plenty of dry ground and grass. It is not established as matter of fact that they did so, and as matter of inference, or suggested probability, it appears to me to be so unnatural and contrary to experience as to be quite out of the question. I can't say I ever heard of such a thing.

Mr Lindsay, a veterinary surgeon, and the only one examined, was called by Mr Hunter, but he gives no support to the suggestion of this probability; and Mr Mitchell and Mr M'Leish, and Mr Thomson and Mr Brown, men of practical experience, witnesses for the pursuer, speak to the same effect, and negative the suggestion.

Then it is to be remembered that the cows are stated by Mr Hunter himself and by his wife to have been affected in the middle of July, before the time when the pumping operations of the Gas Company, which caused a flow of water, commenced, and before any accumulations of water on the field.

The alleged effect preceding the alleged cause is peculiar.

It is plain to me that the case turns on the question of fact. Both Sheriffs have applied themselves carefully to the consideration of the case. But the Sheriff-Principal seems to have viewed it as turning rather on the question of liability than on the question of fact on the proof. I concur with him in regard to liability, but not as to the fact.

On the question of the evidence of injury and of the cause of injury to Mr Hunter's cows, my opinion is in accordance with that of the Sheriff-Substitute.

I do not think that special injury has been proved, or that any injury has been traced to the special cause alleged.

LORD MURE—I concur in thinking, on the question of law, that Paton & Company would be liable for the injury if it were proved that the damage was occasioned by the Gas Company. They would have had relief against the Company, but, in the first instance, the party injured would have had recourse against them.

LORD PRESIDENT—There are two questions before us—one of law and another of fact. Assuming that the defender's cows sustained injury by disease produced by the operations of the Gas Company, I am of opinion that the pursuers would be liable to repair that injury. The relation between the parties is not that of landlord and tenant; there is simply a contract between them of grass-maill. I apprehend that gives no proper title of possession, and I doubt if it would give the defender a title to apply for interdict against the Gas Company; but, anyhow, I think the tenant of the field was bound to protect the interest of his grass tenant.

LORD DEAS dissented on the question of fact.

Counsel for Paton & Company—Dean of Faculty (Clark), Q.C., and Asher. Agent—Alexander, Morrison, S.S.C.

Counsel for Hunter—Solicitor-General (Watson) Q.C., and Balfour. Agents—Keegan & Welsh, S.S.C.

Saturday, February 6.

FIRST DIVISION.

[Lord Young, Ordinary.

ANDREW CLARK *v.* JAMES HENDERSON.

Process—Agent and Client—Husband and Wife.

An action of separation and aliment at the instance of a wife against her husband having been stopped before decree by a reconciliation, *held* (after consultation with the Second Division) that the necessary expenses incurred by the wife's agent, being a debt due by the husband, might be recovered either by decree in the original action or by a fresh action, in the discretion of the Court.

This action was raised by Mr Andrew Clark, S.S.C., to recover from the defender the expenses of an action of separation and aliment which he had brought, on the instructions of the defender's wife, against her husband. The action proceeded as far as the lodging of defences when the parties were reconciled, and the defender's agent enrolled the case with a view to obtaining decree of absolvitor, and then Mr Clark moved that he should be found entitled to his expenses. This motion was refused, and he raised the present action, in which the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 10th December* 1874.—The Lord Ordinary having heard counsel for the parties and considered the record and process: Finds that, in the circumstances averred by the pursuer, the action is not maintainable: therefore assoilzies the defender from the conclusions of the summons, and decerns: finds the pursuer liable in expenses, and remits the account to the Auditor to tax and report.

"*Note.*—It is well settled, and was not disputed by the defender, that in conjugal actions, as, indeed, in all actions, the Court before whom they depend has very ample jurisdiction in the matter of expenses, and may, and habitually does, exercise it in favour of the agents disbursers, as well as the parties themselves. It may also be stated as a general rule that a wife pursuing an action of divorce or separation against her husband, or defending such an action at his instance, is entitled by herself or her agent to have decree against him for the expenses properly incurred by her, even when unsuccessful. There are exceptions to this rule, and whether the case falls under the rule or an exception is judged of and determined by the Court in the case itself.

"In the present case the pursuer, having been employed by the defender's wife to raise an action of separation and aliment against him, which was dismissed at an early stage without expenses in the circumstances stated in the record, sues the defender for his account of expenses, either as being his own proper debt, or that of his wife, for which as her husband he is liable.

"The pursuer cited no authority for such an action, and relied on the principle of liability involved in the practice of the Court to which I have referred in dealing with the matter of expenses in conjugal actions, undertaking to establish by evidence that he had reasonable grounds for accepting of the wife's employment to take proceedings against her husband.

"I am of opinion that the action is not maintainable.

"1st. It may be assumed, although it is not necessary to decide, that the claim is good against the wife, and that it may be enforced against any separate estate which she has or may come to have. But it does not follow that the husband is liable, and, having regard to the nature of the debt, I think he is not. 2d. It may be that the pursuer might have made his claim good against the defender by invoking the jurisdiction of the Court on the matter of expenses in the action of separation itself. But this is a peculiar jurisdiction, and is exercised in each case according to the Court's opinion of its merits and the just claims of parties, when the case itself is before the Court. 3d. The consideration which the pursuer urged—that if the husband be not subject to such a claim as this an ill-used wife may have to go without a remedy from inability to find an agent willing to incur the risk of taking up her case—is worthy of attention, but is, in my opinion, greatly overbalanced by considerations on the other side. As I have already noticed, the wife's agent may always appeal to the Court in the action which he raises for her. But to allow him to make an independent claim by action at his own instance would involve an investigation, at his instance and for his purposes, into family differences after the spouses had, as in the present case, made them up and resumed their cohabitation—a course which is, in my opinion, to be deprecated as inimical to family peace. 4th. I do not think it is desirable, on general considerations, to encourage agents to take up such cases by declaring any other liability on the part of the husband than that which the Court may, as hitherto, give effect to and enforce, according to their judgment, in the wife's own action against him."

The pursuer reclaimed, and pleaded—"(1) The pursuer having performed the business charged for in the account founded on upon the employment of the defender's wife, he is entitled to decree therefor. (2) The defender is liable to the pursuer for said account incurred upon the employment of his wife, in respect that the action raised on her behalf was well founded on its merits, or at all events was an action which the pursuer had every reason to believe to be well founded in fact and law. (3) Generally, in the circumstances, the pursuer is entitled to decree as concluded for, with expenses."

Authorities—*Smith* v. *Smith*, Feb. 21, 1871, 9 Macph. 538; *Aitken* v. *Anderson*, Hume 217; *Masters and Seamen of Dundee* v. *Cockerill*, Dec. 10, 1869, 8 Macph. 278; *Ritchie* v. *Ritchie's Trustees*, March 11, 1874, 1 Rettie 826; *Gordon* v. *Sempill*, 1776, M. 446; *Young* v. *Cooper*, June 9, 1828, 4 S. 81; *Gray* v. *Meikle*, Hume 217; *Harman* v. *M'Allister's Trustees*, July 6, 1826, 4 S. 799; *M'Allister* v. *M'Allister's Trustees*, July 5, 1822, 1 S. 548, 503 new ed.; *Allsopp* v. *Allsopp*, July 8, 1830, 8 S. 1032; *Symington* v. *Symington*, June 11, 1874, 1 Rettie 1006.

Pleaded for defender—"(1) The said action having been unnecessary, and having been raised precipitately and without probable cause, the pursuer cannot maintain the present action. (2) The said action having been abandoned by Mrs Henderson, the defender is not due the sum sued for. (3) Decree of absolvitor having been pronounced in the former action in consequence of the failure of the present pursuer to print as required by statute, the defender ought to be assoilzied, with expenses. (4) *Separatim.*—The account sued for being greatly overcharged, the pursuer is not entitled to decree as concluded for."

Authorities—*Maxwell* v. *Wallace*, March 5, 1808, F. C.; *Macfarlane* v. *Macfarlane*, June 24, 1844, 16 Jur. 521; *Bowman* v. *Bowman*, Feb. 7, 1866, 4 Macph. 384; *Coutts* v. *Coutts*, June 8, 1866, 4 Macph. 802; *Rae* v. *Adden*, 9 American Rep. 175.

At advising—

Lord President—This is an action by a legal practitioner for the recovery of an account incurred to him by the defender's wife in an action of separation and aliment which he raised on her instructions. That action was not carried through, but, on the contrary, after the action had been called and defences had been lodged, and when it had become the duty of the pursuer's agent to print, he received an intimation that the parties had become reconciled, and the defender's agent enrolled the case with a view to getting decree of absolvitor. At that stage of the proceedings the pursuer tabled his claim for payment of his account, but the Lord Ordinary did not think fit to give him decree, or even to entertain his claim, being of opinion that the proper method of enforcing it was by a separate action. That action has now been raised, but having been raised it is met by the objection that it is not competent, and the pursuer seems to have this dilemma presented to him, that he cannot recover under the original process, and that a new action is not competent. I can by no means assent to that. There may, of course, be a question whether the pursuer is entitled to recover at all. If these expenses were reasonably and properly incurred they were services necessary to the wife, and so are recoverable as a debt from the husband, and why that civil debt should not be recoverable in an ordinary civil action I cannot see. In consequence of the judgment of the Second Division, which has been referred to, we have had a consultation with their Lordships in that Division, and this judgment may therefore be taken as representing the view of the whole Inner House. The case of *Smith* v. *Smith* is rather calculated to mislead. The rubric is as follows:—"An action of separation and aliment at the instance of a wife against her husband having been stopped before decree by the reconciliation of the parties, *held* that the wife's agent was not entitled to be sisted as a party in the action for the purpose of enabling him to get a decree against the husband for expenses." The only opinion reported is that of Lord Benholme, but we are informed that in the circumstances the Court did express an opinion that it was not a case in which to sist the agent in the original process, and there was good reason for that opinion. The case of *Smith* was very like the present case, and the same motion was made in both of them, and we are all of opinion that when the motion was made at that stage of the proceedings it was not expedient to consider the question at that stage. The Lord Ordinary knew nothing of the case except the state of the process on one side and the other. If he had known the facts instead of only the averments of the parties it would have been very expedient that he should have disposed of the claim for expenses, for he could then have judged of the sufficiency of the grounds of action, but when no proof has been led, I think, as a general rule, it is expedient that the

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