Saturday, March 3.

FIRST DIVISION.

[Lord Cullen, Ordinary.

N. G. FERGUSSON & COMPANY, LIMITED *v.* BROWN & TAWSE.

War — Process — Furthcoming — Leave to Proceed with Diligence — Courts (Emergency Powers) Act 1914 (4 *and* 5 *Geo. V, cap.* 78), *sec.* 1 (1) (*a*) *and* (7).

The Courts (Emergency Powers) Act as applied to Scotland enacts—Section 1 (1)—"From and after the passing of this Act no person shall (*a*) proceed to [diligence] on, or otherwise to the enforcement of, any [decree] of any court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such court and such notice as may be provided for by [Act of Sederunt] or directions under this Act."

Section 1 (7)—"Nothing in this Act shall . . . give any power to stay [diligence] or defer the operation of any remedies of a creditor in the case of a sum of money payable by or recoverable from the subject of a sovereign or state at war with His Majesty."

Held, in an action of furthcoming against British arrestees to recover out of the arrested funds payment upon a decree against German common debtors held by the arrestors, that leave to proceed with the action was not required.

The Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), sec. 1 (1) (*a*) and (7), is quoted *supra in rubric*.

N. G. Fergusson & Company, Limited, iron and mineral merchants, London, *pursuers*, brought an action of furthcoming against Brown & Tawse, iron, steel, and metal merchants, Dundee, *arrestees*, and Eisenwerk Kraft Aktien Gesellschaft, Duisberg, Germany (against whom arrestments had been used *ad fundandam jurisdictionem*), *principal debtors*, for payment of sums arrested by the pursuers in the hands of the arrestees and due by them to the principal debtors.

The arrestees appeared and lodged answers.

The arrestees *pleaded*—"7. The present action cannot proceed in respect that the sanction of the Court has not been obtained in terms of the Courts (Emergency Powers) Act 1914."

The *facts* of the case appear from the opinion of the Lord Ordinary (CULLEN), who, on 6th February 1917, found that (1) the action was a proceeding in execution of a judgment of the Court within the meaning of the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), sec. 1 (1) (*a*), and (2) leave of the Court to proceed with the action had not been obtained by the pursuers as required by the said Act, and continued the cause and granted leave to reclaim.

Opinion. — "This is an action of furthcoming which proceeds on arrestments used by the pursuers on 23rd March 1916 and 23rd May 1916 in the hands of the compearing defenders as arrestees. The earlier arrestment was used on the dependence of an action in this Court by the pursuers against a German firm or company called the Eisenwerk Kraft Aktien Gesellschaft, and the later was used in execution upon a decree in absence obtained by the pursuers in said action on 3rd May 1916. The debt in respect of which the pursuers so obtained decree was as alleged contracted prior to August 1914. The principal debtors do not compear.

"The first question raised at the hearing in the procedure roll is whether, under the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78) the present action is one for which leave from this Court is required in order to its proceeding. I answer this question in the affirmative.

"Section 1 (1) (*a*) of the Act provides — . . . [*quotes, v. sup. in rubric.*] . . ."

"Now the present action is a proceeding to execution of a judgment of this Court; and it does not seem to me a good answer to say, as the pursuers do, that the party ultimately interested is an enemy subject. This may represent an available argument to the pursuers in any application they may make for leave from this Court to proceed. But the object of the pursuers in the action is to obtain payment of a sum of money, under the decree they hold, from the defenders, who are His Majesty's subjects; and the generality of the terms of the enactment which I have quoted seems to me plainly to apply to such a case.

"From what passed at the procedure roll discussion I gathered that the defenders did not urge that the action should be dismissed in default of leave to proceed hitherto obtained, but that they would be satisfied if, the cause being sisted or continued, the pursuers should procure such leave before the action proceeded further. On this footing I propose to find that the action is one which under the said Courts (Emergency Powers) Act 1914 needs the leave of the Court in order to its proceeding, and meantime to continue the cause.

"On the basis of such an interlocutor I should logically say nothing more at this stage. But as I had a full argument on another question arising in the case I think it may be desirable that I should express the view which I have formed regarding it.

"Section 5 (1) of the Trading with the Enemy Proclamation No. 2, dated 9th September 1914, is directed, *inter alia*, against paying any sum of money 'to or for the benefit of an enemy.' Section 7 says — 'Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident carrying on business or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted.'

"There are provisions in subsequent legislation providing for the sequestration of assets belonging to enemy subjects in this country. But there is no general sequestration of such assets.

"On a review of the recent legislation to

which reference was made at the hearing, it appears to me that that legislation does not preclude such an action as is now before me. There is a British creditor A. There is an enemy debtor B. There is a British subject C, holding as alleged funds of the enemy debtor B available *pro tanto* for the payment of the British creditor A. The payment of the funds which may be held by C to A in order to satisfaction of A's claim against the enemy debtor B does not seem to me to be a payment 'for the benefit of' B in the sense of the legislation referred to. No doubt the payment of the funds to A would, *pro tanto*, discharge B's debt to A. But the funds to be applied belong, *ex hypothesi*, to B. It does not appear to me on the terms of the legislation referred to that payment of the funds held by C to A in respect of A's claim against his enemy debtor B would fall to be regarded on a due construction of the legislation referred to as being a payment made by C 'for the benefit of' B. Such a payment would in my opinion fall to be regarded as a payment 'for the benefit of' A, the British creditor, seeking to obtain payment of a debt due to him by an enemy subject."

The pursuers reclaimed, and argued—The Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), section 1 (1), was limited in application and did not apply to alien enemies—section 1 (1). Here the only decree was the decree against the principal debtors who were alien enemies, and upon it the present proceedings were based. Leave to proceed was therefore not required for the initiation of the action. The question of whether or not the pursuers were entitled to payment from the arrestees was the question in the present action: only if and when that was decided in favour of the pursuers would there be a decree against the arrestees; to proceed upon that decree leave would be necessary. The case was analogous to an action of mailles and duties in which it had been held that no leave was necessary to bring the action—*City of Glasgow Friendly Society* v. *Bruce*, 1916 S.C. 267, 53 S.L.R. 199. The present contention must have been the view of the Court in framing the Act of Sederunt of 28th September 1914, the terms of which showed that the Lord Ordinary's interlocutor was unworkable—section 3 and Schedules I and III.

Argued for the arrestees (respondents)—The present action was a diligence—Bell's Comms., M'Laren's edn., ii, pp. 18 and 63; Stewart, Diligence, p. 275; *Lucas's Trustees* v. *Campbell and Scott*, 1894, 21 R. 1096, at p. 1103, 31 S.L.R. 788. If the pursuers were allowed to proceed there was no proper contradiction, for the principal debtors could not appear, and if no debt was due or the diligence was irregular and decree went out against the arrestees they would have to pay twice over—*Wightman* v. *Wilson*, 1858, 20 D. 779, *per* Lord Curriehill at p. 785. The action was accordingly really a diligence against both the principal debtors and the arrestees. Leave to proceed was therefore required—section 1 (1) (*a*). *Bruce's* case (*cit.*) was distinguished, for it was an action of mailles and duties and was founded on section 1 (1) (*b*).

LORD PRESIDENT—The interlocutor under review seems to me to have been pronounced under a misapprehension. It is common ground that the question at issue is the applicability to this case at this stage of section 1 (1) of the Courts (Emergency Powers) Act of 1914 (4 and 5 Geo. V, cap. 78) which provides that no person shall proceed to the enforcement or execution of any judgment or order of any court until leave has been obtained.

Now this is an action of furthcoming at the instance of an English firm which obtained decree for a sum of money against an alien enemy, and they seek by means of this action of furthcoming to enforce the judgment by which they obtained that decree. The alien enemy cannot oppose the action or proceeding, because by section 1 (7) of the Act it is provided that nothing in the Act is to defer the operation of any remedies of a creditor in the case of a sum of money payable by or recoverable from the subject of a sovereign or state at war with His Majesty. And the very first object of a furthcoming is to transfer the right which the common debtor had against the arrestee to the arrestor. As Lord Curriehill observed in the case of *Wightman* v. *Wilson*, 1858, 20 D. 779, the first object of the "action is to divest" the common debtor "of part of his estate and transfer the right to it by judicial assignation to the arrester." And accordingly, although it is perfectly true that an action of furthcoming is diligence, it is diligence in the first instance against the common debtor in order to acquire the right which he holds to the payment of a sum of money in the hand of the arrestee; and accordingly until decree of furthcoming is pronounced there is no question whatever which can arise with the Scottish arrestee.

He may then after decree of furthcoming is pronounced take advantage of the provision contained in section 1 (1) of the Act and claim immunity from diligence being done against him in respect of causes which he attributes to the war; and that course will still be open after decree of furthcoming is pronounced—if it ever is—in this action. Meantime I am of opinion that section 1 (1) has no application to this case, and accordingly that the interlocutor of the Lord Ordinary should be recalled and the case remitted to his Lordship to proceed.

LORD SKERRINGTON—The arrestee does not wish for time for the payment of his debt, but he did no more than his duty when he called the attention of the Lord Ordinary to this question. I think that the Lord Ordinary ought to have held that in the circumstances the Courts (Emergency Powers) Act of 1914 did not apply.

It is true that an action of furthcoming is part of a diligence for the adjudication or judicial transfer of moveable property from the common debtor to the pursuer. Accordingly if the common debtor had been a British subject I should have thought that the case fell within section 1 (1) (*a*) of the

statute, and that leave was necessary in order to allow the action to proceed. As a matter of convenience leave would have been given as a matter of course, because the question whether the arrestee was or was not in a position to pay would arise more conveniently after the decree of furthcoming had been issued against him.

There is, however, a clause in this statute, namely, section 1 (7), which seems to me to apply to a case like the present where the common debtor is a German. It is there stated that nothing in the Act is to defer the operation of any remedies of a creditor in the case of a sum of money payable by or recoverable from the subject of a sovereign or state at war with His Majesty. Now to hold that the statute applies at this stage would defer the operation of the remedies of a creditor in a question with an alien enemy. Different considerations will arise as soon as the decree of furthcoming has been pronounced, because the diligence against the alien enemy will then be completed, and the only question then remaining to be settled between the pursuers and the arrestee will be whether the latter is unable to make immediate payment owing to the war. It will accordingly be necessary for the pursuers to obtain the leave of the Court before proceeding to do diligence against the arrestee upon the decree of furthcoming.

LORD DEWAR—I concur.

LORDS JOHNSTON and MACKENZIE were absent.

The Court recalled the interlocutor of the Lord Ordinary and remitted the cause to him for further procedure.

Counsel for the Pursuers (Reclaimers)—Moncrieff, K.C.—D. R. Scott. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Arrestees (Respondents)—Macphail, K.C.—Ingram. Agents—J. K. & W. P. Lindsay, W.S.

Saturday, March 3.

SECOND DIVISION.

[Sheriff Court at Lanark.

COLTNESS IRON COMPANY, LIMITED *v.* BROWNLEE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Injury by Accident — Supervening Insanity—Onus of Proof as to Continuance of Incapacity from Original Cause.*

A miner employed at a colliery was injured on the head through an accident arising out of and in the course of his employment. Being totally incapacitated from work compensation was paid him by his employers. He subsequently accepted a sum in full settlement of his claim and granted a discharge. This document was reduced by action in the Court of Session upon the ground that when he signed the receipt and discharge he was of unsound mind. In an arbitration under the Workmen's Compensation Act 1906 the miner craved the arbitrator to award him compensation in respect of his total incapacity for work due to the supervening insanity, which he averred was caused by the accident he sustained in the course of his employment. The arbitrator found it proved that the miner had physically recovered, and that a connection between the physical injury and the insanity could not be proved or disproved. *Held* that the arbitrator had erred in awarding compensation, it being for the miner to establish his case and there being neither proof nor presumption that the respondent's insanity was associated with the original injury.

In an arbitration in the Sheriff Court at Lanark under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between the Coltness Iron Company, Limited, Forth, *appellants*, and Thomas Brownlee, miner, Forth, *respondent*, to fix the amount of compensation payable by the appellants to the respondent in respect of total incapacity for work, due to insanity, the Sheriff-Substitute (SCOTT MONCRIEFF) awarded compensation, and stated a Case for the opinion of the Court.

The Case stated—"This is an arbitration brought under the Workmen's Compensation Act 1906 in the Sheriff Court of Lanarkshire at the instance of the respondent in which the Sheriff was asked to award him compensation under the said Act at the rate of 14s. 5d. per week from 5th November 1913 in respect of injuries sustained by him through accident arising out of and in the course of his employment with the defenders on 28th February 1912.

"The case was heard before me and proof led on the 17th day of November 1916, when the following *facts* were admitted or proved:—1. That the respondent while in the employment of the appellants upon 28th February 1912 met with a severe accident to the scalp of his head, which incapacitated him from work and caused his removal to the infirmary. 2. That liability upon the part of the appellants was admitted and compensation paid until 5th November 1913 although not under a recorded memorandum of agreement. 3. That upon last-mentioned date compensation was stopped, but that it was subsequently offered at a reduced rate, and that the respondent refused to accept it. 4. That in February 1915 the appellants offered to pay to the respondent the sum of £50 in full settlement of his claim, and that respondent accepted said offer upon 24th March 1915, received the money and granted a receipt, also signing a memorandum of agreement which was subsequently recorded upon 3rd April following. 5. That in the following month of December the respondent brought an action of reduction of said receipt and memorandum in the Court of Session upon the ground that when he signed said document he was of unsound mind. 6. That upon 6th July 1916, after certain proof had been led, the