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"I can conceive, that such precise words may be used in a deed, that it would be impossible to mistake them, and thus such evidence of a plan be excluded, but it is quite impossible to come to such a conclusion in this case.

"This is the case of a judicial sale, and depends now, on the appellant's part, on the parole evidence, or the oath of the surveyor as to drawing the plan. Mr. B. Hepburn says, that when the plan is completed, it is usual to burn the protraction. Would you go back to the protraction after such a lapse of time?

"Mr. Home says, all the protractions are gone. (Reads Mr. Glassell's deposition). In treating with his tenant, he has recourse to the plan. Then he sees the alteration of boundaries, taking place partly by accident, and partly by his own operations.

"I go on the whole evidence adduced; and before we can do our duty, we must see if the judges below have done right.

"I think they have; and that it is our duty to affirm."

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Wm. Adam*, *John Clerk*.
For Respondents, *W. Alexander*, *Fra. Horner*.

NOTE.—Unreported in the Court of Session.

WILLIAM ALLAN, Merchant in Leith, - *Appellant;*
CORNELIUS DE VOZ, Merchant in Hamburgh, }
Messrs. RAMSAY, WILLIAMSON & Co., Mer- } *Respondents.*
chants in Leith, his Attorneys, - }

House of Lords, 24th March 1806.

AGREEMENT—PERSONAL PROTECTION—SUSPENSION OF DECREE OF LORDS OF SESSION IN FORO CONTRADICTORIO—CAUTION DE JUDICIO SISTI.—All the creditors of a bankrupt, except one, agreed to grant a personal protection. In a suspension of a charge of the Court of Session, given upon a decree *in foro contradictorio*, Held, (1.) That a letter written by the respondent's attorney, did not, in its import, infer an agreement to grant a protection,—the conditions thereof not having been complied with; and, (2.) That a suspension of a charge on such a decree could only be on consignation or caution,—and execution sisted upon condition of the defender's finding caution *de judicio sisti*, during the dependence of the action. On appeal, interlocutors affirmed.

The appellant having been indebted to the respondent, Mr. de Voz, in a large amount, the latter raised action in the Court of

Session, in his own name and that of Mr. Curtis, his attorney, who, though a foreigner, was then residing in Leith, for payment of his account.

Defences were lodged to this action, stating, 1st. That no power of attorney had been produced in Mr. Curtis' favour; and, 2dly. That even if produced, as Mr. Curtis was himself a foreigner, he was incapable of acting as an attorney for Mr. de Voz.

In the meantime, and before anything was done upon the summons and these defences, Mr. Curtis was authorized to write the following letter to the appellant, which is the foundation of the present action: "12th October 1801, Sir, I "am instructed by Mr. de Voz to inform you, that if you "will immediately desist in opposing his just demands, and "come forward and answer them, to the extent of your "ability, he will not only grant you his protection till mat-"ters are finally wound up; but will, upon your making a "suitable atonement for the injury he has already sustain-"ed by your refractory conduct, and giving your solemn "promise to mitigate his former and present losses, by small "payments, as hereafter shall best suit your convenience, "likewise give you a full and ample discharge, so that you "may go on again uncncumbered with the great load of debt "now impending over you, and which, if not removed, must "ever prevent your doing any good."

The appellant paid no regard to the above letter. He did not come forward to answer these demands to the extent of his ability. Nor did he desist in opposing the respondent's just demands. On the contrary, next session, when the above cause again proceeded, he appeared by counsel, and insisted in his defences, but the Court repelled these, and the respondent obtained decree on 13th November 1801. And he actually raised a counter action, alleging counter claims, and pleading compensation, which were unfounded.

On the other hand, it was stated by the appellant, that Mr. de Voz being the only creditor from whom he had any thing to fear in obtaining a settlement with his creditors, he at once agreed to the proposal contained in the above letter.

Meetings of his creditors were then called, and a trustee appointed. At these meetings Mr. Curtis attended. At last a sequestration was taken out, and, at the meeting of the creditors, all the creditors agreed to give the appellant a personal protection, with the exception of Mr. de Voz.

Soon thereafter, a charge on letters of horning was given

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for his debt of £3688, and the appellant brought a suspension, contending that, from the import of the above letter, there was an agreement to give the appellant "his protection till matters were finally wound up."

The Lord Ordinary, after considering the bill, with answers and replies, and making a verbal report to the whole Lords,

May 18, 1802. pronounced, of this date, the following interlocutor: "The "Lord Ordinary having considered the bill, answers, replies, "and writs produced, and advised with the Lords, refuses "the bill, but sists execution for eight days, upon the com- "plainer's immediately lodging caution *de judicio sisti*, not "to leave this country during that time."

On petition to the whole Lords, the Court refused the petition, "but sist execution, during the dependence of this "question, upon the complainer immediately lodging caution "*de judicio sisti*, to the amount of the debt, as to leaving the "country during that time."

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—Mr. de Voz was bound to concur with the other creditors in granting to the appellant a personal protection, in terms of the letter written by his attorney, Mr. Curtis, at his desire, where, upon certain conditions to be fulfilled by him, it is said "he (Mr. de Voz) "will grant you his protection till matters are finally wound "up." It is plain, from this letter, that Mr. de Voz and Mr. Curtis knew that the appellant was insolvent; that they were desirous that he should no longer fight his way in his then labouring circumstances, but stop payment, and be directed by Mr. Curtis in the steps he was to pursue, in which case Mr. de Voz "will grant you his protection till matters are finally wound up." And he further adds, "he will give "you a full and ample discharge, so that you may go on "again unencumbered with the great load of debt now im- "pending over you, and which, if not removed, must ever "prevent your doing any good." And the actual conduct of Mr. Curtis puts the meaning beyond all doubt; he well knew that no settlement could take place without the concurrence of all the appellant's creditors, and a fair division among them; and, accordingly, at his desire, the appellant applied for a sequestration. The question, therefore, seems to be, Whether or not the appellant fulfilled the stipulations which were required of him, in terms of his missive? The first stipulation is, "If you will immediately desist in oppos-

" ing his just demands." This the appellant complied with, by not insisting any further in his own action, which, although not without foundation, was not supported by that written evidence which was necessary to insure success, and by stating no special defence against the respondent's demands. The second condition was, " to come forward " and answer them to the extent of your ability." By this surely was not intended that the appellant was to give Mr. de Voz an undue preference. He has answered the demands of Mr. de Voz to the extent of his ability, and consistently with the principles of justice, by concurring in measures without delay, to have the effects equally divided among the creditors. Mr. de Voz and Mr. Curtis could mean nothing more, and indeed their intention is fully established by the proceedings that took place immediately upon this letter being granted.

Pleaded for the Respondents.—A creditor cannot be deprived of his right to make use of lawful diligence for the recovery of a debt due to him, otherwise than by his own express obligation to grant his debtor a supersedere from such diligence. Now no such obligation is contained in the letter of the 12th of Oct. 1801, founded on by the appellant. In the letter Mr. Curtis merely says, that the respondent, upon certain conditions, will afford the appellant his protection. This general promise of indulgence referred to certain bills then due by the appellant to the respondent, but it neither did nor could have any reference to the decree now attempted to be suspended, which was not obtained until more than four months after the date of the letter. The obligation or promise contained in the letter above mentioned, taking it in the most liberal and favourable sense for the appellant, was at any rate a conditional promise or obligation; and it has been shown, that every condition attached to it was completely disregarded by the appellant. In order to entitle him to any benefit from this letter, it was necessary that the appellant should immediately desist in opposing the just demands of the respondent. But, subsequent to the date of the letter, the appellant continued, in the most obstinate manner, and upon most frivolous and unjust pretences, to oppose the demands. In the action at the respondent's instance, the appellant, if he meant to avail himself of this letter, should have allowed decree to be pronounced without opposition. But against

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that action the appellant not only protested in his original defences, but he had recourse to a new defence altogether, by alleging that the respondent's claims were compensated by counter claims to a great extent, which he pretended to have against the respondent Mr. de Voz. And he raised an action at his own instance for making these alleged counter claims good, or at least for the purpose of more effectually opposing the respondent's just demands. It was further conditioned in the letter, that the appellant was to come forward and answer the respondent's demands to the extent of his ability. But although the appellant continued solvent for a considerable time thereafter, he never advanced a farthing to the respondent to account of the large balance due, and which ought to have been paid to him many months before. Besides, the appellant was charged on a decree by the Court of Session *in foro contradictorio*, but such decrees cannot, by the law of Scotland, be suspended except upon payment made, or consignation offered, of the sum decerned for. This is enacted by the statute 1584, c. 139, confirmed by act of sederunt 29th Jan. 1650, the latter relaxing so far the rule of consignation as to admit the bill with "*sufficient caution.*" But here, neither consignation nor caution has been offered.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, Henry D. Inglis.*
For Respondent, *Ad. Gillies, M. Nolan.*

NOTE.—Unreported in the Court of Session.