As to the allegation of fraud, I wish only to say that in my opinion no amendment of the record was necessary. Although the word was not on record at the date of the discussion in the Second Division, I think that the thing itself was there if the pursuers' allegations are true; for the statement of the pursuers was that Mr Moore was misled by unfair dealing on the part of the Pumpherston Oil Company and incorrect and imperfect information supplied by them.

Lord President—I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to. After the full expression of opinion given by several of your Lordships I should hardly have thought it necessary to say more than that I concur in the opinions of the Lord Justice-Clerk and of Lord Rutherfurd Clark, were it not for one circumstance to which I ought to allude.

This is a discussion avowedly on the relevancy of the pursuers' averments, and I cannot help thinking that some of my brethren have in their opinions a little forgotten that. It has been remarked, for example, that we have not the whole proceedings in the arbitration before us. But these proceedings were and are equally accessible to the pursuers and to the defenders. The pursuers have laid before us all those parts of these proceedings which they have thought it necessary to found upon. If they desired to set them forth more fully, that was a matter for their own consideration in making up their record. They have laid before us as much as they think useful and necessary for our consideration. That leads me to make the remark (in which indeed Lord Rutherfurd Clark has anticipated me) that when my brother Lord Young seeks to set aside as inadmissible the arbiter's interlocutor and note, which are quoted in article 14 of the condescendence, he forgets that the averments in article 14 are a necessary part of the pursuers' case. If article 14 had not been there I should have thought the pursuers' case even more irrelevant than I now think it. I am bound to accept the interlocutor and note there quoted as being, according to the pursuers' own showing, a step in the arbitration proceedings and constituting a deliverance disposing of the question before the arbiter. The interlocutor finds due a sum of £8350, 14s. 6d., and ordains the Holmes Company to make payment of that to the Pumpherston Company. That is quite according to the ordinary form in which an arbiter before executing a formal decree-arbitral, issues his findings as a proposed judgment in order that the parties if they desire it may be heard thereon. It is in the note appended to the interlocutor that we have the arbiter's views on the construction of the contract. Article 14 of the condescendence goes on to say, "Thereafter he" (the arbiter) "issued a decree-arbitral ordaining the pursuers to pay to the defenders said sums of £8350, 14s. 6d." The decree-arbitral, therefore, as well as the interlocutor, is based upon an opinion in law which the arbiter had formed as to the proper construction of the contract, and which he had indicated in his note. It is of this legal opinion on the construction of the contract that the pursuers complain, contending that it is so manifestly unsound as to amount to legal corruption. Without article 14 I think there would have been no averment of a ground for setting aside the arbiter's decree.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Reclaimers — Graham Murray—C. S. Dickson. Agents—Waddell & M'Intosh, W.S.

Counsel for the Respondents—D.-F. Balfour, Q.C.—Ure. Agents—Cairns, M'Intosh & Morton, W.S.

---

*Tuesday, March* 4.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

### STRAIN *v.* STRAIN.

(*Ante*, p. 239, and vol. xxiii. pp. 90, 739.)

*Expenses—Decree in Name of Agent—Compensation.*

In an action by a wife who had obtained decree of separation and aliment against her husband to enforce the decree for aliment by means of imprisonment, the Sheriff dismissed the action on the ground that the failure to pay was not wilful, and on appeal the Court held that the appeal was incompetent, and dismissed it with expenses. These expenses were not paid. Subsequently the husband brought an action of declarator against his wife for the purpose of having it found that the decree of separation should be recalled. This action was dismissed, and the wife found entitled to expenses. A motion was made for decree for these expenses in name of the agent disburser, which was resisted by the husband, on the ground that he was entitled to set the expenses in the appeal *pro tanto* against the expenses in which he had now been found liable. *Held* that the two actions were not so closely connected as to entitle him to do this, and motion *granted.*

On 2nd December 1885 the Court pronounced a decree of separation against Hugh Strain junior, coalmaster, Airdrie, in an action at the instance of his wife, awarding her £52 per annum of aliment.

Subsequently, proceeding under the Act 45 and 46 Vict. cap. 42, sec. 4, Mrs Strain raised an action in the Sheriff Court at Airdrie to enforce her decree by the apprehension and imprisonment of her husband. He had in the meantime been sequestrated, and on 18th June 1886 the Sheriff-Substitute found that he had not wilfully failed to pay the aliment, and accordingly dismissed the petition. Mrs Strain appealed, but the

Court dismissed the appeal as incompetent, and found the husband entitled to expenses.

The husband on 19th February 1889 raised an action against his wife concluding for declarator that there no longer existed any ground for the defender living apart from him, and that the decree of separation should be recalled. The Lord Ordinary dismissed this action, and the Court on January 10th adhered, and found the wife entitled to expenses.

The wife now moved for approval of the Auditor's report on the account of expenses and for decree in the name of the agent-disburser. He cited *Stuart* v. *Moss*, February 6, 1886, 13 R. 572, and *Peterson* v. *Wilson*, December 20, 1883, 11 R. 358, as authorities which established the general rule in his favour, and distinguished *Clift's* case (*Portobello Pier Company* v. *Clift*, March 16, 1877, 4 R. 685) by the circumstance that there the two actions, as the Lord President said, might have been conjoined.

Counsel for the husband relied on the case of *Clift*. There the parties were the same, and the subject-matter of the two actions was the same; so here; whereas in *Peterson's* case the parties were not the same, and in *Stuart's* case the subject-matter was not the same.

At advising—

Lord President—The case of the *Portobello Pier Company* v. *Clift* does not, I think, apply now, for the subject-matter of the two actions with which we are now dealing is different. The first action—in which the husband was successful—was a process instituted for the purpose of enforcing payment of aliment previously decerned for, by warrant of imprisonment. The Sheriff refused to grant such warrant, and the Court on appeal adhered to the Sheriff's decision. That process was instituted entirely for the purpose of carrying into execution the decree for aliment, and a decree for aliment can only be enforced when the spouses are separate. The second action was brought for the purpose of having it declared that the causes of separation were at an end, and that the husband was entitled to have that asserted, and to ask his wife to return to him, and there was a conclusion for adherence. That is a different process altogether from the first. An action to enforce payment of aliment during separation, and a process to put an end to the separation, are two things which may have some relation to one another, but cannot be said to be concerned with the same subject-matter.

I think therefore we should grant decree in name of the agent disburser.

Lord Shand—I agree. It appears to me that the *Portobello Pier Company* v. *Clift* is an exceptional case, and that the present is not a case to be taken out of the general rule.

The original action differed altogether in its circumstances from the present. The subject-matter of allegation there was whether the wife was entitled to obtain the decree of separation which she did obtain, and which has subsisted for some time. The last action proceeds on the footing that the first decree was rightly granted, but should be recalled because of a change of circumstances. The subject-matter of this action is, I think, quite different from that of the original action, and if that applies to the original action, it applies much more to the intermediate action to enforce payment of aliment on the additional ground stated by your Lordship.

Lord Adam concurred.

Lord M'Laren—Our law recognises the agent disburser as a proper creditor in a decree for expenses, and therefore he is always entitled to obtain decree in his own name unless the result would be to prejudice his client, as might happen if he had already advanced the amount of expenses or part of them, or were thereby deprived of his right to set off expenses due to him against them for which he had been found liable.

The case of *Clift* only recognises the principle that where two actions, either going on concurrently, or the one following the other, are identical in the subject-matter with which they are concerned, the expenses found due to one party in the one action may be set off against the expenses found due by him in the other action, just as may be done in the same action. And the competing parties are not to be prejudiced by each agent getting decree in his own name.

It occurs to me that the two cases with which we are now dealing are concerned with separate subject-matter. The question in the first action related to the personal protection of one party against imprisonment, and that was the only matter in contention. The second action related to the right of the party to have his wife restored to his society.

The Court approved of the Auditor's report on the defender's account of expenses, and decerned for the sum brought out therein in name of the agent disburser.

Counsel for the Pursuer—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel for the Defender—A. S. D. Thomson. Agent—William Officer, S.S.C.