questions of the competency of the application, and I see no reason to doubt that the Court constituted by the Act has power, within certain limits, to determine preliminary questions which are necessary to explicate its jurisdiction. I say "within certain limits," because it seems to me to be clear that the procedure authorised by the Act was intended to be of a summary nature, and that it was not contemplated that an application under the Act should be used for the determination of questions requiring investigation and procedure appropriate to an action in the ordinary Courts, but not appropriate to an application to a special tribunal constituted for a special and limited purpose, and whose statutory functions are ministerial rather than judicial.

It is probably impossible to formulate any precise rule defining upon the one hand the class of questions which may be competently dealt with in such an application as being necessary to explicate the jurisdiction of the Court, and those upon the other hand which must be determined by the ordinary tribunals. Each case, I imagine, must be dealt with according to its own circumstances, and in the present case I am of opinion that the questions raised in the petition and answers cannot competently be disposed of in the present proceedings.

The respondents are English, and they have not been made subject to the jurisdiction of the Scotch Courts unless they can be held to have prorogated jurisdiction by agreeing that any dispute arising from their contract with the petitioners should be settled by arbitration in Glasgow. But there is a question which appears to me to be one of considerable difficulty, whether the arbitration clause is part of the contract at all, and there is a further question, what is the meaning of the clause, and whether it is not so vague and indefinite that it is impossible to give effect to it. Again, the respondents aver (and I think relevantly) that there is no binding contract, or that it may be set aside on the ground that the parties were not at one as to its subject-matter. These are all questions which must be determined before it can be ascertained whether or not the circumstances exist in which alone an application can be made under the Arbitration Act, and it seems to me that to use such an application as if it included the action or actions necessary for the determination of these questions would be to go altogether outside of the scope and purview of the Act. I therefore agree with your Lordships that the most convenient course is to sist this application in order that the parties may have an opportunity of obtaining judgment upon the questions between them in an appropriate action and before a competent tribunal.

I may add that I entirely adopt the views expressed by your Lordship in regard to the competency of this reclaiming note.

LORD STORMONTH DARLING and the LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to sist process.

Counsel for the Petitioners (Respondents)—Younger, K.C.—Spens. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondents (Reclaimers)—Hunter, K.C.—Chree. Agents—Macpherson & Mackay, W.S.

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*Tuesday, March* 20.

## FIRST DIVISION.

[Lord Dundas, Ordinary.

## STEWART *v.* STEWART.

*Husband and Wife—Divorce—Separation and Aliment—Process—Action of Separation and Aliment Raised Pending Action of Divorce on Same Grounds—Competency—Lis alibi pendens.*

A wife raised an action of divorce against her husband on the ground of adultery. Having changed her mind as to the remedy she desired, she thereafter raised an action of separation and aliment against him on the same grounds without having abandoned the divorce action. The defender pleaded—"The action is incompetent" and "*Lis alibi pendens.*"

*Held* that the action was competent, it being open to the defender in the event of the pursuer not proceeding with or abandoning the action of divorce to move that it be dismissed with expenses.

*Process—Abandonment—Minute of Abandonment—Minute not in Statutory Form—Crave as to Expenses—Expenses Carried by Minute in Statutory Form—Judicature Act* 1825 (6 *Geo. IV, cap.* 120), *sec.* 10.

A pursuer in an action of divorce, after a proof on the question of jurisdiction in which she had been successful, and the expenses of which had been paid her by the defender, changed her mind as to the remedy she desired, and with a view to bringing an action of separation and aliment lodged a minute of abandonment. The minute was not in statutory form inasmuch as it contained a crave that she should be allowed to abandon on payment merely of any expenses the minute itself had caused. *Held* that the minute of abandonment must be in statutory form.

*Opinions* that a minute in statutory form would carry payment of the full expenses, including repayment of the expenses already paid to the pursuer in connection with the question of jurisdiction.

Section 10 of the Judicature Act 1825 (6 Geo. IV, cap. 120), *inter alia*, provides that a pursuer has power "to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent."

On 16th February 1905 Mrs Marion Fletcher or Gordon Stewart, wife of James Gordon Stewart of Newburgh House, Newburgh, Aberdeenshire, raised an action of divorce against her husband on the ground of adultery. The defender admitted on record that he had committed adultery but pleaded no jurisdiction. A proof was accordingly led, with the result that the Lord Ordinary (DUNDAS) on 26th July 1905 repelled the defender's plea of no jurisdiction and found the pursuer entitled to expenses, which were paid on 14th December 1905. Thereafter on 8th January 1906, a reclaiming-note meanwhile having been lodged by the defender and on his motion refused, the pursuer, who had changed her mind as to the remedy she desired, lodged a minute of abandonment.

The minute of abandonment was in the following terms:—"Brown, for the pursuer, stated to the Court that the pursuer abandoned and hereby abandons this action in terms of the statute, and in respect the expenses of the action to date have already been disposed of, he craved and hereby craves the Court to dispense with a remit to the Auditor to tax the defender's expenses and to modify the same."

On 19th January 1906 the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer is liable, as a condition of abandoning the cause in terms of the statute, to make payment to the defender of the taxed amount of the expenses incurred by him in the cause, including repayment to him of the expenses already paid by him to her under the interlocutor, dated 26th July 1905: On the motion of the pursuer grants leave to reclaim."

*Note.*—"After a long and expensive proof upon the question of jurisdiction, in which the pursuer was successful, she now lodges a minute of abandonment. In my opinion this minute in its present form could in no event be sustained, because I think that it is well settled that a minute of abandonment in terms of the statute infers payment of 'full expenses,' and that it must not contain any qualification or reservation whatever, whether in regard to expenses or otherwise—*Adamson, Howie, & Company*, 1868, 6 Macph. 347, per Lord Inglis, 358; *Scott* (*Mackay's Trustee*) v. *Thurso Harbour Trustees*, 1895, 23 R. 268. But the form of the minute might be amended. I understand that what is in my judgment the irregular matter in it was introduced in order to raise sharply for my decision an important issue between the parties in regard to the question of expenses. The pursuer's counsel maintained that the only expenses which she is liable to pay to the defender as a condition of abandoning the action under the statute are such slight expenses as may be incurred incidentally to the presentation of her minute, and that these might be modified by me to avoid the cost of a remit to the Auditor. (*See* per Lord Shand in *Hare* v. *Stein*, 9 R. 910.) The defender's counsel, on the other hand, contended that the sole condition upon which the action can be abandoned in terms of the statute is payment by the pursuer to the defender of the taxed amount of expenses incurred by him in the cause, including repayment to him of the expenses which he has paid to the pursuer in obedience to my interlocutor of 26th July 1905. In my opinion the defender's contention is well founded. The statute (6 Geo. IV, c. 120, sec. 10) gives to a pursuer a power or privilege 'to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent.' It was frankly stated for the pursuer that her purpose in abandoning this cause is to bring another action in a different form, by which, if she succeeds in it, she will be in a position to obtain better financial terms from her husband. I think that if the pursuer raised the present action without due foresight, or without duly counting the cost, that is her affair. My duty is to abide by and enforce the terms of the statute. It appears to me that I cannot do so otherwise than by sustaining the defender's view of the matter as regards her liability to pay his 'full expenses.' The pursuer's counsel relied upon the terms of the fifth clause of the General Regulations appended to the Act of Sederunt, 15th July 1876. In my judgment that clause has no application whatever to the present question. I am not here considering the effect of a general finding of expenses in a concluded cause, nor the merits of the case. I have simply to deal with a minute of abandonment under the statute.

"No specialty in my judgment arises from the fact that this is a consistorial action, because (1) the statute makes no reference to any distinction in regard to such actions, and (2) there was evidence in the proof led before me that the pursuer is possessed of a certain amount of separate estate.

"In the circumstances which have arisen I shall not make a remit to the Auditor at this stage, but simply pronounce a finding in the sense which I have indicated, in order that the pursuer may have an opportunity of reconsidering her position in the light of the views which I have expressed."

The pursuer reclaimed, and argued—The effect of sec. 10 of the Judicature Act of 1825 and sec. 15 of the Act of Sederunt of 11th July 1828 read together gave the pursuer right to abandon her action on payment of the expenses incident to the abandonment. These were all that were due now, for the previous expenses had been disposed of in the minuter's favour. The minute of abandonment must not be made to put the defender in a better position than if he had won—*Lockhart* v. *Lockhart*, July 15, 1845, 7 D. 1045. There was no reservation here as to a new action—*Adamson, Howie & Company* v. *Guild*, June 26, 1867, 6 Macph. 347, at p. 358. The minute therefore being practically in common form should be allowed—*Scott* v. *Thurso Harbour Trustees*, December 11, 1895, 23 R. 268, 33 S.L.R. 202. A wife was not bound in a question with her husband to pay expenses as a condition of abandonment—

*Steedman* v. *Steedman*, March 19, 1887, 14 R. 682, 24 S.L.R. 476.

In the course of the reclaimer's argument the Lord President invited consideration of the question whether a pursuer might not competently bring an action of separation and aliment without formally abandoning a pending action of divorce. Counsel for the reclaimer thereupon moved the Court to sist the case in order that the pursuer might raise an action for separation and aliment against the defender, and the discussion was adjourned on the understanding that the pursuer would proceed with the action of separation and aliment, and that thereafter the Court would dispose of the pursuer's motion to have the divorce action sisted, and also of the reclaiming-note dealing with the minute of abandonment.

On 15th February 1906 the pursuer raised the action of separation and aliment against her husband before the same Lord Ordinary (DUNDAS). The defender lodged defences to this action, and pleaded, *inter alia*—"(1) The action is incompetent. (2) *Lis alibi pendens*."

The Lord Ordinary reported the case to the First Division.

The pursuer at the same time lodged a note to the Lord President stating that the action of separation and aliment had been raised, and craving his Lordship to move the Court to sist further procedure in the action of divorce.

Counsel for the defender objected and opposed the crave of the note.

Argued for the defender—It was incompetent to go on with the second action without abandoning the first. Neither by the device of a "sist" nor by that of "conjunction" could the pursuer have two inconsistent and different remedies concurrently. She might have either but not both on the same grounds. The only authority in the pursuer's favour was a dictum of Lord St Leonards in *Geils* v. *Geils*, November 30, 1852, 1 Macq. 255, at p. 267, quoted by Lord Fraser (H. & W., p. 905). A pursuer might get separation, and thereafter on new facts get a divorce, but she could not on the same facts get both. Two inconsistent actions at the same time and on the same *media concludendi* could not be brought and could not live together.

Argued for pursuer—There was no inconsistency in the Court granting separation and then granting divorce — Ersk. Inst., i, 6, 19. A pursuer was entitled to elect a second remedy and depart from the first. It was not necessary to go through the mere technicality of abandonment. The plea of *lis alibi pendens* was inapplicable, for the *lis* was not the same, viz., in the one case it was divorce, in the other separation. The second action was not incompetent. A pursuer could bring an action with alternative conclusions. Questions of status were not in the same domain of law as questions of contract — they involved considerations of public policy and expediency. The pursuer was entitled to proceed with her action of separation without first abandoning her action of divorce.

At advising—

LORD PRESIDENT—We have here to dispose of two matters, the one being a reclaiming note in the divorce action by the pursuer against a finding of Lord Dundas pronounced on a minute of abandonment lodged by the pursuer, and the other a report by Lord Dundas in an action of separation and aliment between the same parties.

The divorce action was raised first and contained conclusions for divorce and for divorce alone. The ground of divorce which was put forward was adultery. The husband joined issue in that action upon the preliminary question of jurisdiction, and a proof and argument took place upon that question, the result being that the Lord Ordinary held that the jurisdiction had been established. As in the pleadings, so far as upon the merits, the defender had admitted the act of adultery, there would then in ordinary course have only remained an allowance of proof, because of course in a consistorial case a mere admission in the pleadings is not sufficient. But before that took place the pursuer, who had changed her mind as to the remedy she would propose to take, lodged a minute of abandonment. This minute of abandonment was not in the ordinary and correct form—a mere abandonment in the terms of the statute—but had a crave with regard to expenses, the meaning of which undoubtedly was designed to be, that she should be allowed to abandon the action merely upon payment of any expenses the minute itself had caused, in respect that she had already been paid the expenses which had been incurred in the matter of the jurisdiction to which I have alluded. That minute, so couched, the defender objected to, and Lord Dundas upon considering it pronounced the following interlocutor:— . . . [quotes interlocutor *supra*] . . . Before I come to deal with the merits of that I proceed with my narrative. After a certain amount of discussion on the reclaiming note the pursuer made what I may call an alternative motion, that is, the pursuer proposed through her counsel that even although we should be of opinion with the Lord Ordinary on the findings in the interlocutor that we should grant a sist of the action, the avowed purpose being that the pursuer might then proceed to raise an action of separation which is now the remedy she declares she wishes. Your Lordships thought that the matter might be more expeditiously dealt with if for the moment we superseded giving any judgment upon the reclaiming note and the motion for the sist, allowing the pursuer to raise her action of separation and aliment in order to see if that action could go on. Accordingly the pursuer did raise before Lord Dundas an action of separation and aliment, founding of course upon the same *media concludendi*—the act of adultery—and to that action the defender lodged defences in which he pleads *lis alibi*

*pendens* and incompetency, these pleas of course being both based upon the same substratum of fact, namely, the dependency of the divorce action. Lord Dundas reported the case, so that in that action your Lordships are now really to give your opinions as to what judgment Lord Dundas should give on these pleas in the procedure roll.

Referring now to the reclaiming note in the action of divorce, so far as Lord Dundas' opinion is concerned I agree with him. I am not quite certain whether he really ought to have pronounced any such opinion, because I rather think the strict and accurate method of dealing with the matter should simply have been this, to refuse to accept any minute which was not in the pure words of the statute, and thus to leave for after consideration what the effect of that minute was. His Lordship did not take that view, and as he has pronounced an opinion on what is the true effect of the minute under the statute, I see no harm at least in saying that I think his Lordship has taken completely the correct view, and accordingly if there was to be a minute of abandonment here it would have to be in the absolute terms of the statute, which would carry the whole expenses.

Well now, that being so, there comes the second question of the motion for a sist. Now that question, although of course it comes up in this action, really must depend upon what view we are going to take of the other action, and accordingly I leave this action again for a moment to go to the second action.

The question is, is it or is it not possible for a spouse to raise an action of separation or aliment while there is an action of divorce pending. I am of opinion that it is possible. In the first place, I see no reason to doubt that the summons could have been brought with alternative conclusions for divorce or separation and aliment. It is of course, I quite see, unusual that that should be done where there is only one and the same *medium concludendi* and where the pursuer is clearly entitled to either remedy, but I can conceive several cases where the alternative conclusions would, in my opinion, be quite appropriate. For instance, if a wife believed that her husband had committed adultery, and also believed that he had been guilty of cruelty—I am supposing that the wife wished to get divorce *a vinculo*, but yet it is quite obvious that as a matter of fact she might not be able to substantiate adultery against her husband and yet might well be able to substantiate cruelty. Now, I cannot see any incompetency or unreasonableness in a case of that kind of raising an action with alternative conclusions and saying "I propose to show my husband has been guilty of adultery, but if I fail and cannot get divorce then I sue for a separation and aliment on the ground of cruelty." It would seem to me to be quite an abuse of process to say that the wife in this situation must not raise an action with alternative conclusions but must betake herself first to whatever remedy she prefers, and having failed, try again with another action.

Accordingly, I begin my consideration of this question by settling in my own mind that an action with alternative conclusions would be competent.

Well now, if an action with alternative conclusions would be competent, I see no reason why you should not have these conclusions which are alternative in two separate actions. It is perfectly true you cannot get decree in both actions, at least concurrently. It is perfectly true, also, that if you did proceed to get decree in the divorce action it would thereafter be quite impossible to get decree in the separation and aliment. It is not quite clear if you got decree in the separation and aliment, that you might not go on to get decree in the divorce. But while I think all these things are possible I am not for one instant suggesting that a person could do so and simply keep the judge in the dark as to what her proceedings were to be. I think, as the ordinary master of the procedure before him, that the judge would be perfectly entitled to put the pursuer, before she actually asked for a decree, to her election as to which remedy she was going to ask. Nay more, I can understand that the judge also would be entitled to know precisely what form of proof was to be granted. But these are all matters which do not go to competency, but simply to general command over the process, for a judge must have power to keep the litigation within due bounds. Accordingly, I am of opinion that these two pleas are bad pleas and that in this action of separation and aliment the pursuer here is entitled to go on, and that if she proves the proper medium she is entitled then to ask for decree in that action, notwithstanding that there is in the Court another action, namely, an action for divorce.

But reverting now to the first action, I do not think the pursuer is entitled to a sist. I quite agree that it must just suffer the fate of other actions. If she does not abandon it she need do nothing, and then the matter lies with the other party, and then I think, as in every action, the one party can always ask that the action should be disposed of either by absolvitor or dismissal, although I do not think absolvitor is the proper decree in a consistorial case. Accordingly, it seems to me that if the pursuer does nothing the defender is perfectly entitled to have the action of divorce dismissed. The result of that would be, of course, that he would have a finding of expenses as against her, but these expenses would not be made a condition-precedent to her proceeding with the separation action, which would be the result if we decided that the divorce action must be first abandoned under the statute.

I therefore think what we should do is, in the original case, *i.e.*, the action of divorce, (1) refuse the reclaiming note, and (2) refuse the motion to sist, and remit the case to the Lord Ordinary; and in the separation and aliment case we should instruct his Lordship to repel the pleas of *lis alibi pendens* and incompetency and proceed with the action as shall be just.

LORD M'LAREN—I may say frankly that after hearing the argument I am disposed to think the first action should be got out of the way, but after conferring with your Lordships and considering the tendency of recent decisions to restrict the plea of *lis alibi pendens*, I am not prepared to take a different view. I have not the least doubt that an injured wife is entitled to bring an action with alternative conclusions, and the only difficulty would be if by bringing the action at a later stage the other parties should be put to additional expense. Now that cannot be said here, for the proof which took place was confined to the question of jurisdiction. If the pursuer here had gone to proof on the merits, and had afterwards sought to change the issue from divorce to separation, it might very well be that your Lordships would have made it a condition that expenses should be paid, but that point does not arise here. I am satisfied that neither the plea of incompetency nor that of *lis alibi pendens* ought to be allowed to prevail.

LORD KINNEAR—I agree entirely with your Lordships, and think the Lord Ordinary was absolutely right in holding that the minute of abandonment could not be sustained inasmuch as the statutory condition had not been complied with, and therefore as far as that question goes we can only adhere. On the second point, I agree with your Lordships in thinking that there is nothing incompetent in raising the action of separation when the other action is in Court, and that the pleas of incompetency and *lis alibi pendens* must be repelled. But it does not follow that the pursuer is entitled to a relaxation of all the ordinary rules of procedure to such an extent as to put her exactly in the same position as if she had brought one action at the outset with alternative conclusions. It appears to me that her motion for a sist should be refused. Each case will then follow the ordinary course of procedure before the Lord Ordinary.

LORD PEARSON—I entirely agree with your Lordship, subject to a qualification in regard to one point. I still entertain some doubt on the Lord Ordinary's finding with regard to repayment to the defender of the expenses already paid. We have not before us a proper minute of abandonment in terms of the statute; and in my view the question whether such a minute would infer repayment of those expenses is not competently raised. While concurring in the course proposed, I would not be held as committed to the defender's view on that question.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming note for the pursuer against the interlocutor of Lord Dundas, dated 19th January 1906, along with the note for the pursuer, Adhere to the said interlocutor: Refuse the reclaiming-note, also refuse the crave for a sist contained in said note, and decern; and remit to the Lord Ordinary to proceed as may be just: Find no expenses due to or by either party since 19th January 1906."

Counsel for the Pursuer and Reclaimer—Dean of Faculty (Campbell, K.C.)—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defender and Respondent—Lord Advocate (Shaw, K.C.)—Clyde, K.C.—Orr, K.C.—Mitchell. Agents—Winchester & Nicolson, S.S.C.

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*Tuesday, March* 20.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## LANARKSHIRE UPPER WARD DISTRICT COMMITTEE *v.* AIRDRIE, COATBRIDGE, AND DISTRICT WATER TRUSTEES AND OTHERS.

*Limitation of Actions—Public Authorities Protection Act* 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1—*Company Incorporated by Act of Parliament—Action to Recover Cost of Repairing Road Opened by Company under Statutory Power—Turnpike Roads Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 100—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *and Sched. C, sec.* 100.

In an action by a District Committee of a County Council against Water Trustees as the successors of a Water Company incorporated by Act of Parliament and the contractors, for the expense incurred in repairing and restoring a road which the Water Company had opened under powers in their Act, but which as alleged had not been properly restored, the defenders pleaded that the action was barred by the Public Authorities Protection Act 1893, sec. 1, as not being timeously brought.

*Held* that as the Water Company was in fact and in substance a commercial company, empowered for its own purposes and with a view to profit to carry on the undertaking, it was not a public authority in the sense of the Act, and so was not protected thereby.

*Held*, further, that as the action was laid on section 100 of the General Turnpike Act 1831 (incorporated in the Roads and Bridges Act 1878, by sec. 123 thereof), it was not a claim in respect of an act or default on the part of the Water Company, and therefore not an action or proceeding of the nature contemplated by the Public Authorities Protection Act.

*Road—Public Road—Turnpike Roads Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 100—*—Roads and Bridges Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *and Sched. C. sec.* 100—*Recovery of Cost of Repairing Road*