to show cause, and also to ordain that payment of the taxed account of said expenses should be a condition-precedent to the pursuer proceeding with the trial appointed to take place on 4th March next."

Argued for the trustees—The general rule as to expenses in these cases was that when a new trial was granted expenses were reserved, and if the party who was unsuccessful in the first trial were successful in the second, no expenses would be granted to either side. There were, however, exceptions to this rule, and the present case was one. The pursuer had abandoned his case against the trustees, against whom he had made charges *qua* their conduct as trustees which ought never to have been brought. They were therefore entitled to expenses. The case was identical with that of *Pagan* v. *Pagans and Fords*, July 15, 1871, 8 S.L.R. 645. Expenses had also been granted in the cases of *Lyell* v. *Gardyne*, November 20, 1867, 6 Macph. 42; *Macbride* v. *Williams*, May 22, 1869, 7 Macph. 790. Moreover, the issues were quite inconsistent, since the first and second indicated that the disponer was too weak and facile to be capable of executing a deed, the third that he had done so "in fraud of the legal rights of his other children."

Argued for the pursuer—The inconsistency of the issues was only suggested for the first time on the hearing of the motion for a new trial. The pursuer had accepted the warning of the Bench, and accordingly dropped the issues on fraud and circumvention. The rule as to expenses in these cases was laid down in *Lindsay* v. *Shield*, January 31, 1863, 1 Macph. 380. The only circumstances in which the defenders would be entitled to expenses were when the pursuer had obtained his verdict in the first trial by misconduct or misrepresentation. This had not been done here. Mackay's Manual, 647. In *Pagan's* case expenses had only been allowed because the action had been brought with an ulterior purpose—*Stewart* v. *Caledonian Railway Company*, February 4, 1870, 8 Macph. 486.

At advising—

LORD PRESIDENT—I think this is an exceptional case, and I proceed both on my recollection of the evidence, to which we gave very full consideration when the case was before us on the motion for a new trial, and on the subsequent conduct of the pursuer. These two considerations lead me to the conclusion that the charges of facility, fraud, and circumvention made by the pursuer are—to use the words of the Court in *Pagan's* case—charges which ought never to have been made. The present position of the case is that the trustees are entitled to be assoilzied from the conclusions of the action; they go out of it with absolvitor from the charges made against them, and Robert Cockburn, *qua* trustee, is freed along with them.

It is true that a part of the action survives, but I agree with Lord M'Laren, that but for being inextricably tied up with the charges of facility, fraud, and circumvention, this part would never have been allowed to go to a jury at all. The only averments left are that this deed was executed in defraud of the legal rights of the rest of the children.

I am therefore of opinion that the trustees should be assoilzied, and that they should be found entitled to the expenses for which they have moved.

LORD ADAM—I concur with your Lordship that the trustees are entitled to absolvitor with expenses. As to the expenses of the previous trial, I do not understand that anything is to be done by us to innovate upon the ordinary and well-established rule that, where a new trial is granted, and expenses are reserved, if the party who has lost in the first trial is successful in the second, no expenses are allowed to either party.

But, as is shown by *Pagan's* case, there are exceptions to this rule, and, if the Court consider that the action is one which should never have been brought, it may give expenses to the party who is ultimately successful.

My recollection of the evidence is the same as your Lordship's, that there was no ground for the charges of facility, and this view is confirmed by the subsequent conduct of the pursuer in abandoning these charges. Therefore I am of opinion that the trustees are entitled to expenses.

LORD M'LAREN and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Having heard counsel for the parties upon the note for Robert Cockburn and others, trustees of the late David Cockburn, defenders, assoilzie said defenders from the conclusions of the summons: Find the pursuer liable to said trustees in their expenses of the first trial, and of the subsequent hearing upon the rule," &c.

Counsel for the Defenders, the Trustees—Jameson—Ure. Agents—W. & E. C. MacIvor, S.S.C.

Counsel for the Pursuer—Watt. Agent A. C. D. Vert, S.S.C.

Tuesday, February 19.

SECOND DIVISION.

THE COMMISSIONERS OF DUNOON AND OTHERS *v.* HUNTER'S TRUSTEES.

Burgh—Boundaries—Extension below Low Water-Mark—Sheriff—Jurisdiction—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 11.

Held that, upon the application of the commissioners of a burgh under section 11 of the Burgh Police Act of 1892, the

Sheriff had jurisdiction to extend the boundaries of the burgh so as to include piers situated in part below low water-mark.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), provides, sec. 11—"Upon the application of the commissioners or of the council of any burgh, . . . it shall be lawful for the sheriff, after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act, but so as not to encroach on the boundaries of any other burgh, and such deliverance, unless appealed against in manner hereinafter provided, shall be final. . . . Where the burgh and the lands proposed to be included in any application for an extension of boundary lie in more than one county, the application shall be made to and disposed of by the sheriff of all the counties concerned. The sheriff or sheriffs in revising the boundaries of a burgh shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to or ought to form part of the burgh, and should in their judgment be included therein." . . .

Dunoon was constituted a burgh in the year 1868 under the General Police and Improvement (Scotland) Act 1862.

In October 1894 the Commissioners of the burgh presented a petition in the Sheriff Court of Argyllshire under the Burgh Police (Scotland) Act 1892, sec. 11, to have the boundaries of the burgh extended to certain limits which they described. The boundary proposed by the petitioners extended seawards at two points to a distance of 300 yards below low water-mark, and ran parallel with low water-mark between these points, the object of the petitioners in proposing this boundary being to have Hunter's Quay and the piers of Kirn and Dunoon, which were partly situated below low water-mark, included within the burgh.

The trustees of the late William Frederick Hunter of Hafton, as proprietors of the piers of Dunoon and Hunter's Quay, which were built out into the Clyde from points within the boundaries of the burgh of Dunoon, and the Kirn Pier Company, Limited, as proprietors of the Kirn pier, and adjoining slipway, as well as of the foreshore and *alveus* of the Firth of Clyde on which they were situated, lodged objections. *Inter alia*, they objected to the proposal to extend the boundaries of the burgh below low water-mark, on the grounds that the sea area proposed to be included was within the jurisdiction of the Board of Trade and of the Clyde Pilot Board, or the Clyde Navigation Trustees, or both; and (2) that the section of the Act founded on did not authorise the extension of the boundaries so as to include the sea below the low water-mark.

The Cowal District Committee of the County Council of Argyll also lodged objections to the petition, wherein they referred to and adopted the objections lodged by the previous objectors, and further averred that "such extended area cannot participate in any advantages or derive any benefit from the Police Acts."

Upon January 4th 1895 the Sheriff (M'KECHNIE) pronounced a deliverance extending the boundaries of the burgh landward according to a detailed description, but carried the boundary seaward only so far as low water-mark.

"*Note.*—. . . The Commissioners proposed to have a boundary in the sea at a considerable distance from low water-mark of ordinary spring tides, and running parallel with low water-mark at a distance of 300 yards or thereby. I could not see my way to grant this boundary, because it was an attempt to get in a very indirect way a question of the right to assess the piers of Hunter's Quay, Kirn, and Dunoon conferred upon the burgh of Dunoon. The transfer of this right of assessment from the county to the burgh appeared to me to contradict the judgment of my predecessor, who defined the burgh boundary at this part as low water-mark of ordinary spring tides. Further, I do not think in this case that I had jurisdiction to do so, because under the Statute 2 George IV. and 1 William IV., cap. 69, sec. 24, the jurisdiction of the Sheriff of Argyllshire is not privative in the matter, but is only cumulative with the jurisdiction of other sheriffs whose territories come up to the estuary of the Clyde. I asked for any authority upon this point and was supplied with none. It does not appear to me that the Statute of 1892 contemplates the creation of ideal boundaries in the sea." . . .

In January 1895 the Commissioners of the burgh of Dunoon and eight persons, owners or occupiers of premises within the old or extended boundaries of the burgh, presented a petition to the Court of Session, under section 13 of the Burgh Police Act, to recal the deliverance of the Sheriff, and to appoint the boundaries to be fixed in a manner stated in the prayer. They averred that they were satisfied with the landward boundaries as fixed by the Sheriff, and had repeated them in the prayer of the petition, but they objected to his deliverance in so far as it excluded the area below low water-mark, or at any rate in so far as it excluded the parts of the piers which stretched below low water-mark.

The Hafton Trustees and the Kirn Pier Company, Limited, objected to the petition on the ground that it was incompetent for the Commissioners of the burgh, not being aggrieved persons within the provisions of 13th section of the Burgh Police (Scotland) Act 1892, to present the present petition. They repeated their objection to the original application that it was incompetent to ask the Sheriff to extend the boundaries of the burgh below low water-mark. The County Council of the County of Argyll also objected to the petition as being incompetent.

In the course of the discussion before the Court of Session the petitioners limited their claim for inclusion of the area below low water-level to the parts of the piers below low water-mark, and counsel for the

Board of Trade intimated that the Board raised no objection to the claim so limited.

The petitioners argued—The petitioners were owners or occupiers of property within the burgh, and therefore were entitled to appeal against the deliverance of the Sheriff under section 13 of the Burgh Police Act 1892. The real question was whether the Sheriff had jurisdiction to include or exclude the part of the piers below low water-mark within the burgh of Dunoon. The petitioners were of opinion that he had such jurisdiction, and the question was really foreclosed by authority—*Gardiner* v. *Leith Dock Commissioners*, June 17, 1864, 2 Macph. 1234; *Forth Bridge Case, &c.* v. *Assessor of Railways and Canals*, September 30, 1890, 1 Poor Law Mag. 1890, 147. As the petition was now before the Court it should be dealt with as a regular appeal under the Act, and remitted to a Lord Ordinary for further procedure.

The respondents, the proprietors of the piers, argued—An appeal in this form was incompetent by the commissioners of a burgh, as the right of appeal under the 13th section of the Act was only conferred upon owners or occupiers who considered themselves aggrieved by their property being included within the extended boundaries of the burgh. As regarded the second question the first ground of objection stated by the Sheriff to his jurisdiction in this matter was not pressed. The second ground stated by him, however, was sound. It was admitted that the piers in question were within the county of Argyll, and the Sheriff had within the exercise of his proper jurisdiction included the portions of the piers above low water-mark within the extended boundaries of the burgh, but it was not within the scope of the Act for him to include the portions below low water-mark. The whole purpose of the Act was to enable the boundaries of a burgh to be extended so as to include portions of the adjacent county which had been built over and become populous, so that it was necessary to include them within the burgh for proper administration. The wording of the Act showed this. There were also provisions in the Act which related to the foreshore, and which plainly never contemplated that the shore below low water-mark should be included in the burgh. As regarded the cases quoted, it had been decided in England that the foreshore was not necessarily within the limits of a burgh—*Blackpool Pier Company, &c.* v. *The Assessment Committee of the Fylde Union*, January 29, 1877, 46 L.J.M.C. 189.

At advising—

LORD JUSTICE-CLERK—The only point we have to decide is whether the Sheriff was right in holding that he had no jurisdiction to consider the question whether these piers should belong to the burgh of Dunoon for rating purposes or not? First, it is necessary to consider whether these piers are in the county of Argyll, because it is only out of the county that the Sheriff, if he approves, can order any addition to be made to the burgh. There is no doubt that these piers, which are structures situated on the ground, are structures within the county. In a recent case—that of the Forth Bridge—it was held that the piers of the bridge some of which were far below low water-mark were situated partly in the county of Linlithgow and partly in Fifeshire. Therefore I think that in this case, where the piers begin upon the land and are afterwards built below low water-mark, they come into the county where the burgh ends, and are assessable for the county. Now, if that is so, there seems to me to be no question whether the Sheriff has jurisdiction to determine whether the ends of the piers below low water-mark are to be included in the burgh. The piers are in the county of Argyll, and the Sheriff has jurisdiction to consider whether any addition is to be made to the burgh from the county. I therefore think he has jurisdiction to determine the question, and I therefore am in favour of recalling his interlocutor, finding to that effect, and remitting back to him to proceed.

LORD YOUNG—In this application under the Police Act of 1892 the Sheriff has extended the burgh of Dunoon to a certain extent, but has refused to extend it below low water-mark, believing that he has no jurisdiction to do so, and he has not applied his mind to the question whether it is expedient that it should be so extended or not. In this appeal his judgment on the matter is assented to in all points except in so far as he has refused to exercise the jurisdiction, which the petitioners believe he possesses in this matter.

What we have to consider is whether he has jurisdiction in regard to those parts of the piers which lie below low water-mark.

Now, whether this petition was the proper form to bring up the question I do not think it is necessary to decide, but it is plain that it was right in the interests of all parties to have this question of jurisdiction determined, and I agree with your Lordship that it is within the jurisdiction of the Sheriff to extend the boundaries of the burgh below low water-mark, if he considers that expedient.

It was conceded that the portions of these piers which were above high water-mark were within the county of Argyll. This is important only in view of the provisions of the Act that the sheriff of a county cannot extend the boundaries of a burgh so as to encroach upon another county without the assent of the sheriff of that county, and I am of opinion that within the county of Argyll the Sheriff of Argyllshire has jurisdiction, if he sees fit and thinks it expedient, to extend the boundaries of the burgh of Dunoon to the ends of these piers, which are below low water-mark. The question is now limited to these three piers, and as it has been so limited the extension is not objected to by the public authorities.

LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—

"Find that the Sheriff has jurisdiction to decide the application of the appellants for the extension of the boundaries of the burgh so as to include the piers in question: Therefore recal the deliverance of the Sheriff, and remit to him to consider and decide the application on its merits."

Counsel for the Petitioners—C. S. Dickson—Constable. Agent—Alexander Campbell, S.S.C.

Counsel for the Proprietors of the Piers—Dundas—Graham. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the County Council of Argyll—Pitman. Agent—W. A. Harris, L.A.

Counsel for the Board of Trade—C. K. Mackenzie. Agents—Davidson & Syme, W.S.

Saturday, February 23.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

DOMBROWIZKY *v.* DOMBROWIZKY.

Process—Reclaiming-Note—Act of Sederunt 11th July 1828, *sec.* 77—*Competency.*

The defender in an action of divorce was allowed to put in defences after the evidence for the pursuer had been led. Thereafter the Lord Ordinary repelled the defences, and granted decree of divorce. The defender having reclaimed, the pursuer objected to the competency of the reclaiming-note on the ground that a copy of the record had not been appended thereto in terms of the Act of Sederunt of 11th July 1828, section 77.

The Court *repelled* the objection on the ground that the record had never been closed, and that the section only applied to cases in which there was a closed record.

On 10th November 1894 Dina Dombrowizky, 23 St Mary Street, Edinburgh, raised an action of divorce against her husband Joseph Dombrowizky, on the ground of adultery.

The time for lodging defences having passed without any defences having been lodged, the Lord Ordinary, on the pursuer's motion, found the libel relevant, and fixed a diet for proof.

The defender appeared at the diet of proof by counsel, and cross-examined the pursuer's witnesses. At the close of the pursuer's evidence he moved for and obtained an adjournment in order that he might lead evidence in defence. He was also allowed to put in defences, in which he denied the adultery, and pleaded no jurisdiction.

On 31st January 1895 the Lord Ordinary (KINCAIRNEY), without having closed the record, repelled the defences, and granted decree of divorce.

The defender reclaimed — The pursuer objected to the competency of the reclaiming-note on the ground, *inter alia*, that a copy of the record was not appended thereto in terms of section 77 of the Act of Sederunt of 11th July 1828, which provides—"That reclaiming-notes not being against decrees in absence, or upon failure to comply with orders, shall at first be moved merely as single bills, and immediately ordered to the roll, and shall then be put out in the short or summar roll as the case may be: Provided always that such notes if reclaiming against an Outer House interlocutor shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record in terms of the statute, if the record has been closed, and also copies of the letters of suspension or advocation and of the summons with amendment, if any, and defences."

Argued for the pursuer—A copy of the record was not appended to the reclaiming-note as was prescribed by section 77 of the Act of Sederunt, 11th July 1828, and it therefore should be dismissed as not being in due form.

Argued for the defender — The section did not apply, for in this case the record had never been closed, and the section only dealt with cases in which there were closed records—*Fleming* v. *Morrison*, June 4, 1835, 13 S. 859.

At advising—

LORD PRESIDENT—The objection fails on the ground that the Act of Sederunt, 11th July 1828, section 77, does not apply.

The Act of Sederunt imposes on a reclaimer the duty of appending to the reclaiming-note "copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed," and it goes on to say that the reclaimer must append "copies of the letters of suspension or advocation and of the summons with amendment, if any, and defences."

The duty of producing the summons and of appending the record to the reclaiming-note does not arise unless you have a closed record, which here you have not.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court repelled the objection.

Counsel for the Pursuer — Trotter. Agent—G. Jack, S.S.C.

Counsel for the Defender — Blackburn. Agents—Anderson & Green, S.S.C.