either in the terms of the clause or in the good sense of the matter for such an opinion. It is clearly of as great if not greater importance to a litigant that he should be able to extract the final decree on the merits without awaiting the taxation of his account of expenses as that he should be able to extract an interim decree at an earlier stage without awaiting the conclusion of the cause. This case is a very good example. The time when decree was pronounced was 19th July, and I understand that it would have been impossible for the pursuers to have got their account of expenses taxed and decerned for before the meeting of the Court in October. It was not maintained before us, although it may have been suggested, that before 1850 it was incompetent to obtain special authority from the Court to extract decree on the merits, reserving right to come back for approval of the Auditor's report and decree for expenses. The case of the *Magistrates of Rothesay* indicates the contrary. And it does not seem to me that the words of the 28th section are confined to interlocutors prior to the final decree on the merits, the words used being "Every decree granted or to be granted during the dependence of a process," which are certainly wide enough to include a final decree.

I therefore, with great respect, am of opinion that we are not bound by the expression of opinion made *obiter* in the case of *Taylor* v. *Jarvis*.

I express no opinion as to the competency of the reclaiming-note, which was assumed.

The Court adhered.

Counsel for the Pursuers and Respondents—Campbell, K.C.—Dewar. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders and Reclaimers—Chree. Agents—Gill & Pringle, S.S.C.

Wednesday, December 4.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ELLISON *v.* ELLISON.

Husband and Wife—Divorce—Action for Divorce and for Recovery of Terce, Jus Relictæ, and Conventional Provisions—Arrestment—Recal—Process—Diligence—Debtors (Scotland) Act 1838 (1 *and* 2 *Vict. cap.* 114) (*Personal Diligence Act*), *sec.* 16.

A wife brought an action against her husband, which contained (1) a conclusion for divorce on the ground of adultery, and (2) conclusions for the recovery of the terce and *jus relictæ* and the conventional provisions to which she would be entitled on obtaining decree of divorce. The pursuer used arrestments on the dependence of this action. The Court *recalled* the arrestments, upon the ground (1) that the case must be treated as if two separate actions had been raised by the pursuer, one for divorce and the other containing the pecuniary conclusions, and (2) that arrestment on the dependence would not have been competent in either of these actions, in respect that arrestment is not competent upon the dependence of an action of divorce, and that meanwhile the wife would have had no title to sue an action for terce, *jus relictæ*, and conventional provisions.

Question—Whether the arrestments would have been competent if it had been relevantly averred that the husband was *vergens ad inopiam* or *in meditatione fugæ*.

Question—Whether an action combining such conclusions was competent. *Opinions reserved.*

Expenses—Husband and Wife—Recal of Arrestments in Action Containing, inter alia, Conclusions for Divorce.

In an application for recal of arrestments used on the dependence of an action at the instance of a wife containing a conclusion for divorce and also conclusions for recovery of terce, *jus relictæ* and conventional provisions, the Court, having recalled the arrestments as incompetent, *found* the wife liable in expenses, upon the ground that the question was not properly consistorial.

Section 16 of the Debtors (Scotland) Act 1838 (1 and 2 Vict. cap. 114) (Personal Diligence Act) provides that "It shall be lawful to insert in summonses . . . concluding for payment of money a warrant (or will) to arrest the moveables, debts, and money belonging or owing to the defender until caution be found." . . .

This was an action at the instance of Mrs Jenny Galbraith Hamilton or Ellison against her husband Robert Arthur Ellison. The summons concluded (1) for divorce on the ground of adultery, and (2) "upon decree being pronounced in terms of the foregoing conclusions for divorce," for declarator that the pursuer was entitled to implement of the provisions in her favour contained in her marriage-contract, and to the terce and *jus relictæ* to which she would have been entitled at the defender's death. There was a further conclusion for count, reckoning, and payment, with a view to recovery of her *jus relictæ*.

On 28th September 1901 the pursuer used arrestments on the dependence of the action.

The pursuer averred that the defender earned a salary of £400, "and that in addition he has a substantial annual income from other sources." She averred further, however, that she had reason to believe that in the event of her raising the present action he would alienate his property so as to prejudice her rights consequent on divorce, and that he had in fact transferred certain shares. The pursuer further averred—"Upon the defender's own statement of the value of his estate he is *vergens ad inopiam*."

The defender presented a petition for recal of the arrestments.

The Lord Ordinary (STORMONTH DARLING) on 12th November 1901 recalled the arrestments as craved, reserved all questions of expenses, and decerned, and granted leave to reclaim.

Opinion.—"I think I must recal these arrestments, leaving it open, of course, to the pursuer to proceed by way of letters of arrestment or otherwise at some future time if so advised. It is clear that the use of diligence on the dependence of an action of divorce containing no pecuniary conclusions except for expenses is incompetent, and the mere addition of a conclusion for aliment to the children does not in my view affect this, for that is not a debt which can be due by the defender to the pursuer until the question of custody has been determined in her favour. The pursuer here has chosen the unusual and I think inconvenient course of combining two actions in one, namely, an action for divorce and an action for recovery of the legal and conventional provisions to which she would be entitled on obtaining decree of divorce, but she quite recognises that she has combined two essentially separate things, for she prefaces the second series of conclusions with the words, 'and further, upon decree being pronounced in terms of the foregoing conclusions for divorce.' At present we are at the stage of adjusting the record on the question of divorce, and the defender complains that his estate ought not to be tied up at present merely because it may turn out eventually that he must pay to the pursuer the legal and conventional provisions due on the dissolution of the marriage. I do not say that a case might not be made out justifying the use of diligence on the dependence of such a summons as this. On the authorities it appears that averments to the effect that the defender was *vergens ad inopiam* or *in meditatione fugæ*, or was making away with funds so as to defeat the pursuer's claims, might render such diligence competent, even in the case of a future debt. But the condescendence with which the pursuer has come into Court contains no such averments; on the contrary, it affirms that 'the defender is in a good financial position.' No doubt the pursuer says now that she is prepared to make other averments, but I do not see that a mere offer to make such averments in answer to a petition for recal of arrestments can justify the previous use of these averments. A person who uses diligence must be prepared at the moment he uses it to make such averments as are necessary to justify its use.

"I accordingly think that the arrestments laid on by the pursuer are bad, and that the defender is entitled to have his estate liberated. It will, of course, be open to the pursuer to lay on the arrestments again by a separate proceeding if she can make the proper averments. I shall reserve the question of expenses, and grant leave to reclaim."

The pursuer reclaimed, and argued—Having a right to decree of divorce she was also entitled to the consequences following thereon, *i.e.*, to her legal and conventional provisions, and accordingly, seeing that the summons contained pecuniary conclusions, she was entitled to lay on the arrestments. The case of *Manderson* v. *Sutherland*, February 28, 1899, 1 F. 621, 36 S.L.R. 432, showed what the result of obtaining decree of divorce would be, viz., that she would be entitled to decree on the other conclusions. Under section 16 of the Debtors (Scotland) Act 1838 (1 and 2 Vict. cap. 114), (Personal Diligence Act) where there was a conclusion for payment of money a warrant to arrest might be competently inserted in the summons. Accordingly, the criterion was whether the summons contained pecuniary conclusions, and if it did the Court would sustain arrestments—*James* v. *James*, July 10, 1886, 13 R. 1153, 23 S.L.R. 819; *Ketchen* v. *Grant*, July 5, 1871, 9 Macph. 967, 8 S.L.R. 625; *Telford's Executor* v. *Blackwood*, February 3, 1866, 4 Macph. 369, 1 S.L.R. 136; *Marsh* v. *Miller*, November 24, 1849, 12 D. 172; *Farrell* v. *Willox*, February 10, 1849, 11 D. 565; *Smith* v. *Cameron*, June 28, 1879, 6 R. 1107, 16 S.L.R. 685; *Geddes* v. *Geddes*, March 14, 1862, 24 D. 794. The only case really in favour of the defender's view was that of *Cunningham Fairley* v. *Her Husband*, May 21, 1814, quoted in Fraser on Husband and Wife, i. 579. The mere fact that the debt was not instantly prestable did not make necessary an averment that the husband was *vergens ad inopiam*, but here the defender's own averments amounted to that, and it was clear that he was making away with his estate to defeat the pursuer's claims.

Argued for the defender—The Personal Diligence Act left untouched the general principles of the law of recal of arrestment as laid down by the Institutional writers. Before the pursuer could have any rights to *jus relictæ* the marriage must be dissolved. She was not a creditor till then. The case of *Cunningham Fairley*, quoted by Lord Fraser, had never been doubted. Arrestments were incompetent on a debt which was future and contingent—2 Bell's Comm. 69; *Smith* v. *Cameron*, *supra*, at p. 1108; *Symington* v. *Symington*, December 3, 1875, 3 R. 205, 13 S.L.R. 124. The only possible exception to the general rule was the case of a defender *vergens ad inopiam*, and the pursuer's statements on record negatived that idea.

LORD ADAM—The question now before us arises upon a petition for the recall of arrestments by the defender in an action upon the dependence of which the arrestments were used. In disposing of this application the Lord Ordinary has come to the conclusion that the arrestments should be recalled, and I agree with his Lordship.

The arrestments were used upon the dependence of an action of divorce by the wife against the husband. The conclusions of the action are not, however, limited to a conclusion for divorce, but combined with that conclusion there are other conclusions with reference to the pursuer's rights in the event of her obtaining divorce, viz.,

her rights to certain conventional provisions, and her legal rights which would arise if her husband were naturally dead. I must say I concur with an observation from the Bar that this is a most unusual form of action. I do not remember to have come across such an action in the course of an experience which has not been limited, and indeed there seems to be good reason why the course which has been adopted by the pursuer in this case should not be sanctioned by the Court.

But it is not maintained in this case that the action is incompetent, and I propose to consider the case as if it were competent, although I decline to offer any opinion on the question. The question thus is whether, assuming the form of action not to be open to objection on general grounds, arrestment used on its dependence is competent. Mr Ure maintained that the arrestments were justified by the terms of section 16 of the Personal Diligence Act 1838, which declares that it shall be lawful to insert in summonses raised in the Court of Session "concluding for payment of money" a warrant to arrest the moveable estate of the defender till caution be found.

It appears to me that this section is merely meant to facilitate procedure in the matter of laying on arrestment, but not meant to make lawful arrestment in cases in which it would not previously have been lawful, or to alter the rights of parties in that respect.

The question thus comes to be, whether the arrestments used on the dependence of this action would have been competent at common law and apart from the statute.

Now in dealing with this question it appears to me that the conclusions of the action must be treated as separate, and the case dealt with as if there were two actions—one containing the conclusion for divorce and the other containing the conclusions for the pursuer's pecuniary claims. The latter action would not, in my opinion, sustain the arrestments, because the pursuer would have no title to insist in it—being at its date a married woman with a husband alive—and such an action would be open to be dismissed on a plea of no title to sue. If this be so, then the question comes to be, is it competent to use arrestment on the dependence of an action for divorce.

In my opinion a married woman bringing such an action has no right to use arrestment against her husband's estate. There is no practice in favour of such a proceeding, for the reason that the pursuer of such an action has no debt due to her while her status remains that of a married woman. No debt can arise until her status is altered and she acquires rights by reason of her husband's civil death under a decree of divorce. But the rights which she acquires by such a decree cannot belong to her when the action is brought and before the decree is obtained, so as to justify arrestment on the dependence.

It may be that where the husband is *vergens ad inopiam*, or *in meditatione fugæ*, and when this is duly set forth on the record, a case might arise where diligence would be competent; but taking the case as presented to us, I agree with the Lord Ordinary that the arrestment here was incompetent and should be recalled.

LORD M'LAREN — The arrestments in question were used on the dependence of an action, which concludes, first, for decree of divorce, and secondly, that on decree of divorce being pronounced in terms of the first conclusion the pursuer should be found entitled to an annuity of £100 a-year in terms of her conventional provisions, and that she should also be found entitled to one-third of the rents of her husband's heritable estate as terce, and one-third of his moveable estate as *jus relictæ*, and then follow conclusions for accounting and payment.

The action, as has been observed, is very unusual in form, and I may say that I have never seen an action of divorce combined with a count and reckoning. Supposing such a hybrid action to be competent, it is perfectly clear that by combining two actions in one the pursuer can have no advantage, unless in economy of expenditure, which she would not have had if she had brought separate actions. It is then legitimate to treat the case as if the actions had been separate. Suppose that an action were brought by a wife concluding for declarator that, in the event of the dissolution of the marriage by death or divorce, she should be found entitled to her marriage-contract provisions, and also to her terce and *jus relictæ*, and that an account should be taken of her husband's estate. What would be the worth of such an action? There would be more than one conclusive answer, one being that the instance would not be good without the husband's consent. But again, how is it possible during the subsistence of the marriage that the question of the value of the estates at the dissolution of the marriage should be entertained. The estate might be all consumed by its owner and nothing left to his heirs. It would be in vain to say that such an action, raised during the lifetime of a moribund husband, or one whose conduct had entitled his wife to decree of divorce, should be kept alive until the dissolution of the marriage. Whatever might be thought of such a possibility, it might be taken for granted that no judge would authorise the issue of letters of arrestment for a debt which might never exist, and which was contingent on events which might never occur. If the debt were certain in amount and only contingent on an event which must happen, there are then the conditions of a vested right, and the result might be different.

I agree with your Lordship that the pursuer can take no advantage from section 16 of the Personal Diligence Act 1838 which she would not have had if she had proceeded according to the older practice by presenting a bill for letters of arrestment. That section is a mere simplification of process and saving of expense. In my opinion the Lord Ordinary's judgment is right.

LORD KINNEAR—I am entirely of the same opinion. The action is novel and indeed unprecedented, and it follows that there can be no direct authority for holding that it will support the arbitrary diligence which the pursuer has used.

We are, I think, to assume that the action as framed is not absolutely incompetent, because the defender's counsel—no doubt for sufficient reasons—has taken no plea to title or competency, but still, without deciding that it is competent or incompetent, we must consider what its true character is, and it is obvious that it is a combination in effect of two separate actions—an action for divorce and an action for enforcing rights that may accrue to a divorced wife after she has obtained decree of divorce. The two actions, although they are put into one summons, are so entirely separate that the right to sue the second cannot emerge until the first has been followed out to decree. So long as the pursuer remains a married woman it is clear that she can have no right to enforce an action against her husband for the performance of contractual obligations prestable only at his death. We must therefore consider the second branch of the action as being withheld from consideration until decree shall have been obtained in the first branch, because otherwise it would be incompetent, and that is very clearly set out in the terms of the summons. It follows that at the present stage we must regard this as an action of divorce and nothing else, and I agree that the use of arrestment on the dependence of an ordinary action of divorce is incompetent. A wife who has obtained divorce may arrest on the dependence of an action for her *jus relictæ* and marriage-contract provisions, but until she has obtained divorce she cannot raise her action, and cannot use arrestment on the dependence of a simple action of divorce. I therefore agree in the judgment proposed, and I think the Lord Ordinary puts his judgment on the proper ground when he says the arrestments are bad, and not merely that the circumstances justify their recal.

The LORD PRESIDENT was absent.

The defender moved for expenses.

The pursuer maintained that as this was a consistorial cause she ought not to be found liable in expenses.

LORD ADAM—The question we have dealt with in this case does not appear to me to be a proper consistorial question, and I therefore think that the respondent is entitled to his expenses in accordance with the ordinary rule.

LORD M'LAREN—I agree. It may turn out that the wife's estate is valueless, but it appears that she has certain rights under a trust, and I agree that this question, not being consistorial, must follow the ordinary rule as to expenses between party and party.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered, and found the pursuer liable in expenses from the date of the interlocutor reclaimed against.

Counsel for the Pursuer—Ure, K.C.—Ainslie. Agents—Smith & Watt, W.S.

Counsel for the Defender—Shaw, K.C.—Orr. Agents—Simpson & Marwick, W.S.

Wednesday, December 4.

FIRST DIVISION.

[Sheriff Court at Perth.

ARROL & SONS *v.* CHRISTIE.

Bankruptcy—Sequestration—Notour Bankruptcy—Expired Charge on Decree in Absence—Recal of Decree in Absence before Expiry of Induciæ in Petition for Sequestration.

A debtor allowed a charge on a decree in absence to expire without payment, and the creditor presented a petition for sequestration. Before the induciæ in the petition for sequestration had expired, the Sheriff, on the motion of the debtor, recalled the decree in absence.

Held that the decree in absence having been recalled there was no evidence of notour bankruptcy, and that consequently the petition for sequestration fell to be *refused.*

This was an appeal from the Sheriff Court at Perth in a petition for sequestration upon which sequestration had been refused.

On 1st October 1901 Archibald Arrol & Sons, 16 Dixon Street, Glasgow, pursuers, obtained a decree in absence in the Sheriff Court at Perth against Annie Christie, Ancaster Arms Hotel, Comrie, for a debt which they alleged to be due to them by her.

On 14th October the pursuers executed a charge on the decree in absence, which expired without payment by the defender on 21st October.

On 24th October the pursuers presented a petition for sequestration of the defender's estates.

On 25th October, in the original action at Messrs Arrol's instance, the Sheriff-Substitute (SYM) refused a motion by the defender for recal of the decree in absence.

On 4th November, before the induciæ had expired in the petition for sequestration, the Sheriff (JAMESON) recalled the Sheriff-Substitute's interlocutor of 25th October refusing the defender's motion for recal, recalled the decree in absence of 1st October, and allowed defences to be received.

On 7th November the Sheriff-Substitute pronounced the following interlocutor:—"In respect the decree in absence upon which the defender was charged has been recalled, and the defender reponed in the action at the instance of the present pursuers against the present defender for pay-