agent should recover by a separate action. There is no question of competency; it is a matter for the discretion of the Court whether the claim should be disposed of in the original action or in a new one. Lord Gifford exercised that discretion in the case of *Smith*, and I think exercised it rightly. The husband had an absolute right to immediate absolvitor in the action at his wife's instance, and it was very expedient that that should be pronounced at once, but when that was done the process was at an end. No doubt in ordinary circumstances the question of expenses may be reserved, but that is the question of expenses as between party and party, which this is not, and so I think the Lord Ordinary was right in not entertaining that motion, but then he was quite wrong in holding that the debt was thereby extinguished. I am therefore for recalling his interlocutor and allowing a proof.

Lord Deas—I am of the same opinion, and I quite agree with your Lordship that there is no incompetency in the agent asking for his expenses, either in the original action or in a new one. The matter is dealt with by the Act of Sederunt of 1806. I agree with your Lordship that the question is one of expediency. The case in the Second Division, like this one, was an action of separation and aliment, and in both cases the action had gone only a very short way before it was settled; and, in these circumstances, the Second Division was quite right in not allowing the action to stand over—in the first place, because it was not expedient to postpone the renewal of domestic intercourse until the conclusion of an inquiry into the agent's account; and, secondly, because the Judge could not get any more knowledge of the grounds of the claims. Both those reasons apply here. I have no doubt of the competency of either way of making the claim, but it is a question of expediency.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the Lord Ordinary's interlocutor; sustain the competency of the action; and, in respect of the minute now lodged for the defender, No. 11 of process, decern in terms of the conclusions of the summons for £24, 1s., being the taxed amount of the account sued for; find the defender liable in expenses of process; and remit to the Auditor to tax the amount of said expenses, and report."

Pursuer's Counsel—J. Campbell Smith. Agent—Party.

Defender's Counsel—Thorburn. Agents—Wallace & Foster, S.S.C.

Monday, February 15.

OUTER HOUSE.

[Lord Craighill, Ordinary.

KEENE *v.* AITKEN.

*Reparation—Wrongous Imprisonment—Designation—Warrant to Apprehend—*1 *Vict., cap.* 41, § 16.

A person having been served with a small-debt summons, in which he was incorrectly designed, informed the officer that it was not intended for him; he, however, kept the copy but failed to appear at the diet of citation. Decree in absence was pronounced, and he was charged for payment upon extract, and subsequently incarcerated. *Held* that the error in designation could not have led to any misconception, and that the pursuer was bound to take objection either at the diet of citation or at a diet for rehearing granted under the Act—and action *dismissed.*

Reparation—Wrongous Imprisonment—Offer to pay under protest.

In the above circumstances, the pursuer on his apprehension offered to make payment of the debt, under protest, to the sheriff-officer. *Held* that such offer founded no claim for damages—and action *dismissed.*

This was an action raised by George Robert Keene, butler at Pinkie House, Musselburgh, against George Aitken, corn-merchant, Fisherrow, Musselburgh, concluding for £500 damages for wrongous imprisonment.

On 9th August 1873 a sheriff-officer handed to the pursuer a small-debt summons at the instance of the defender against "Charles Kean, Butler, Pinkie House, Musselburgh." The pursuer alleged that on observing the name he returned it to the officer, stating that the document was not for him; but that the officer insisted on leaving it with him. Keene further averred that the summons and the account prefixed to it did not apply to him, his name being George Robert Keene, and that accordingly he did not appear on the court-day, and the Sheriff on the 20th August pronounced decree in absence against "Charles Kean," finding him liable in the sum of £12, with 6s. 1d. of expenses, and decerning and ordaining instant execution by arrestment, and also execution to pass thereon by poinding and sale and imprisonment, if the same were competent, after a charge of ten free days. On the 25th September a charge of payment was served on the pursuer, bearing to be at the instance of the defender against "Charles Keene." And on December 23d Keene was arrested, and, according to his own account, "offered to pay the amount in the decree under protest," but the officer refused to accept payment. After incarceration in Edinburgh prison for a few hours the money was paid, and the pursuer liberated. Aitken, the defender, in his statement of facts set forth that the pursuer had rented a park at Pinkie from him, and had fallen into arrear with his rent, and that some months prior to August 1873 Mr Adam Lamb, Justice of Peace officer at Musselburgh, called on him, and presented for payment the account subsequently prefixed to the small-debt summons. In this account the designation was exactly the same as in the summons. The pursuer was also applied to on other occasions, both verbally and by letter, and he disputed the amount, but never denied liability. The defender's 5th statement was as follows:—"Neither when the summons was served, nor when the charge was given, nor when he was apprehended, nor when he was delivered over to the prison authorities, did the pursuer state that he had been erroneously designed in the summons, or charge, or warrant, nor did he say what his Christian name was, or take any objection whatever to the accuracy or regularity of

any of these documents or of any of the proceedings following thereon. Had he done so the proceedings complained of would not have taken place."

The pursuer pleaded—"(1) The said pretended decree not having applied in any way to the pursuer, there was no legal warrant for his apprehension; and the defender having, without such warrant, caused him to be apprehended and incarcerated, is liable in reparation and solatium. (2) In the circumstances, the pursuer was entitled to make, and the defender bound to accept, payment under protest, and the pursuer having tendered payment under protest, and having, notwithstanding said tender, been incarcerated for non-payment, he is entitled to damages, as concluded for. (3) The whole proceedings of the defender having been grossly illegal, irregular, and unwarrantable, as well as malicious and oppressive, the pursuer is entitled to damages, as concluded for, with expenses."

The defender, *inter alia*, pleaded—"(2) The pursuer never having intimated any objection to his designation in the summons, or any of the other documents, is now barred, especially at this distance of time, from insisting in this claim for damages. (3) Any damage the pursuer may have sustained having been altogether caused by his own silence as to any error in his designation, he is not entitled to insist in this action. (4) The pursuer having by his own actings, as condescended on, given the defender reason to believe that his designation as in the summons and decree was correct, is not entitled to insist in this action."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 25th January* 1875.—The Lord Ordinary having heard parties procurators on the closed record, and more particularly on the first plea-in-law for the defender, and considered the debate and whole process, Finds as matter of law that the pursuer—assuming the facts of the case to be as represented in the averments of the pursuer upon record—is not entitled to recover damages from the defender: Therefore sustains the said plea in law, dismisses the action, and decerns: Finds the defender entitled to expenses, &c.

"*Note.*—This is an action of damages for the alleged wrongful incarceration of the pursuer. There are two grounds upon which that proceeding is impugned. The one is, that the small-debt decree constituting the warrant did not 'apply in any way to the pursuer;' and the other, that payment under protest was offered to and refused by the officer at the time of apprehension. A few words as to each of these will explain the reasons for which the action has been dismissed.

"When the pursuer says that the decree 'did not apply to him,' this is what is meant. He was personally served with a copy of a small-debt summons, in which the person called as defender was described as 'Charles Kean, butler, Pinkie House, Musselburgh.' The pursuer at the time was butler at Pinkie House, Musselburgh, and his surname is Kean or Keene; his christian name, however, not being 'Charles,' but 'George Robert.' He says (cond. 2) that when served with the copy he mentioned to the officer that the copy was not for him. Nevertheless he kept the copy, and yet did not appear at the diet of court to which it was a citation. Decree in absence was therefore pronounced. In virtue of an extract of this decree he was afterwards charged for payment; but he did nothing to secure protection against the threatened imprisonment. He might, as provided for by sec. 16 of the 1st Vict. c. 41, have obtained a rehearing; but this was not asked for, and so the present defender, the creditor, was left free to put the decree to execution, as was done. The pursuer no doubt alleges (cond. 7) that 'the defender was duly warned before the execution of the said warrant of apprehension that the decree he had obtained did not apply to the pursuer.' What this imports is left to be conjectured; but plain it is that though there was a partial misnomer, on account of which the regularity and consequently the sufficiency of the decree as a warrant for imprisonment might be challenged with a possibility of success, provided the challenge had come in time, the pursuer is the person to whom the decree applied. He does not say that there was another person of the name of Kean who was butler at Pinkie House; nor does he say,—which is even a more pregnant omission,—that he had not incurred a debt to 'Charles Aitken, corn merchant, Fisherrow, Musselburgh,' the description of the present defender given in the account prefixed to the small-debt summons, as averred in condescendence, article 2. The error, such as it was, could lead to no misconception; and if it was to be made the ground of an objection the pursuer ought to have appeared in court either at the original diet or at a diet for rehearing, which on application must have been granted. But he lay by, either indifferent to the consequences or willing to turn these to profit; and having acted thus, the law will not recognise as a ground for damages the incarceration which ensued. For this, were authority needed, it is to be found in the decision of *Bell* v. *Gunn*, 21st June 1859, 21 D. 1008, which was followed in the subsequent case of *Peddie* v. *Miller*, reported on issues to the First Division of the Court, July 18, 1861. The latter is not to be found in the books, no final judgment having been pronounced; but the Lord Ordinary (having been one of the counsel in the case) is able to say that after a full argument all the Judges expressed their approval of those views of the case according to which *Bell* v. *Gunn* had been decided.

"As to the second of the grounds of complaint here put forward, all that the Lord Ordinary has to say is, that a sheriff-officer is not by his employment as such impliedly empowered to take payment of the debt either under protest or even without protest. He is not the agent of the creditor, and his duty begins and ends with the execution of the warrant; if the pursuer desired to avert the risk of imprisonment there was ample opportunity before his apprehension; and the alleged refusal of the officer to take payment when offered under protest, is a suggestion of hardship for which there is not in law or in reason any real foundation."

This interlocutor was not reclaimed against, and has accordingly become final.

Counsel for Pursuer—Brand. Agent—D. Bridgeford, S.S.C.

Counsel for Defender—Lancaster. Agents—Mackenzie & Kermack, W.S.