

the oath. There was no appearance for the respondents, and the Court, after hearing counsel for the suspender, suspended the conviction upon the ground stated.

Counsel for Suspender—Mr Scott. Agent—D. F. Bridgeford, S. S. C.

COURT OF SESSION.

Tuesday, March 12.

FIRST DIVISION.

MARTIN v. MARTIN.

Agent and Client—Husband and Wife—Expenses.

A wife raised an action of aliment against her husband, but before it was terminated she returned to her husband's house, and so virtually put an end to the action. Held that the wife's agents were entitled to sist themselves as parties, and decree pronounced in their favour against the husband for the expenses due to them.

Mrs Martin raised an action in the Sheriff Court at Glasgow for the purpose of obtaining interim alimment from her husband until the rights of parties should be determined by a competent Court. The husband's defence was a denial of the ill-treatment upon which the action was founded, and an offer to receive the pursuer into his house.

After proof, the Sheriff-Substitute assolizied, but the Sheriff Principal found ill-treatment proved, and decerned for aliment. The husband advocated, and, after an interlocutor against him from the Lord Ordinary, the Inner House pronounced an interlocutor on 28th June 1866, finding ill-treatment proved, decerning for certain sums of expenses *ad interim*, and for interim alimment until the farther consideration of the case. *Quoad ultra* the case was superseded until the third sederunt day in November last, in order that the wife, if so advised, might raise an action of separation and aliment. No such action was raised by the wife, and no step was taken by either party in the case. The parties are both about eighty years of age.

Messrs M'Gregor & Barclay, S. S. C., who had been the wife's agents, now compared in the case, and craved the Court so to dispose of the case as to give them decree for expenses, and to allow the decree for expenses in the Sheriff Court to be extracted. The grounds upon which they rested their application were that the husband had not paid the interim alimment allowed by the last interlocutor of the Court, although he had paid the expenses thereby decerned for; that the wife, without consulting the comparers, had returned to her husband's house, and that consequently the action had been put an end to, and no separation and alimment could be raised.

FRASER and GEBBIE, for comparers.

R. V. CAMPBELL, for the husband, admitted that the wife had returned to the husband's house, and stated that she had returned acknowledging she was ill-advised in raising the action, and referring to a son and daughter as having been the real *domini litis*. He contended that the agents' remedy was to try their right to expenses either against the defender or the son and daughter by an action at their own instance. Neither of the parties was moving in this suit; if the pursuer was not going on, the defender was not asking absolvitor, and the agents, being mere third parties, should not

be allowed to interpose and to proceed with a suit affecting the personal relations of husband and wife with a view to getting decree for expenses. 1. The ordinary rule was that agents were allowed to proceed with a case notwithstanding a compromise when an interlocutor was pronounced necessarily implying expenses. No such interlocutor existed here, for the Court clearly intended the pursuer's right to expenses to be contingent upon her proceeding to raise a separation and upon her success in showing grounds for that remedy. Farther, the case was out of the principle of the rule. The wife had taken no benefit by the interlocutor of Court, and had simply accepted a tender which the defender had made from the very first. Then it was not suggested that there had been any fraud or collusion between the parties to defeat the agents' claim. It was monstrous to say that an agent's consent was required to every amicable compromise between the parties to a lawsuit. On the contrary, both in England and Scotland, it was the law that his right to the expenses, which might be decerned for in a suit, was subject to the contingency of a compromise without fraud. 2. The ordinary rule did not apply. No case had been found in which the agents of a party in a consistorial action had been allowed to proceed with the action notwithstanding a compromise. There was reason to limit the agents' right in such actions (1) because, in actions of this class, the wife's expenses might, if the Court thought fit, be provided for in advance by interim decrees; and (2) because of the personal nature of the conclusions.

At advising,

The LORD PRESIDENT said that the agents had a good claim, but there was considerable difficulty in regard to the manner in which it could be made effectual in this action. He thought, however, that in respect the husband himself stated that the wife had returned, and that the action was therefore virtually at an end, an interlocutor might be pronounced in the agents' favour.

The other Judges concurred, and an interlocutor was accordingly pronounced in the terms proposed by the Lord President, decerning, in name of Messrs M'Gregor & Barclay, for the expenses here and in the Sheriff Court.

Agents for Husband—Neilson & Cowan, W. S.
Agents for Comparers—Parties.

Tuesday, March 12.

JURY TRIAL.

(Before Lord Barcaple.)

PAGAN v. WILLIAMSON.

Reparation—Assault. Action of damages by a tenant against his landlord for assault.

In this case Allan Cunningham Pagan, farmer, Innergeldie, in the parish of Comrie, Perthshire, was pursuer; and David Robertson Williamson of Lawyers, presently residing at St Fillan's, in the county of Perth, was defender. The following was the issue:—

“Whether, on or about the 24th day of July 1866, in or near a field on the farm of Innergeldie, on the estate of Lawyers, in the county of Perth, the defender did assault the pursuer—to the loss, injury, and damage of the pursuer?”

Damages were laid at £2000 sterling.

Before the case was opened, parties withdrew

for conference, and the following minute was adopted and signed :—

“The parties agree to settle the case in the following terms :—

“1. The defender to pay the pursuer 100 guineas of damages, with expenses to and inclusive of this date, as the same shall be taxed.

“2. Any claim which may now be competent to either party against the other for any assault or defamatory words is discharged.

“3. The pursuer's lease of the farm of Innergeldie to be adjusted at the sight of Donald Mackenzie, Esq., advocate, and all questions now existing between the pursuer and defender, as tenant and landlord respectively of said farm, to be referred to the said Donald Mackenzie.

“4. The interdict case now depending in the Sheriff Court of Perthshire to be referred to the said Donald Mackenzie.”

In consequence of the above agreement the jury were discharged.

Counsel for Pursuer—Mr Young and Mr A. Moncrieff. Agents—Hill, Reid, & Drummond, W.S.

Counsel for Defender—Mr A. R. Clark and Mr Gifford. Agent—James Webster, S.S.C.

COURT OF TEINDS.

Wednesday, March 13.

KERR v. HERITORS OF YESTER.

Augmentation of Stipend—Decimae Inclusae Right.

Circumstances in which held that an heritor had not shown such a *prima facie* case of possession under a *decimae inclusae* title as to justify the refusal of an augmentation.

This was an application by the minister of the parish of Yester for an augmentation of his stipend.

GIFFORD and WEBSTER, for the Marquess of Tweeddale, one of the heritors, objected to any augmentation being granted, on the ground that the only lands in the parish which the minister pretended were unvalued were held by him under a title *cum decimis inclusis*. He founded on (1) a charter dated 9th May 1592, by “Walter Hay, provost of the collegiate church or provostrie of Bothanes, with advice and consent of James Lord Hay of Yester, patron of the said collegiate church, and of the other prebendaries thereof,” whereby he gave, granted, &c., to William Hay certain lands “*una cum decimis earundem inclusis que ab invicem nunquam separari solebant* ;” (2) a charter or disposition, dated 10th May 1592, whereby the said William Hay sold the said lands to James Lord Yester; and (3) a Crown charter of confirmation, dated 26th September 1592, whereby the before mentioned charters are ratified. The present Marquess is heir-male of Lord Yester, and he founded upon possession of the lands, without payment of minister's stipend, since 1592.

WATSON, for the minister, argued, that the deeds produced did not instruct a good *decimae inclusae* title. The words “*et nunquam antea separatis*” did not occur in the charters. Such a title can only be held when it has flowed from the regular clergy, which is not the case here.

The Acts 1567, c. 12, and 1592, c. 161, were referred to, as also the following authorities :—*Ersk.*, 1, 5, 3; *Officers of State v. Stewart*, 20th July 1858, 20 D. 1331; *Locality of Caputh*, 3d June 1864, 2 *Macp.* 1133; *Locality of Alyth*, 7th

Feb. 1810, F. C.; *Locality of Carmylie*, 23d May 1810, F. C.; and *Lord Dundas*, 22d June 1823, *Shaw's Teind Cases*, 41.

At advising,

The LORD PRESIDENT—The only question which we have to determine at present is, whether an augmentation shall be granted, or whether the heritor has shown such a *prima facie* case of the possession of a *decimae inclusae* right as to justify us in refusing the augmentation at once. The Court are all satisfied that the heritor has not shown such a *prima facie* case, and that the augmentation should proceed as if the objection had not been stated.

The stipend was modified at 18 chalders, leaving the question raised to be determined in the locality.

Agents for Minister—W. H. & W. J. Sands, W.S.

Agents for Marquess of Tweeddale—Gibson-Craig, Dalziel, & Brodies, W.S.

COURT OF SESSION.

Thursday, March 14.

FIRST DIVISION.

ALLANS v. TEMPLETON.

Restitution—Issue—Criminal Accusation. A pursuer is bound to put in issue the case he avers on record; therefore, in an action for restitution of money said to have been obtained by means of theft and forgery, the pursuer having proposed an issue not containing these accusations, issue disallowed and action dismissed.

This is an action at the instance of Margaret Linn Hope or Allan, wife of John Allan, residing at Livingston, near Mid-Calder, the said John Allan, and Margaret Linn, residing with him, against Marian Templeton, Over-Dalserf, near Carluke. It concludes for payment of £134, 7s. 1d., and for £100 “as the loss and damage which the pursuers have sustained through the defender having fraudulently and illegally abstracted or stolen a deposit-receipt for £133 sterling, granted by the Bank of Scotland to the pursuer, Margaret Linn Hope or Allan, dated 13th May 1862, uplifted the contents thereof, and retained or applied the same to her own purposes.”

The following averments set forth the pursuers' grounds of action :—

“Cond. 4. The pursuer, Margaret Linn, lives in family with the other pursuers, John Allan and Margaret Linn Hope or Allan, and has a chest in their house in which she keeps her articles of wearing apparel, &c. The said deposit-receipt was always kept in the said chest. In November 1862 the defender paid a visit to the pursuers. During that visit the defender had access to Margaret Linn's chest, in which she (the defender) had been allowed to place several articles of her own, and she took the opportunity of abstracting or stealing the said deposit-receipt therefrom.”

“Cond. 6. Thereafter the defender forged the signature of the pursuer, Margaret Linn Hope or Allan, by writing the name ‘Margaret Linn Hope’ across the back of the said deposit-receipt. She did so without the sanction, authority, or knowledge of the pursuers, or any of them. The defender thereupon presented the said deposit-receipt, with the said forged indorsation thereon, for payment at the office of the City of Glasgow