

Saturday, July 3.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

ROSS v. ROSS.

Process—Reclaiming-Note—Competency—
Consistorial Cause—Decree *in foro*.

Where in an action for divorce the defender, though appearing by counsel, did not lodge defences or contest the case on the merits, or oppose the granting of decree, held competent for the defender to reclaim against the decree of divorce on the ground that his appearance by counsel was an appearance for all purposes, and therefore that the decree was pronounced *in foro*.

Opinion (per Lord M'Laren and Lord Kinnear) that in consistorial causes a defender who has lodged no defences, and who has not appeared either in person or by counsel in the Outer House, is not thereby debarred from reclaiming against the Lord Ordinary's judgment.

On 12th October 1896 Lady Ross, wife of Sir Charles Ross of Balnagown, Ross-shire, raised an action of divorce against her husband on the ground of adultery.

No defences were lodged, and upon 31st October the Lord Ordinary (KYLACHY) found the libel relevant and appointed the proof to be taken on 11th December.

On 8th December Sir Charles Ross raised an action of divorce against his wife on the ground of adultery, and on 9th December the following interlocutor was pronounced—"The Lord Ordinary, in respect it is stated that a counter action has been served, discharges the diet of proof for the 11th inst."

The following interlocutors were further pronounced in the cause:—"17th February 1897.—The Lord Ordinary appoints the proof allowed by the preceding interlocutor of 31st October last to take place on Wednesday, the 17th day of March next, at ten o'clock forenoon, and of new grants diligence for citing witnesses and havers." "17th March 1897.—Finds facts, circumstances, and qualifications proved relevant to infer that the defender Sir Charles Henry Augustus Frederick Lockhart Ross, baronet, has committed adultery: Finds him guilty of adultery accordingly; but *quoad ultra*, in respect of the dependence of a counter action at the instance of the defender against the pursuer, supersedes further consideration of this cause until the said counter action is ripe for judgment." "20th March 1897.—. . . The Lord Ordinary, on the motion of the pursuer, and in respect the proof in the counter action does not take place until the 19th May next, decerns *ad interim* against the defender for payment to the pursuer of the additional sum of £100 in name of aliment." "12th June 1897.—The Lord Ordinary, in respect of the finding contained in the preceding interlocutor of 20th March last, divorces and separates the defender Sir Charles Henry Augustus

Frederick Lockhart Ross from the pursuer Dame Florence Winifred Berens or Ross, her society, fellowship, and company, in all time coming, and finds, declares, and decerns in terms of the conclusions of the libel: Finds the pursuer entitled to expenses," &c.

Proof in the counter-action had been led before the interlocutor last quoted was pronounced.

From the statements of counsel at the bar it appeared that the defender's counsel did not cross-examine any of the witnesses at the proof, but when the proof was closed asked the Lord Ordinary not to pronounce decree until the counter-action should be determined. The defender, however, did not resist the granting of decree of divorce on 12th June, or in any way contest the case on the merits.

The defender reclaimed against the interlocutor of 12th June 1897.

On the reclaiming-note appearing in the Single Bills, the pursuer argued that it was incompetent, on the ground that the decree appealed against was a decree in absence, the defender not having been present at the proof, and that his remedy would have been to apply to be reponed within ten days of judgment being pronounced in terms of section 23 of the Court of Session Act 1868. The period of ten days having expired, the decree of divorce had become final.

Argued for the defender—The reclaiming-note was competent. Every consistorial action was *in foro*, and section 23 of the Act of 1868 applied only to cases appearing in the undefended roll, where no consistorial action ever did appear. Even if this rule were held not established, the defender had appeared at critical stages of the case. The defender referred to 11 Geo. IV. and 1 Will. IV. cap. 69, sec. 11.

LORD PRESIDENT—I think there is no doubt that this reclaiming-note is competent. Upon the proceedings it appears that Sir Charles Ross was represented by counsel at what I may call the two most critical stages of the case. And accordingly I have heard nothing to show that he is not entitled to follow the action forward by carrying on the appeal here.

I by no means imply by my reference to the proceedings in the Outer House that the reclaiming-note would have been incompetent if Sir Charles had stayed away.

LORD ADAM—I am entirely of the same opinion.

LORD M'LAREN—I concur. I agree in an observation made by your Lordship in the course of the argument, that if the defender in a consistorial case appears by counsel at any stage, that is an appearance for all purposes, and that the mere circumstance that he has not thought it consistent with the requirements of the case to contest it on the merits does not prevent the appearance being an appearance on the merits. If it were necessary to consider the point, my leaning would be to go further and hold that although the defender

had not appeared by counsel or in person in the Outer House, he was not thereby barred from presenting a reclaiming-note against the Lord Ordinary's judgment, because he may change his mind, and the decision is not final until the expiry of the reclaiming-days.

LORD KINNEAR—I have no doubt as to the competency of the reclaiming-note. I think a defender in an action of divorce may appear at any time, though he has not put in defences.

The Court sent the reclaiming-note to the roll.

Counsel for the Pursuer—D. F. Asher, Q.C.—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Sol. Gen. Dickson, Q.C.—J. C. Thomson—Pitman. Agents—J. & F. Anderson, W.S.

Saturday, July 3.

FIRST DIVISION.

[Sheriff of Stirling, Dumbar-
ton, and Clackmannan.

PAOLO v. PARIAS.

*Expenses—Decree in Name of Agent—Com-
pensation.*

Held that the unsuccessful party in an action against whom decree had been pronounced for expenses was not entitled to set off against the account of the successful party the expenses for which, prior to the said decree being pronounced, the former had obtained and extracted a decree against the latter in another action relating to the same subject-matter.

Decree for expenses accordingly allowed to go out in name of the agent-disburser of the successful party. *Portobello Pier Company v. Clift*, March 16, 1877, 4 R. 685, distinguished.

Philip Parias raised an action in the Sheriff Court of Clackmannan against Pasquale di Paolo concluding for payment of £30, being the balance of the purchase price of the pursuer's ice-cream business which the defender had contracted to purchase.

The defence was that the pursuer having failed to implement a material part of the contract entered into between the parties, the defender was entitled to refuse to implement his obligation thereunder.

On 17th January 1896 the Sheriff-Substitute (JOHNSTONE) assolized the defender on the defence stated, and his judgment was acquiesced in.

On 1st April 1896 decree for expenses was pronounced against the pursuer, on 20th April this decree was extracted, and on 24th April the pursuer was charged thereon. No payment of expenses was made by the pursuer.

In March 1896 Paolo, the successful de-

fender in the above-mentioned action, raised an action in the same Court against Parias to have him interdicted from carrying on the business of an ice-cream merchant within a radius of ten miles of Alva.

The complainer founded upon the agreement which he had repudiated in the previous action, and on 20th April 1896 the Sheriff-Substitute (LIDDELL) found that the contract founded on by the complainer had been discharged in virtue of the judgment in the previous action, and refused interdict.

After sundry procedure the Sheriff (LEES) adhered to this interlocutor on 2nd June 1896.

On 8th July 1896 the Sheriff-Substitute (JOHNSTONE) approved of the Auditor's report on the defender's account of expenses, and allowed decree for said expenses to go out and to be extracted in name of a solicitor at Alva as agent-disburser for the defender.

The complainer appealed against this interlocutor, and, relying on the case of the *Portobello Pier Company v. Clift*, March 16, 1877, 4 R. 685, maintained that the account of expenses in the first action, which had not yet been paid, should be set off against the account of expenses in the present action, and that the complainer should be found liable for payment of the balance only.

The respondent argued that the case was distinguishable from *Clift*, the two actions not being concurrent, but the former one having been disposed of and decree extracted before judgment was pronounced in the latter.

LORD PRESIDENT—I must own that I have some sympathy with the proposal to refuse to allow decree to go out in the agent's name, but at the same time this is a matter of right, and we can only assent to Mr Wilson's proposal if it falls within some recognised rule of practice. Now, it seems to me that the fatal defect of the argument is that the decree in the other action in the Sheriff Court was granted and had been extracted before this appeal ever came into Court. It had therefore passed into the region of a judgment debt, historically, no doubt, arising out of a dispute on the same subject-matter, but not out of a living proceeding.

I am of opinion, therefore, that the case of *Clift* does not apply, and that we cannot refuse the motion.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the Auditor's report, decerned against the pursuer for the taxed amount of the defender's account, and allowed the decree therefor to go out in the name of the agent-disburser.

Counsel for the Complainer—Wilson. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Respondent—Forsyth. Agent—W. Ritchie Rodger, S.S.C.