

introduced by these provisions. I don't admit that at all, and I am not sorry that we have come to the conclusion we have arrived at in this case, for I think the nature of the action of reduction is such that it ought to be confined to the Court of Session.

The interlocutors advocated were therefore recalled, and the action dismissed as incompetent, with expenses in this and in the Court below.

Agent for Advocator—John Thomson, S.S.C.

Agents for Respondent—Adam & Sang, S.S.C.

Friday, June 8.

FIRST DIVISION.

COUTTS v. COUTTS.

Husband and Wife—Action of Aliment—Competency. An action of aliment by a wife raised after she had been for eleven years living apart from her husband, notwithstanding his offers to receive her, which she rejected in consequence, as she alleged, of her husband's cruelty, held incompetent in respect there were no conclusions for judicial separation.

This was an action at the instance of a wife against her husband, in which she concluded for payment to her yearly for her aliment of the sum of £75. The parties were married in 1853, but have been living separate from each other since 1855. In the end of that year the wife raised an action before the Sheriff Court of Aberdeen for interim aliment, in which she obtained decree for £26. In that action the defender expressed his willingness to receive his wife back to his house, and in this action he repeated that offer, and said that he had been all along willing so to receive her, but that she refused to return. The wife, on the other hand, averred that she had left her husband's house in consequence of her husband's cruelty towards her. The present action contained no conclusion for separation.

The defender's first plea in law was that "the pursuer had not averred a relevant case to entitle her to insist in this action." The Lord Ordinary (Jerviswoode) repelled this plea, and allowed a proof. The defender reclaimed.

SOLICITOR-GENERAL and MAIR, for him, argued—This action is incompetent because the defender is willing to receive the pursuer into his house. It is no answer to this to say that the defender has treated the pursuer with cruelty, because in that case the action should be for separation and aliment. Countess of Caithness, 25th July 1744, M. 5886; Bell v. Bell, 22d February 1812, F.C.; Anderson v. Anderson, 3d March 1819, F.C. There is no statement as to what the pursuer has been doing in the interval since 1855, and it is not competent at this distance of time to raise a simple action of aliment.

PATTON and THOMS, for the pursuer, replied—The pursuer is not bound to return, if her averments are true, which must at present be assumed, for her life would not be safe. Lady Fowles, M. 6158; Shand, 28th February 1832, 10 S. 384.

(Lord ARDMILLAN referred to the cases of Williamson, 27th Jan. 1860, 22 D. 599, Couper, 24th Nov. 1860, 23 D. 68; and Paterson, 14th Dec. 1861, 24 D. 215.)

In the course of the argument the defender was allowed to add the following plea:—"The action is in the circumstances averred by the pursuer incompetent, in respect there is no conclusion for a judicial separation."

At advising,

The LORD PRESIDENT said—This is an action at the instance of Mrs Coutts against her husband for payment of the sum of £75 yearly, in name of aliment, from the term of Martinmas 1864. It appears that this lady has been living separate from her husband since 1855. An objection was taken by the husband to the relevancy of the action. He says he has repeatedly offered to take his wife back to live with him—that she had no good reason for going away—and that he is still willing to receive her. She says that his conduct towards her was such as justified her leaving him, and that she cannot in safety return to live with him. The husband denies all this, and objects to a claim being made against him for aliment, there being no conclusion for judicial separation. He pleads that the pursuer has not averred a relevant case to entitle her to insist in this action. Under this plea the averments of the pursuer were somewhat closely criticised, and objections of a broader kind were stated, which some of your Lordships thought amounted to a plea against the competency of the action, and the defender added a plea to this effect. This action has undoubtedly been raised under very unusual circumstances. The lady had been living separate from her husband for about nine years before it was brought. She was not doing so under any arrangement with her husband of the breach of which she complained. What she says is, that her husband's conduct amounted to *sevitia*; and we are asked to investigate a case which, if true, would give grounds for a judicial separation in an action containing no conclusions for separation. I am not aware that any case of this kind has ever occurred; and I am of opinion that the action ought not to be sustained. If the defender had not expressed his willingness to take the pursuer back to live with him, it would have been different. It would then have been an ordinary case of aliment. Perhaps, too, the case might have been different had it been brought immediately. But in the circumstances in which the action has been raised I think it cannot be sustained. It may be a very nice question whether it should be dealt with as an irrelevant or incompetent action. These terms may run very much into one another in their meaning. It is enough that the circumstances disclosed by the pursuer don't warrant the investigation which she seeks, there being no conclusion for separation. This will not prevent her from bringing an action for judicial separation whenever she pleases. There will be conclusions for aliment in that action, under which it will be competent for the Court to award it. This is the opinion of the Court, and in the circumstances of it we don't think it a case for finding the husband liable in the wife's expenses.

Agent for Pursuer—William Officer, S.S.C.

Agent for Defender—James Finlay, S.S.C.

SECOND DIVISION.

SILLARS v. BOWIE.

Cautioner—Relief—Pactum de non Petendo.

Circumstances in which held that a cautioner was entitled to operate immediate relief for payment of the balance of a sum advanced by him to pay the second instalment of a composition due by a sequestrated estate.

The facts of this case were these. The defender, a bankrupt, was discharged, on 2d April 1863, on paying a composition of 5s. 6d. per pound, in two instalments of 3s. and 2s. 6d. respectively. His