case. In answer to an inquiry as to the ground of defence in this relation, we were referred to statement 7 of the defences—"The true reason of the pursuer's refusal is this, that he has come under some obligation to give a lease of the quarry to Mr Anderson or his nominees." Now, I think that averment quite consistent with this meaning, that, having considered the sale to the Messrs Whitehead and rejected it, Lord Breadalbane came under an obligation to Mr Anderson, and of course, if that is the meaning of the statement, it is no defence to this action. If it had been intended to make such a case, as according to my suggestion would be a good answer, viz., that the landlord had disabled himself from giving his consent, I think it was incumbent upon the defenders to make this quite clear, and to put the facts before us so far as they had come to their knowledge.

For these reasons, which are in all essential respects identical with those of your Lordships, I think the interlocutor should be recalled, and decree given in terms of the conclusions of the summons. I give no opinion as to what right the liquidator may have with reference to any possible future sale, because that case is not before us.

LORD KINNEAR was absent.

The Court recalled the Lord Ordinary's judgment and granted decree of reduction and removing as craved.

Counsel for the Pursuer—W. Campbell—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Defenders The Ben Cruachan Granite Company, Limited—Guthrie. Agent—Alexander Morison, S.S.C.

Counsel for the Defenders J. Whitehead & Sons—H. Johnston—Wilson. Agent—R. C. Gray, S.S.C.

Tuesday, November 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACDOUGALL *v.* M'NAB.

Bank—Bank Cheque—Acceptance of Cheque as Equivalent to Cash—Reparation—Wrongous Use of Diligence.

A, residing in Glasgow, held a decree against B, residing at Innellan, and employed C, a solicitor in Glasgow, to recover its amount. C caused a charge to be given to B, which expired on 29th December 1892, and on that day C intimated to B that a poinding would be executed unless payment was made on the 30th.

On 31st December C instructed a sheriff-officer to poind the furniture in B's house.

On 3rd January 1893 C received from B, in a letter dated 31st December, a crossed cheque for the amount of the debt, but on inquiry he found that there were no funds in the bank to meet it. He telegraphed to that effect to B, and returned the cheque to B by letter on the same day, intimating that there were no funds. His letter was crossed by a letter from B, received by C on the afternoon of 3rd January, explaining why no funds had been provided for the cheque, and requesting that the cheque should be held over until the next day, the 4th, when funds would be provided. This letter C acknowledged.

On 4th January B by letter returned the cheque to C, and requested that he should again present it at the bank. Before 2 p.m. this letter was delivered at C's office, and about that hour his clerk ascertained that there were funds in the bank to meet the cheque. C was absent from the office from one to five o'clock, but on his return at five o'clock he was informed by his clerk of what had happened.

On 5th January, between 10 and 11 a.m., C sent the cheque to his bank with a request that it should be presented specially at B's bank. In compliance with that request it was presented about eleven o'clock and paid. The officials of C's bank did not inform C of the payment till two o'clock, and C then wrote the sheriff-officer intimating the settlement, and desiring that the decree should be returned, but the poinding had been executed at B's house at one o'clock of that day.

In an action of damages by B against C and A for wrongous poinding, the Court *assoilzied* the defenders, in respect that C was entitled to wait until he got money for the debt before staying proceedings, and that he had not on 4th January accepted the cheque as equivalent to cash.

Richard M'Nab, residing in Glasgow, obtained in the Sheriff Court at Glasgow a decree against Robert Macdougall, residing at Innellan, for £40, and employed T. C. Young, writer, Glasgow, to recover the amount. The latter caused a charge to be given to Mr Macdougall. The charge expired on 29th December 1892, and on that date Mr Young intimated to Mr Macdougall that a poinding would be executed unless payment was made on the following day.

On 31st December Mr Young instructed W. Warner, sheriff-officer, to poind the furniture in Mr Macdougall's house, situated about a mile and three-quarters from Dunoon.

On 3rd January 1893 Mr Young received from Mr Macdougall a letter dated 31st December 1892, enclosing a crossed cheque on the British Linen Company's Bank for the amount of the debt, but he was informed on inquiry that there were no funds in that bank to meet the cheque. He telegraphed to that effect to Mr Macdougall, and on the same day he returned the cheque by letter to Mr Macdougall, intimating that there were no funds. On the same date Mr Young wrote to W. Warner as

follows—"We wrote you on 31st ultimo ordering poinding herein; we had this morning a letter from the debtor, dated 31st ultimo (but posted in Dunoon yesterday), enclosing cheque for £45, 9s. 5d. On inquiry we found there were not funds to meet it, and have returned it. We suppose you will have executed the poinding ere this. If not please do so at once."

On 3rd January Mr Macdougall wrote to Mr Young—"Referring to cheque posted to you yesterday, I would ask you to hold same over till to-morrow, because, on account of the outer door of office at 57 West Nile Street being closed for a holiday to-day, I am unable to get at letter in box containing large remittance, which I require to lodge in bank to meet same." This letter was received by Mr Young in the afternoon of the 3rd, and was acknowledged by him. On 4th January, after receiving Mr Young's letter of the 3rd returning the cheque, Mr Macdougall wrote to Mr Young—"I am sorry there should have been any hitch about the cheque. Ample funds now at credit, and I return you cheque, which please present again."

On 4th January, shortly before 2 p.m., the cheque enclosed in Mr Macdougall's letter was received in Mr Young's office, and shortly afterwards his clerk on making inquiries ascertained that there were funds in the British Linen Company Bank to meet the cheque. Mr Young was absent from his office on business on that day from one to five o'clock, but on his return at five o'clock he was informed of what had had happened in his absence.

On 5th January, between ten and eleven o'clock in the morning, Mr Young sent the cheque to his bank, the Commercial Bank of Scotland, with a request that it should be presented specially at the British Linen Company Bank. It is the practice of banks on receiving such a request from a customer with regard to a crossed cheque to present it specially by messenger, and in compliance with Mr Young's request the cheque was presented at the British Linen Company Bank about eleven o'clock and paid. The officials of the Commercial Bank did not inform Mr Young of the payment till two o'clock in the afternoon. Mr Young then wrote to Warner, the sheriff-officer—"This has been settled. Please return decree on receipt, with note of your fees;" but the poinding had been executed by the sheriff-officer at the house of Mr Macdougall at one o'clock of that day.

Thereafter, in March 1893, Mr Macdougall raised an action against Mr M'Nab and Mr Young to have them ordained, jointly and severally, to make payment to the pursuer of the sum of £1000.

The pursuer pleaded—"(1) The defenders having wrongfully poinded the pursuer's furniture, they are bound to compensate him for the loss and injury thereby sustained, with expenses. (2) The pursuer, at the time of the poinding, not being indebted to the defender Mr M'Nab in any sum, the use of the diligence complained of was unjustifiable."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (3) The whole procedure under the said decree having been legal and regular, the defenders should be assoilzied. (4) The pursuer having suffered no loss or damage, the defenders should be assoilzied. (5) The pursuer having by his own actings caused the proceedings complained of, the defenders should be assoilzied."

On 29th July the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Repels the pleas-in-law for the defenders: Finds that on 5th January 1893 the goods of the pursuer were wrongfully poinded on the instruction of the defenders, and that the defenders are liable in damages in respect thereof: Assesses said damages at £20, and decerns against the defenders for payment thereof to the pursuer.

"*Opinion*—In this action of damages for wrongous poinding, the facts have been ascertained by a joint-minute. It does not bear a renunciation of probation, but when the case was called it was stated that the parties had no proof to lead. These facts, so far as they seem material, are as follows—[*His Lordship here stated the circumstances*].

"The question whether under these circumstances the poinding was wrongous, seems of considerable general importance. No decision in the Scotch Courts directly bearing on it was referred to.

"While I think the question a very narrow one, I have formed the opinion that the poinding was wrongous, and that the pursuer is entitled to decree for £20, the amount at which the parties have assessed the damage by the joint-minute. I think it was the duty of Young to countermand his instructions to poind on the afternoon of the 4th of January, after he had received the cheque for the second time, had ascertained that funds had been placed in the pursuer's bank to meet it, and had retained the cheque in order to present it for payment. I am not prepared to decide against the defenders on any other ground.

"No question has been raised as to the amount of the cheque. It has not been said that it was insufficient because it did not include the expense of the diligence. There is no point of that kind in the case. Had the amount of the cheque been paid in cash, that would admittedly have been sufficient.

"I think the cheque was negotiated with due despatch. Young cannot be blamed for delay in obtaining payment.

"Young was quite within his rights when on the 3rd January he returned the cheque and renewed, as he did, his instructions to the sheriff-officer to proceed with the poinding.

"He would have been within his rights had he returned the cheque again on the 4th. But he did not do so. He cannot be blamed for not having been in his office from one until five o'clock. But when at five o'clock he was informed that the cheque

had been returned, he was, I think, put to consider and decide whether he would return or retain it.

"Had the pursuer at that time sent payment in cash, I do not think it could have been disputed that Young would have been bound immediately to certiorate the sheriff-officer, and to instruct him not to poind if he had not already done so, and if this had been a case of cash payment I think there can be no question that the defenders would have been liable in damages although they were not aware that the diligence had been executed after payment. Some material difficulty in countermanding the diligence might make a difference. A question might be raised if it could not be done except by telegram, but in this case there was no difficulty.

"But I agree in the contention for the defenders that this cheque was not equivalent to a payment in cash. It did not discharge the debt, and had it been dishonoured the debt wonld have remained due, and the diligence would have been available. The case of *Davis* v. *Gyde*, January 27, 1835, 2 Adol. & Ellis, 623, may be an authority to that effect, although the grounds of judgment are in part founded on technical English rules, the reasonableness of which has not been apprehended in the Scotch Courts. The American case of *Burnet* v. *Smith*, July 1858, 64 American Dec. 290, quoted by the defenders, is to the same effect. But the same law is laid down in Bell's Prin. sec. 127, and I see no reason to doubt it.

"The defenders further maintained that nothing short of a tender in money, or what was equivalent to money, could oblige a creditor to abstain from or stop his diligence. That proposition may be admitted generally, but cannot be affirmed without qualification. The defenders quoted in support of it *Inglis* v. *M'Intyre*, February 14, 1862, 24 D. 541. But I do not think that case in point. It was there held that a tender of payment made to the sheriff-officer, coupled with a condition which the debtor had not a right to adject, did not oblige or entitle the sheriff-officer to stop the execution of his diligence.

"Although a cheque is not equivalent to a payment in money, it is not, if it be retained, to be disregarded entirely. 'Until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, or to sue the debtor as if he had given no security'—*per* Lush, J., in *Currie* v. *Misa*, 1875, L.R., 10 Exch. 153.

"It appears to be settled in England that a cheque or bill accepted, although it be not absolute payment, is conditional payment, the condition being that it shall become absolute payment when honoured; and that, on the other hand, the debt shall revive if the cheque be not honoured—*Currie* v. *Misa*, *supra;* Byles on Bills (15th ed.), 372; Chitty on Bills, 127; Chalmers on Bills, 305. I do not know that that principle has been expressed in any Scotch judgment, but I think that I ought on such a point to follow the English authorities, there being, so far as I know, nothing repugnant in our own decisions.

"Now, I think it ought to follow that diligence in execution should cease during the time when the cheque or bill bears the character of payment, and apparently, according to the English authorities, the cheque or bill has, as a general rule, that effect.

"But it has not in every case received that effect, and the defenders maintain that it has been decided in England that it does not suspend diligence, and they quoted as authorities for that proposition *Davis* v. *Gyde*, *supra*, recognised in *Belsham* v. *Buchan*, 1851, 11 C.B. 191, and also in Byles on Bills, 374. So far as I have been able to discover, this exception to the general rule has been admitted chiefly or only in questions between landlord and tenant, it being apparently held that a landlord is entitled to distrain notwithstanding that he has received a note or cheque from the tenant. But this exception from the general rule appears to have been deduced from certain distinctions known in the law of England, but unknown in the law of Scotland, between the degrees of debts of different characters. I have much difficulty in following the reasons for this limited exception to the general principle. I observe that Mr Chalmers suggests the propriety of reconsidering the judgments by which it has been established—Chalmers on Bills, 307—and if I can judge from the notes at the close of the American report which was quoted, the exception does not appear to be received in America. It was decided expressly in *Judge* v. *Fisk*, 1844, 42 American Decisions, 380, that the acceptance of a promissory-note suspends the landlord's right of distress.

"I do not say that the acceptance of a note for rent would affect any security which the landlord might have. It has been held not to affect his right of hypothec—*Swinton* v. *Stewart*, June 25, 1766, 5 B.S. 477. But the question now is as to a diligence in execution.

"The rule adopted in England seems in accordance with reason and principle. I cannot imagine that if a creditor accepts a bill, say at a few days' date, for his debt, as conditional payment of it, he could immediately commence diligence in execution, or (which is the same thing) would not be bound to stop diligence already ordered while the bill was current; and a bank cheque is by definition a bill of exchange drawn on a banker, payable on demand—Bills Act 1882, sec. 73. It seems to me that when a debtor's bill or cheque is not returned, he is entitled to think himself safe from diligence until the bill is matured or the cheque presented. If the pursuer's cheque had been returned immediately, he would have had an opportunity of paying in money, and so of avoiding the damage to his credit caused by the poinding.

"It is true that if this be the effect of retaining a cheque, the creditor or his agent who holds a decree with an expired charge incurs a certain risk, but if he has no confidence in his debtor, his remedy appears to be to refuse to have anything to do with the cheque.

"Entertaining these views, I do not require to consider whether Young might or ought to have done more than he did on the 5th of January. It was no doubt possible for him to have got the money into his hands by ten or eleven o'clock on the morning of that day, and he might then have stopped the poinding by telegram. But on the whole, if I had held that it was not his duty to countermand on the afternoon of the 4th of January, I think he could not be subjected in damages for anything he did or failed to do on the 5th."

The defenders reclaimed, and argued—The Lord Ordinary's decision was wrong. He had overlooked the fact that there was here no antecedent agreement to accept the cheque in payment of the debt, and as it was the debtor's duty to pay in cash, he could not succeed in any event unless he could show that Mr Young had accepted the cheque as payment on the 4th of January. In this case Mr Young had never accepted the cheque as payment of the debt.

Argued for pursuer—A tender to a clerk was tender to his master—*Inglis* v. *M'Intyre*, February 14, 1862, 24 D. 541. When the cheque was presented to Mr Young's clerk on the 4th of January, in his master's absence, he should have got payment by special presentment. If Mr Young did not intend to accept the cheque as payment, he should have returned it when he came home on the 4th. But he retained it, and thus acted wrongously. He also should have stayed the diligence. He kept the cheque intending to operate it, and by his actings showed that he had accepted it as cash. If a man accepted a cheque, or did not object to it as a cheque, it was equivalent to payment in cash—*Polglaso* v. *Oliver*, 1831, 2 Cr. & J. 15; *Currie* v. *Misa*, 1875, L.R., 10 Exch., 153. [LORD TRAYNER—The law is clear if you can prove that the cheque was accepted as payment.]

At advising—

LORD JUSTICE-CLERK — It is important here to attend strictly to the history of what happened. It appears that an account was due by the pursuer Macdougall, who is a property agent in Glasgow, having a house in Dunoon, to the defender M'Nab, a plumber in Innellan, for the amount of which M'Nab held a decree upon which there was an expired charge. M'Nab instructed the defender Young, a writer in Glasgow, to take proceedings to make the charge good, and Young being so instructed employed a sheriff-officer to make the charge good by poinding. On 29th December Young wrote to Macdougall intimating that the charge expired that day, and that they would require to give instructions to poind on the following day unless the amount were paid by twelve o'clock. On the 31st Macdougall wrote to Young in these terms—"Herewith please find cheque for £45, 9s. 5d., being amount decerned for, with expenses herein, the decree for which please send to me at your convenience." Now, that letter, although dated 31st December, did not reach Young until the 3rd January, as is proved by the post-marks on the envelope. On inquiry at Macdougall's bank Young was informed that there were no funds to meet the cheque, and accordingly he telegraphed to Macdougall—"Cheque presented, no funds,"—and sent a letter to the same effect, enclosing the cheque. Now, that to the ordinary business mind was a very unsatisfactory state of matters. But on 4th January Macdougall writes to Young—"I am sorry there should have been any hitch about the cheque. Ample funds now at credit, and I return you cheque, which please present again." So that Young received the cheque back again with a request to present it again. It so happened that when this letter enclosing the cheque reached Young's office he was absent at a funeral, and he did not return to the office until five o'clock in the afternoon—after bank hours. His clerk, however, had gone to the bank, and had ascertained that there were then funds in the bank to meet the cheque, but Young of course having returned to the office after bank hours could not get the money that day. In these circumstances he had to consider what he would do. He came to the conclusion that he ought not to take any steps until he knew what the result of presenting the cheque next day might be. His clerk no doubt had ascertained when he called on the 4th that there were then funds in the bank, but there was nothing to prevent someone else from coming forward and laying an embargo on these funds, and thus making them unavailable to the defender before the cheque could be presented. It was reasonable therefore that he should come to the conclusion not to stop the diligence until he knew how the cheque stood, and had got the money. It is indeed clear that he was under the belief that the poinding had been already executed, for he on 3rd January had written to the sheriff-officer a letter, in which he said—"We suppose you will have executed the poinding ere this." It is quite plain therefore that he saw no ground for taking steps on the 4th, as he evidently thought that the poinding had already been carried through. When the cheque was presented on the 5th it was found to be good for the money, and he accordingly wrote on that day to the sheriff-officer informing him that the matter had been settled. It turned out that the poinding was not executed until one o'clock on the 5th, and it was said that he might have telegraphed to the officer to stop the poinding. But his belief that the poinding had been already executed was, I think, sufficient to account for his not telegraphing, and in any case I do not think that he was bound to telegraph.

In these circumstances I am unable to see anything in Mr Young's conduct sufficient to subject the defender in damages for the wrongous use of diligence. I say nothing against Macdougall, although his position was, unfortunately for him, suspicious. But it is clear that Young was bound to do his best for his client. It was to be regretted that he did not get the cheque till

five o'clock on the 4th, but that did not arise from anything out of the ordinary course of business. It was a pure accident, from which I am unable to hold him responsible. On the whole matter, I think that the interlocutor of the Lord Ordinary should be recalled and the defenders assoilzied.

LORD RUTHERFURD CLARK—I am of the same opinion. The Lord Ordinary holds the defender liable on no other ground than this—that when Mr Young learned on his return to his office on the afternoon of the 4th January that there were funds in the bank to meet the cheque, he should at once have countermanded the poinding. I am unable to assent to that view. I do not think he would have been doing his duty to his client if he had so acted. Although his clerk then told him there was money in the bank, there was no certainty that it would be available to meet the cheque when it was presented next morning. He was therefore entitled to allow the diligence to proceed till he got the money.

LORD TRAYNER—I agree. I think with the Lord Ordinary that no fault can be attributed to Mr Young down to five o'clock on the afternoon of the 4th. Then, according to the Lord Ordinary, he should have returned the cheque or countermanded the poinding. I am unable to agree with the Lord Ordinary in this opinion. I think, on the evidence, that it is perfectly plain that Mr Young did not accept the cheque on the afternoon of the 4th as an equivalent for the money, but held it at the request of the pursuer, who had sent it to him to be presented a second time. He does present it with due despatch next day, and it is paid, but I think that he would have been wanting in his duty to his client if he had accepted it on the 4th as equivalent to payment, and I entirely concur with Lord Rutherfurd Clark that Mr Young was not bound to countermand the diligence on the 4th, because although the clerk ascertained that there were funds to meet it on the 4th, there was no ground for thinking that there would still be funds when the cheque was presented on the 5th.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuer—Comrie Thomson — W. Thomson. Agent — Thomas M'Naught, S.S.C.

Counsel for the Defenders — Guthrie Smith. Agents — Adamson & Gulland, W.S.

Tuesday, November 21.

FIRST DIVISION.

BLAIKIE AND OTHERS *v.* COATS AND OTHERS (THE BRITISH MEXICAN RAILWAY COMPANY).

Company—Shares Allotted as Promotion Money — Rectification of Register — Whether Petition Competent or Appropriate—Form of Procedure—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 35.

Section 35 of the Companies Act of 1862 provides that "If the name of any person is without sufficient cause entered in or omitted from the register of any company under this Act . . . the person or member aggrieved, or any member of the company, or the company itself, may, . . . as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Court may direct, apply for an order of the Court that the register may be rectified." . . .

A petition was raised under this section by certain shareholders in a company craving the Court to order that the register of the company should be rectified by deleting therefrom the names of certain shareholders, in respect that their shares had been illegally allotted to them as promotion money. The respondents pleaded that the questions at issue could not be competently raised by a petition under the section.

The Court, without expressing a decided opinion as to the competency of the application, *held* that petition under the section was a very inappropriate and inconvenient way of dealing with the questions raised, and that the proper course for the petitioners was to raise an action of reduction in ordinary form, pending the raising of which the petition should be sisted.

Opinion by Lord M'Laren that section 35 was not intended to create a substitute for the ordinary forms of procedure in cases where there was a strong divergence between the parties as to facts.

The petitioners John Blaikie, Leadenhall Street, London, James Moore Dickey, St Enoch's Hotel, Glasgow, and William Niven, St James Terrace, Glasgow, were shareholders in the British Mexican Railway Company, Limited, which was registered under the Companies Acts upon 22nd August 1892. The objects of the company, as set forth in the memorandum of association, were to "adopt and carry into effect, with or without modification, an agreement dated 11th May 1892, entered into and made between James Moore Dickey . . . as representing and on behalf of the Chihuahua Eastern Railway Company, ... and Charles Knight, Rutherglen, on behalf of this company."

Under that agreement the company