and I think it makes my view of the case stronger; but let that be dropped; let it be supposed that they made no objection upon that head, which was the most objectionable of the two. However, they made some objection upon some points rightly or wrongly; and suppose they were entirely wrong, but having gone down there, and deliberately together chosen to say—"We will work no longer," it would not seem that there was any breach of contract with respect to the piecework they were engaged in. It would be only that they did not earn anything. Even if they had been employed as daily labourers, if they wrongfully chose to say—"We will not work any more," and if, without proper cause for so saying, they had said—"We will terminate our contract, now take us up again," it was unquestionably the duty of the master, *qua* master, in his capacity of master, to take them up safely, just the same as to have brought them down safely. For that purpose the obligation of the master continues in that sense after the termination of the service, after they have in truth continued to work in his employment, and while they were only causing themselves to be removed from it.

It appears to me, therefore, that the direction of the learned Judge on the first issue was, as the learned Judge seems himself to think it might probably turn out, not sound, and consequently that the verdict ought to have been given upon the second issue. The learned Judge's direction was—that if the jury were satisfied that the men left the mine without working, with no apprehension of danger, but of their own accord, for a purpose of their own, then the master is not liable for the accident. If we take all this merely strictly, it is clearly wrong. It might be a most legitimate purpose of their own. It might be that they went up because the agent, or whoever was managing in the mine, had told them that unless they worked double they should not have their wages, or some wrong direction of that sort might have been given. I do not mean that there is any notion that that was the truth; but if we look merely at the words, it is clear it was wrong. If, instead of that, we take a more liberal construction, and look at what the facts were, then the facts were—that the workmen were down there; that, whether rightly or wrongly, they chose to say they would not work any longer unless some grievances that they had, or supposed that they had, should be redressed; that they directed themselves to be taken up again; and that they were accordingly taken up; and in the course of being so taken up the accident happened. In my opinion it is quite clear, by the law of England and by the law of Scotland, that the injury happened to this man from the neglect of his master while he was sustaining the character of master towards him, and consequently the verdict ought to be entered up upon the second issue and not upon the first.

LORD BROUGHAM.—My Lords, I am entirely of the same opinion. It is perfectly clear that it makes no difference whatever in this case whether there was want of proper cause for coming up from the mine, which the jury have found by the verdict upon the first issue. The master who lets them down is bound to bring them up, even if they come up for their own business, and not for his. He is answerable for the state of his tackle by which this lamentable accident was occasioned.

LORD CHANCELLOR.—My Lords, I move that this case be remitted to the Court of Session, with a direction to enter the verdict up on the second issue for the pursuer, £150 damages, with costs in the Court below. Though it is a pauper case here, it was not a pauper case in the Court below.

Interlocutor reversed, and cause remitted, with directions.

Appellants' Agents, Scott and Gillespie, W.S.—*Respondent's Agents*, Gibson Craig, Dalziel, and Brodie, W.S.

MARCH 13, 1855.

Messrs WALKER and Co., *Appellants*, *v.* Sir M. R. SHAW STEWART, *Respondent.*

Et è contra.

Appeal—Competency—Arbitration—Reference to the Court as Arbiters—*The parties to a jury cause before trial agreed to refer the subject matter by a reference to a civil engineer, to which the presiding Judge interponed his authority; and the arbiter afterwards issued a report containing his views, in order to receive the instructions of the Court. The parties having been heard before the Court, their Lordships recalled the interlocutor of the presiding Judge interponing his authority, directed the cause to proceed as if no reference had taken place; and appointed it to be tried by a jury.*

HELD (reversing judgment), *that the last interlocutor not being by consent was incompetent, and the cause must be remitted, so that the judicial reference may be proceeded with.*

Servitude—Grant—Right to take water from stream—*S conveyed land to A with liberty to take water from a stream for use of A's works, by a pipe not exceeding 12 inches diameter:*

Opinion, *that A was not entitled to dam up the stream so as always to keep the pipe filled; for though the maximum was expressed there was no minimum, and A must be content to take what water would run through the pipe.*[1]

Messrs. Walker and Co., who are sugar refiners, have right by feu contract to a piece of ground situated on the West Burn of Greenock, of which Sir M. R. S. Stewart is superior. The feu-right was originally granted to Robert Angus and others in 1826, and came, by transference, into the hands of Messrs. Walker. It contained the following stipulations :—"With liberty to the said Robert Angus and others, and their foresaids, to take water from the West Burn for the use of their work, by a pipe not exceeding twelve inches diameter; providing that, after serving their purposes, they return the water back again into the burn; and also expressly providing, that in so using the water they do not interfere with the rights and privileges of the mills or properties of those having a prior right to the water above or below them; and which privilege of the water is only granted by the said Sir Michael Shaw Stewart, and accepted of by the said feuars, in so far as the said Sir Michael Shaw Stewart has right himself; and in case he may have exceeded his powers, then the said privilege to the water is at an end, and neither Sir Michael Shaw Stewart nor his heirs shall be liable in any damages or expenses, in prosecuting or defending any law suits that may hereafter be brought at the instance of any persons having a prior right—with and under which explanation this privilege is granted."

A question having occurred as to the right of the Messrs. Walker in regard to the use and enjoyment of the water, and certain operations made by them on the banks, Sir M. S. Stewart presented an application for interdict against them in the Sheriff Court of Renfrew, and afterwards the process was advocated to the Court of Session *ob contingentiam* of a declarator brought by him to settle the points in dispute.

Issues were suggested by the pursuer, and counter issues by the defenders, and these having been approved of by the Court on 20th July 1852, the case was set down for trial on 3rd August following, but the case was not proceeded with in consequence of the following minute of reference, to which the parties agreed, and to which the presiding Judge interponed his authority :—"The parties agree to refer to Mr. Leslie the question of what works and operations are necessary or proper to enable the defenders to secure to them the full supply of water from the West Burn, to which the feu contract entitled the defenders, in such way and manner as may least interfere with the use of the burn by the pursuer or others, and that either by the present weir, if necessary, or in any other way which the said referee may direct,—with power to him to continue, alter, or pull down the existing works, and order the erection of such other works, if any, as he may think proper; with power also to the referee to report to the Court any point which may arise, on which he thinks it necessary to take that step—the expenses to be disposed of by the Court after the referee has disposed of the case."

The arbiter made a report stating that the parties raised a question as to how far the burn could be dammed up to feed the pipe, and so keep it always filled. He thereupon reported the matter to the Court for further instructions. Counsel were next heard before the Court.

The Court then by interlocutor of 3d Feb. 1853 recalled the deliverance of 3d Aug. 1852, and allowed parties to proceed as if no reference had been entered upon : and the Court also ordered the trial of the issues to proceed.

Messrs. Walker then applied to the Court for leave to appeal against the interlocutor of 23d February 1853, which their Lordships granted on 8th March following.

They pleaded in their case that the interlocutor ought to be reversed—"1. Because it was *ultra vires*, in respect the Court had no power to set aside a judicial reference validly entered into, and to which judicial authority had been formally interponed. 2. Because the Court, upon the interim report by the referee, ought to have instructed him that the point of abstract legal right therein referred to was not involved in the reference to him, and not necessary to be taken into account in disposing of it. 3. Because, at all events, there were no legal or sufficient grounds for setting aside the reference; and it was not consistent with the rights of parties under it, and with the justice of the case, and true legal merits of the question before the Court, that it should be set aside; and the Court ought, in any view, to have instructed the referee to proceed under it."

In his case Sir M. S. Stewart maintained that the interlocutor ought to be affirmed—"Because the appellants, by their conduct and pleading, warranted the Court in believing, and in acting upon the belief, that they were dissatisfied with the minute of reference, and were desirous of being relieved against it, in the manner expressed in the interlocutor appealed against; and the appellants are consequently barred from challenging that interlocutor."

A cross appeal was also presented by Sir M. S. Stewart, against the counter issues which had been suggested by Messrs. Walker, and approved of by the Court, principally on the ground that they contained no relevant defence to the action, or were superfluous and irrelevant.

[1] S. C. 2 Macq. Ap. 424 : 27 Sc. Jur. 321.

Against the cross appeal Messrs. Walker *pleaded*, that—" 1. It was incompetent, in respect that the interlocutors appealed from, granting the defenders' issues, and sending the case to be tried, were not liable to review by appeal. 2. Because, at all events, there were no grounds for interfering with the exercise by the Court below of its statutory functions in granting the defenders' issues, and appointing them to be tried. 3. Because, in the special circumstances of the case, the appeal is incompetent, or, at all events, is groundless and ineffectual, in respect that the appellant, by entering into the reference to Mr. Leslie, acquiesced in the allowance of the defenders' issues, and precluded himself from afterwards objecting; and that the proceedings as to the reference, and in particular the interlocutor of the Judge at the trial interponing authority thereto, are not brought under review, and cannot competently be set aside."

Sir F. Kelly Q.C., and *Anderson* Q.C., for appellants.—The simple question is—whether this interlocutor of the Court below can stand, whereby they assume to interpose and put an end to a pending arbitration. If a reference is entered into, whether in Scotland or in England, no Court has any power to interfere and put an end to it, unless one of the parties alleges there is fraud or corruption on the part of the arbiter.—*Dixon* v. *Monkland Canal Co.*, 1 W. S. 636; *Fairly* v. *M'Gown*, 14 S. 470; *Drew* v. *Drew*, *ante*, p. 439: 2 Macq. Ap. 1. This is so, even where the reference is entered into by counsel.—*Mackenzie* v. *Girvan*, 2 Bell's Ap. 43. And where the parties at a trial refer to the Court itself all the matter in dispute, the decision of the Court is final, and no appeal lies to a higher Court.—*Dudgeon* v. *Thompson*, *ante*, p. 403; 1 Macq. Ap. 714. The reference here gave power to the arbiter to apply to the Court for advice, but the Court had no power to set aside the reference altogether, any more than it has power to interfere and set aside any other contract which the parties may choose to enter into. The arbiter, under the terms of the reference, might or might not apply to the Court, as he thought fit; but the Court, instead of giving advice, took upon itself to set aside the agreement between the parties, which was entirely *ultra vires*.

As to the cross appeal, it is well settled that there can be no appeal from an interlocutor of the Court of Session ordering issues to be tried.—55 Geo. III., c. 42; 59 Geo. III., c. 35; *Bald* v. *Kerr*, 3 Sh. & M'L. 1; *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 211.

Solicitor-General (Bethell), and *N. C. Campbell*, for respondents.—The interlocutor of the Court below was one pronounced by consent of the parties, and it is to be regretted that the Court did not insert words bearing that it was so. Still it was not necessary that the interlocutor should express this consent.

As to the cross appeal, the interlocutor allowing the counter issues of the appellants was wrong, for it proceeds on the assumption that the appellants were entitled to dam the burn and construct the weir. The feu contract gives them no such right. Besides, the issues introduce irrelevant matter, and are improperly framed. (The case of *Marquis of Breadalbane* v. *Macgregor*, 7 Bell's Ap. C. 45, was also referred to.)

LORD CHANCELLOR CRANWORTH.—My Lords, this is a case which comes before your Lordships upon an appeal, and a cross appeal, against the original interlocutor, by Messrs. Walker, and against the interlocutor of the 23d of February 1853, whereby the Court of Session put an end to the minute of the judicial reference, which had taken place in the preceding month of August. The circumstances of the case were these:—Legal proceedings were instituted for the purpose of raising the question—whether or not Messrs. Walker, who were sugar manufacturers in Greenock, were entitled, and if entitled, to what extent, to abstract water from a burn, the soil of which belonged to the pursuer Sir M. S. Stewart. I need not recall your Lordships' attention to the precise course which the cause took. It resulted in the pursuer obtaining from the Court an issue to try, "Whether, during the year 1850, the defenders, that is, Messrs. Walker, or others for whom they are responsible, wrongfully constructed a dam, breastwork, or weir, upon and across the channel of the West Burn of Greenock, and wrongfully erected embankments on the sides or banks thereof within the property of the pursuer?" On the other hand, shortly after this, the defenders obtained two cross issues, the first of which appears to have little or, indeed, perhaps no bearing upon the question. The second was, "Whether, having regard to the ordinary supply of water in said burn in and subsequent to 1850, the foresaid dam, breastwork, or weir, and embankments, or works of some similar description, are required for the proper exercise of the privilege of using said water conferred on the defenders by the said feu contract?"

Those original and counter issues came on for trial on the 3d of August 1852, and on that occasion the parties did that which often happens on trials of this sort. It appeared to be a question which would probably be very unsatisfactorily decided by a jury, therefore they agreed to refer the question to a gentleman, a civil engineer, of the name of Leslie, and the terms of the reference were these:—" The parties agree to refer to Mr. Leslie the question of what works and operations are necessary or proper to enable the defenders to obtain and secure to them the full supply of water from the West Burn, to which the feu contract entitled the defenders, in such way and manner as may least interfere with the use of the burn by the pursuer or others, and that either by the present weir, if necessary, or in any other way which the said referee may

direct; with power to him to continue, alter, or pull down the existing works, and order the erection of such other works, if any, as he may think proper; with power also to the referee to report to the Court any point which may arise on which he thinks it necessary to take that step —the expenses to be disposed of by the Court after the referee has disposed of the case."

My Lords, the arbitrator proceeded, and several meetings took place, but then a difficulty arose. What he was to determine was the question—what works and operations were necessary and proper to enable the defenders to obtain the full supply of water from the West Burn, to which the feu contract entitled the defenders. Now, that makes it necessary that your Lordships' attention should be called to what the rights of the parties were under this feu contract. It appears that Sir M. S. Stewart was the owner of some land through which this burn ran; the owner, we may say, therefore, of the burn, and of the adjoining land; that in the years 1825 and 1826 he conveyed the property adjoining the burn not to Messrs. Walker, the present appellants, but to their predecessors; we may say, therefore, to Messrs. Walker; he conveyed to them a portion of land for the purpose of enabling them to build certain mills and works. And then there was this clause:—"With liberty to take water from the West Burn for the use of their work by a pipe not exceeding 12 inches in diameter, providing that, after serving their purposes, they return the water back again into the burn;" and with an express stipulation, that Sir M. S. Stewart in no respect guaranteed to them the water, but merely granted to them such right as he could lawfully grant. Therefore, that being the nature of the title that was given to the water, and the reference to Mr. Leslie being to ascertain how best the right they had to the water under the feu contract could be obtained by them, he proceeded with his reference. But he soon came to a stop, because he very naturally said, "I do not want to know how to proceed with this reference till I am satisfied as to what is the extent of the right that the parties have under the feu contract; that is not a question of fact, but it is a question of law, and until that is cleared up I am proceeding in the dark. I may be giving a great deal too much, or I may be giving a great deal too little." With a view to get that matter elucidated, he made a report, which he considered the terms of the reference enabled him to do, viz., that portion of the reference which proceeds thus:—"With power to the referee to report to the Court any point which may arise on which he thinks it necessary to take that step." It is not very happily or distinctly worded; but I think the fair import of that is, that in the progress of the reference, if for any purpose it became necessary for him to take the opinion of the Court, it should be open for him to do so.

Now, my Lords, Sir F. Kelly suggested, that under that the Court could do nothing, for that the Court had been brought under the category of those cases in which it ceased to be a Court so to say, and became a mere arbitrator. Now, I very much doubt whether that principle is properly applied to such a case, because here the Court was fully seised of the whole matter, and all that is withdrawn from it is by an arrangement that the facts are to be settled in a different way. The true meaning of that is, that, subject to that, which by arrangement is a settling of the facts in a different mode from that which the *cursus curiae* would have taken, the jurisdiction is to remain unimpaired. I think that this is the reasonable construction of that clause; though I do not think it is necessary to decide that, but I wish to guard myself, at least, against being supposed to acquiesce hastily in that suggestion of Sir F. Kelly.

The arbitrator making his report, the matter came before the Court upon that report, and this matter having been argued in the latter end of December 1852, the note having been made, I think, on the 1st December, the Court, on 23d February, pronounced this interlocutor:—"The Lords having resumed consideration of this case, and heard counsel, recall the deliverance of the Judge of 3d August 1852, interponing his authority to the minute of reference settled between the parties, and allow the parties to proceed as if no reference had been entered into." Now it is against that interlocutor that Messrs. Walker have appealed. We have no doubt, and we come to the conclusion without any hesitation, that the Court had no authority whatever to take that step. Sir F. Kelly properly said, that when parties had by contract agreed to a judicial reference, that is a contract like any other contract, and the Court has no more authority to put an end to that contract than they would have to put an end to a contract for the sale of an estate or the lease of a house; it is irrevocably binding upon the parties, unless they have stipulated for some mode by which they may get out of that binding contract. That observation, however, is, of course, subject to this remark, that every judicial reference must be taken to be with this qualification, that where by the act of God it becomes impossible that it should proceed, it is to be looked on just as if it had been inserted as a condition *ex vi termini* in the contract. Suppose the arbitrator had died, what would have become of it? And other cases may be suggested, in which it would be impossible to proceed with the arbitration. And then, probably, the true construction of the law is, that the parties are then remitted to their original rights. Nothing of that sort, however, is suggested here. The Lords of Session seem to have called it back, either because they thought it might be a more expedient mode of proceeding, or, as it is suggested, because they understood at least that it was the wish of both parties.

Now, although I think we cannot act upon the notion of this having been an order by consent,

not having been so expressed, yet I very much incline to think the Lords of Session probably did think that they were doing that which both parties wished them to do. I think that is extremely probable, and I am very glad to be able to come to that conclusion, because then, in point of fact, in overruling this interlocutor, we are not deciding against anything which they were deciding; because if this had been expressed to be an interlocutor by consent, of course a motion for setting it aside would have been impossible. We must deal with it, however, as an interlocutor not by consent; and so dealing with it, I think it is quite clear that it was an interlocutor which there was no jurisdiction to make, and that therefore it must be reversed.

Then comes the question—what is to be done in disposing of this interlocutor? Several courses have been suggested. Now, from what appears in the course of the printed argument, and partly also from what was said at the bar, and partly from what fell from the learned Judges in the Court below, I cannot but think, with all deference to the learned Judges, and the gentlemen who have argued this case, that there has been a most unfortunate mistake here, in talking about this being some abstract legal right to be decided. There was no abstract legal right to be decided. That which is to be decided is to the last degree concrete; the question to be decided being—what is the right of the party, according to the true construction of the feu contract?—what right had Messrs. Walker under the true construction of the contract? Call it abstract, or call it concrete, or give it what name you please, it is a question which Mr. Leslie, the referee, must either have decided himself, or one which the Court must have decided for him, before he could by possibility know what were the rights of those parties. It appears to me a monstrous proposition to say to an arbitrator, "Decide it as you please—go to the whole expense which would be incurred—settle what is to be done according to the true construction of the rights—go through the whole question, and then come back, and have it all undone, if you have taken a wrong view of the case." I think, therefore, all considerations of convenience require that the course should be taken which I conceive to be the natural and proper course in such a case, that in this matter we must report to the Lords of Session that they should give the arbitrator their direction upon the point of law as to what the rights of Messrs. Walker were under the feu contract. What I propose, therefore, to your Lordships is, to reverse this interlocutor, and to remit the case back to the Lords of Session, with a direction that they should do therein as to them seems fit.

My Lords, I think that is all we ought to do in point of form. But I think the Court of Session would not think we were acting very fairly by them; and I think the parties would have a just right to say that we were not acting very fairly by them, if, in remitting it back in that general way to do what is right, we were not to state (for I think that is only moving in the proper direction) what is our view as to what the rights of the parties are; and I am the more inclined to do that, because if we were not to do so it might give rise to another appeal, and in all human probability it would do so. And I am also the more disposed to follow this course, because I confess, with all due deference to those who have argued this case, and taken another view of it in the Court below and in the printed arguments, it appears to me to be a case as to which the question of what the rights are admits of not a moment's doubt.

Now, my Lords, observe, Sir M. S. Stewart conveys the land to Angus and others—that is, Walker and others (no matter what the conveyance was—that is immaterial)—"with liberty to take water from the West Burn for the use of their work, by a pipe not exceeding 12 inches in diameter," provided they comply with certain conditions. I disregard the conditions, of course, but when I am speaking of the rights, I mean their rights, supposing them to comply with all those conditions,—"with liberty to take water from the West Burn for the use of their work, by a pipe not exceeding 12 inches in diameter."

Now the first question which has been raised is as to whether they may dam up the stream, so as to make a pond for some other purpose than that of taking the water. I should have thought, I confess, that that was hardly an arguable point. They are to do nothing but take the water for the use of their works. But I go a great deal further than that. I think they have no right to dam it up an inch. All they are to do is just what is stated—they may take water from the West Burn for the use of their work, by a pipe not exceeding 12 inches in diameter. It seems to have been assumed that they are entitled to have the water in such a state that they shall always have a pipe 12 inches in diameter full of running water. Where do you find that they are to take the water, and to take it by a pipe not exceeding 12 inches in diameter? It seems that the maximum they can take is 12 inches in diameter, but there is no provision that that is the minimum—that they shall always have that and nothing less. I agree with the observations of one of the very learned Judges, I think Lord Murray, who says, that when the privilege is given to them, to take water by a 12 inch pipe, there is given to them, incidentally, the power to do all that is necessary for that purpose. Yes, all that is necessary for taking care that there is a 12 inch pipe for conveying whatever water may flow into the 12 inch pipe, but not all that is necessary for making the water always flow into that 12 inch pipe. There is nothing pointing to such a provision. It appears to me, therefore, that all that these persons have a right to do is, to have a pipe 12 inches in diameter, or a pipe not exceeding 12 inches in diameter, to con-

vey away as much water as can be conveyed by it. That is all the right they have—they have that right, and, in my opinion, nothing more. I do not, however, propose to your Lordships that we should make that a direction to the Lords of Session, but simply remit the case to them to do what to them may seem right; but I wish them to have the strongest intimation that I can give, that that is the only construction to be put upon this feu contract.

That disposes of the original appeal. With regard to the cross appeal I have heard nothing from the beginning of the case that at all shakes my opinion not only that it must be dismissed, (that cannot be questioned, because it is dependent upon the fact that the judicial reference was to come to an end, and the judicial reference being pending, it would be ridiculous to talk of appeals calling in question the issues which have been directed by the Court,) but, further, it must be dismissed with costs, upon two grounds. In the first place, I have heard nothing which satisfies me that this was, under any circumstances, a competent appeal; and even if it were competent after the issues had been directed, and the parties had gone down to trial, without, however, raising such a point, it seems to me far too late, if it had been a matter of discretion to allow of such an argument. My advice, therefore, to your Lordships is to reverse the interlocutor, and to remit the matter back to the Court of Session, with a direction to do therein as justice may seem to them to demand; and, upon the cross appeal, to dismiss it with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend upon both points—both as to the mode of proceeding and the course to be followed out. My only doubt was as to which course we should take, whether we should make it a part of the judgment, or intimate, in pronouncing the judgment, what course was to be pursued. I entirely agree that the best course is that which my noble and learned friend has advised your Lordships to adopt, viz., not to make it any part of the judgment, but to intimate it, as my noble and learned friend has done.

With respect to the other point as to the competency of the cross appeal, I have only to observe, upon the case of *Breadalbane* v. *M'Gregor*, that there is no doubt whatever that the interlocutor then under appeal was one finding the averments relevant, and fit to be the subject of a jury trial. And it was upon that ground that the appeal was held competent. But there is an expression in the judgment or in the argument of my Lord Chancellor Cottenham in coming to that conclusion, which appears to me to go a little further than we who agreed with him (Lord Campbell and myself) can be said to have gone. He says the prohibition in the act does not refer to those cases where the Court of Session, having jurisdiction over the matter, finds it necessary, for the purpose of disposing of the case, to direct an issue to be tried. That, probably from an inaccuracy in taking down his Lordship's words, appears to go a good deal further than he himself can be supposed to have gone, that in every case in which the Court of Session has jurisdiction, whensoever it chooses to direct an issue, that issue is not within the prohibitory provision at all of the act. My Lords, I cannot go the length of that, undoubtedly.

Interlocutor complained of in the original appeal reversed, and cause remitted, with directions.
Interlocutor in cross appeal affirmed, with costs.

Appellants' Agents, Duncan and Dewar, W.S.—*Respondent's Agents*, Patrick, M'Ewen, and Carment, W.S.

MARCH 16, 1855.

CHARLES BUCHANAN, *Appellant, v.* JAMES TORRIE DOUGLAS, *Respondent.*

Diligence—Mora—Cautioner—Landlord's Sequestration—Damage, Consequential—*A creditor holding a decree used a poinding of his debtor's furniture, and obtained a warrant of sale, but a sale was prevented by an interdict first by one party and then by another. Ultimately both processes of interdict were successively dismissed; but, before the creditor effected a sale, the landlord used sequestration for rent, which was preferable. The creditor then brought an action against the cautioner in the first suspension for payment of the expenses of the second suspension, and for the amount in the decree on which the poinding proceeded. In the special circumstances of the case, which were* held *to amount to* mora *on the part of the creditor in carrying out his diligence,* HELD (affirming judgment), *the action was properly dismissed.*[1]

On 4th September 1846, the appellant, under a decree for £30 19*s.* 10*d.*, obtained by him against James Gordon, poinded certain furniture in Gordon's house, the appraised value of which amounted to the sum decerned for. Warrant of sale was granted, and the sale advertised. But

[1] See previous report 15 D. 365; 25 Sc. Jur. 222. S. C. 2 Macq. Ap. 48: 27 Sc. Jur. 328.