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-

sides the witnesses in the present action would be difficult to find unless it was proceeded with at once, and if there were delay until both proofs could be led simultaneously, they might be no longer in a position to adduce sufficient evidence.

Fraser, for defender, was not called on.

At advising—

Lord President—This is purely a question under the Statute 48 Geo. III., c. 151, sec. 9. No doubt the language of that section is such as occasionally to cause a good deal of difficulty as to the meaning of the words "relating to the same subject, matter, or thing, or having a connection or contingency therewith." In regard to this the Second Division had a good deal of difficulty in some recent cases, and especially in *The Western Bank of Scotland and Others* v. *Douglas and Others*, 21st January 1860, 22 D., 447, where the Second Division consulted this Division. These were difficult questions—this is not. I don't know what meaning we can put on the words "connection or contingency," unless they apply to actions of divorce by a wife against her husband, and by the husband against his wife for the purpose of dissolving *the same* marriage. The two processes will not necessarily be conjoined, though the Statute requires they shall be in one and the same Court, or before one and the same Lord Ordinary. I can imagine one of the parties saying, "I am ready now to prove my case, and should not have to wait till the other party seeks perhaps the whole world over for his witnesses." Therefore, though I am for adhering to the Lord Ordinary's interlocutor, I don't think the processes should be conjoined.

Lord Deas—I can't conceive a more clear instance of contingency than such a case as the present. As your Lordship says, conjunction does not necessarily follow. It is entirely in the power of the Lord Ordinary to conjoin or not, and I think that very likely in this case he will not. But that does not in the least touch the question of contingency.

Lord Ardmillan concurred.

Agents for Pursuer—Duncan, Dewar, & Black, W.S.

Agent for Defender—J. S. Darling, W.S.

Friday, July 10.

SECOND DIVISION.

WOTHERSPOON *v.* HENDERSON'S TRUSTEES.

Agent and Client—Accounts—Continuity of Employment — Triennial Prescription — Copartnery. (1) *Held* that the formation of a copartnery known and intimated to the parties is operative to destroy the continuity of employment prior to it of one of the partners as an individual. (2) Circumstances in which *held* that individual employment during the copartnery was available to preserve the continuity of individual employment, so as to elide the plea of prescription.

In this action Mr William Wotherspoon, S.S.C., Edinburgh, sued the trustees of the late William Henderson, writer, Hamilton, for payment of upwards of thirty accounts for professional service as an agent, done by the pursuer for or on account of Mr Henderson between the years 1829 and 1864. The pursuer formed a partnership on 1st November 1857 with Mr Alexander Morison, S.S.C., under the firm of Wotherspoon & Morison, which was dissolved on 1st November 1860. The greater portion of the accounts are sued for as having been incurred before the formation of the partnership, some of them during its continuance, and others after its dissolution. The defenders pleaded prescription against all the accounts prior to the dissolution of the partnership, and more than three years before raising the action.

The Lord Ordinary (Barcaple) pronounced the following interlocutor and note:—

"*Edinburgh, 30th May* 1867.—The Lord Ordinary having heard counsel for the parties, and considered the closed record and whole process, sustains the plea of prescription as to the accounts alleged by the pursuer to have been incurred to the firm of Wotherspoon & Morison, being Nos. 29 and 33, inclusive of the abstract of accounts No 6 of process, and also, *separatim*, as to the accounts alleged to have been incurred prior to 10th January 1852, being the first eighteen accounts in the said abstract, in so far as the same are now sued for: And before further answer on the said plea of prescription, as applicable to the other accounts, as to which it is proponed, allows the pursuer a proof *prout de jure* that he was employed by the deceased William Henderson to perform, and did perform, the work charged for in the account No. 28 of said abstract, as an individual for his own separate behoof and emolument, and to the defenders a conjunct probation: Appoints said proof to be led before the Lord Ordinary: Appoints the cause to be enrolled that a diet for the same may be fixed: and reserves all questions of expenses."

"*Note*—1. The first and most general question which arises under this plea is, Whether the accounts subsequently incurred to the pursuer as an individual, commencing soon after the date of the dissolution, and ending within three years of the action being raised, are to be held in this question of prescription as being continuous with those incurred to the firm, so as to prevent the triennial prescription operating against the latter?

"In *Barber* v. *Kippen*, 3 D. 965, Lord Cockburn held that, in the special circumstances of the case, an account incurred partly to a company and partly to one of the partners carrying on the business after the dissolution of the firm, was continuous. The judgment on this point is, however, of less weight, as he also held that letters written after the three years were out, amounted to an acknowledgment both of the constitution and subsistence of the debt. The Court expressly waived the determination of the general point, holding there was enough, in the special circumstances of the case, from which to infer that the account sued for was continuous, and that prescription was excluded. Unfortunately the opinions of the judges are not given. Upon the whole, the Lord Ordinary does not think that any aid is to be got from that case. The decision in the case of *Torrance* v. *Bryson*, 3 D. 186, and 13 Jurist 69, is still less in point. It was there merely held that an account incurred throughout to a law-agent as an individual, without any interval of three years, is not deprived of its continuity by the circumstance that, for a period of eighteen months occurring in the middle of the time over which it extended, a company of which the pursuer was a partner had acted as agents for the client. It was not proposed, as is done in this case, to connect the employment of the company with that of the individual, as giving rise to one continuous account liable to one course of prescription. The only question was, Whether the inter-