mitted to the Lord Ordinary to refuse the note, with expenses.

Counsel for Complainer — Dean of Faculty (Gordon) and Mackintosh. Agents—Mitchell & Baxter, W.S.

Counsel for Respondents — Lord Advocate (Young) and R. Johnstone. Agents — Hope, Mackay, & Mann, W.S.

Saturday, December 13.

FIRST DIVISION.

WILSON *v.* NORTH BRITISH RAILWAY CO.

Expenses—Fees of Counsel—Auditor's Report—Proof.

The Court, on the Auditor's report, (1) refused to allow the fees of more than two counsel in a proof lasting for an entire day; (2) that the fees allowed for a jury trial in the cases of *Cooper* and *Hubback* did not fetter the discretion of the Auditor in modifying the fees in a proof.

This case came before the Court on a note of objections by the Railway Company to the Auditor's report. Exception was taken to the Auditor having reduced the fees paid by the defenders to counsel and counsels' clerk to the extent of £14, 14s. 9d. The Auditor explained the grounds of disallowance in the following Note appended to his report:—"In this case the defenders have been represented by three counsel—two seniors and a junior. One senior and the junior have been instructed throughout, the other senior not continuously, in consequence of occasional absence from Edinburgh. The case is certainly not one for three counsel, and the defenders do not claim fees for more than two, but the fees in the account are stated sometimes as paid to the two seniors and sometimes as paid to the senior who was continuously instructed and to the junior. The Auditor is humbly of opinion that in a question with the pursuer this is not a proper or convenient course, and he has therefore dealt with the fees of counsel as if the senior not continuously instructed had not appeared for the defenders in the case." It having been stated at the bar that it had been the practice of the Auditor to allow in proofs the fees of £21 to senior and £15, 15s. to junior counsel, sanctioned by the Court in jury trials in the cases of *Cooper* v. *North British Railway Company*, December 19, 1863, 2 Macph. 346, and *Hubback* v. *North British Railway Company*, June 25, 1864, 2 Macph. 1291, the Court remitted to the Auditor to report specially whether "in his practice he has followed the rule laid down as to the fees of senior counsel in jury trials" in these cases "as being applicable to proofs before the Lords Ordinary, and if not what other rule he has followed."

The Auditor reported in the following terms:—"In obedience to the remit of the Court, the Auditor begs to report that in dealing with the fees of counsel in proofs before the Lords Ordinary he has kept in view the rules laid down by the Court in the cases of *Cooper* and *Hubback*, as regulating the *maximum* fees to be sustained as against a losing party in cases which are not exceptional. There are from time to time proofs in which it humbly appears to the Auditor that the *maximum* fees are not more than adequate for the proper remuneration of the counsel who conduct them, and he has in such cases sustained the *maximum* fees, but in the great majority of cases he holds that fees in proofs should be sustained at rates somewhat lower than in jury trials. It seems to him that in jury trials the strain and responsibility upon those who conduct them are greater than in proofs. In a trial, any omission in preparation or absence of evidence may be fatal—the proceedings going on continuously to the verdict, while in a proof the danger is not so great, as adjournment may be and is occasionally permitted. Holding these views, the practice of the Auditor in regard to counsel's fees in proofs, when senior and junior are engaged, has been to sustain jury trial fees somewhat modified. He endeavours, in regard both to trials and to proofs, to satisfy himself, by examination of the record, precognitions, and productions, as to the nature and difficulty of each case, and, keeping in view the ruling of the Court in *Cooper* and *Hubback* and other cases, to fix the fees accordingly. He feels the delicacy of the duty committed to him, and anxiously endeavours to avoid undue interference with the discretion of the agents. With regard to this particular case, the Auditor may state that he limited the fees in the manner objected to by the defenders only after full consideration, and he may add that, even had the case been tried by a jury, he could not have regarded it as one for allowance of the *maximum* fees."

At advising—

LORD PRESIDENT—I think we have great reason to be glad that a special remit was made of this case to the Auditor, for the result is a most satisfactory and sensible report, which proves what I have long felt, that the Auditor bestows great care and pains on his work. I think it would be very unwise to interfere, particularly when it turns out that he has acted on a general rule; and I am for repelling this objection. As to the other point, also I think the Auditor has dealt rightly with it. He is of opinion that this was not a case for the employment of three counsel. The party had a senior and a junior counsel, and at a later stage of the case thought fit to employ another senior. The Auditor has gone on the footing that there were only two counsel throughout, and has taxed the account as though the second senior had never been instructed.

LORD DEAS—I am of the same opinion as your Lordship. I think the Auditor's report shows great discrimination, especially in the distinction which he draws between a proof and a jury trial; the latter is much more anxious, both from the nature of the tribunal, which is less skilful in apprehending the merits of a case than a trained judge, and also from the difficulty of rectifying any mistake which may occur. On both these points I entirely agree with the Auditor's views, and as to the other matter I agree with your Lordship.

LORD ARDMILLAN—I agree with your Lordships in thinking it fortunate for the ends of justice that this special remit was made. I concur in all the Auditor says as to this case, and in his application of the rule laid down by the Court in the cases of *Cooper* and *Hubback*.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Repel the said objections; approve of the

said report; and decern against the pursuer for payment to the defenders of £226, 2s. 11d. the taxed amount of the said expenses; find the defenders liable to the pursuer in the expenses of the discussion on the said Note of Objection, and remit to the Auditor to tax the amount thereof, and to report."

Counsel for Objectors—Lord Advocate (Young), Solicitor-General (Clark) and Balfour. Agents—Dalmahoy & Cowan, W.S.

Counsel for Respondents—Pattison and Sir W. G. Simpson. Agents—Mitchell & Baxter, W.S.

Saturday, December 13, 1875.

FIRST DIVISION.

[Lord Mure, Ordinary.

M'AULEY *v.* COWE.

Abandonment of Action—Lis alibi pendens.

In a case where a summons in a Sheriff-court action had been executed, but not called, and a second action was thereafter raised in the Court of Session, in which it was stated on record that the first action had been abandoned—*held* that this was a sufficient abandonment, and that the plea of *lis alibi pendens* did not apply.

Daniel M'Aulay, fisherman, on September 16, 1873, raised an action in the Sheriff-court of Aberdeen against Henry Cowe, fish-curer in Leith, for the price of certain herrings. This action was abandoned on 27th September by letter of abandonment written by the pursuer's agent to the defender, and on 29th September the pursuer raised an action in the Court of Session, the abandonment being formally repeated on record. The defender pleaded, *inter alia*, *lis alibi pendens*.

The Lord Ordinary (MURE) pronounced the following interlocutor:—

"3*d December* 1873—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, repels the plea of *lis alibi*: And before further answer, allows the parties a proof of their averments, and to each a conjunct probation, on a day to be afterwards fixed.

"*Note*—The Lord Ordinary sees nothing in the decision in the case of *Aitken*, 7th July 1873, relied on by the defender, and which related to proceedings in an action in which there had been litigation in Court tending to supersede the rule laid down in the case of *Laidlaw*, 8th March 1834, to the effect that where a summons, although executed, has never been actually brought into Court, it may be withdrawn or abandoned by letter; and that when such a course has, as here, been taken, there is no foundation for the plea of *lis alibi*. The Lord Ordinary has therefore repelled that plea, and allowed a proof, as neither party was prepared to renounce probation."

The defender reclaimed.

Authorities—*Swan* v. *Mackintosh*, March 14, 1867, 5 Macph. 599; *Macgregor* v. *Macgregor*, Feb. 1, 1828, 6 S. 475; *Laidlaw* v. *Smith*, March 8, 1834, 12 S. 538; *Gracie* v. *Kerr*, Feb. 28, 1846, 19 Jur. 60; *Sinclair* v. *Campbell*, June 22, 1832, 4 Jur. 520; *Cormack* v. *Walters*, June 25, 1846, 8 D. 889 *Campbell* v. *Campbell's Trs.*, July 5, 1863, 1 Macph. 1016; *Aitken* v. *Dick*, July 7, 1863, 1 Macph 1038.

At advising:—

LORD PRESIDENT—If it were necessary to suppose that the Lord Ordinary had determined that the extrajudicial communication of the agents in this case was an abandonment of it, I should have but little doubt about the matter, but it appears to me that the case of *Laidlaw* is an authority sufficient to justify his interlocutor. It is quite true that in that case the abandonment of the first action was *in gremio* of the second summons, and so the second summons came into Court bringing with it an abandonment of the first, while here the abandonment of the first action was not made until the second summons had been served and defences lodged. The argument against the authority of *Laidlaw's* case is that there was a certain point of time when both actions were in dependence together, and that is quite true. During that time both the summonses were in dependence, and if the circumstance that they were so at a certain point of time is to be fatal to the second, then that fact is enough to justify dismissal now. But that is not the case, and the Court did not deal so technically with the matter. The real question is whether both are in dependence when the matter comes to be discussed, and if not, the plea of *lis alibi pendens* does not apply. In the present case I am of opinion that there is no longer another depending process.

LORD DEAS—There is no doubt that a summons executed, but not called, is a depending action. The question here is not whether there is a depending action, but whether the first action has been abandoned. This is not a case of abandonment by letter. The only difference between this case and *Laidlaw's* is, that here the abandonment is in the record, there it was in the second summons. It has not even been suggested that the effect of abandonment is different at one time and at another. The total difference between the abandonment of a summons which has never been called, and in which the defender has incurred no expense, and a case in which litigation has been going on and expense has been incurred, is that the party abandoning may have to pay down the expense.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Adhere to the said interlocutor, and refuse the reclaiming-note, and remit the cause to the Lord Ordinary to proceed further as may be just; find the defender liable in expenses since the date of the Lord Ordinary's interlocutor reclaimed against: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report to the Lord Ordinary, with power to his Lordship to decern for the taxed amount."

Counsel for Pursuers—Scott and Rhind. Agent—William Officer, S.S.C.

Counsel for Defender—Asher and Taylor Innes. Agents—Boyd, Macdonald & Lowson, S.S.C.
