

was not what is called in that system a condition precedent of the obligation to deliver the amount stipulated for December. From any study that I have been able to give to the English cases, I do not think they indicate any material difference in principle from our own rules on this subject. A condition precedent rather states a result than a principle. But a certain amount of technicality has been attributed to the term from the fact that it is truly a phrase of technical pleading. Prior to the Common Law Procedure Act of 1852 it was necessary for the plaintiff in an action founded on breach of contract, not only to set out in his declaration that he had performed those parts of the contract incumbent on him, but to specify the particular parts which he had so performed, and an omission to specify any material part was fatal to his declaration. The case of *Withers*, which was referred to in the debate, and is entirely analogous to the present, is an example; for there the point was raised on demurrer, and the plaintiff was nonsuited because he had not set out in his declaration that he had paid for the straw already furnished. The ordinary reply to such an objection was, that the condition omitted was not one precedent to performance, and therefore not necessary to be stated in the declaration. Hence arose many refinements as to dependent and independent conditions, which have never found place in our system, and since the Common Law Procedure Act of 1852, which altered the nature of the declaration, the views as to conditions precedent have been considerably relaxed, and the intention of parties in the contract more regarded. With us, as I have already said, all the conditions of a mutual contract are dependent on their counterparts, as a general rule, when they are of a substance of or material to the subject matter of the contract itself. (Stair i, 10, 15.) Exceptions may no doubt arise either from the special nature of the contract or in regard to stipulations which are incidental or accidental to the subject matter, or in regard to which, from their comparative insignificance, equity will interfere to prevent contract from being rescinded. For instance, if Turnbull had contented himself with retaining the £80, or if M'Lean had delivered 100 tons short in any one month, these, although in breach of the contract, might not have availed to justify its rescission. But if M'Lean had only delivered half his quantity in November and had given notice that he meant to deliver no greater quantity in December, Turnbull would have been no longer bound, and as the latter, in the present case, refused to make any payment for November, on a ground equally applicable to the December deliveries, and which has now been found to be in breach of his obligation, I cannot doubt the right of M'Lean & Company to rescind the contract as they did.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming note for Hugh M'Lean & Company against Lord Mackenzie's interlocutor of 22d November, 1873, recal the second finding of said interlocutor, and assoilzie Hugh M'Lean and Company from the claim of damages on the part of George Vair Turnbull. Find Hugh M'Lean & Company entitled to the sum of £571, 18s. 9d. with interest thereon, as

concluded for, for which decern. Further, recal the finding of the Lord Ordinary as to expenses; *Quoad ultra* adhere; and find Hugh M'Lean & Company entitled to expenses both in the Inner and Outer House, and decern.”

Counsel for M'Lean & Company—Asher and Mackintosh. Agents—W. & J. Burness, W.S.

Counsel for Turnbull—Watson and Balfour. Agents—Hill, Reid, & Drummond, W.S.

[R., Clerk.]

Wednesday, March 4.

## FIRST DIVISION.

[Lord Mure, Ordinary.]

CHRISTINA MARY CARMICHAEL OR RITCHIE  
v. ROSS AND OTHERS.

*Divorce—Reclaiming Note—Right of third parties to sist themselves.*

A husband obtained decree of divorce in the Outer House against his wife, who reclaimed; before the reclaiming note came on for hearing the husband died and the case was dropped. The wife thereafter raised an action against her husband's trustees for payment of her conventional or legal provisions as widow,—held that the trustees were entitled to sist themselves in the action of divorce and to defend the decree obtained by the husband.

The pursuer of this action was married to George Ritchie in 1852, and on Feb. 28, 1872, Lord Ormidale pronounced decree against her in an action of divorce at the instance of her husband on the ground of adultery. A reclaiming note against this judgment was presented by Mrs Ritchie on March 20, 1872; her husband died on June 27 of the same year. The reclaiming note came before the First Division on July 18, 1872, and was dropped from the roll by order of the Court. On Jan. 23, 1873, Mrs Ritchie raised the present action against Sir David Ross and others, her husband's trustees and executors, for payment of £30 as an allowance for mournings, £150 *per annum*, being an annuity secured to her under her husband's trust-disposition, or the sum of £5000, or whatever other amount might be held to be the amount of her share of her husband's estate as his widow. The trustees resisted this claim on the ground that the pursuer's legal and conventional provisions were only payable in respect of her marriage, and that the marriage had been dissolved.

The Lord Ordinary pronounced the following interlocutors:—

“3rd June 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, sists process for one month from this date, that the pursuer may take steps by action of transference or otherwise for having the decree of divorce founded upon in the defence recalled or set aside.

“Note.—Until the decree of divorce here founded on is recalled, or otherwise held to have become inoperative in consequence of the pursuer of the action having died before the reclaiming note was disposed of, it must, it is thought, be held to be a valid decree in dealing with the claim made in the present action. For although it seems to be settled that it is a good defence against decree of divorce

being pronounced that the pursuer has died in course of the process (Bell's Prin., sec. 1534; Lord Medwyn in *Menzies*, Nov. 21, 1835, 14 D., p. 47; Fergusson's Con. Law, p. 177; Lothian's Consistorial Practice, p. 168), the Lord Ordinary is not aware that it has ever been decided that where decree of divorce has been pronounced and is reclaimed against, but the pursuer dies before the reclaiming note is disposed of, the decree *ipso facto* falls as here contended for on the part of the pursuer, and must be disregarded in any proceedings on which it is afterwards founded upon; and, as it appears from the cases noted by Mr Fraser, vol. i., p. 658, that there is one case in which it has been held that parties having a patrimonial interest, such as the representatives of a husband who had died before decree of divorce had been actually pronounced, were allowed to carry on the process, or rather to institute a new process of declarator to the extent of maintaining a defence against a claim for aliment, the Lord Ordinary, as at present advised, is not prepared to hold that in this case the representatives of the husband may not be allowed to appear as parties respondents in the reclaiming note, and to the same extent oppose the recall of the decree; as this, however, is a question which, in the view the Lord Ordinary takes of it, cannot be satisfactorily dealt with except in or with reference to the process in which the decree was pronounced, he has sisted this process in order that the pursuer may take steps for having the question authoritatively disposed of.

"22d October 1873.—The Lord Ordinary having heard parties' procurators, and resumed consideration of the closed record and productions, in respect of the decree of divorce founded upon in defence, dismisses the action, and decrees: Finds no expenses due to or by either party.

"*Note*.—As no steps have been taken in this case to have the reclaiming note against the decree of divorce pronounced by Lord Ormidale disposed of, it appears to the Lord Ordinary, for the reasons explained in the note to his interlocutor of the 3d of June 1873, that as matters stand at present he is not entitled to refuse to give effect to that decree to the extent which has now been done."

The pursuer reclaimed.

Argued for her—The action of divorce is competent to the spouses only, the injury being a personal one to the aggrieved party. This is undoubtedly the case in regard to raising such an action, and it seems naturally to follow that no one who was incapable of raising the action can be capable of insisting in it after it has been raised, and in all the cases where third parties have been allowed to intervene it has been during the lifetime of both spouses. In the present case the decree of divorce is not final, it has not been extracted and is not extractable, and the marriage has been dissolved by the death of the husband. The status of the wife has been already fixed by the husband's death and nothing can now be done to alter it; and as the trustees could not have raised the action of divorce, so neither can they be allowed to insist in it.

Authorities—*Walker v. Walker*, 24th Jan. 1871, 9 Macph. 460, (effect of reclaiming note); *Clement v. Sinclair*, 4th March 1762; *Menzies v. Stevenson*, 21st Nov. 1835, F.C., 14 S. 47; *Gardiner v. Macarthur*, 16th May 1823, F.C., 2 S. 275, (new ed.); *Greenhill v. Ford*, 7th Feb. 1822, 1 S. 296, (new ed.) 275;

16th June 1824, 2 S. App. 435; Stair i. 4, 7 Ersk., i. 6, 43; Bell, 1534; Fergusson's Consist. Rep., p. 317 app.; Fergusson's Consist. Law, pp. 106, 177; Lothian, p. 168.

Argued for the trustees—It is not incompetent for persons other than the spouses to be parties to an action of divorce. Either the trustees must be sisted and allowed to support the Lord Ordinary's interlocutor on the ground of their *jus quesitum*, or that judgment must stand; it cannot be got rid of by the mere presentation of a reclaiming note, nor can decree in absence be given. It is not here a question of pursuing an action of divorce; the trustees are simply defending a position gained by the husband, whom they represent.

At advising—

LORD PRESIDENT—My Lords, this is undoubtedly a question of some novelty, and that arises from the peculiar nature of a process of divorce—a kind of process which requires exceptionally cautious dealing. There is one rule which is of universal application, and it is this, that when one party to an action dies the action at once stops, and no further step can be taken in it until the void so created has been supplied. That can be done in ordinary cases in one of two ways, either by an action of transference, or, according to the more modern practice, by sisting the representatives of the deceased party; but until one or other of these is done the Court can proceed no further, and if nothing of the kind can be done then the case becomes immortal. This applies to the case of an action of divorce as much as to any other. But it is said that when the pursuer of such an action dies the suit necessarily comes to an end, because there is no one else who is entitled to carry it on, it being an action private to the two spouses; and to a certain limited extent that is quite true. No one else except the injured party is entitled to sue a process of divorce, and if decree of divorce is not given during the lifetime of the pursuer, but the marriage is dissolved by death, then no one else is entitled to raise such a process. But the position of the present case is peculiar, and that rule does not apply, for decree of divorce was pronounced in the lifetime of the husband, complete in all respects on the 28th February 1872 and it was not till 27th June of that year that the pursuer died. Meantime a reclaiming note was presented on 20th March and sent to the roll, but when it came on for advising we were informed that the husband was dead, and the case accordingly dropped. Now, the husband's representatives desire to sist themselves as respondents and that is opposed; but it appears to me that if they be not sisted it must necessarily follow that the case can go no further, for we cannot take up the reclaiming note without having these parties sisted, and the result will be that the Lord Ordinary's interlocutor can neither be recalled or altered; and if it be not recalled or altered it must just stand as it is. Mr Campbell Smith says that it has not been extracted, and that nothing else but an extracted decree would be received as evidence of divorce in any other action between the parties, but I fail to see how that applies, for when he goes to the trustees to demand payment he does so on the footing that she is the widow of her late husband. The trustees' answer to him would be that she was divorced, and the only way to decide that is to go on with the reclaiming note. That is what Lord Mure has done, and I think he

was quite right. It is in this lady's power to call parties into the field by an action of transference, supposing that action to be a competent one. The trustees do not come here as pursuers in an action of divorce, they simply come to defend a judgment already obtained. If her reclaiming note be refused, the result will be that she has been divorced since the date of the Lord Ordinary's interlocutor, and so the position of the trustees is that of defending a decree of divorce already pronounced. Suppose that, instead of a reclaiming note this had been an action of reduction of a decree of divorce on the ground of some inherent nullity. The action would have to be directed against somebody, and the trustees would necessarily be called as defenders. The present proceeding is quite analogous to that; they are merely defending that which the husband gained during his own life, and I can see no reason why they should not occupy that position.

The other Judges concurred.

The Court refused the reclaiming note.

Counsel for Mrs Ritchie—J. Campbell Smith and A. J. Young. Agent—T. Lawson, S.S.C.

Counsel for Ritchie's Trustees—Balfour. Agent—John Galletly, S.S.C.

Friday, March 6.

## SECOND DIVISION.

[Sheriff of Roxburghshire.

BROWN v. MURRAY AND OTHERS.

*Spurious Race Card—Stopping of Sale—Police interference—Apprehension of Riot.*

Certain incorrect race cards were being sold in a burgh during the races. The proprietors of the authorised cards having sought to stop the sale, and having obtained the assistance of the police superintendent,—held that the officer was justified in stopping the sale by apprehensions of a disturbance, but that he could not interfere in the interests of private persons.

This was an appeal from the Sheriff Court of Roxburghshire in an action at the instance of John Brown, stationer, Kelso, against Mrs Elizabeth Murray, Bridge Street, Kelso, George M'Call, auctioneer, Kelso, and John Moscrip, superintendent of police, Kelso, concluding for payment of the sum of £8, 6s. 8d. sterling, being damages sustained by the pursuer in consequence of the defenders having, the 2d day of October 1872, wrongfully, illegally, maliciously, and without probable cause, threatened to cause the pursuer to be apprehended and imprisoned for having sold, and if he should continue to sell, certain printed race cards, headed "Kelso Races, 1872," whereby he was wrongfully and illegally compelled and induced to discontinue his sale of the whole of the race cards then in his hands, being in number 1927 or thereby; and further, for having apprehended and conveyed to the police office in Kelso, for retailing one or more copies of the race card, which copies had been purchased from the pursuer, James Craig, residing at No. 52 Brodie's Close, Edinburgh; and having wrongfully, illegally, and maliciously, by threats of imprisonment, compelled and induced the whole or the greater number of

the persons to whom the pursuer had sold, for retail purposes, and who were retailing, copies of the card, to discontinue the sale thereof, and the pursuer to pay back to the persons so retailing them the purchase price of the whole of the copies then in their hands; by all which proceedings the defenders wrongously, illegally, maliciously, and without probable cause, prevented the pursuer from selling and disposing of his whole stock of race cards, being 2000 in number or thereby, to the loss, injury, and damage of the pursuer: and further, for £20 damages sustained by the pursuer in consequence of the defenders having wrongously, illegally, and maliciously, on several occasions upon the 2d day of October 1872, forcibly invaded and occupied the pursuer's shop, for the purpose of using, and having therein used, threats of imprisonment to the pursuer, thereby excluding his customers, and obstructing his business.

The pursuer averred that on the morning of 2d October 1872, the second day of Kelso races, he had in hand a stock of 2000 race cards, and that about eleven o'clock in the forenoon he commenced to sell the race cards in his shop, and continued the sale until he had sold to a number of persons, including James Craig, altogether 173 cards, at the price of sixpence per dozen wholesale, and one penny each for single cards. About twelve o'clock the defenders came into the shop, accompanied by Mrs Murray's two sons, and George M'Call's son, and threatened to apprehend and imprison the pursuer for having sold the race cards, and if he should continue to sell more. On two or three subsequent occasions on that day the defenders entered the shop and repeated the threats, with much abusive language, whereby the pursuer was put in fear of being apprehended and imprisoned, his fear being increased by the threats being used by and in presence of defender Moscrip, who is a member of the police force, and by his having been informed that James Craig had been already apprehended and conveyed to the police office in Kelso; and in consequence he was compelled to discontinue his sale of race cards. Further, it was alleged that the defenders apprehended and conveyed James Craig to the police office in consequence of his having sold certain of these race cards, and compelled the whole parties to whom race cards had been sold, by threats of apprehension and imprisonment, to accompany the defenders to the shop, where the pursuer was compelled, by similar threats, to repay the purchase price of the cards, and that this was done without legal warrant or authority. Finally, the pursuer stated that the defender Mrs Murray was the printer of another race card called the "Official List," applicable to the day's races, and the defender George M'Call was her manager, and that they interfered with the sale because these cards were successfully competing with the sale of the cards printed by them.

The defenders in answer stated that on the second day of the races it was reported to them that a spurious card of the races was being sold in Kelso, and that M'Call intimated the fact to the clerk of the course, who instructed him to try and get the sale stopped. That when he was about to make further inquiry into the circumstances along with the defender Moscrip, a number of the public complained that they had been imposed upon, and Craig was nearly mobbed. James Craig was asked by M'Call and Moscrip where he got the cards, and