

introduced by these provisions. I don't admit that at all, and I am not sorry that we have come to the conclusion we have arrived at in this case, for I think the nature of the action of reduction is such that it ought to be confined to the Court of Session.

The interlocutors advocated were therefore recalled, and the action dismissed as incompetent, with expenses in this and in the Court below.

Agent for Advocator—John Thomson, S.S.C.

Agents for Respondent—Adam & Sang, S.S.C.

Friday, June 8.

FIRST DIVISION.

COUTTS v. COUTTS.

Husband and Wife—Action of Aliment—Competency. An action of aliment by a wife raised after she had been for eleven years living apart from her husband, notwithstanding his offers to receive her, which she rejected in consequence, as she alleged, of her husband's cruelty, held incompetent in respect there were no conclusions for judicial separation.

This was an action at the instance of a wife against her husband, in which she concluded for payment to her yearly for her aliment of the sum of £75. The parties were married in 1853, but have been living separate from each other since 1855. In the end of that year the wife raised an action before the Sheriff Court of Aberdeen for interim aliment, in which she obtained decree for £26. In that action the defender expressed his willingness to receive his wife back to his house, and in this action he repeated that offer, and said that he had been all along willing so to receive her, but that she refused to return. The wife, on the other hand, averred that she had left her husband's house in consequence of her husband's cruelty towards her. The present action contained no conclusion for separation.

The defender's first plea in law was that "the pursuer had not averred a relevant case to entitle her to insist in this action." The Lord Ordinary (Jerviswoode) repelled this plea, and allowed a proof. The defender reclaimed.

SOLICITOR-GENERAL and MAIR, for him, argued—This action is incompetent because the defender is willing to receive the pursuer into his house. It is no answer to this to say that the defender has treated the pursuer with cruelty, because in that case the action should be for separation and aliment. Countess of Caithness, 25th July 1744, M. 5886; Bell v. Bell, 22d February 1812, F.C.; Anderson v. Anderson, 3d March 1819, F.C. There is no statement as to what the pursuer has been doing in the interval since 1855, and it is not competent at this distance of time to raise a simple action of aliment.

PATTON and THOMS, for the pursuer, replied—The pursuer is not bound to return, if her averments are true, which must at present be assumed, for her life would not be safe. Lady Fowlis, M. 6158; Shand, 28th February 1832, 10 S. 384.

(Lord ARDMILLAN referred to the cases of Williamson, 27th Jan. 1860, 22 D. 599, Couper, 24th Nov. 1860, 23 D. 68; and Paterson, 14th Dec. 1861, 24 D. 215.)

In the course of the argument the defender was allowed to add the following plea:—"The action is in the circumstances averred by the pursuer incompetent, in respect there is no conclusion for a judicial separation."

At advising,

The LORD PRESIDENT said—This is an action at the instance of Mrs Coutts against her husband for payment of the sum of £75 yearly, in name of aliment, from the term of Martinmas 1864. It appears that this lady has been living separate from her husband since 1855. An objection was taken by the husband to the relevancy of the action. He says he has repeatedly offered to take his wife back to live with him—that she had no good reason for going away—and that he is still willing to receive her. She says that his conduct towards her was such as justified her leaving him, and that she cannot in safety return to live with him. The husband denies all this, and objects to a claim being made against him for aliment, there being no conclusion for judicial separation. He pleads that the pursuer has not averred a relevant case to entitle her to insist in this action. Under this plea the averments of the pursuer were somewhat closely criticised, and objections of a broader kind were stated, which some of your Lordships thought amounted to a plea against the competency of the action, and the defender added a plea to this effect. This action has undoubtedly been raised under very unusual circumstances. The lady had been living separate from her husband for about nine years before it was brought. She was not doing so under any arrangement with her husband of the breach of which she complained. What she says is, that her husband's conduct amounted to *sevitia*; and we are asked to investigate a case which, if true, would give grounds for a judicial separation in an action containing no conclusions for separation. I am not aware that any case of this kind has ever occurred; and I am of opinion that the action ought not to be sustained. If the defender had not expressed his willingness to take the pursuer back to live with him, it would have been different. It would then have been an ordinary case of aliment. Perhaps, too, the case might have been different had it been brought immediately. But in the circumstances in which the action has been raised I think it cannot be sustained. It may be a very nice question whether it should be dealt with as an irrelevant or incompetent action. These terms may run very much into one another in their meaning. It is enough that the circumstances disclosed by the pursuer don't warrant the investigation which she seeks, there being no conclusion for separation. This will not prevent her from bringing an action for judicial separation whenever she pleases. There will be conclusions for aliment in that action, under which it will be competent for the Court to award it. This is the opinion of the Court, and in the circumstances of it we don't think it a case for finding the husband liable in the wife's expenses.

Agent for Pursuer—William Officer, S.S.C.

Agent for Defender—James Finlay, S.S.C.

SECOND DIVISION.

SILLARS v. BOWIE.

Cautioner—Relief—Pactum de non Petendo.

Circumstances in which held that a cautioner was entitled to operate immediate relief for payment of the balance of a sum advanced by him to pay the second instalment of a composition due by a sequestrated estate.

The facts of this case were these. The defender, a bankrupt, was discharged, on 2d April 1863, on paying a composition of 5s. 6d. per pound, in two instalments of 3s. and 2s. 6d. respectively. His

cautioners were the pursuer and a person named Thomson, now bankrupt and dead, who concurred with him in granting certain promissory notes to his creditors for said second instalment. When these notes fell due they were dishonoured and protested for non-payment. But in order to raise money to pay the debt it was agreed between the pursuer and defender and the trustee on the defender's sequestrated estate that the defender, with the trustee's concurrence, should assign to the pursuer, *ex facie* absolutely, certain policies of life insurance forming part of defender's assets. Accordingly, in February 1864, an assignation was executed. Upon the pursuer getting the policies, he reassigned them to a Mr Wilson, obtaining from him a loan of £300 on their security. With this sum, and a further sum of £156, 2s. 2d. paid out of pursuer's own funds, the defender discharged said second instalments. Thereafter the pursuer raised the present action for payment of the full sum of £456, 2s. 2d. sterling, in the Sheriff-Court, Glasgow, and was met with the defence that, by the terms of a back-letter granted by the pursuer to defender on 16th February 1864, the pursuer had bound himself to take no steps towards recovering his debt or selling the policies for six months after its date, and that as the action was raised within the six months, it was premature, and fell to be dismissed. In said back letter it was acknowledged that the assignation had been granted in security only of the pursuer's advances to pay the said second instalment of 2s. 6d. per pound, and then followed the clause of the letter on which the whole case turned, and which is in these terms:—"But as I am about to negotiate a loan on said policies to meet said payments in part, and that therefore the said absolute assignation has been necessary, I agree and bind myself, upon said loan being completed, to reassign to you, at your expense, the said policies, under burden of the sums, principal, interest, and penalties, contained in said bond, and all other further sums paid by me in liquidation of said composition, and of any premium I may be called upon to pay to keep said policies in force, with interest thereon, and I bind myself also that said policies will not be sold under the bond to be granted by me for six months from this date."

The Sheriff-Substitute (Strathern) and the Sheriff (Alison) dismissed the action as premature. On advocacy the Lord Ordinary (Mure) adhered. The pursuer reclaimed.

SCOTT and BRAND for him argued—With reference to the balance of £156, 2s. 2d. to which the summons had been restricted in this Court—(1) That it was clear from the letter that only a part of the sum necessary could be raised on the security of the policies, and that the back letter did not affect the pursuer's right as cautioner in the promissory notes to operate immediate relief for payment at least of the said balance not obtained on the security of the policies. (2) That the last clause of the letter related entirely to the money to be advanced by the lender (Wilson), and that even he was not to be bound to give a credit of six months, but only not to sell the policies during that interval. (3) That the right of immediate relief was clear, that it was a favourable right, and being founded always on generous motives, should be neither taken from the cautioner nor suspended, except upon clear words to that effect. (4) That the case of the Dundee Marine Insurance Company v. Brown, 11th Feb. 1847, 9 D. 607, had no application, as here the sum was

due and payable, while in that case the sum sued for was neither due nor payable.

GIFFORD and W. N. M'LAREN, for the defender, answered that, on a fair construction of the back letter and the accompanying facts, it must be inferred that the pursuer had agreed to take no steps for six months, and that therefore, on the authority of the Dundee Marine Insurance Company v. Brown, the action was premature, and ought to be dismissed. It was admitted that the back letter showed that only a part of the necessary sum could be raised on the security of the policies, and that the last clause restricted the lender of the £300, and not the pursuer.

The LORD JUSTICE-CLERK—This action was raised for payment of £456, 2s. 2d. advanced by the pursuer to the defender to enable him to pay the second instalment of his composition. We are all of opinion that the Sheriff-Substitute and the Sheriff were wrong in dismissing the action. We are also of opinion that the pursuer originally asked too much. Instead of asking £456, 2s. 2d. he should have deducted the £300, which was plainly not to be made the subject of demand; but as to the balance, we think his claim is good. Therefore we sustain the pursuer's right to sue, but as he asked too much we find no expenses due to or by either side in the Court below, and in the advocacy we recall the Lord Ordinary's interlocutor, decern for £156, 2s. 2d., superseding extract till the pursuer has reassigned the policies to the defender, and we find the pursuer entitled to the expenses of the advocacy.

Agent for Pursuer—John Walls, S.S.C.

Agent for Defender—William Officer, S.S.C.

CROSBIE v. M'MINN.

Public Houses Act—25 and 26 Vict., cap. 35—Reduction—Relevancy—Jurisdiction—Notice.

(1) Complaint, conviction, and sentence alleged to be under this Act, reduced in respect the complaint did not charge an offence, and the Judge had therefore no jurisdiction to try it; (2) Action of reduction not barred by section 35 of the Act in respect it did not protect proceedings not conducted under the statute.

This was an action of reduction of a complaint, conviction, and sentence against the pursuer, in the Burgh Court of Dumfries, for alleged breach of her hotel certificate, obtained under the 25 and 26 Vict., cap. 35. The certificate, *inter alia*, provides that the pursuer "do not keep open house, or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after eleven of the clock at night, of any day, with the exception of refreshment to travellers, or to persons requiring to lodge in the said premises." The 26th section of the statute under which the complaint apparently professed to proceed requires that the particulars of the offence, and the place and time of commission, should be set forth, and also whether it be a first, second, or third offence, as the case may be. And the pursuer was charged by the Procurator-Fiscal of Dumfries with breach of certificate, inasmuch as "she did unlawfully keep her said inn and hotel or public-house open, by permitting or suffering one or more persons to be therein—viz., John Gillespie, a baker, residing in Dumfries, and others, militiamen, whose names are to the complainer unknown, who were neither lodgers nor persons requiring to be accommodated in said house, inn, or hotel."