the assessment leviable under sub-section 2 of section 94 of the said Act, is that assessment leviable on and within the special drainage district alone, or upon the whole district of the local authority?"

At advising—

LORD PRESIDENT—The question in this case is, whether certain expenses form a charge against the ratepayers of the district generally, or against the ratepayers of the special drainage district. The drainage commissioners say that the expenses must be charged against the particular district, and Mr Pearson, one of the ratepayers, says that they must be charged against the district generally.

I am always unwilling to refuse to entertain a Special Case, for I think that it is a very expedient and economical mode of trying a question of law when parties are agreed upon the facts. But we must take care not to pervert the provisions of the statute for the purpose of enabling parties to bring questions before the Court which they could not raise in any other process. The meaning of the statute is, that when parties could try the question in some known process, and agree as to the facts of the case, they may bring a Special Case. Now, could the Parochial Board of Bothwell and Mr Pearson have tried the question here presented to us in any known process. I think not, for the case rests only on the statement of parties that it is intended to impose an assessment. Now, Mr Pearson could not have brought a suspension of the threatened assessment, and he could not have brought an action of declarator, for in that case it would have been necessary to call all the other ratepayers as parties to the case. If, then, this matter could not be tried either in a suspension or in a declarator, I do not know of any other form of process in which it could even be attempted to try it. Thus the question here, being one which cannot be tried by a known form of process, it cannot be made the subject of a Special Case. I therefore think that this case should be dismissed.

LORD DEAS—I do not feel safe to say that in all cases in which an action can be brought, a Special Case may be brought if the parties are agreed as to the facts, but certainly there can never be a Special Case unless there could be an action between the same parties who are parties to the Special Case, and between them only. Now in this case, if the question had been raised in any other form, it would have been a good objection to it that all parties interested had not been called.

Another objection to this case is that no assessment has been imposed, and the question presented to us may never arise, and we have often refused action when matters were in that position. I therefore concur with your Lordship that the case should be dismissed.

LORDS ARDMILLAN and JERVISWOODE concurred.

The Court dismissed the case as incompetent.

Counsel for the First Party—Balfour. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Second Party — Lancaster. Agents—Jardine, Stodart, & Frasers, W.S.

Friday, February 7.

SECOND DIVISION.

(1) ANDREWS *v.* ANDREWS & STIRLING.
[Lord Jerviswoode, Ordinary.

(2) ANDREWS *v.* ANDREWS & STIRLING.
[Lord Shand, Ordinary.

Process—Conjoined Actions.

A raised an action for divorce against his wife, and thereafter reclaimed; before the case came on for hearing he raised a second action, alleging acts of adultery committed since the first was raised. *Held* that the two actions must be conjoined in pronouncing decree of divorce, the Court being satisfied with the proof of adultery in both.

Expenses—Conjugal Rights Act, 1861, § 7.

Held, (1) That the defender, *qua*-wife, is entitled to recover her expenses from her husband in an action for divorce although adultery has been proved; (2) That under the Conjugal Rights Act 1861, § 7, the co-defender may be decerned against *both* for the pursuer's expenses and for those thus paid by the pursuer to his wife.

These two actions were both for divorce on grounds of adultery. In the first action a reclaiming note was presented by the pursuer, Aug. 20, 1872, against the interlocutor of Lord Jerviswoode, and the second action was reported to the Inner House by Lord Shand on January 21, 1873. The interlocutor pronounced was as follows:—"The Lord Ordinary, having considered the cause, for the reasons stated in the subjoined note reports the cause to the Lords of the Second Division of the Court: Appoints the pursuer to print and box the record, proof, and documents; and grants warrant to enrol in the Inner House rolls." And thereafter in his note the Lord Ordinary, on the point of the two actions, adds—"The present case is the sequel of a previous action of divorce between the same parties, which has not yet been finally disposed of. In that action the pursuer maintains that he has proved acts of adultery between the defender and co-defender during a period prior to that embraced in the present action, and although he has failed to establish this to the satisfaction of the Lord Ordinary before whom the case was heard, their Lordships of the Second Division of the Court have made avizandum with the debate, and have not yet pronounced judgment. It appears to the Lord Ordinary, in these circumstances, that while on the one hand he ought not to delay the proceedings in the present action till the issue of the other case, on the other hand he ought not to pronounce a decree of divorce, seeing that the Court have at present under consideration the question whether a decree of divorce ought to be granted in the action before them, which was instituted before the present. As both cases are now ripe for judgment, it appears to the Lord Ordinary that they should be disposed of at the same time; and, indeed, it will be for the consideration of the Court whether they ought not to be conjoined,"

At the same time the Court heard counsel on the reclaiming note in the first action.

At advising—

LORD JUSTICE-CLERK—(His Lordship proceeded

to consider the effects of the proof, and then added)—In my opinion we ought to conjoin these two actions and find in both of them for the pursuers.

LORD COWAN—(After animadverting on the disgraceful conduct of the defender and co-defender) I can see no objection to the course proposed by your Lordship in conjoining the two cases, and deciding them both at this time; on either case, individually, I have formed a clear opinion that the adultery has been proved.

LORD BENHOLME—I look upon the proof in both cases as perfectly decisive, and concur in the course proposed to be adopted.

LORD NEAVES—Under the first action I regard it as demonstrated beyond the possibility of doubt, that a guilty attachment existed between the defender and co-defender. With regard to the second action, nothing can be more infatuated than their conduct. These acts of adultery being thus established, and it being of course competent only once to pronounce a decree of divorce, I am of opinion, with your Lordship in the chair, that such decree should be pronounced in the conjoined actions.

The counsel for the pursuer thereupon asked the Court to decern against the co-respondent for the whole expenses of process. He rested his demand on the seventh section of the Conjugal Rights Act, 1861, which is as follows:—"In every action of divorce for adultery at the instance of the husband, it shall be competent to cite, either at the commencement or during the dependence thereof, as co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the Court, in such action, to decern against the person with whom the wife is proved to have committed adultery for the payment of the whole or any part of the expenses of process, provided he has been cited as aforesaid, and the same shall be taxed as between agent and client." It was admitted that husband was formally liable for the wife's expenses, but in terms of the section quoted it was argued that decree should be given against the co-defender, not merely for the pursuer's expenses, but also for the expenses incurred by his wife in defending the action.

For the defender it was maintained that she was entitled to decree for her expenses against her husband (as being his wife until the decree was pronounced), and that she had no interest in the matter as to who might be ultimately liable therefor.

The co-defender asked in the first place for modification of the expenses, on the ground that the pursuer had failed to prove some of his averments in the first action; and, in the next place, that the section above quoted had reference only to his expenses, and those of the pursuer as against him, and therefore that decree should not be given against him for the expenses of the wife, which did not properly fall under the Act.

After considering the matter, the Court pronounced the following interlocutors—

"*7th February* 1873.—. . . In the first action recal the interlocutor reclaimed against: Find it established by the proof in that case that the defender and the co-defender committed adultery on the occasions libelled in the third and fourth sub-divisions of the 12th article of the condescendence. In the second action, Find that it is established by the proof that the defender and co-defender committed adultery, first, in the co-defender's house in Glasgow, secondly, in Mrs Wishart's house in Millport, and, thirdly, in the house No. 4 Soho Street, Glasgow, at the times libelled: therefore in the conjoined actions, Find the defender guilty of adultery accordingly: therefore devorce and separate the defender, Elizabeth Peacock or Andrews, from the pursuer, Robert Andrews, his society, fellowship, and company, in all time coming: further, Find and declare that the defender has forfeited all the rights and privileges of a lawful wife, and that the said pursuer is entitled to live single, or to marry any free woman, as if he had never been married to the defender, or as if she had been naturally dead: Find the co-defender liable to the pursuer in expenses, as well of those incurred by the pursuer himself as of those for which the pursuer may be liable in respect of the expenses of the defender: further, Find that the pursuer is liable to pay the expenses incurred by the defender; and remit to the auditor to tax the expenses now found due as between agent and client, and to report, and decern.

"*22d February* 1873.— . . . Approve of the Auditor's report upon the defender Mrs Elizabeth Peacock or Andrews' account of expenses; and decern for payment to her by the pursuer of £253, 6s. 2d., under deduction of £120, 4s. 9d. paid to account, leaving a balance now payable to her of £133, 1s. 5d; and allow this decreet to go out and be extracted in name of Messrs Campbell & Smith, S.S.C., the agents disbursers.

"*22d February* 1873.— . . . Approve of the Auditor's report upon the account of expenses; and decern for payment by the co-defender Joseph Stirling to the pursuer of the whole expenses incurred by him, amounting to £809, 17s. 9d."

Counsel for Pursuer—Scott and Rhind. Agent—A. Kelly Morrison, S.S.C.

Counsel for Defender—Trayner. Agents—Campbell & Smith, S.S.C.

Counsel for Co-Defender—Maclean. Agent—T. J. Gordon, W.S.

Friday, February 7.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

SURTEES *v.* WOTHERSPOON.

(See *ante*, vol. ix., p. 230.)

Marriage — Promise subsequente copula — *Conditional Promise.*

A man in the course of an uninterrupted illicit connection gave his mistress a writing, in which he promised to marry her when his circumstances warranted it, provided that, "in the interim she continued to lead a virtuous and exemplary life." *Held* that this did not constitute marriage.