the trust-deed of 1792, and therefore was to be held by them for the purposes expressed in that deed. On looking at these purposes it was evident that the trustees were to allow the heir to possess the estate. Therefore there could be no doubt that during these forty years the pursuer's father possessed as the beneficiary of the trust, and his possession was the possession of the trustees. On the other hand, negative prescription had not run against the trustees on account of their having all died by the year 1821. Though all the trustees died, the trust did not therefore die. It could at any time be revived by the appointment of a judicial factor to the trust-estate. At the same time, though they did not agree with the Lord Ordinary on the grounds of his judgment, they were disposed to agree with him in the result. There was no ground for the defender's contention that the trustees were bound by the trust-deed to execute an entail of the estate. In short, the whole question was, Whether the pursuer was justified in making up titles as he did in 1845, 1846, and 1847, after the death of his father? On the ground that, as beneficiary under the trust of 1792, he was entitled to a conveyance of the estate in fee-simple, he obtained decree in an action of adjudication in implement against the heirs of the trustees (whom he had charged to enter) whereby the lands were declared to pertain and belong to him and his heirs heritably and irredeemably. Having by this time acquired on a different title the *superiority* of the lands, he, as superior, granted a charter of adjudication in implement in favour of himself, and on this charter he was infeft. He then consolidated the superiority and the *dominium utile*. These deeds were included in the progress of titles offered to the purchaser, and were perfectly good titles to convey the lands to a purchaser in fee-simple.

Interlocutor of Lord Ordinary adhered to.

Agent for pursuer—Wm. Mitchell, S.S.C.

Agents for Mr Tennant—Macrae & Flett, W.S.

Agent for Mr John Stewart—Jas. Dalgleish, W.S.

Friday, July 17.

M'LEOD AND OTHERS *v.* LESLIE AND OTHERS.

(*Ante*, p. 275.)

Expenses—Diligence for Recovery of Writs. Circumstances where the expense of a diligence was *allowed*, though no documents had been recovered under it.

Expenses—Counsel's Fees. Held that junior counsel ought to attend the advising of a case as well as senior counsel, and expense of a fee allowed accordingly.

The Auditor reported this case with the following note:—"The sum taxed off this account amounts to £177, 8s. 11d. In this are included the whole expenses of obtaining and executing a commission and diligence at the instance of the pursuers for recovery of certain documents, amounting to no less than £120, 0s. 11d. At the audit, the grounds on which this branch of the account was disallowed were explained by the Auditor, but as the amount is considerable, and it is not improbable that objections to the report may be stated, the Auditor thinks it right to record the grounds on which he has proceeded in disallowing these expenses.

"The summons contains conclusions against the defenders for exhibition and delivery of two contracts of marriage, the terms of which it was necessary for the pursuers to establish as the basis of the petitory conclusions of the action. Previous to the institution of the action, the pursuers had discovered the existence of the draft of one of these contracts, and in whose custody it was. In the defences it was stated, that the defenders were not, and never had been in possession of the deeds libelled. Before revising the condescendence the pursuers applied for a commission and diligence for the recovery of a great variety of documents enumerated in a specification lodged in process. The diligence was granted, but only to a limited extent, viz., for recovery of the 1st, 2d, and 3d articles of the specification—article 1st being one of the contracts above mentioned, article 2nd the other contract, and article 3d—all drafts or copies of these deeds. The diligence thus limited was executed at great expense in Edinburgh and Aberdeen, but the only document recovered was the draft of one of the contracts, the existence and custody of which were within the knowledge of the pursuers when the action was raised. After reporting this diligence, the pursuers craved and obtained a sist of procedure to enable them to prove the tenor of the contract (of which the draft had been recovered) in a separate action, and the tenor having been proved, the record in this action was completed and closed.

"It appears to the Auditor that, however important to the pursuers it might be to set up the draft of the missing contract as the foundation of their claims, they are not entitled to recover from the defenders in this process the expense of obtaining and executing their diligence in the face of the statement in the defences—that the defenders had not the deeds libelled, and if the failure of the pursuers to recover them or to obtain decree in this action in terms of the conclusions for exhibition and delivery, and that the expenses in question are truly expenses incident to and for the purposes of their separate action of proving the tenor, the expenses of which have not been given against the defenders.

"The Auditor has disallowed these expenses *in toto* as being expenses not covered by the general finding of expenses. But even should a different view be taken by the Court, it seems to the Auditor that the diligence has been executed at an expense altogether disproportionate to the simple nature of the specification *as limited;* and in order that the Court may have the materials (without a further remit to him) for disposing of this branch of the expenses, on the assumption that it is to be sustained to some extent as expenses under the general finding, the Auditor has marked on the margin of the account the items of the expenses of obtaining and executing the diligence which may, on such assumption, be sustained against the defenders. These amount to £43, 0s. 4d. sterling."

The pursuers also objected to the report, in respect the Auditor had disallowed a fee to junior counsel for attending advising of the case in the Inner-House.

Nevay for them.

Clark in reply.

At advising—

Lord Deas—There is no general rule to the effect that whenever a diligence is unsuccessful the expenses are to be disallowed. In this case we thought proper that every effort should be made to recover these documents. I am clearly of opinion

that the expense of the diligence should be allowed.

Lord Ardmillan—Whether the cost of a diligence should be allowed when no documents are recovered is a case where no general rule can be laid down. I agree with Lord Deas that every exertion was necessary here to recover the documents in question, and that, in the special circumstances of this case, the expenses of the unsuccessful diligence should be allowed. I do not agree with the Auditor that the fee to junior counsel for attending the advising should be deducted.

Lord Kinloch—I am of the same opinion. I think the expense of diligences is a thing the Court ought very carefully to watch, because in my experience in the Outer-House, I have found that a great part of the unnecessary expense of cases arises from unnecessary diligences. I think it of great importance that *both* counsel should be present at advising, and that this should not be done without that suitable acknowledgment which usually accompanies services rendered in this Court.

Lord President—I sympathise in Lord Kinloch's observation with regard to the expense very often incurred in unnecessary diligences, and I was inclined at first to agree with the Auditor here. But the explanation given by your Lordships induces me to concur in the necessity of a diligence in this case.

Agent for Pursuers—J. Knox Crawford, S.S.C.
Agents for Defenders—H. & A. Inglis, W.S.

Saturday, July 18.

HART & SON *v.* IRVINE.

Jurisdiction—Meditatio Fugæ—*Caution* de judicio sisti. A foreign debtor, apprehended on a *meditatione fugæ* warrant, found caution *de judicio sisti*, and was liberated. He did not seek to have the proceedings set aside. *Held* that he could not decline the jurisdiction of the Scotch courts in an action by the creditors at whose instance he had been apprehended, he having consented to submit himself to the courts of this country on condition of being liberated.

Messrs Lemon, Hart & Son, wine merchants, London, raised this action against the Hon. Nicol Irvine, merchant, Accra, West Coast of Africa. While the defender was in Kirkwall in 1867, on a visit, the pursuers caused him to be apprehended on a *meditatione fugæ* warrant. On this warrant he was detained till he found caution *de judicio sisti*. The defender's first plea in law was want of jurisdiction on the part of the Court, on the ground that he had his domicile at Accra where there were law courts in which the action might have been brought, and that no jurisdiction had been competently founded against him in Scotland. The Lord Ordinary (Barcaple) repelled this plea, on the ground that the defender not having sought redress in any competent form against the proceedings in the application for his apprehension as *in meditatione fugæ*, and having found caution *de judicio sisti*, and thereby obtained his liberation, made it impossible for him to decline the jurisdiction of the Court.

The defender reclaimed.

Young and Fraser, for him, stated that he had raised an action of reduction of the proceedings before the Sheriff-substitute at Kirkwall, whereby the *meditatione fugæ* warrant was obtained, and that the summons therein had been served on the pursuers the previous night.

The Dean of Faculty and Monro in reply.

At advising—

Lord President—The point does not admit of the smallest dispute. The ground of the Lord Ordinary's interlocutor is simply this, that in consideration of getting liberation from custody, the defender consented to submit himself to the courts of this country. That is the true meaning of the bond *de judicio sisti*. I cannot do better than refer to the case of *Muir* v. *Collett*, 23d November 1866, 5 Macph. 47, where the law relating to this was settled. If the proceedings in the petition to the Sheriff-substitute for obtaining the *meditatione fugæ* warrant were incompetent this raises a wider question. That would be a good ground for bringing an action of reduction of these proceedings; but it is not the case we have before us just now. The Lord Ordinary's interlocutor must be adhered to.

Lord Deas—I concur. The interlocutor of the Sheriff-substitute was pronounced on the 26th October 1867, and caution *de judicio sisti* was found the same day. That interlocutor might have been brought under review of this court if the defender had wished, and the present proceedings would have been obviated. But that was not done, and no reduction was brought till last night. It is plain to my mind that the Lord Ordinary could do nothing but what he did; and that the bringing of the reduction within the last day or two makes no difference.

Lord Ardmillan—I also concur. In the absence of a reduction, the Lord Ordinary decided rightly.

Agents for Pursuers—Morton, Whitehead & Greig, W.S.
Agents for Defender—Scarth & Scott, W.S.

Saturday, July 18.

A. *v.* B.

Husband and Wife—Divorce—Contingency—48 *Geo. III., c.* 151, *sec.* 9. A husband brought an action of divorce against his wife before one of the Lords Ordinary, and the wife subsequently raised an action of divorce against her husband before a different Lord Ordinary. *Held* that there was between these two actions a contingency in the sense of Stat. 48 Geo. III. c. 151, sec. 9, and an interlocutor remitting the second action *ob contingentiam* of the first *affirmed*.

This was an action of divorce at the instance of A against her husband B. The Lord Ordinary (Ormidale), on the motion of the defender, remitted this case to Lord Barcaple, in terms of Statute 48 Geo. III., c. 151, sec. 9, *ob contingentiam* of an action of divorce at the defender's instance against his wife presently depending and previously brought before his Lordship.

The pursuer reclaimed.

Young and Trayner, for her, maintained that there was no contingency here in the sense of the Statute. The acts of adultery on the part of the defender set forth in arts. 4, 5, 6, and 7 of the pursuer's condescendence, were met by a simple denial on the part of the defender, and could not be shown to have any relation to the same subject as, or any connection or contingency with, the subject matter of the defender's action against the pursuer. Be-