said report; and decern against the pursuer for payment to the defenders of £226, 2s. 11d. the taxed amount of the said expenses; find the defenders liable to the pursuer in the expenses of the discussion on the said Note of Objection, and remit to the Auditor to tax the amount thereof, and to report."

Counsel for Objectors—Lord Advocate (Young), Solicitor-General (Clark) and Balfour. Agents—Dalmahoy & Cowan, W.S.

Counsel for Respondents—Pattison and Sir W. G. Simpson. Agents—Mitchell & Baxter, W.S.

Saturday, December 13, 1875.

FIRST DIVISION.

[Lord Mure, Ordinary.

M'AULEY *v.* COWE.

Abandonment of Action—Lis alibi pendens.

In a case where a summons in a Sheriff-court action had been executed, but not called, and a second action was thereafter raised in the Court of Session, in which it was stated on record that the first action had been abandoned—*held* that this was a sufficient abandonment, and that the plea of *lis alibi pendens* did not apply.

Daniel M'Aulay, fisherman, on September 16, 1873, raised an action in the Sheriff-court of Aberdeen against Henry Cowe, fish-curer in Leith, for the price of certain herrings. This action was abandoned on 27th September by letter of abandonment written by the pursuer's agent to the defender, and on 29th September the pursuer raised an action in the Court of Session, the abandonment being formally repeated on record. The defender pleaded, *inter alia*, *lis alibi pendens*.

The Lord Ordinary (MURE) pronounced the following interlocutor:—

"3*d December* 1873—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, repels the plea of *lis alibi*: And before further answer, allows the parties a proof of their averments, and to each a conjunct probation, on a day to be afterwards fixed.

"*Note*—The Lord Ordinary sees nothing in the decision in the case of *Aitken*, 7th July 1873, relied on by the defender, and which related to proceedings in an action in which there had been litigation in Court tending to supersede the rule laid down in the case of *Laidlaw*, 8th March 1834, to the effect that where a summons, although executed, has never been actually brought into Court, it may be withdrawn or abandoned by letter; and that when such a course has, as here, been taken, there is no foundation for the plea of *lis alibi*. The Lord Ordinary has therefore repelled that plea, and allowed a proof, as neither party was prepared to renounce probation."

The defender reclaimed.

Authorities—*Swan* v. *Mackintosh*, March 14, 1867, 5 Macph. 599; *Macgregor* v. *Macgregor*, Feb. 1, 1828, 6 S. 475; *Laidlaw* v. *Smith*, March 8, 1834, 12 S. 538; *Gracie* v. *Kerr*, Feb. 28, 1846, 19 Jur. 60; *Sinclair* v. *Campbell*, June 22, 1832, 4 Jur. 520; *Cormack* v. *Walters*, June 25, 1846, 8 D. 889 *Campbell* v. *Campbell's Trs.*, July 5, 1863, 1 Macph. 1016; *Aitken* v. *Dick*, July 7, 1863, 1 Macph 1038.

At advising:—

LORD PRESIDENT—If it were necessary to suppose that the Lord Ordinary had determined that the extrajudicial communication of the agents in this case was an abandonment of it, I should have but little doubt about the matter, but it appears to me that the case of *Laidlaw* is an authority sufficient to justify his interlocutor. It is quite true that in that case the abandonment of the first action was *in gremio* of the second summons, and so the second summons came into Court bringing with it an abandonment of the first, while here the abandonment of the first action was not made until the second summons had been served and defences lodged. The argument against the authority of *Laidlaw's* case is that there was a certain point of time when both actions were in dependence together, and that is quite true. During that time both the summonses were in dependence, and if the circumstance that they were so at a certain point of time is to be fatal to the second, then that fact is enough to justify dismissal now. But that is not the case, and the Court did not deal so technically with the matter. The real question is whether both are in dependence when the matter comes to be discussed, and if not, the plea of *lis alibi pendens* does not apply. In the present case I am of opinion that there is no longer another depending process.

LORD DEAS—There is no doubt that a summons executed, but not called, is a depending action. The question here is not whether there is a depending action, but whether the first action has been abandoned. This is not a case of abandonment by letter. The only difference between this case and *Laidlaw's* is, that here the abandonment is in the record, there it was in the second summons. It has not even been suggested that the effect of abandonment is different at one time and at another. The total difference between the abandonment of a summons which has never been called, and in which the defender has incurred no expense, and a case in which litigation has been going on and expense has been incurred, is that the party abandoning may have to pay down the expense.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Adhere to the said interlocutor, and refuse the reclaiming-note, and remit the cause to the Lord Ordinary to proceed further as may be just; find the defender liable in expenses since the date of the Lord Ordinary's interlocutor reclaimed against: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report to the Lord Ordinary, with power to his Lordship to decern for the taxed amount."

Counsel for Pursuers—Scott and Rhind. Agent—William Officer, S.S.C.

Counsel for Defender—Asher and Taylor Innes. Agents—Boyd, Macdonald & Lowson, S.S.C.
