not merely to the waters of the loch, but even to the very *solum* itself.

LORD NEAVES—I have no difficulty in concurring with the views expressed by the Court. I think the Lord Ordinary is right. The rule fixed by the authorities is that without a special grant the property of the *solum* of a loch is presumed to be in the riparian proprietors *pro indiviso*. Now the only specialty founded on here is the clause in the titles of the mill and mill lands, "with the loch of Derculich, and the fishings thereof." I cannot think it clear that this is a substantive and special conveyance of the whole loch. It was merely an accessory to the enjoyment of the mill. There is no contiguity of mill and loch, and this being so, there is a presumption against the loch being given, but a very obvious ground for the grant that was made—the loch being in fact a mill-dam—one of the water-dams to supply the mill. The possession of the pursuers is not at all consistent with the views they have maintained on that point.

The Court adhered to the judgment of the Lord Ordinary, with expenses.

Counsel for Pursuers—Dean of Faculty (Gordon), Q.C., Guthrie Smith, and H. J. Moncreiff. Agents—Mitchell & Baxter, W.S.

Counsel for Defender, Mr Stewart Robertson—Lord Advocate (Young), Q.C., and Marshall. Agents—Adam, Kirk & Robertson, W.S.

Counsel for Defender, Mrs Stewart Hepburn—Solicitor-General (Clark), Q.C., and Adam. Agents—Adam, Kirk & Robertson, W.S.

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*Tuesday, January* 6.

## FIRST DIVISION.

[Lord Gifford, Ordinary.

### DUNCAN AND OTHERS *v.* SALMOND AND OTHERS.

*Counsel—Client—Mandate—Effect of Acts of Counsel to bind Client—Reclaiming — Action of Reduction—Competency.*

Where a minute of abandonment of a claim in a multiplepoinding, signed by counsel, was lodged for certain parties, in consequence of which decree was pronounced against them; in an action at their instance for reduction of said decree on the ground that they had not authorised said minute, *Held* (1) that a client is bound, in a question with the opposite party, by every judicial or forensic act of his counsel or agent in the conduct of the cause—and this includes even the abandonment or withdrawal of the action or defence; (2) that the present action, being in reality an attempt to reclaim against the previous judgment, was incompetent.

On 1st March 1871 an action of multiplepoinding was brought in name of the trustees of the late Miss Ann Duncan of Balchrystie, for the purpose of distributing her estate. The real object was to determine who were the heirs and next of kin of Miss Duncan, for although she left a trust deed, and intended to have executed a relative deed of directions, she executed no such deed, and consequently, in effect died intestate. A great variety of claims were lodged by parties claiming to be next of kin, or among the next of kin, of Miss Duncan, and among others the four pursuers in the present case appeared and lodged a claim, and the record was closed on 6th February 1872, and a proof allowed, the diet for which was afterwards adjourned. The present pursuers were parties to the closed record and to the proof allowed thereon At the adjourned diet of proof, on 19th March 1872, a joint minute was lodged for a number of the claimants, and among others, for the four pursuers of the present action, stating that "they did not now insist in the claims lodged for" them, and craving the diet of proof to be discharged. This minute is duly signed by the counsel for all the parties, and among others by the counsel for the present pursuers. On this minute being lodged, the Lord Ordinary the same day discharged the order for proof, as regarded the claimants who had not withdrawn, till 14th May 1872. On 14th May 1872 the proof proceeded, the question being between Mrs Thomas and the Crown, who claimed as *ultima hæres*; commissions were granted to examine infirm witnesses who were unable to attend, and the proof was adjourned till 29th May. At the adjourned diet new claimants appeared, who on certain conditions as to expenses were allowed to lodge claims. The record was closed of new and proof ordered to proceed. On 31st May 1872 additional claimants appeared again, and the same course was followed, the record being again closed of new on 31st May 1872. The proof proceeded on 20th and 21st June, and after additional depositions were got in, the whole parties were heard, and, on 30th July 1872, the Lord Ordinary disposed of the whole case on the proof and on the merits by ranking and preferring certain of the claimants to the whole moveable succession of Miss Duncan, and repelling the claim of the Crown. This is the leading judgment which the pursuers now seek to reduce. A great deal of procedure followed, having for its object the carrying out of this judgment. The judgment was not reclaimed against, but was understood to be acquiesced in by all parties interested. Certain of the claimants were found entitled to expenses, and as the whole fund was to be divided among the various claimants, it was arranged that these expenses should be taken out of the fund, which was done accordingly. There is a long series of interlocutors after judgment of 30th July 1872, about twenty in number, having for their object the carrying out of the judgment of 30th July 1872, disposing of the interest of the claimants preferred *inter se*, sisting a judicial factor in room of the trustees, and similar procedure. On 29th November 1872 the present pursuers tendered a new claim in the multiplepoinding, which the Lord Ordinary, reserving all questions of competency, allowed to be seen. At the date of the Lord Ordinary's judgment in the present case nothing further had been done in reference to this claim. In these circumstances, the present pursuers, on 7th February 1873, brought the present action of reduction, to reduce and set aside the decrees of preference of 30th July 1872 and the whole procedure following thereon, and concluding for a decree against the judicial factor ordaining him to pay Miss Duncan's whole moveable estate to the present pursuers.

With reference to the minute of abandonment above mentioned, the pursuers averred that after the diet of proof of 7th March 1872 (in the former

case) had been fixed, a certain John Hogarth, the father of a married woman in the same degree of relationship as the pursuers, who had taken a leading interest in the conduct of the case but had no mandate whatsoever for the pursuers' employing him to act for them, gave instructions to abandon the claim not only on behalf of his daughter, but on behalf of the present pursuers. It was further averred that the pursuers were never consulted about, nor consented to, said abandonment of the cause, and that they disapproved thereof whenever the same came to their knowledge, which they alleged was shortly afterwards by means of the publication in the newspapers of the Lord Ordinary's interlocutor of 30th July 1872, and that as soon as it was possible they took steps by employing other counsel and agents to have their claim proceeded with. The summons in the present action was signeted on 7th February 1873.

On 22d July 1873 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and having considered the closed record and whole process: Finds that the interlocutors sought to be reduced in this process were pronounced *in foro* in an action of multiplepoinding to which the present pursuers were parties, and after they had made up a closed record therein, in which process the present pursuers are still parties, and which still depends: Finds that the pursuers have set forth no relevant or sufficient grounds for reducing the said interlocutors: Therefore repels the reasons of reduction, assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the defender entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court, to tax the same, and to report.

"*Note.*—. . . The pursuers say that the minute of 19th march 1872, withdrawing their original claim, was lodged without their knowledge or authority. They say that they, and not the claimants preferred, are the true next of kin of Miss Duncan, and they demand that the whole proceedings in the multiplepoinding shall be set aside, that a new proof shall be allowed in this action, and that thereupon the holder of the fund shall be decerned to make it over to the pursuers. It is to be kept in view that the multiplepoinding still depends, and that no decree for payment of the fund has yet been pronounced.

"The course now adopted by the pursuers is very unusual, if not unprecedented. The Lord Ordinary is not aware of any case, and no case was cited to him, in which an action like the present was held competent. But the circumstances, it is said, are unprecedented, and it is urged that no other remedy is open to the pursuers. The Lord Ordinary, although quite disposed to aid the pursuers if they have suffered a real wrong, feels himself compelled to assoilzie from the present action.

"(1.) He is of opinion that the pursuers are bound by the minute of 19th March 1872, signed by their counsel and lodged by their agent on their behalf,—that is, that the pursuers are bound in a question with other and competing claimants by the act of their counsel and agent.

"The authority of counsel to bind his client has been a good deal discussed since the celebrated case of *Swinfen* v. *Swinfen*, 25 L. J. C. P. 303; 26 L. J. C. P. 27; and 27 L. J. Chancy, 35, 491. See also *Swinfen* v. *Lord Chelmsford*, 29 L. J. Exch. 382. The decision in the case of *Swinfen* has been considered and commented on in several subsequent cases—See *Mackintosh* v. *Fraser*, 20th Jan. 1860, 22 D. 421, and *Strauss* v. *Francis*, 23d April 1866, Law Reports, B. 379.

"The principle seems to be that while a counsel may act for and bind his client by every judicial or forensic act in the conduct of the cause, he has no power to make a compromise involving matters collateral to or outwith the subject matter of the action.

"Now, a minute withdrawing a claim is just as much a forensic act as the lodging of a claim, or as the terms in which a claim is stated or maintained. It is difficult to draw the line between withdrawing a claim altogether and withdrawing a statement, or a plea, or making a judicial admission. It would be subversive of the finality of process altogether if counsel, as in questions with the opposite party, had not full power to do any or all of these things. The withdrawal of a plea, or even its non-statement, may be as fatal to a party's interests as the withdrawal of his claim; and even the manner in which a plea is urged or supported may sometimes be equally fatal as its formal withdrawal.

"In particular cases it is quite conceivable that the party may have redress against his agent or counsel, but in a question with the opposite party acting in *bona fide* as an opposing litigant, he is bound by the acts of his agent or counsel in the proper conduct of the suit, and this includes even the abondonment or withdrawal of the action or defence. Thus, in *Currie* v. *Glen*, 19th Dec. 1846, 9 D. 308, where a defender's counsel at a jury trial gave up the case, and a verdict was returned for the pursuer, the Court refused to disturb the verdict, although it was offered to be proved that counsel acted against the orders of the defender. In *Strauss* v. *Francis*, above noted, it was held that counsel had power to withdraw a juror and consent that his client be non-suited.

"(2.) But the act of the pursuers' counsel in withdrawing their claim was acquiesced in by the pursuers for a period of no less than eight months. The minute was lodged and cited on the 19th March 1872. It was not till 29th November 1872 that the pursuers proposed to renew their claim, and the present action was not brought till 7th February 1873. There is no sufficient explanation given of this delay, and it is quite incredible that the pursuers should have thought that proof was being led for them and their claim insisted in from March till November.

"(3.) But, even supposing that the pursuers are not bound by the minute, their position is not much improved. In that case they were bound to go on with the proof on 19th March 1873, and at the subsequent repeated diets. They failed to do so, although parties to the closed record. The competing claimants led proof, proved their case, and obtained judgment *causa cognita*, although opposed by the Crown. That judgment is equally binding against the pursuers as a judgment *in foro* as it is against the Crown. No doubt it may be said to be, in one sense, a judgment by default; but the default is that the pursuers themselves failed to lead proof, as they knew they were bound to do. Apart from the minute therefore altogether, the pursuers are excluded, because they have suffered judgment on a cancelled proof in which they have failed to lead a single particle of evidence. The proof was

very long and elaborate, and involved the consideration of a complicated and an old pedigree, but this only renders it the more inexcusable in the pursuers not leading proof as they were bound to do, for if the minute of 19th March be held unwarranted and out of the case, then the original order for proof against the present pursuers stands binding and undischarged.

"(4.) It is unnecessary to criticise the statements of the pursuers in the present record, but they are open to criticism. The say the minute in question was lodged by a John Hogarth, the father of a claimant in the same position as the present pursuers. They say Mr Hogarth took a leading interest in the conduct of the case, but they do not say that he was not allowed to do so. For aught that is said, he may have instructed the lodging of the pursuers' claim along with that of his own daughter. If he employed the agent who acted for all, this implies a mandate of a very ample kind. The pursuers' other statements are unsatisfactory. The say they never heard of the Lord Ordinary's final judgment till it appeared in the newspapers, but even then they were in time to reclaim or to remonstrate. Silence for four months more is inexplicable. This suggests,—

"(5.) That the pursuers' proper course was to have reclaimed immediately after the judgment of 30th July 1872, and that an attempt to reclaim by way of action of reduction is incompetent as well as unprecedented. The action of multiplepoinding still depends; and even if the decree of preference has become final by mistake, there is provision made for that; it may still be reclaimed against on payment of expenses. It is by no means clear, however, that the decree may not be reclaimed against yet, for under the recent statute all interlocutors may be brought under review by reclaiming against any final decree for payment or otherwise. The decree of preference in really an interlocutory judgment. It is true the pursuers would have, besides, to get the proof opened up and a new proof allowed, and payment of expenses would probably be imposed as a condition of this; but a party is not entitled to escape an award of expenses merely by resorting to an action of reduction. See *Smyth* v. *Walker*, 21st Nov. 1863, 2 Macpherson 126. And this leads the Lord Ordinary to observe,—

"(6.) That even if the pursuers got over all other objections, they would require to pay expenses before they could get a new proof. These expenses would necessarily be serious, for it is now proposed to go into the whole evidence of pedigree *de novo*. The fact that expenses have been paid out of the fund makes no material difference, for that was just a way of taking them from the preferred claimants, and the pursuers would have to replace the fund partially or wholly before they could be allowed to open new claims upon it. There are some indications that this reduction is, in part at least, a device to escape expenses.

"(7.) There are other objections, which it is needless to notice in detail. For example, the petitory conclusion against the judicial factor is, to say the least, very anomalous. He and the trustees have long ago been found liable only in once and single payment. He might have consigned the whole fund, and he has paid away considerable sums under orders of Court. Is he to account of new in this action of reduction,—is he to bring a second process of multiplepoinding, or how is he to act? As there is no suspension, he may be ordered to-morrow to pay the whole fund to the preferred claimants, and against this he would have no defence, notwithstanding the present direct petitory action against him. All these considerations point to the radical incompetency of the present process. The Lord Ordinary gives no opinion as to whether any, and what other, remedies are open to the pursuers, if they have really suffered wrong."

The pursuers reclaimed to the First Division of the Court.

At advising, the Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuers—Campbell Smith, and Reid. Agent—A. Clark, S.S.C.

Counsel for Defenders—Rhind, W. A. Brown, R. V. Campbell, and Asher. Agents—A. Kelly Morison, S.S.C., A. Morrison, S.S.C., D. Cook, S.S.C., Millar, Allardice & Robson, W.S., Leburn Henderson & Wilson, S.S.C.

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*Wednesday, January 7.*

## FIRST DIVISION.

[Sheriff of Fifeshire.

## JACKSON (INSPECTOR OF POOR, PARISH OF ABBOTSHALL) *v.* ROBERTSON (INSPECTOR OF POOR, PARISH OF LESLIE).

*Poor—Chargeability—Residential settlement.*

A sailor had a birth settlement in one parish: having taken his wife to a neighbouring parish, the following day he went to sea, and subsequently, during a period of more than five years, visited her three times in all, remaining twice for a few days, and once, when in bad health, for a whole year. *Held* that these visits were not sufficient to found a residential settlement by the husband.

*Observed* (*p.* Court) that cases of *Greig* and *Moncrieff* did not apply in the present circumstances.

In this case the parties agreed upon the following statement of facts:—Jane Young or Stewart, the pauper lunatic whose settlement is in dispute, is forty years of age, and was born in the parish of Leslie. She is the wife of Andrew Stewart, seaman, aged thirty-seven years, who was also born in Leslie. Andrew Stewart is the son of the late Robert Stewart, flax-dresser, who resided for many years in Leslie. At Martinmas 1851 the said Robert Stewart removed to Kirkcaldy, and subsequently, in May 1859, to Abbotshall. He emigrated to America in October 1865, and died there about two years after, leaving his wife and family in Abbotshall, where they still reside. Andrew Stewart removed with his father to Kirkcaldy in 1851, and for some time worked as an apprentice blacksmith; but in consequence of the dulness of trade at the time, he failed to complete his apprenticeship, and went away to sea. Since that time he has followed the occupation of a seaman, for the most part sailing on board American vessels, and generally returning at the end of his voyages, which usually extended from one and a-half to two years, to his father's house in Kirkcaldy, and after-