refused, but continued for four months, then if the debtor's circumstances altered in one month, *e.g.*, by his acquiring property, an application made by her would be met by the answer that there was a depending application which had been sisted for four months.

Such procedure would thus be injurious to the debtor by keeping a possible warrant of imprisonment hanging over his head, and to the creditor by interfering with her right to apply for a warrant according to the circumstances of the time when she fancies she could make an application with success. I am for granting decree of suspension.

LORD M'LAREN—I am satisfied that the Court in the case of *Tevendale* did not mean to decide anything except this—that right to a decree for aliment by assignation or other derivative title would not confer upon the person holding such decree, not being the person for whose benefit the aliment had been decerned, the right to enforce that decree by imprisonment. It does not appear that the Court meant to decide that imprisonment would be incompetent if arrears were mentioned. So to hold would, in my opinion, be contrary to the scope of the provisions of the Act for enforcing payment of aliment by means of imprisonment. I think the distinction cannot be maintained, and that a creditor is entitled to recover arrears by means of imprisonment against a debtor who has means at his disposal. The debtor always has the protection of the Sheriff if he can show he is unable to pay.

I also agree with your Lordship in holding that the proceedings here are not in proper form, and contrary to what the statute intended. Application for an order of imprisonment is to be summarily considered by the Sheriff with reference to the debt, and to the circumstances of the debtor, when the application is made. If the debtor, by being out of work or for any other sufficient reason, is not in a position to pay, then the motion—for it is nothing more—will be dismissed. The creditor may always apply again in case of a change of circumstances. I see no inconvenience in this, but great inconvenience in "continuing" such applications for a definite period.

The Court passed the note.

Counsel for Complainer and Reclaimer—M'Lennan. Agent—Robert Broatch, L.A.

Counsel for Respondent—Cosens. Agents—Smith & Mason, S.S.C.