that right is this, that he "shall be paid out in the order of his application, and as the funds permit." He is not therefore in a position to demand payment of a debt presently due and payable, but is only creditor in a debt which will be paid at some future time but cannot now be exacted.

But the petition is supported on another ground. It is said the petitioner has made out a case to satisfy the Court that "it is just and equitable that the company should be wound up." Now, no doubt in the course of the last year, this company has been in considerable difficulties, and in that respect most probably its condition was not very different from that of many companies of other kinds. The securities on which its money was advanced were not so good owing to the depression in trade, and partly to the deterioration in the value of house property in Glasgow, where its principal place of business is situated. But it does not follow that "it is just and equitable" to wind-up the company. It may not now be in a position to comply with the demand of this particular shareholder or of any other shareholder, because it is not in funds to pay him out; and our attention was called to the fact that the amount of funds in the directors' hands at any time depends to some extent on the regularity of the shareholders in paying the instalments of money which they advance upon their shares. If the petitioner had alleged anything like a necessary or permanent insolvency of the company, I could understand his right to this demand, or if he represented the affairs of the company as being mismanaged and the shareholders were generally dissatisfied and anxious that it should be wound up, these would be very important considerations for the Court in deciding as to the justice and equity of the proposal. But the position of the petitioner in that respect is somewhat unfortunate; he is entirely alone and unsupported by any other member of the company. On the other hand, the manager and directors state in their answers that they cannot see any reason why the petitioner should insist in this application unless to obtain a preference, contrary to the rules of the society; and we have a body of shareholders of great number, and to the extent of more than £40,000 in value, appearing by minute and adopting and sanctioning that statement, and alleging that the petition "if sanctioned by the Court would be fatal to the interests of the compearers and of the petitioner himself, and would be most injurious to the interests of the society." All the statements made by way of argument from the bar pointed to an investigation into the position of the society's affairs, and this at first sight seemed very plausible, but on inquiry it appears that that very investigation has been made in the most competent and proper way by the society itself. At a meeting held in April last a committee of investigation was appointed to inquire into the whole condition of the society's affairs; and it is plain from their report that very serious suggestions had been made at the general meeting in regard to the conduct of some of the directors. But the result of this report was to clear the directors and to state that they had acted all along with great discretion; that the society's losses were due to the depression of trade and the stoppage of the City of Glasgow Bank; and the report concludes in the following terms:—"The committee would strongly urge upon all the shareholders to give the directors their entire confidence and support, being satisfied that if they do so there is not the least doubt but the affairs of the society will be brought through successfully, and the society become as prosperous as hitherto. Any other course on the part of a large number of shareholders is all but fatal to their own interests and injurious to the society."

I think it is out of the question in the face of this report and of the explanations we have had to interfere with the management of the present directors and to put the society into liquidation, when the shareholders themselves have resolved that the society's prospects are promising, and are all with one exception satisfied with that resolution. I am for refusing the petition.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court refused the petition.

Counsel for Petitioner — R. V. Campbell. Agent—D. R. Grubb, L.A.

Counsel for the Society (Respondents)—Asher —C. S. Dickson. Agent—J. Smith Clark, S.S.C.

Counsel for Compearing Shareholders—James Reid. Agent—J. Smith Clark, S.S.C.

Tuesday, December 9.

FIRST DIVISION.

BURNS *v.* BURNS.

Diligence—Inhibition—Arrestment on Dependence of Consistorial Action — Competency — Recal upon Caution.

In a petition by a husband for recal of inhibition and arrestments used against him by his wife on dependence of an action for separation and aliment at her instance against him, *held* that the diligence was competent, the summons of the depending action concluding for payment of aliment, and that recal could not in the circumstances be granted without substantial caution, there being evidence that the husband was *in meditatione fugæ*.

Michael Burns presented this petition to the Court for recal of inhibition and arrestments used against him by his wife on the dependence of an action at her instance against him. The summons was raised on October 30, 1879, and concluded for separation on the ground of cruelty, and for aliment to the amount of £750 per annum, to be payable quarterly in advance. On the dependence of the action, and under warrants contained in the summons, Mrs Burns on 19th November 1879 recorded a notice of inhibition against the petitioner; and on 25th November she caused arrestments to be used in the hands of Messrs Curror & Cowper, S.S.C., to the amount of £10,000, and to the amount of £3000 in the hands of the Royal Bank of Scotland, Edinburgh. The petitioner stated that Mrs Burns had left his house at Kingussie on September 24, 1879, and had not since resided with him; that since then he had paid her aliment at the rate of £150 per an-

num; and he prayed the Court to recal the inhibition and arrestment, with or without caution.

The respondent Mrs Burns lodged answers stating that the diligence was necessary in consequence of the petitioner being in the course of putting away his funds with the avowed intention of defeating her claims, and that she was willing to have it recalled on caution.

A letter was produced of date 17th September 1879, addressed by the petitioner to a daughter, and admitted to be in his writing, which contained these words—"Oh, my poor girls, my poor heart is sore for you all. What shame and disgrace hangs over you all. I must try and make the best of matters and leave the place, if not the country, if I can get a round sum for Mauldslie."

A letter was also produced of date September 22, 1879, from Mr Curror, S.S.C., to Mrs Burns, in the following terms—"By request of Mr Burns I forward herein bank order in your favour for £37, 9s. 5d., as a quarter's allowance for your own use. He expects you will find a house for yourself, as he declines to live under the same roof with you again. A similar sum will be sent you quarterly, in advance, hereafter. He has not gone into explanations with me, and I only obey his instructions in forwarding the cash."

The petitioner argued—The diligence was incompetent. Inhibition could not be used on dependence of a purely consistorial cause. The wife here was not a proper creditor, and the aliment sued for was not a proper debt, but only a contingent claim, depending subsidiarily (just as expenses in an ordinary case) upon the success of the principal demand, *i.e.*, for separation. If the recal of the diligence were refused, that would tend to give a wife successive powers as against her husband. In the circumstances it should be recalled without caution.

Authorities—Fraser on Husband and Wife, i., 579, and authorities there, especially *Fairley* v. *Fairley*, May 21, 1814, n.r., 2 Bell's Comm. 144 (5th ed.); *Glenbervie*, 1638, M. 6053; *Ketchen* v. *Grant*, July 5, 1871, 9 Macph. 966; *Weir* v. *Otto*, July 19, 1870, 8 Macph. 1070; *Gordon* v. *Duncan*, March 8, 1827, 5 S. 544.

Replied for the respondent—The diligence was quite competent both on principle and in practice, the summons of the depending action containing a pecuniary conclusion for aliment, and special circumstances being averred, such as the husband being *vergens ad inopiam*, or, as here, *in meditatione fugæ*. It was a wife's proper remedy in such a case against her husband to receive aliment for herself. The diligence should not be recalled without substantial caution.

Authorities—*Thomson* v. *Sharp*, Nov. 13, 1828, 7 S. 1; *Symington* v. *Symington*, Dec. 3, 1875, 3 R. 205; *Anderson* v. *Anderson*, Nov. 18, 1848, 11 D. 118.

At advising—

Lord President—The question which the petitioner has raised as to the competency of the diligence used on the dependence of this action of separation and aliment may be a very important one, but I do not think it is attended with any difficulty. The competency of such diligence depends mainly on the conclusions of the summons in the action on the dependence of which it is used. If the summons does not contain what are called pecuniary conclusions—that is, a demand for payment of money—then there can be no such diligence. Nor can such diligence be used on dependence of any action of declarator, and it is said it cannot be used on dependence of an action of divorce. I take that for granted, for there are there no conclusions for payment of money. The conclusion here is to the effect that the defender should be decerned to pay to the pursuer the sum of £750 yearly aliment, payable by quarterly instalments in advance. No doubt this is not a demand for immediate payment of a fixed sum, but a prospective obligation; but I never understood that there is any incompetency in using the diligence of inhibition or arrestment on dependence of an action for enforcing a future debt. No doubt such diligence will not be warranted unless there is something in the position of the defender specially to justify it, as, for instance, that he is said to be *vergens ad inopiam* or *in meditatione fugæ*. But the only question here is, not whether such qualification is required for the use of diligence on dependence of an action of this kind, but whether the diligence is absolutely incompetent. Now, on principle it is clearly competent; and I think it has also been decided to be competent in the case of *Thomson* v. *Sharp*, and assumed to be competent in the case of *Symington*.

I have no doubt as to the mere competency, but I also think that on the doctrine of *Symington's* case a wife is not entitled in suing for aliment to use diligence on dependence if the husband is solvent, and it is not shown that he had any intention of leaving the country or of putting away his funds for the purpose of not fulfilling his contract to her.

The question is, Whether there is sufficient evidence here that the defender in this action of separation and aliment is in either of these two positions? He is certainly not insolvent nor *vergens ad inopiam;* but we have a letter, which is admittedly in his own handwriting, and of which no intelligible explanation has been offered to take off the effect of the words used—a letter plainly showing the existence in his mind on the 17th September last of an intention to realise his funds and leave the country; and about the same time he directs his agent to write and say that he can no more live under the same roof with Mrs Burns, but will pay her a certain aliment by quarterly advances. In these circumstances I think the diligence here is justified; and being competent, the only question appears to me to be, on what conditions the petitioner is entitled to have the inhibition recalled. I am not disposed to take an extravagant view of the wife's rights, nor to measure those rights by the conclusions of her summons; but even taking the low estimate of the petitioner himself, who proposes to give her about £150 a-year, we must see that some security is granted which will give the wife a reasonable assurance of sufficient aliment in the event of his threat of leaving the country being executed. I should suggest that we should not recal this inhibition except upon caution to the extent of £4000.

Lord Deas—This is an action of separation and aliment at the instance of a wife against her husband—separation is demanded on the ground

of cruelty, and aliment claimed to the amount of £750 per annum. Now, on principle I see no objection to the competency of either arrestment or inhibition being based on the conclusions of such a summons, and no case has been referred to which to my mind goes to negative the competency of such diligence. If it is competent, then the question arises in the ordinary way, whether we should recal the inhibition without caution or consignation; or if not, on what conditions? I should not like to commit myself by saying that such diligence will always or generally be recalled in exceptional circumstances. It is not necessary to say that, and I did not mean to commit myself to that opinion in *Symington's* case. I consider it a question of circumstances in each case whether the diligence should be recalled, and if so, on what conditions.

Not only do I see no principle against the competency of such an inhibition, but no direct case has been referred to in which it has been found incompetent. I cannot so construe any of the cases, and I think it would require very strong authority to affirm the proposition.

The question of circumstances in this case is attended with no difficulty. If it is necessary that there should be special circumstances to justify the diligence, I think we have them here. We have the husband's statement under his own hand that he has or had it in contemplation to realise his admittedly large means and to leave the country. I think this is a case in which we should insist upon caution, and to a substantial amount; for it might be of such amount as to stand in the way of the defender in the view of his realising his estate and leaving the country. I think the amount proposed by your Lordship seems very moderate, and I do not see that anything less could be expected to effect the object in view.

LORD MURE concurred.

LORD SHAND—As this summons makes a pecuniary claim and has pecuniary conclusions, I am of opinion, in accordance with the general rule, that it may be the foundation of diligence. No case has been cited in which an action with pecuniary conclusions has been held unsuited for diligence, and it appears to me that if we were to give effect to the defender's argument it might result practically in depriving a wife of the possibility of recovering money from her husband from whom she was obliged to live separate. According to the petitioner's argument, a husband might announce his intention of going away and leaving no provision for his wife, and she would in such circumstances have to stand by without the power of recovering anything from him. This result would be discreditable to our law. Assuming the competency of the diligence, I am of opinion that it is not in every case of separation and aliment that a wife may use such diligence. I think there is great force in the view that while the relation of husband and wife subsists, the wife follows her husband's fortunes for her own interest as well as his, and ought not to be allowed in ordinary circumstances to do such diligence as to hamper or perhaps ruin him in the course of his business. Special circumstances require to be made out; and in this case I think we have them. The ground of diligence might have been that he was *vergens ad inopiam*, but the present case is even stronger, for he has himself announced in a letter his intention of realising his goods and leaving the country. I think a special case has been made out, and that £4000 is a reasonable sum to fix as the condition of loosing the arrestments.

The Court pronounced an interlocutor granting the prayer of the petition to the effect that the arrestments might be loosed upon caution being found to the amount of £4000.

Counsel for Petitioner — Dean of Faculty (Fraser)—Guthrie. Agents—Mason & Smith, S.S.C.

Counsel for Respondent — Lee — M'Kechnie. Agent—H. W. Cornillon, S.S.C.

Tuesday, December 9.

SECOND DIVISION.

PATERSON & OTHERS *v.* MILTON & OTHERS (MAGISTRATES OF ST ANDREWS) AND BAIN & OTHERS.

Burgh—Property and Rights—Powers of Magistrates to Allow New Use of Part of Common Good.

Certain land in a burgh was held by the magistrates for the common good, and in the fulfilment of that purpose was applied as a golfing links for the recreation and amusement of the inhabitants. Part of the land had been feued out without objection, and prescription had followed. Upon the magistrates proceeding to form a road across the links, which *inter alia* afforded an access to the feus in question, it was objected that the act in question was an encroachment upon the rights of the public, and interfered with the privilege of golfing. *Held* that in the circumstances as proved the proposed use of the land in question was *innocuæ utilitatis* and within the discretion of the magistrates.

Remarks per the Lord Justice-Clerk (Moncreiff) on the powers of magistrates to deal with ground held by them for the recreation of the inhabitants.

Process—Joint-Minute—Reclaiming-Note—Effect of a Joint-Minute upon which no Interlocutor had been Pronounced.

Some inhabitants of a royal burgh brought an action against the magistrates and town council, and also against certain of the feuars, for declarator and interdict to the effect that a certain road which the magistrates proposed to allow to be made was an encroachment upon ground appropriated to the recreation and amusement of the community. The magistrates were successful, and the pursuers reclaimed. Before the reclaiming note was heard a new town council had been elected, who, at a meeting held for other business, and at which no notice of motion to that effect had been made, withdrew the defences, and a joint-minute consenting to decree passing against them, and signed by their and the pursuers' counsel, was moved in Court. Some days afterwards, before any