wife, or child, or agent of the depositor, is empowered to uplift the money. In regard to these cases the position of a bank or depository is perfectly clear, because until the depository is interpelled by action or diligence he is safe in paying to the person to whom he had undertaken to pay with the assent of the party making the deposit; and no court would compel second payment in such circumstances. But of course if there is a dispute the bank may be interpelled by arrestment or by notice, which probably would in most cases be accepted as equivalent to diligence. But now for the purposes of this action it does not seem to me to be necessary to determine who is the owner of this fund. Miss Fyfe and her son, Mr Anderson, by mutual agreement lodged this money in bank, not on a current account but as a deposit payable to either of them or the survivor. Although I do not need to draw an exact parallel between this case and that of the drawer of a bill, I think that when a bank, upon a deposit by A, agree, in writing, to pay to B, they are much in the same position as if they had accepted a draft by A in favour of B. Whoever is the true owner has at all events for the purposes of delivery made over his right of delivery in favour of another person, or, as in this case, in favour of either, or the survivor. Just suppose that the bank had no interest in this matter, and an action had been brought, they could not be heard to maintain that they were not going to honour Mr Anderson's demand because as a result of private inquiries they had heard that the money belonged to his mother. The bare statement of such a plea carries absurdity on the face of it. But then they say the bank is not doing this as a matter of interest in family history, but with a view to a more substantial interest, because Miss Fyfe has incurred liabilities. I do not think they put it as compensation, but they say they are entitled to retain until they see whether this obligation will be fulfilled. Now I do not know any legal ground that would justify such a claim of retention, because it is a very peculiar contract, and the obligation resulting from it is a precise and definite obligation to pay to a particular person. Unless there were identity of persons and "reciprocal claims," I should think compensation or retention was impossible. I cannot see how the claims of two persons who are jointly interested in a fund can ever be set against a debt which is due by only one of them, because there is not that identity of person between debtor and creditor that would raise either compensation or a right to retention.

I should wish to reserve my opinion as to the case where a person deposits money in his own name and he has at the same time an overdraft, because I think it would raise a very difficult question, and I can see grounds on which the bank might say, "We decline to pay your deposit unless you will agree to it being applied to the overdraft." Passing from this, I think it follows that it is unnecessary for the purposes of the present case to consider to whom in fact this money belongs. If the bank are bound to pay it, then I think that question of ownership could only arise in an action between the bank and Mr Anderson, or between them and some person who had claims on his estate. But I agree that if it had been necessary to consider the matter of fact, one would wish to hear argument on both sides, and to have the evidence more fully examined. I agree that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and Respondent —Watt, K.C.—J. R. Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Reclaimers —Campbell, K.C.—Cullen. Agents—Alex. Morison & Company, W.S.

Thursday, November 7.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LAMB *v.* THOMPSON.

Process—Sheriff—Suspension of Charge on Sheriff Court Decree ad factum præstandum — Imprisonment Threatened —Competency—Diligence.

A manufacturer who had consigned certain goods for sale to an auctioneer, on the bankruptcy of the latter raised an action against him in the Sheriff Court for delivery of the goods, and obtained decree. Meanwhile part of the goods had been sold by auction. Thereafter the consignor charged the auctioneer upon the decree to deliver the goods sold under pain of imprisonment. The auctioneer brought a suspension of the charge and whole grounds and warrants thereof, and averred that he was unable to implement the decree in respect that the goods had been sold to purchasers for cash, whose names and addresses he did not know.

Held that the suspension was competent (*per* the Lord Justice-Clerk and Lord Young) in respect of the circumstances of the case; and (*per* Lord Trayner and Lord Moncreiff) upon the general ground that decrees of inferior courts may still be competently brought under review by way of suspension.

This was a note of suspension at the instance of D. B. Lamb, auctioneer, Edinburgh, against M. Thompson, wholesale boot and shoe manufacturer, Kettering, Northamptonshire, in which the complainer craved the Court to suspend a charge under a Sheriff Court decree executed against him at the instance of the respondent, and whole grounds and warrants thereof, whereby the complainer was charged to

deliver certain boots to the respondent under pain of poinding and imprisonment. The question was, whether the suspension was competent.

In December 1900 Lamb received from Thompson 467 pairs of boots for sale by auction. On 15th February 1901 Thompson brought an action against Lamb in the Sheriff Court at Edinburgh, craving decree for delivery of the said 467 pairs of boots. Defences were lodged by Lamb. On 20th February 1901 Lamb was sequestrated, and on 22nd March the Sheriff-Substitute appointed the dependence of the action to be intimated to the trustee. On 29th March the Sheriff-Substitute, "in respect of no appearance by or for the defender, and of his failure to pay the dues of Court exigible at closing—the defender's trustee having declined to sist himself as a party to the action, on the motion of the pursuer's agent" decerned against the defender "forthwith to deliver to the pursuer the boots and shoes specified in the prayer of the petition," and found the defender liable in expenses. Thereafter, on 3rd May, the Sheriff-Substitute decerned against the defender for the taxed amount of the expenses. No appeal was taken against these interlocutors. Lamb having failed to appeal, extract was issued on 13th May 1901, and on the same day Lamb was charged under the pain of poinding and imprisonment to deliver to Thompson the boots specified in the petition under deduction of certain pairs mentioned in the charge.

Lamb thereupon brought the present suspension, and averred that prior to the date of his sequestration 120 pairs of the boots in question had been sold, leaving in his hands 347 pairs, which had been returned to the respondent by the trustee. This averment was ultimately admitted by the respondent's counsel at the bar. The complainer further averred that after the intimation of the action to the trustee the complainer had no knowledge of the course of the action, and had received no intimation of any proceedings therein; that thereafter the respondent had, without his knowledge, taken decree against him for delivery of the 120 pairs of boots sold by him; that the complainer was unable to implement said decree being unaware of the names and addresses of the purchasers of the boots, which had been sold by public roup, and paid for at the time in ordinary course; and that the respondent's agents were threatening him with imprisonment upon the charge now sought to be suspended.

The complainer pleaded—"(1) The complainer being willing but unable to implement said decree for delivery, decree of suspension of said charge should be granted as craved. (2) The proceedings complained of being grossly oppressive and unjust, the prayer of this note should be granted."

The respondent pleaded, *inter alia*—(1) The action is incompetent.

On 9th July 1901 the Lord Ordinary (PEARSON) passed the note.

The respondent reclaimed, and argued—It was incompetent to bring under review by way of suspension the decree of an inferior court which had become final, upon grounds which should have been stated before decree was pronounced. The grounds stated by the complainer, viz., that he had stayed away from the proceedings and could not obtemper the decree, would not have availed him even in an appeal. *A fortiori*, they could not be listened to in a suspension—*Bain* v. *Lawson*, February 16, 1899, 1 F. 576, 36 S.L.R. 417; *Lumsdaine* v. *Australian Company*, December 18, 1834, 13 S. 215; *Maule* v. *Tainsh*, October 19, 1878, 6 R. 44, 16 S.L.R. 10; *Kerr* v. *James*, January 24, 1866, 1 S.L.R. 119; *Smith* v. *Kirkwood*, May 28, 1897, 24 R. 872, 34 S.L.R. 652.

Argued for the complainer and respondent—Suspension had been long recognised as a competent mode of review of the decrees of inferior courts—*Wilson* v. *Bartholomew*, July 7, 1860, 22 D. 1410; *Taylor's Trustees* v. *M'Gavigan*, July 3, 1896, 23 R. 945, 33 S.L.R. 707; *Mathewson* v. *Yeaman*, May 18, 1900. 2 F. 873; 37 S.L.R. 681. Shand's Practice, 447; Dove Wilson, 565, 586. The Act 1 and 2 Vict. cap. 86, sec. 4, which was not affected by the Court of Session Act 1868, recognised suspension as a competent remedy. The cases of *Lumsdaine* and *Tainsh*, cited by the reclaimer, had reference to decrees of the Supreme Court, where a different rule applied.

At advising—

LORD JUSTICE-CLERK—The sole question is, whether we ought to interfere with the judgment of the Lord Ordinary in passing this note of suspension, and that depends upon whether suspension in this case is competent or not. Having heard the debate, I have no doubt that suspension is competent. The question is not whether the Lord Ordinary acted discreetly in passing the note in order that the question between the parties may be tried, but, as I have said, whether he had power to pass the note. Mr Aitken referred to the case of *Smith*, but it is clear from the opinion of Lord Curriehill in that case that suspension is competent. What it is desired to suspend is a charge upon which imprisonment may follow, in respect of the complainer's failure to deliver the boots and shoes which he had been ordained to deliver to the respondent. I put the question to Mr Aitken, whether if the complainer were actually imprisoned it would not be competent for him to bring a suspension; and on that question Mr Aitken declined to commit himself. But to my mind the question is exactly the same as if the charge had been executed to the effect of putting the complainer in prison. In such circumstances I should require strong grounds for holding that the complainer was without remedy. As I have already said, the only matter we have to consider is whether we ought to interfere with the Lord Ordinary's discretion, on the ground that it was incompetent for him to pass the note, and my opinion is that we ought not.

LORD YOUNG—This appeal raises a simple question. A charge was given to the complainer on 18th May last. That charge was

that he should deliver to the respondent certain boots specified, to the number of 120 pairs, within seven days, under pain of poinding and imprisonment. A correspondence followed, but the charge was not withdrawn, and on 17th June the present suspension was presented. The question whether suspension of such a charge is competent—if there are good grounds for it, which is another matter—is a question which I think is attended with no difficulty whatever. When the complainer comes to this Court we are informed that the charge proceeded on a decree pronounced by the Sheriff, of date 29th March, which, in respect of no appearance on behalf of the defender, ordained him to deliver to the pursuer the boots and shoes specified in the prayer—*i.e.*, not only the 120 pairs to which the charge applies, but a larger quantity, and we were informed, when the case came before us, that all the goods that were in the hands of the defender had been delivered, and that the 120 pairs which had been sold by him had been satisfactorily accounted for. In these circumstances, to say that a charge to deliver these articles under pain of imprisonment cannot competently be suspended is as extravagant a proposition as could be put into words. Your Lordship put the case that the complainer had actually been imprisoned, and asked whether in such a case the complainer could not have brought a bill of suspension and liberation. The only difference here is, that the complainer seeks suspension without liberation, not having been imprisoned. It appears to me to be as clear as can be that suspension is competent, and accordingly I agree that the reclaiming note should be refused.

Lord Trayner—The complainer having been charged upon a decree *in foro* pronounced against him in the Sheriff Court, brought this suspension of the charge and all its grounds and warrants for the purpose of having the decree reviewed. It was objected by the respondent that the suspension was incompetent, and that upon authority it could be shown to be so. I was rather surprised to hear this, because my acquaintance with the authorities as well as with the practice of our law in reference to suspensions had impressed me with a different view. I willingly therefore attended to the argument addressed to us by the reclaimer, because in matters of diligence especially it is desirable that there should be uniformity of decision and practice. The authorities relied on by the reclaimer do not, however, support the proposition which he maintains. The case of *Watt* was decided on the special terms of an Act of Sederunt which has no application here, and it has no bearing upon the general question whether a decree of an inferior court can be reviewed by way of suspension. The cases of *Lumsdaine* and *Maule* decided no more than this, that where in the Court of Session a judgment has been pronounced by a Lord Ordinary, the mode of having that reviewed is by reclaiming-note duly lodged within the statutory period, and that the Court will not sanction a review by suspension where the party desiring review has neglected to use the ordinary and, indeed, statutory form for obtaining such review.

Suspension is a mode of obtaining review of an inferior court judgment of very ancient standing, and was distinctly recognised as being so in the Act of 1838. It is as competent now as it was then. I think the Lord Ordinary's interlocutor passing the note should be affirmed.

Lord Moncreiff—I am of the same opinion. The only question is, whether the Lord Ordinary had jurisdiction to pass the note of suspension—in other words, whether suspension is competent. We have heard an interesting discussion as to the abstract competency of reviewing the judgments of inferior courts by way of suspension upon grounds which might have formed the subject of appeal. I am not sure that it is necessary to decide that question in its most general aspect. We are dealing here with a case where imprisonment is threatened, and I should think, even if the general rule were against the competency of review by suspension, that it would in such circumstances be competent. But I have no doubt that review by suspension is a competent mode of review. There are three modes of review of inferior court decrees—appeal, suspension, and reduction. The only limitation is that if the party has already appealed and failed in the Supreme Court, whether on the merits or by default, he cannot fall back upon another mode of review, viz., suspension. It must be observed that if suspension is adopted the complainer may have to find caution, which acts as a check upon litigants who prefer to resort to that process instead of appeal. It is clear from the case of *Watt*, and others which have been referred to, as well as from the treatises of Shand and Dove Wilson, that suspension is a competent mode of reviewing the decrees of inferior courts. The cases of *Maule* and *Lumsdaine* were cases of Supreme Court judgments, where a different rule applies. On the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Counsel for the parties stated that they were agreed in asking the Court to dispose of the whole case, including the question of expenses.

The Court refused the reclaiming-note; of consent suspended the proceedings complained of, and whole warrants and grounds thereof; and found the complainer entitled to the expenses of the suspension, and the respondent entitled to the expenses in the Sheriff Court.

Counsel for the Respondent and Reclaimer—Aitken—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for the Complainer and Respondent—Younger. Agent—John W. Deas, S.S.C.