

the petitioner's remedy may be, the Lord Ordinary does not think that he is entitled to demand the appointment of a judicial factor." I cannot see the force of that; the remedy suggested seems to me to be a very insufficient one. I think the circumstances amount practically to a case of necessity, and that being so, I am for granting the prayer of the petition and appointing a judicial factor, with the usual powers.

LORD DEAS.—We are dealing here with what I consider a very valuable part of the jurisdiction of the Supreme Court. The Lord Ordinary states the law quite correctly in one part of his note. He says he "does not doubt the power of the Court to appoint a judicial factor over a partnership estate when this is shown to be absolutely necessary;" but he goes on, with reference to this case, "that the factor might have to carry on the lease to its ish," and he "is not aware of any case in which the Court has appointed a judicial factor for the purpose of carrying on a mercantile partnership either till the term fixed by the contract or even for a more limited time." So that, although in the outset he says he does not doubt the power of the Court, he here goes on to say that it is not competent for the Court to interfere for the management of a partnership estate. I am of opinion that it is not incompetent for the Court to interfere. I think the very principle on which the jurisdiction of the Court is founded makes it as competent in the one case as in the other, though it may require very cautious exercise. The case of *Dickson* was very fully considered in this Court. In that case it was very difficult to say if there was any subsisting contract at all, but there were representatives of a great number of partners all liable for the debts and entitled to the profits of the concern, and what influenced the Court very much was the immense loss which would have resulted from stopping and winding up the concern. The important power which was given to the factor in that case was the power of management, so much so that we granted *interim* execution pending appeal. When the case came before the House of Lords they felt considerable hesitation, but the result was that they satisfied themselves that the jurisdiction existed. I am therefore of opinion that the question is not one of competency, but a question whether the circumstances are such as to justify us in making the appointment. I agree with your Lordship that the case is a very strong one. There might have been a practical difficulty as to who should be appointed, but the landlord comes forward and consents not only to the appointment but to the particular individual suggested.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Alexander Dickie against Lord Gifford's interlocutor of 6th May 1874, Recall the said interlocutor, sequester the estate of the joint-adventure subsisting between the petitioner and the respondent; appoint John Crombie, accountant in Aberdeen, to be judicial factor thereon, with the usual powers, he finding caution before extract in common form, and decern; find the petitioner entitled to expenses since the date of the lodg-

ing of the answers to the petition, and remit to the Auditor to tax the account of the said expenses and report."

Counsel for the Petitioners—Watson and M'Laren. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents—Dean of Faculty (Clark) Q.C., and Trayner. Agent—J. B. Sutherland, S.S.C.

Thursday, June 11.

## FIRST DIVISION.

SYMINGTON v. SYMINGTON.

*Expenses—Husband and Wife—Arrestment and Inhibition on the Dependence of an Action.*

In an action of separation and aliment at the instance of a wife against her husband, the Court gave decree in favour of the pursuer. Held (*diss.* Lord Deas) that she was not entitled to charge against the defender the expense of arrestments and inhibition used on the dependence of the action, as not being part of the expense of process, although the use of diligence was in the circumstances reasonable and necessary.

*Expenses—Fees to Counsel—Third Counsel.*

Circumstances in which the Court allowed against the unsuccessful party the expense of a third counsel, taken in in the Inner House, and of the senior of two counsel employed both in the Outer House and the Inner House.

This was an action of separation and aliment, at the instance of Mrs Symington against her husband, on the ground of the alleged adultery of the defender. The Court, on 19th March 1874, gave decree for the pursuer, and the case now came up upon the auditor's report of the pursuer's account of expenses.

The following findings of the auditor were objected to:—

(1) The pursuer had used arrestment and inhibition against the estate of the defender on the dependence of the action, and the auditor disallowed the expense thereby incurred; (2) The pursuer had employed two counsel in the Outer House, and when the case came before the Inner House had, in addition, taken in a third counsel (Sol.-Gen. Millar). The auditor struck off the fees charged for the latter counsel.

It was stated for the pursuer that the defender, immediately upon the Inner House giving judgment against him, had left the country, and that but for the diligence used by her on the dependence of the action, the pursuer would not have derived any benefit from the decree which she had obtained. It was further stated that before the Solicitor-General was taken into the case by the pursuer, the Lord Advocate had been taken in by the defender, although he had already two counsel in the case.

Argued for the pursuer—The expense of arrestment and inhibition should be allowed, 1st, because, as the sequel showed, it was a reasonable and proper precaution, and necessary to render the decree, when obtained, effective; 2d, Because it was really part of the expense of process, being a step taken during the continuance of the process; and 3d, Because it was an action

between husband and wife, and therefore not subject to the same strict rules as a case between party and party. As to the third counsel, it was reasonable and proper that the pursuer in a case of such importance should have the benefit of one of the leaders of the bar, and the more so as the defender had retained the Lord Advocate.

Argued for the defender—The charge for diligence should not be allowed, as it was not part of the expense of process. The test of what was expense of process was, whether it contributed to the obtaining the decree. The diligence did not contribute to obtaining the decree, but was to guard that it should be effectual when obtained. Three counsel should not be charged against the defender, as it was not a case of such difficulty as to render three counsel necessary.

Authorities—*Steven v. M'Dowall's Trustees*, Mar. 19, 1867, 3 Scot. Law Rep. 320; *Wilson v. North British Railway Co.*, Dec. 13, 1873, 1 Rottie, 304; *Taylor v. Taylor*, Jan. 25, 1820, F.C.

At advising—

LORD PRESIDENT—There are two questions raised upon the auditor's report in this case. In the first place, the auditor has disallowed the expense of executing an arrestment and inhibition upon the dependence of the action, on the ground that such expense is not part of the expense of process. Of course, if that is the case, the auditor has rightly disallowed the charge. I think that it is settled by the case of *Taylor* that the expense of diligence upon the dependence of an action is not part of the expense of process; and in practice that decision has been followed uninterruptedly. I think that it rests upon a sound principle, viz., that diligence upon the dependence of an action does not contribute to the obtaining decree, which is the sole object of the action. I am therefore of opinion that this objection should be repelled. The next question has reference to the fees to counsel. In this respect this case is in a peculiar position. I can't say that three counsel were required in this case; so I cannot sustain the objection to the effect of adding the fees for the third counsel. The way in which the auditor has dealt with this matter is the usual one of allowing the fees to the two counsel who were in the case all through, and this operates hardly against the pursuer. The question is, whether the pursuer was not entitled to secure the services of one of the leaders of the bar. The defender had done so, although he had already two counsel in the Outer House, and I think that the wife was entitled to the same advantage. So I think we should do what at first sight may appear inconsistent, namely, sustain the fees to the Solicitor-General and to the senior of the two other counsel, or, in other words, allow the fees to the two counsel who argued the case before us. The rule followed by the auditor is in general sound; but the circumstance that the husband had fortified himself by retaining a leading counsel, takes the case out of the general rule, so I think that we should allow the fees to the counsel who argued the case, and disallow the fees to the junior counsel.

LORD DEAS—The first question is as to the arrestments and inhibition used by the pursuer on the dependence of the action, and I think it clear that if she hadn't used that diligence, her decree for aliment and expenses would have been useless,

because the defender, so soon as he found what the result of the action was to be, left the country. Thus, if it hadn't been for the arrestment and inhibition, there would now have been nothing for the pursuer to get. The objection to the pursuer getting the expense of her diligence is the technical one that it is not part of the expense of process, and that objection is grounded upon the principle that nothing is expense of process which is not necessary to get decree. I admit that that principle has some countenance from the report of the case of *Taylor*; but I do not think the principle a sound one. The question whether an item of expense is a proper expense of process does not depend on any technical ground, but upon the consideration whether the expense was reasonable and proper. That is well illustrated by the case of *Colquhoun v. M'Kay*, 28th May 1829, 1 Deas and Anderson, 100, which is reported by Mr Anderson, Q.C., so that there is no doubt as to the accuracy of the report. In that case the expense of a commission and diligence to examine a witness in America, the evidence to lie *in retentis*, was allowed, and the objection that it was not part of the expense of process was repelled. The evidence had never been used, but the Court allowed the expense, because it was reasonable and proper. That, I think, is the sound and proper test to apply. In this case there is no doubt that the expense was reasonable and proper; for if the pursuer had not used diligence, all the defender's property would have been removed from the country. Then, again, this is an action between husband and wife, and this expense is a debt of the husband's. I am therefore of opinion that the objection should be sustained.

In regard to the other points raised, I concur with your Lordship.

LORD ARDMILLAN—The question as to the expense of the pursuer's arrestment and inhibition is attended with some difficulty. This is a case between husband and wife, and the rules as to the husband's liability for the wife's expenses are in some respects different from the ordinary liability between party and party. Then, to gain a suit, to obtain a decree, is the aim of an action in Court. Arrestment of funds and inhibition are not steps to obtaining decree, but to prevent the decree when obtained being defeated. In this case the use of diligence was an appropriate and, indeed, necessary proceeding; but the expense thereby incurred is not expense in that course of procedure which terminates in a decree. That is the true rule as to expenses chargeable against the other party, and that is the rule laid down in the case of *Taylor*. The case cited by Lord Deas—viz., the case of a commission to take an examination of a witness to lie *in retentis*—is not, I think, a parallel case. Such an examination is taken to meet a contingency, and is strictly a step in the course of procedure which ends in decree. But the use of arrestment or inhibition is without and beyond that procedure, and that was the principle laid down in the case of *Taylor*. There is much force in the position taken up by Lord Deas; but I think it safer, and more in accordance with authority and principle, to repel the objection.

The Court pronounced the following interlocutor:—

“Allow execution to proceed on the decrees mentioned in the petition, notwithstanding

the appeal, to the effect prayed for; and having heard counsel for the parties on the Auditor's report on the pursuer's account of expenses, No. 278 of process, and on the objections thereto for the pursuer, No. 279 of process, Sustain the objection to the said report, disallowing fees to the Solicitor-General as counsel for the pursuer, to the effect of adding £22, 4s. to the taxed amount of the said account; *quoad ultra*, repel the objections and approve of the Auditor's report, and decern against the defender for payment to the pursuer (petitioner) of the sum of £584, 1s. 8d (being the taxed amount of the account with the addition aforesaid): Further, decern against the defender for payment to the pursuer (petitioner) of the sum of £100 towards her expenses as respondent in the appeal, as prayed for, and allow the said decrees for expenses and other decrees foresaid, to go and be extracted *ad interim*, and execution to proceed thereon, notwithstanding the appeal."

Counsel for the Pursuer—Asher. Agents—J. & R. D. Ross, W.S.

Counsel for the Defender—Scott. Agent—J. Galletly, S.S.C.

Thursday, June 11.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

SMITH v. SMITH.

*Husband and Wife—Aliment—Sheriff—Competency.*

A wife brought an action for interim aliment against her husband in the Sheriff Court, on the ground of desertion and failure to provide for her and her children. The defence on the merits was substantially a denial and recrimination. *Held* that the action was competent in the Sheriff Court.

This was an action for interim aliment, at the instance of a wife against her husband, in which the conclusion was for a sum in name of interim aliment, "until the rights of parties are permanently fixed by the Supreme Court," the defender having deserted the pursuer and her children, and ceased to provide for them, notwithstanding that he earned wages at the rate of £12 per month.

The defender stated a preliminary plea that the action was incompetent in the Sheriff Court. The defence on the merits was as follows:—"A denial that the defender has ceased to provide for his wife and children. The defender was abroad following his employment of a steam-ship engineer for twenty-two months, and on his return he found the pursuer occupying a small hired room, and that a deal of valuable furniture and effects which he had left with her was all either sold or pawned, although he had never failed to make her ample remittances for the support of herself and the children, and had to pay, on his return, accounts for provisions, &c., incurred by her in his name in his absence. The pursuer chose to dispendish the defender's house in his absence, and his means do not enable him instantly to refurnish a house; but he has never refused to provide her with an aliment, although the sum concluded for is, ridiculously extravagant. He has offered her, in the meantime,

and did so before this action was raised, and still offers her, 7s. a-week, and he has, besides his three children by the pursuer, his children by a former marriage to support, and the pursuer is very able as a needlewoman to earn as much as support herself. As to the children, for whom aliment is sought by the pursuer, they were, before the date of this action, taken by the defender to live, at his expense, with a sister of his, and it was the pursuer's own fault if that did not take place sooner, as the pursuer refused to give up the children. The defender is ready to take the pursuer to reside in family with him."

The Sheriff-Substitute pronounced an interlocutor allowing interim aliment at the rate of 7s. per week.

On appeal, the Sheriff (W. G. DICKSON) pronounced this interlocutor and note:—

"Glasgow, 13th February 1874.—Having heard parties' procurators on the defender's appeal, which the defender's procurator stated was directed only against the decree of 15th October last for interim aliment, for the reasons stated in the note, adheres to the interlocutor appealed against, and dismisses the appeal.

"*Note.*—The rate of interim aliment allowed in the Sheriff-Substitute's interlocutor is that which the defender states in the Minute of Defence he is willing to allow the pursuer. It was not pretended at the discussion to-day that the defender is really prepared to take the pursuer back into his family, although that is stated in the Minute of Defence. The only ground on which his procurator resisted the decree for interim aliment was, that the pursuer had kept certain furniture belonging to him, which she refused to give up. The pursuer denied that statement. She must be allowed a sufficient sum for her maintenance while that matter is under discussion."

The defender appealed, and argued—The action was not competent in the Sheriff Court, but only in the Consistorial Courts. The Act 11 Geo. IV. and 1 Will. IV. cap. 69, s. 32, enacting that "action of aliment may be instituted, heard, and determined in any Sheriff Court of Scotland," only applied to actions of aliment other than those of actions between husband and wife, as between them the aliment was incidental to another action, which was not competent in the Sheriff Court. At all events, the Sheriff, in cases of this sort, had no greater power than the Court of Session had before the consistorial jurisdiction was transferred to it in 1830. Before that, if a husband deserted his wife, or turned her out of the house, and offered no defence, or did not appear, the Court of Session would grant interim interdict. But if the husband appeared in Court and denied the desertion or alleged cruelty, there arose consistorial questions, to be inquired into by a competent Court, before aliment could be awarded. In such a case the Court of Session would have refused to interfere. This was a case of this latter sort, and therefore it was not competent in the Sheriff Court.

Authorities—*Lang v. Lang*, April 19, 1869; 13 Journal of Jurisprudence, p. 351; *M. Gregor and Barclay v. Martin*, 12th March 1867, 5 Macph. 583; *Rennie v. Rennie*, 7th Feb. 1863, 1 Macph. 389; *Bel. v. Bell*, 22d Feb. 1812, F.C.; *Anderson v. Anderson* 3d March 1819, F.C.; *Jackson v. Jackson*, 3d March 1825, 2 Shaw, 610; *Benson v. Benson*, 15th Feb. 1854, 16 D. 555.

The pursuer was not called on.