ment, as disclosed by the terms of the oath, with the destruction at the time of the I O U, on which the charger was bound for £2500, was, that both parties were to destroy the written obligations they held from each other, and that the complainer was to pay any balance which was due by him on an accounting in connection with Riggend Colliery. Under this obligation, the charger's remedy is an action for payment when he has made up his account, if he can show a balance due; but he cannot enforce payment of bills which he ought to have destroyed.

"At the debate the Lord Ordinary alluded to the absence of any statement in regard to the agreement on which judgment has now been given on the record as made up and closed on the passed note. He is of opinion that, under the general terms of the reference, it was competent to examine the charger as to this agreement, to which the charger was himself a party; but he thinks it should have been set forth in the note, and, at all events, in the closed record. The matter is one, however, on which the charger cannot plead that he was taken by surprise; and the Lord Ordinary has felt himself entitled, even in the absence of a special statement on the record, to proceed on the agreement, as its existence has been fully admitted by the charger himself."

Against this interlocutor the respondent reclaimed

The following authorities were referred to—*Stair*, 4, 44, 18, (More's Notes, 418); *Greig* v. *Boyd*, 8 S. 382; *Mather* v. *Nisbet*, 16th Dec. 1837, 16 S. 258; *Macfarlane* v. *Watt*, 6 S. 1095; *Phœnix Fire Insurance Co.* v. *Young*, 10th July 1834, 12 S. 921; *Soutar* v. *Soutar*, 14 D. 140.

At advising—

Lord Neaves—After narrating the facts of the case—It is not maintained that the reference to oath has established any of the special facts set forth in the suspension. What is brought out in the oath is something not to be found in the suspension, viz., a complex agreement between the parties about which the reference stated nothing. The interlocutor proceeds on the principle that "under the general terms of the reference it was competent to examine as to this agreement, to which the charger was himself a party." I cannot assent to this. I read the reference, not as one of the general and sweeping kind contended for, but one of all facts and circumstances tending to instruct the leading averments, namely want of value for the debt of the charger, and that the bill was not a document of debt at all. This is just springing a mine on the party by proving something of a different date and character from the averments, and this cannot be allowed. I think the oath here is negative of the reference, and that we should repel the reasons of suspension.

The other Judges concurred.

Counsel for Reclaimer and Respondent—Watson and Robertson. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Respondent and Complainer—Solicitor-General (Millar) Q.C. and Asher. Agents—J. & R. D. Ross, W.S.

BILL CHAMBER.

[Lord Gifford, Ordinary.

WILLIAMS *v.* CARMICHAEL.

Process—Extract Decree of Absolvitor—Agent-Disburser—Decree for Expenses.

In an action between two parties the defender was assoilzied from the conclusions of the summons. The defender's agent thereafter obtained an extract decree of absolvitor, containing also a decree in his own name, as agent-disburser, for expenses incurred. The pursuer having declined to pay the expenses unless upon delivery of the extract decree, a charge was given therefor. Against this charge a note of suspension was presented. *Held* that the suspender was not entitled to delivery of the extract decree on payment of the expenses found due, and note refused.

Observed that the decree of absolvitor was the main thing, but that it might be otherwise in a petitory action for a sum of money to be paid.

This was a note of suspension at the instance of Mrs Williams, sometime proprietrix of Little Earnoch, near Hamilton, against Mr Thomas Carmichael, S.S.C. The complainer prayed for suspension of a charge for the sum of £234, 8s. 11d. of expenses, decerned for against her in an action brought by her against Mr Thomas Smith, farmer, Little Earnoch, from the conclusions of which Mr Smith was assoilzied. The extract decree of absolvitor in this action contained a decree in the name of Mr Carmichael, as agent disburser, for the expenses incurred in the action, and Mrs Williams having declined to pay the expenses unless upon delivery of the extract decree, a charge was given therefor.

The ground upon which the note of suspension proceeded was that the complainer was willing to pay the expenses upon receiving a discharge and delivery of the extract decree; and it was also pleaded that the charger, having no interest to retain the extract decree, was bound to deliver the same to the complainer. The amount of expenses having been consigned, execution was stayed, and answers ordered to be lodged by the 4th of May. In his answers the charger contended that his client Mr Smith was entitled to retain the extract decree as his discharge from the conclusions of the action brought by Mrs Williams, and that she was not entitled to withhold payment of the expenses until the extract was delivered.

On 7th May 1874 the Lord Ordinary on the Bills (Gifford) pronounced an interlocutor, with note appended, as follows:—"The Lord Ordinary having resumed consideration of the note of suspension, answers, and whole process, Refuses the note of suspension, and decerns; but finds that the whole sums charged for having been consigned by the suspender, the charge is no longer insisted in: Grants warrant in favour of the charger Thomas Carmichael for payment to him of the whole consigned money, and that upon his duly executing a holograph or tested discharge in terms of the form No. 18 of process, and lodging the same in process for behoof of the suspender, and grants authority to the clerk or other custodier of the deposit receipt to deliver up the same for payment, and grants authority to the bank to pay the whole sum consigned to the said Thomas Carmichael, and decerns: Finds the charger, the said Thomas Carmichael, entitled to expenses, and remits, &c.

"*Note.*—The sole question in dispute in the present case is, Whether the suspender, on payment to the charger of the expenses found due to the charger in the action at the suspender's instance against Thomas Smith, is entitled to delivery of

the extract decree of absolvitor in favour of Mr Smith, which embraces decree for expenses in favour of the charger, who was Mr Smith's agent? As a second extract of the decree would only cost £1, 3s., and could be got by any one, this sum is the whole pecuniary interest involved in the present suspension, to which it may be added, that it seems very immaterial in whose hands the formal extract decree may remain. There is no other dispute between the parties. . . .

"It is quite fixed in law and in practice that a defender who obtains decree of absolvitor with expenses is entitled to an extract of that decree at the expense of the unsuccessful pursuer. This is a matter of every-day practice, and was recognised in the case of *Hunter* v. *Stewart*, 18th Nov. 1857, 20 D. 60. Mr Smith, who had been defender in the action at Mrs Williams' instance, and who succeeded in obtaining decree of absolvitor with expenses, was therefore entitled to an extract of that decree at Mrs Williams' expense. He obtained that extract accordingly. It is No. 16 of process in the present suspension, and admittedly Mrs Williams, the suspender, must pay therefor. The same extract decree of absolvitor embodies and contains a decree for the expenses, which was allowed to go out and be extracted in name of Mr Thomas Carmichael, who had been Mr Smith's agent, and who had been the disburser of these expenses; and the question is, whether Mr Carmichael, the present respondent, on receiving payment of those expenses, is bound to give up the extract decree of absolvitor which really belongs to his late client Mr Smith, and which merely contains as an accessory or pertinent the decree for expenses. The Lord Ordinary thinks that he is not. The extract decree of absolvitor is really Mr Smith's voucher. It is his discharge for the claim made upon him by Mrs Williams, and the mere circumstance that it also contains the decerniture for expenses does not entitle Mrs Williams to demand or obtain possession thereof. The circumstance that the decree for expenses went out in the name of the agent makes no real difference. The extract decree of absolvitor is still Mr Smith's discharge, only it is his agent and not he who will sign the receipt for expenses. It is the decree for absolvitor that is the main thing, and this might in some cases be an important step in the defender's progress of titles. The same principle would apply to a decree of declarator obtained by a pursuer. A pursuer would not in general be bound to give up such decree merely on payment of the expenses. The expenses in such cases are the mere accessory. It may be otherwise when the decree is in a petitory action for a sum of money which, as well as the expenses, is to be paid. It was suggested that a separate extract should have been got for the expenses. The Lord Ordinary does not think this necessary. It certainly is unusual, and in any view it would have been at the suspender's expense.

"Holding the suspender, therefore, to have been wrong in her demand for the delivery of the extract decree of absolvitor, the Lord Ordinary has refused the note of suspension, and expenses must follow."

This interlocutor not having been reclaimed against has become final.

Counsel for Suspender—Adam. Agents—A. & A. Campbell, W.S.

Counsel for Respondent—M'Kechnie. Agent—Thos. Carmichael, S.S.C.

Saturday, May 23.

FIRST DIVISION.

[Sheriff of Lanarkshire.

JAMES HENDERSON *v.* WALTER MACLELLAN AND OTHERS.

Interim Interdiet—Continuance—Intimation.

Interim interdict was granted in the Sheriff-court up to a certain day, and on that day was continued in absence of the respondent by an interlocutor which *inter alia* ordained parties' procurators to be heard on the following day, which order was obeyed. A complaint of breach of interdict, said to have been committed after the continuance of the interdict, was dismissed by the Sheriff as irrelevant, on the ground that it did not aver personal knowledge of the continuance on the part of the respondent. *Held* that the respondent having once entered appearance in the cause must be held to know all that took place in it, that he knew what his procurator knew, and the original interdict having been duly intimated, its continuance required no fresh intimation.

On July 31, 1873, the Sheriff-Substitute of Lanarkshire (DICKSON) granted interim interdict at the instance of James Henderson, engineer, Leith, against Walter Maclellan and others, iron merchants, Glasgow. The interdict was to remain in force until August 4, and on that day the Sheriff-Substitute (CLARK) pronounced the following interlocutor:—Having heard the procurator for the petitioner, no appearance being made for the respondents,—on the craving of the petitioner's procurator, Continues the interim interdict already granted till the future orders of Court, and appoints parties' procurators to be heard on the grounds of action and defence to-morrow, in chambers, at half-past 12 o'clock afternoon." On September 3, 1873, the petitioner Henderson presented a petition and complaint, with concurrence of the procurator-fiscal, charging the respondents with various acts in breach of interdict during the month of August, subsequent to August 4.

The defender lodged the following minute of defence:—"(1) That the statements in the petition were irrelevant and insufficient to support the prayer thereof. (2) That the pretended interdict referred to in the petition was never served on, or otherwise intimated to, the defenders, at the petitioner's instance, prior to the service of the present complaint. (3) A denial of the statements in the petition; and explained, that the defenders were in entire ignorance of an interdict having been granted against them on 4th August last; that they had no intention of showing any disrespect to the orders of the Court; and that the interdict referred to having been now brought under their notice, they will pay respect thereto until the same be recalled."

The Sheriff-Substitute pronounced the following interlocutor:—

Glasgow, 29th October 1873.—Having heard parties' procurators on and considered the closed record,—for the reasons stated in the note, finds that the petition does not set forth a relevant complaint of breach of interdict against the respondents; therefore sustains the preliminary defence, and dismisses the petition: Finds the respondents