

At advising—

LORD COWAN—The competency of this application is involved in and depends on the merits of the suspension, that is, on the general character of the grounds pleaded by the suspender. I cannot think that the right to bring a suspension can be excluded or our interposition prevented where there is a radical defect in the jurisdiction of the Court below. In such cases we have always a right to interfere.

I come, therefore, to consider, in the first place, the grounds of suspension here. But it is pleaded that the suspender has selected to appeal to the Quarter Sessions, and whatever the grounds of complaint against this sentence he must bring them before that Court. If the grounds of complaint had been some objection entering into the merits, and if all had been correct with regard to form, the Quarter Sessions is no doubt the proper Court of Review under the Poaching Act. An appeal then is entered by the suspender, but from that appeal he afterwards departs, either before this application is made to us, or, at all events, the intimation of this suspension was *de facto* a departure from his appeal. Now I think that it was perfectly competent for the suspender to take that course. If he had a right on any ground to come here *ab initio*, nothing which he has done can be construed as depriving him of that right.

I hold that the plea of tried and acquitted is one of the most important pleas excluding further proceedings. If completed proceedings had taken place, the accused could not again be tried on the same charge. Now, what took place here? A complaint was brought before a competent Court; the suspender is brought up and pleads; evidence is heard, and then an interlocutor is pronounced, stating that in consequence of difference of opinion the Justices pronounce no judgment. That is quite sufficient to found the plea of *res judicata*. The Act provides that in case of difference of opinion the complaint shall be held to be not proved, and judgment shall be given for the respondent. The state of matters here is that the event happens (equal division of opinion) on which the Act declares that the acquittal of the accused shall follow; and I cannot for a moment suppose that the failure of the Clerk to point out to the Court the course prescribed by the Act to be followed, or the neglect or refusal of the Justices to follow that course, can prevent the statutory result or deprive the accused of the privilege conferred on him; for I hold that the language of the Act is such as clearly to confer on the accused a privilege. I am therefore for suspending the conviction.

The other Judges were of the same opinion.

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

Agent for Respondent—Neil M. Campbell, S.S.C.

## COURT OF SESSION.

Tuesday, February 1.

### FIRST DIVISION.

HIBBERT, PETITIONER.

(*Ante*, p. 235.)

*Leave to appeal—Divorce—Co-defender—Jurisdiction.*

A co-defender in an action of divorce pled no jurisdiction; leave to appeal to the House of

Lords an interlocutor repelling this plea, *refused*.

This was a petition to the Court for leave to appeal to the House of Lords against a judgment of the Court, dated 14th January 1870.

The petitioner Colonel Hibbert was co-defender in an action of divorce, and pleaded no jurisdiction. He obtained a judgment dismissing the action against him from the Lord Ordinary (ORMIDALE); but on a reclaiming note the First Division recalled the Lord Ordinary's interlocutor, sustained the jurisdiction of the Court, and remitted to the Lord Ordinary to proceed further with the cause.

LANCASTER for petitioner.

A. MONCREIFF in answer.

At advising—

LORD PRESIDENT—If Colonel Hibbert be allowed to appeal this judgment to the House of Lords, the pursuer will either proceed with the action of divorce here or he will not. If he be prevented from proceeding with the cause, not by legal impediment, but by a consideration of the inexpediency of proceeding pending this appeal, the result will be an indefinite delay. If he does proceed, it will be in the absence of Colonel Hibbert, the co-defender. Now, supposing the pursuer successful in proving the acts of adultery alleged against this co-defender, would he be entitled to decree for expenses against him in his absence? I very much doubt whether he would be entitled to such a decree, and consequently, if we allow this appeal we may deprive the pursuer of his right to recover the expenses of process from the co-defender, which is in truth one of the main objects of making him a party to the action.

The counter action by Mrs Fraser complicates the difficulty which I have stated.

On the other hand, it does not appear that our refusal to allow this appeal will entail any material hardship upon Colonel Hibbert. The cause will proceed to its conclusion according to present practice within a very few months. Thereafter, Colonel Hibbert may appeal our former judgment on the question of jurisdiction, and the judgment on the merits at the same time. So far as the co-defender is concerned, therefore, this course will cause him very slight delay, while the other course would occasion indefinite delay and great inconvenience to the pursuer. I am therefore for refusing this petition.

LORD DEAS—I think we ought to do nothing which may stop the progress of this action of divorce. If I thought granting leave to appeal would do so, that would be conclusive to my mind; but I confess that I am not satisfied that it would have that effect. Suppose, for instance, that instead of a unanimous judgment there had been a difference of opinion on the bench, then Colonel Hibbert might have appealed without leave asked. Then the question would have arisen, whether an appeal by him upon the question of jurisdiction would have the effect of preventing the pursuer here going on with his suit as against him? As at present advised, I cannot come to that conclusion.

Suppose, again, that the pursuer was successful in his action against the co-defender, and on appeal to the House of Lords it was afterwards held that the co-defender had never been subject to the jurisdiction of this Court, I confess that, to my mind, he would have suffered material hardship from the course which your Lordships are now going to adopt.

For these considerations, if it had not been for the strong opinions which your Lordships have formed, I should have been inclined to differ; as, however, I was not present when the judgment in question was pronounced, although I feel doubt and difficulty, I will not do so.

LORD ARDMILLAN—Seeing that this appeal, if allowed, would deprive the pursuer, if successful in the action of divorce, from recovering his expenses, it will be both safer and wiser to refuse this leave at present, and by doing all in our power to further the trial of the principal question here, to enable Colonel Hibbert to have his appeal at no distant date.

LORD KINLOCH concurred.

Petition refused.

Agents for Pursuer—Burn & Gloag, W.S.

Agents for Co-Defender and Petitioner—H. & A. Inglis, W.S.

Wednesday, February 2.

BELL v. SHAND.

*Reparation—Assault—Apprehension—Day Trespass Act.* Circumstances in which held that a lessee of shootings who had apprehended a person whom he suspected of poaching, had used no undue violence, and was not liable in damages.

This was an appeal from interlocutors of the Sheriff's Substitute and Depute of Kincardineshire, in an action of damages at the instance of George Bell junior, Clayfolds, Muchalls, in the parish of Fetteresso, and his father George Bell senior, against Mr Thomas L. R. Shand, residing at Muchalls Castle, in the same parish. It appeared from the allegations of the pursuers that Mr Shand, the defender, was lessee of the shootings of Muchalls, and the senior pursuer was tenant of the farm of Clayfolds upon that estate. It was alleged that on 23d October 1867 George Bell junior, a boy of fifteen years of age, was engaged digging potatoes on the farm when he heard a shot fired by his younger brother James. He went up to James and asked him what he had fired at, the reply was "a rabbit," whereupon he took the gun from his brother, and seeing Mr Shand coming forward he concealed it in a stook. Mr Shand then came up, found the gun, and accused George Bell of poaching. The statement of facts for the pursuer proceeds to state that Bell replied that it was his brother who had fired the gun, and that notwithstanding, "the defender, having paid no attention to what the pursuer the said George Bell junior said to him, seized the said pursuer by the collar of the coat, and dragged him forcibly and against his will from the stook where he had been sitting, and continued dragging him in the direction of Clayfolds, accusing the said pursuer at the same time of having been among the turnips—meaning 'floors turnips'—notwithstanding the said pursuer's repeated remonstrances against the defender's conduct, and his assurance that he (the said pursuer) had neither used the gun nor been among the said turnips. After dragging the pursuer, the said George Bell junior, by the collar of the coat as aforesaid across the said field to the distance of twenty yards or thereby, the defender violently threw the said pursuer to the ground, and grasped him tightly by the throat while upon the ground, holding his gun, and also the one the pursuer's brother had, in the direction of the said

pursuer while he was lying upon the ground; but the said pursuer, after struggling for some time, got upon his feet, the defender, however, still retaining his hold of the said pursuer." The father then came up, and Mr Shand, telling him that had he known that the boy was his son he would not have meddled with him, released the boy.

From these violent proceedings of the defenders, Bell alleges that he sustained severe injury, and on 12th December he was examined by Dr Thom, Stonehaven, and Dr Fergusson, Cove, who some months afterwards drew up a certificate in the following terms:—

"Cove, Nigg, March 28th, 1868.

"We hereby certify, on soul and conscience, that we were called to visit George Bell, a lad of fifteen years of age, son of George Bell, Clayfolds, Muchalls, on the 13th December 1867.

"We found him presenting a very sickly appearance. He was affected with diarrhoea, bleeding from the nostrils, and complained of palpitation at the breast, and of frequently awaking from his sleep with starts. His general health was considerably impaired, and his mind seemed to be also somewhat affected. He was in fact dumpish. Both he and his relatives stated to us that he had been in nearly the same condition ever since an encounter with Mr Shand of Muchalls, sometime previously; and they attributed his illness to a severe fright he had received on that occasion.

"We have since separately seen him several times, and have found him affected, more or less, in the same way. From all that we have observed in this case, as well as the history we received both before and after we visited him, we believe that there is the strongest probability that the illness was caused by the fright which it is alleged he received on the occasion of his meeting with Mr Shand.

"JOHN FERGUSON, M.D. M.R.C.S.E., &c.

Cove, Nigg, Kincardineshire.

JAS. TAYLOR THOM, M.D. L.R.C.S.E.,  
Stonehaven, Kincardineshire."

Upon 3d October 1868, after repeated letters to the defender, the pursuers raised the present action, claiming £200 as *solatium* for the injuries he had sustained by the defender's conduct, and for medical attendance.

The defender stated that, imagining that the boy was poaching on his land, and not knowing who he was, he had arrested him without any unnecessary violence. The boy has sustained no injury and was none the worse.

After a long proof the Sheriff-Substitute (DOVE WILSON) pronounced the following interlocutor, to which was appended a most elaborate note:—  
"Stonehaven, 3d May 1869.—Having heard parties' procurators on the record and proof, finds that it is proved that defender did not assault the younger pursuer, and therefore assolizies defender from the conclusions of the action: Finds the defender entitled to expenses, of which allows an account to be given in, and, when lodged, remits the same to the Auditor of Court to tax and report, and decerns."

On appeal this interlocutor was affirmed by the Sheriff-Depute (SHAND) on 24th June 1869.

The pursuers appealed.

BURNET and A. J. YOUNG, for them, pleaded that there had been undue violence used towards the pursuer, which had caused him serious injury; and that the defender had not complied with the pro-