and if there be such he is liable for them as debts and not as damages. It is therefore impossible for us, in estimating the damage which the pursuer is entitled to recover if he proved that there was a breach of contract, to take into account the liabilities of the defender during the subsistence of the joint-adventure, but throwing them aside I do not think the pursuer has proved that he has sustained any damage whatever. I have looked carefully into the proof, and even if I were to affirm that there had been a contract of partnership and that the defender had withdrawn in breach of it I could not have found that the pursuer had sustained more than mere nominal damages. The result of that in my opinion would be that according to the pursuer's own view of the case he should fail to recover anything more than merely nominal damages.

But further, I agree in thinking that there was no contract made for a joint-adventure. I think there was nothing more than an agreement on the defender's part to pay such expense as would be sufficient to enable the pursuer to test whether the article invented by the pursuer would be a paying article, with a view to its becoming the subject some day of a joint-adventure. Hence in that view too the pursuer's case fails. I think, however, that the defender acted well in agreeing to allow the Case to be used as a means of adjusting accounts.

Lord Young was absent.

The Court recalled the Lord Ordinary's interlocutor and ordained the defender to make payment to the pursuer of £40 ; *quoad ultra* assoilzied the defender from the conclusions of the summons, and found him entitled to expenses.

Counsel for Reclaimer—Graham Murray—Salvesen. Agent—H. B. & F. J. Dewar, W.S.

Counsel for Respondent—Strachan—Wilson. Agent—Wm. Officer, S.S.C.

Friday, February 25.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BEGG *v.* BEGG.

Proof—Recal of Witness—Evidence Act 1852 (15 *Vict. cap.* 27), *secs.* 3 *and* 4—*Husband and Wife—Divorce.*

It is incompetent after a witness has been examined to recal him for the purpose of putting to him the question whether *after* he had been examined as a witness he had made statements inconsistent with his evidence in the cause.

Circumstances in which it was *held* that a witness for the pursuer in an action of divorce ought not to be allowed to be recalled by the defender after the pursuer's case was closed for the purpose of asking her whether *before* giving her evidence in the cause she had made certain specified statements inconsistent therewith.

Such a motion must be specific both as to the alleged statement and the time and place at which it was made.

In an action of divorce at the instance of Charles Begg, bachelor of medicine, residing in China, against his wife on the ground of adultery, proof was led on the 15th and 16th July 1886. On the former day a domestic servant, Christina Fairbairn, was examined on behalf of the pursuer. The proof was adjourned till October the 16th, and at the close of the defender's proof, and before the pursuer's conjunct proof was led, counsel for the defender, according to the notes of evidence, moved the Lord Ordinary (Fraser) "to be allowed to recal the witness Christina Fairbairn, a witness for the pursuer [examined on the first day of the proof], in order to prove through her that she stated to her sister Mrs Margaret Fairbairn or Whitson, with whom she was living at the time at Dunbar, on the evening of the day on which she gave evidence, that her evidence against Mrs Begg was false, that she knew nothing whatever against Mrs Begg, and that the charges against her were not true ; also, whether three or four weeks thereafter, at 14 Pipe Street, Portobello, in the house of Mrs Mary Clark or Fairbairn, she made a similar statement to Mrs Fairbairn, her aunt.

"Counsel for the defender also moved the Lord Ordinary to recal the same witness Christina Fairbairn to prove a statement made by her to Mrs Mary Clark or Fairbairn *before* giving evidence, and the second day after being examined by Alexander Macdonald (a sheriff officer who made enquiries on the pursuer's behalf), to the effect that she knew nothing against the defender, and that false charges were being got up against her; and also that she repeated the same statement to Mrs Fairbairn or Whitson a day or two before her examination in the cause. Counsel stated that he had discovered this since the cross-examination of the witness Fairbairn."

The Lord Ordinary refused both motions. The motions were founded on sections 3 and 4 of the Evidence Act of 1852, by which it is provided—"3. It shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding, and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified. 4. It shall be competent to the presiding judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness who shall have been examined in the course of such trial or proof to be recalled.

On 10th November 1886 the Lord Ordinary pronounced an interlocutor finding the adultery proved and granting decree of divorce.

The defender reclaimed, and when the case came on for hearing her counsel moved that he should be allowed to recal Christina Fairbairn for the purposes stated in the motions above cited, and relied on the cases of *Hoey* v. *Hoey*, February 21, 1884, 11 R. 578, and *Robertson* v. *Stewart*, February 27, 1874, 1 R. 532, pointing out that he had made the motion before the Lord Ordinary exactly at the stage of proceedings at which it had been held to have been properly made in these two cases. The motion was of vital importance to his case, inasmuch as

Christina Fairbairn was the sole witness who deponed to certain familiarities relied on by the pursuer, and she was contradicted on all sides.

Counsel for the pursuer opposed the motion.

At advising—

Lord Justice-Clerk — The proof was adjourned from July to October, when three months after Christina Fairbairn had been examined it was proposed to challenge the veracity of her testimony on the ground that both before and after her examination she had made statements inconsistent with what she had said in her examination. I think the course which the Lord Ordinary took was the right one. With regard to statements made by the witness after her examination, I must say I know no precedent for holding her recal competent. With regard to statements made by her before her examination, if distinct and specific, I think her recal would probably be competent under the provisions of the Evidence Act. But in my opinion the allegations contained in the motions before us are not capable of proof. They are not sufficiently specific as regards the time and place, and the precise words said to have been used by her. It is true that it may be said that there is a certain specification in the words "a day or two before," but then the motion is lacking further in place and detail of words. I am unwilling, like the Lord Ordinary, after three months had elapsed, and the witness had been examined, to open up her evidence on such meagre statements as were contained in the motion. Therefore on the whole matter, and without deciding that it would be incompetent to allow parties to make the statements more specific if we thought necessary for the justice of the cause, I am of opinion that as the case stands we ought not to sanction the additional inquiry.

I have thought it right to indicate my opinion on this question as it was fully argued before us, although it is not necessary for the decision of this case in the view I take of it.

Lord Craighill—It is obvious that a distinction must be taken in the two motions relating to the additional evidence proposed to be taken in virtue of the 4th section of the Evidence Act. The first relates to things which were said by Christina Fairbairn after she had been examined as a witness, and the second to things said by her prior to her examination. Now, although it is not necessary for the decision of the case, I may say that in my opinion the matter of the first motion is not covered by the section of the Act as I understand it, and I should for my own part disallow such a motion. As regards the second motion, the matter is different, though I may say that I could not have allowed it without a more precise specification of the things which are to be the subject of the examination.

Lord Rutherfurd Clark—There is here a motion made on the part of the defender to recal Christina Fairbairn for further examination, and it may be divided into two parts—first, to recal her in order to examine her as to statements made by her before her examination as a witness; second, to recal and examine her with respect to statements made by her after she had been examined as a witness. The motion, as I understand it, is made under the Evidence Act of 1852. Now, I am clearly of opinion that the Act gives no warrant whatever for the motion to examine the witness as to statements made by her after being examined as a witness. The purpose of the Act was, shortly stated, to enlarge the subject-matter of cross-examination, but I do not think the Act intended for that could be further extended or applied to statements made after cross-examination. The other part of the motion is clearly within the Act, and so far as I can judge is sufficiently precise and detailed to allow us to grant it, and I myself should have been inclined to allow the witness to be recalled and examined on that part of the motion.

The Court refused the motion, and after hearing counsel on the proof adhered to the judgment of the Lord Ordinary.

Counsel for Pursuer—Balfour, Q.C.—Jameson. Agents—Stuart & Stuart, W.S.

Counsel for Defender—Johnstone—Lorimer. Agents—Crombie, Bell, & Mathieson, W.S.

Saturday, February 26.

SECOND DIVISION.

WEBSTER AND OTHERS *v.* MILLER'S TRUSTEES.

Trust—Nobile Officium—*Trusts (Scotland) Act* 1867 (30 *and* 31 *Vict. cap.* 97), *secs.* 7 *and* 16.

Held that a petition presented to the Court in the exercise of its *nobile officium*, and alternatively under the seventh section of the Trusts (Scotland) Act 1867, was competently presented to the Inner House.

Trust—Nobile Officium—*Advances out of Income directed to be accumulated, and out of Capital.*

A truster in his trust-disposition and settlement directed his trustees to accumulate the income of certain funds for behoof of the children of a married daughter till they should severally reach majority, and then to pay over to each his or her share of the capital and of the accumulated income; and further, in the event of the death of the father, but in that event only, before all or any of the children should reach majority, the trustees were empowered to pay the mother, or to lay out at their discretion, such part of the income as they might consider right for the maintenance and education of the children. The trustee in his daughter's marriage-contract, had provided her in the income of a sum of £10,000. Four years after the truster's death the daughter's children, who were all in pupillarity, presented a petition in which they prayed the Court either to authorise subpayments to be made out of the income directed to be accumulated for behoof of the children as the Court might deem sufficient for the proper maintenance and education of the children; or to authorise, under the 7th sec. of the Trusts Act 1867, certain annual payments to be made out of the capital sum itself for the same purpose. The petition