third party taking a cheque as in payment of an account, and not taking and holding it as agent for the person who paid it to him, does not hold it for value? But the *rationes*—the grounds—upon which, apart from all authority on the point, I should proceed as a matter of principle, are fully expressed in the opinion of the majority of the Judges in the Court of Exchequer Chamber in the case of *Currie* v. *Misa*. It is true that another ground of judgment was adopted by the House of Lords when that case was before them on appeal, but I cannot find anything in any observation made by the noble and learned Lords who decided the appeal in *Currie* v. *Misa* to throw the least discredit upon the doctrine laid down by the majority of the Judges in the Court of Exchequer Chamber, whilst, on the contrary, I find a great deal of observation which tends to support the view taken by the majority.

My Lords, these observations seem to me to be quite sufficient to dispose of the appeal before the House. I shall not go into the view (which in the main is correct according to my opinion) taken by Lord Shand in the Court of Session. His Lordship was of opinion (and I do not at all disagree with him) that the case ought to be decided upon broader grounds than those which were adopted by the majority of his brethren. I think that the grounds of judgment relied upon by Lord Shand, and the grounds of judgment relied upon by the majority of the Court, are equally sound, and equally fatal of course, to the contentions of the appellant at your Lordships' bar. I have only to add this observation, that I do not think that the principles involved in this case at all relate to or touch the doctrine laid down by the Court in the case referred to by Lord Shand of *The Clydesdale Bank* v. *The Royal Bank*, March 11, 1876, 3 R. 586. The whole question in that case related to the character in which the bank got possession of and held Mr Paul's cheque. The Court there decided according to the view which they took of the circumstances of the case that the bank held simply as agents for Mr Paul. But what was decided in that case cannot in the least degree affect the present, because the question in what character a bank holds a cheque which has been given to them by their customer is a question of fact. In the present case it is conclusively established by the findings of the Court contained in the interlocutor appealed against that the Clydesdale Bank held the cheque in question, not as agents for Mr Cotton, but as onerous holders, the cheque having been given to them in payment of what was due by Cotton to them.

In these circumstances I have no hesitation in concurring in the proposal which has been made by my noble and learned friend, that this appeal be dismissed with costs.

LORD BLACKBURN—My Lords, I wish to add one word upon a matter which was not present to my mind before, namely, that the question whether the opinion of Lord Coleridge, who was in the minority in the case of *Currie* v. *Misa*, or that of the majority of the Court of Exchequer Chamber, is the right one, can never arise at all in future, for the 27th section of the Bills of Exchange Act says this—"Valuable consideration for a bill may be constituted by an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."

The House affirmed the judgment of the First Division, and dismissed the appeal with costs.

Counsel for Appellant—Solicitor-General (Herschell, Q.C.) — Campbell Smith. Agents — A. Beveridge, Westminster—W. Officer. S.S.C.

Counsel for Respondent—Davey, Q.C.—Readman. Agents—Murray, Hutchins, & Stirling—Morton, Neilson, & Smart W.S.

COURT OF SESSION.

Wednesday, November 28.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

LOCHHEAD *v.* GRAHAM.

Diligence—Poinding — Competency of Poinding Goods in Creditor's own Custody.

Held (*aff.* judgment of Lord Kinnear) that it is no good objection to the validity of a poinding that the goods of the debtor pointed are in possession of the creditor at the time of poinding.

Poinding—Procedure—Service of Warrant of Sale by Registered Letter—Statute 1 *and* 2 *Vict. cap.* 114, *sec.* 26—*Citation Amendment* (*Scotland*) *Act* 1882 (45 *and* 46 *Vict. cap.* 77), *sec.* 3.

Held that section 3 of the Citation Amendment Act applies to judicial intimations in the course of diligence as well as to citations, and that a warrant of sale under a poinding was validly served by a copy being sent to the known address of the debtor, who was then resident out of the jurisdiction of the Sheriff who granted the warrant.

Section 26 of the Personal Diligence Act 1838 enacts, with regard to sales under the diligence of poinding, *inter alia*—"The Sheriff shall order a copy of the warrant of sale to be served on the debtor, and on the possessor of the pointed effects if he be a different person from the debtor, at least six days before the date of the sale."

Section 3 of the Citation Amendment Act enacts—"From and after the commencement of this Act, in any civil action or proceeding in any court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in in Scotland by an officer of the court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law and practice, might lawfully execute the same, or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation . . . a registered letter by post containing the copy of the summons or petition or other document re-

quired by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

By minute of agreement dated 16th November 1882, between William Graham, farmer, and Gavin Lochhead, dairyman, Graham agreed to let in bowing to Lochhead for one year, from Martinmas 1882 to Martinmas 1883, a certain number of cows at the farm of Cardrona Mains in the county of Peebles. Lochhead was to occupy the dwelling-house and dairy premises there. The agreement contained other detailed stipulations relative to the contract. Lochhead agreed to pay a monthly rent of £16, 10s. for each cow, payable on the first day of each month, the first instalment of £52, 5s. being due on 1st December 1882.

Lochhead in implement of this agreement entered into occupation of the dwelling-house and other premises on 22d November. He failed to make payment of the first instalment of £52, 5s. due on 1st of December. On 19th December he renounced his agreement on certain terms adjusted between the parties. On the same or the following day he with his family left the house, leaving the furniture and plenishings there, and the key of the house, in the hands of Graham. He did not return to the house at Cardrona, but took up his abode with his wife and family at Peebles, where he remained until the 3d of February, when he went alone to Edinburgh in search of employment, his wife and family remaining in Peebles till 20th February.

On 30th January 1883 Graham raised an action against Lochhead in the Sheriff Court of Peebles for payment of £30, which he alleged to be due to him by the latter as the sum due to him, after making certain deductions to which Lochhead was entitled. Lochhead did not defend the action, and decree was pronounced against him in absence. On 13th February Graham then charged him on the decree, the execution of the charge bearing that a copy was left at his dwelling-house in Peebles with a servant therein, because himself personally could not be found. On the expiry of the charge, Graham caused a poinding to be executed of the furniture and other effects belonging to Lochhead in the house at Cardrona Mains, and which was then in his (Graham's) own possession. The poinding took place on the 5th of March, and the execution bore that a schedule of poinding was left for Lochhead "in the hands of a servant within the dwelling-house of William Graham, possessor, to be given to him [Lochhead] because I could not find himself personally."

On 8th March Graham obtained warrant of sale. The service of intimation of sale (dated 13th and 14th March, after Lochhead and his family had finally left Peebles) was made, as stated in the execution thereof, "by transmitting by registered letter, through the post-office at Peebles, a just copy of the said deliverance, having a just copy of service and intimation to the effect foresaid subjoined thereto, for the said Gavin Lochhead, or Gavin Wotherspoon Lochhead, to his present known address, 167 Rose Street, Edinburgh." The officer also returned an execution, stating that he had left a copy of the warrant of sale for Lochhead "within his last known residence in Peebles, in the hands of a servant, because I could not find himself personally.

Lochhead thereupon presented to the Lord Ordinary on the Bills a note of suspension and interdict, praying for the suspension of the decree of 13th February, charge, and poinding, and for interdict against Graham interfering with or selling the furniture.

The complainer averred that no schedule of the poinding had ever been sent to him. He also maintained that the warrant of sale was defective, and did not comply with the requirements of the Personal Diligence Act, in respect that there was no order by the Sheriff for service of a copy of the warrant upon the possessor of the effects poinded (Graham); that he (complainer) first became aware of the poinding and warrant of sale in consequence of a letter (enclosing handbill of sale) dated 9th March, written by the respondent's law-agent to his own law-agent in Edinburgh, which letter and handbill were only received by the latter on 12th March; and that service had not been made at all upon him. He admitted, however, that on 14th March he had received through the post-office a copy of a warrant of sale, being that above mentioned; and that further on 20th March he had also received through the post-office another copy of the warrant which had been left for him at Peebles on 14th March.

He pleaded—"(1) The complainer not having been duly charged under the said pretended decree, is not liable to implement the same, and the said pretended poinding and sale are therefore wholly inept and void. (2) The effects condescended on having been poinded in the respondent's own hands, or at least not in the hands of the complainer or anyone on his behalf, such pretended poinding is inept and void, and suspension, as prayed for, falls to be granted. (3) In the circumstances condescended on, the said charge and poinding being irregular, and the warrant of sale complained of being defective, and not having been served upon the complainer, the sale threatened should be interdicted as prayed for with expenses."

The defender pleaded, *inter alia*—"(4) The decreet which is the foundation of the diligence is valid and effectual. (5) The whole proceedings complained of being regular and formal, and the complainer being subject at the date thereof to the jurisdiction of the Sheriff of Peebles, the present note of suspension and interdict should be refused with expenses."

Interim interdict was granted. Thereafter the Lord Ordinary on the Bills (KINNEAR) pronounced this interlocutor:—"Suspends the proceedings complained of, and remits to the Sheriff to recal the interlocutor of 13th February 1883, and to receive defences upon payment by the complainer of such expenses as the Sheriff shall think just, and thereafter to proceed with the cause as shall be just, &c.

"*Note.*—The objection to the execution of poinding, that it represents the creditor as the possessor of the poinded goods, does not appear

to me well founded. A creditor cannot arrest in his own hands (apart from recent statute), because arrestment is a diligence *in personam*, and operates as a restraint upon third parties, who are prohibited from performing the obligations in favour of the debtor until the right of the arresting creditor shall be satisfied. But poinding is *in rem*, and if the poinded goods are the property of the debtor, the fact of them being in the creditor's possession does not appear to create any obstacle to their being poinded. In the case of *Tillicoultry* v. *Lord Rollo*, Fountainhall, it was accordingly found that 'a man may cause poind goods of his debtor's that are in his own custody, and that for debt owing to him by the debtor.'

"But the objection that the order of sale has not been served in terms of the statute appears to me to be fatal to the diligence. It is not enough to say that the complainer had notice, because the statute prescribes service, and that implies that an execution of service must be returned before the poinding authorised as regulated by the statute can be carried out. Now, there is no such execution of service. The execution which was returned sets forth that the officer did two things—(1st) He addressed a letter to the complainer to his present known address in Edinburgh, and (2d) that he left a copy at the complainer's last known residence in Peebles, in the hands of a servant, who of course could not be a servant of the complainer, for according to the officer's statement he was not then living in Peebles. It was conceded that the recent statute was inapplicable, and therefore that service by letter could not be sustained, and it follows that there has been no service upon which the sale could proceed.

"If the diligence is ineffectual, the decree is in the position of an unimplemented decree in absence, against which the complainer may be reponed on payment of expenses."

The respondent reclaimed, and argued—The Lord Ordinary was right in regarding the poinding as regular up to the stage of service of the warrant of sale. The case of *Tillicoultry* (1678, M. 10,517, Fountainhall, i. 10, More's Stair, ccccxx.) cited by him disposed of the objection founded on the fact of the respondent's being in possession of the furniture at the time of the execution of the poinding. (2) The statement in the Lord Ordinary's note that it had been conceded that the Citation Act did not apply was made in a misapprehension. That was not meant to be conceded in the Outer House, and now, at all events, it was explicitly maintained that section 3 of that Act was applicable to the effect of rendering the service of the warrant of sale by registered letter a valid service, and removed the objection to its regularity founded on section 26 of the Personal Diligence Act. The case could not now go back to the Sheriff as ordered by the Lord Ordinary. The diligence being regular throughout, the decree was not unimplemented, for poinding was "implement" in the sense of the Sheriff Court Act 1876, sec. 14, subsec. 2.

The suspender replied—No doubt poinding if regularly executed was implement. The objection, however, to the diligence on the ground of the creditor being in possession of the poinded effects was fatal to its validity. This had always been so regarded—Campbell on Citation, 225; Bell's Comm. ii. 60. If the creditor is in possession, poinding is not his remedy; he can then get at his debtor's goods by simply applying for a warrant to sell. But even granting the Lord Ordinary right on that point, the diligence was vitiated at a later stage. The service of the warrant did not satisfy the requirements of section 26 of the Personal Diligence Act. The Citation Act did not apply to judicial intimation in steps of diligence, but only to citations. The procedure of the Lord Ordinary in remitting the case back to the Sheriff was sanctioned by the case of *Oliver* v. *Weir's Trustees*, May 21, 1870, 8 Macph. 786.

At advising—

Lord Young—The Lord Ordinary has decided this case on what he understood to be a concession of the respondent's counsel that the recent Citation Act was not applicable, and therefore on the assumption that the complainer did not have judicial notice of the sale, and that means that the warrant cannot be executed. I assume he did not mean to decide on the point as if it had been argued before him, but merely in the absence of any contention, for he has expressed no opinion as to his own view. My own opinion is that the recent statute is applicable here. I think it is, both in language and reason, applicable to judicial intimations of this kind as well as to citations. I cannot conceive a case in which its provisions might more appropriately be resorted to than the present, where the party for the sale of whose goods a warrant has been applied for in Peebles is resident in Edinburgh. If that be so, then, being of opinion as I am with the Lord Ordinary in thinking that, taking all things connected with this diligence together—viz., a good action, a good decree in absence, and a good charge on that decree, joined with an admission on the part of the complainer that he did in point of fact receive the notice—the diligence was otherwise valid and regular. That disposes of the whole case, and the warrant of sale will be regular.

Lords Craighill and Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor: Repel the reasons of suspension: Find the charge orderly proceeded: Find the respondent entitled to expenses," &c.

Counsel for Complainer—R. Johnstone—Shaw. Agent—Andrew Newlands, S.S.C.

Counsel for Respondent (Reclaimer)—Comrie Thomson—M'Kechnie. Agents—Curror & Cowper, S.S.C.