absolvitor is not entitled to an extract at the expense of his opponent. But I think it is settled by authority and practice that this is not so. In the case of *Hunter* v. *Stewart*, 20 D. 60, the defender in an action of declarator, who was assoilzied, was found entitled to an extract of the decree of absolvitor at the pursuer's expense—'The Court hold the rule quite established that the successful party, whether defender or pursuer, was entitled to an extract at the expense of his opponent.'

"Again, in *Scott* v. *North British Railway Company*, 22 D. 922, an action for implement or damages, the defenders having been assoilzied and found entitled to expenses, the pursuer objected to the defenders being allowed the expense of approving the report and obtaining decree, the amount of expenses incurred having been tendered. The defenders answered that the expense of extracting the decree of absolvitor was not tendered, and that therefore the defenders were entitled to proceed in the usual way, and this answer was sustained by the Court. Again, in *Williams* v. *Carmichael*, 11 S.L.R. 530, Lord Gifford said—'It is quite fixed in law and practice that a defender who obtains decree of absolvitor with expenses is entitled to an extract of that decree at the expense of the unsuccessful pursuer. This is a matter of everyday practice, and was recognised in *Hunter* v. *Stewart*, 20 D. 60.'

"In view of those decisions I think that Mr Mackay is amply justified in stating the practice as he does at page 317 of his Manual on Practice, as follows:—'21. The party who has obtained decree with expenses in his favour is entitled to extract at the expense of his opponent, and that whether he is defender or pursuer. Decree for expenses is held to include a decree for the expense of extracting. . . . When a motion for approval of the Auditor's report would be otherwise necessary, the unsuccessful party is entitled to save the expense of this motion for which he would be liable by tendering the expenses found due along with the dues of extract. But if he does not include the dues of extract in his tender he will be found liable in the expense of the motion for approval of the Auditor's report.'

"The case of *Allan* v. *Allan's Trustees*, 13 D. 1270, does not touch the point, because there the unsuccessful party tendered the amount of the taxed account under deduction only of the expense of obtaining approval and decree.

"The Parish Council of Glenbucket also referred to the case of *Bannatyne* v. *M'Lean*, 11 R. 681. That case is very shortly reported, and it can only be reconciled with the previous cases by supposing that the cost of ordering an extract was not included in the account taxed by the Auditor. This may be so, because it is stated that the defender tendered the whole amount of the account of expenses, and the only authority noted as having been referred to is a case of *Allan* v. *Allan's Trustees* in 13 D. Perhaps by some oversight the point was not brought under notice of the Court. I cannot believe that the Court intended, without comment or reference to previous decisions, to overrule the previous decisions upon the point. The case of *The Magistrates of Leith* v. *Gibb*, 19 S.L.R. 399, merely decided that approval by the Court of the Auditor's report and decree for expenses were not necessary to enable a defender to extract a decree on the merits previously pronounced in his favour. And therefore where the unsuccessful party tendered the amount of the taxed account, less expenses for approval and decree, the Court only gave decree for the taxed amount under deduction of those expenses.

"It will be seen from the authorities which I have quoted that it is a recognised practice that a defender who obtains decree of absolvitor even in an ordinary petitory action is entitled to an extract at the expense of his opponent if he is found entitled to expenses. It may be that in such cases the defender usually has no interest, and does not care to obtain an extract of the decree; and I desire to say nothing to encourage unnecessary expense in this matter. But his right according to the authorities is as I have said. But this is not an ordinary petitory action. It is an action brought by a relieving parish to have what will probably prove to be a continuing liability established against one or other of two parishes. I think that on principle (apart from the matter being concluded by authority) the successful defender in such a case is entitled as a reasonable charge to obtain at the expense of his unsuccessful opponent an extract of the decree by which his exemption from liability is established.

"I shall therefore approve of the Auditor's report as it stands and grant decree for the amount. According to practice that decree will be sufficient authority to the extractor to include the dues of extract in the warrant to charge. As discussion was rendered necessary by the action of the Parish Council of Glenbucket, I shall find them liable in two guineas expenses."

Counsel for Parish Council of Dalziel—Cullen. Agents—Bruce & Kerr, W.S.

Counsel for Parish Council of Glenbucket—J. A. Reid. Agents—Henderson & Clark, W.S.

Saturday, January 25.

OUTER HOUSE.

[Lord Kincairney.

WEBSTER *v.* WEBSTER.

Process — Mandatory — Divorce — Interim Aliment—Liability of Mandatory.

In an action of divorce, a party pursuing as mandatory of the husband is not personally liable for *interim* aliment to the wife.

Mr G. A. Webster brought an action of divorce against his wife, Mrs M. Campbell

or Webster, and being resident in Australia, sued along with a mandatory. Mrs Webster moved for a decree for *interim* aliment against the mandatory personally.

The Lord Ordinary (KINCAIRNEY) *refused* the motion.

Opinion.—"On considering the motion for the defender for decree against the pursuer's mandatory, I have come to the conclusion, contrary to my original impression, that it should be refused. I have come to think that I ought not to extend the liabilities of a mandatory beyond previous usage or pronounce a decree against him which is not warranted by decisions or judicial *dicta*, or the authority of institutional writers, or practice, and no such authority has been quoted to me in favour of this motion, and I have not been able, after some investigation, to find any. It is quite possible that the question has never been raised before. When I pronounced the interlocutor of 28th November my attention was not called to the fact, or at least I did not advert to it, that the pursuer sued along with a mandatory, and hence my judgment was pronounced against one pursuer only — that is, of course, the principal pursuer; but the form of that interlocutor does not preclude a second interlocutor including the mandatory also in the decree for *interim* aliment.

"The position of a judicial mandatory and the extent of his liability have more than once been defined and explained from the Bench. Lord Ivory in a note to Erskine, iii. 3, 32, says that 'the liability of a judicial mandatory does not go beyond the expenses of process.' But I think that all that was intended was to state that he was not liable to implement the merits of the action, for there is no doubt that the liability of a mandatory does go beyond liability for the expenses of process. Thus in *Renfrew & Brown* v. *Magistrates of Glasgow*, June 7, 1861, 23 D. 1003, the Lord Justice-Clerk (Inglis) says—'As regards the merits he is a mere representative, but he is personally answerable for all the other conditions of the contract of litiscontestation. He is liable to implement any order the Court may pronounce in regulating the conduct of the process; he is personally liable for fines and for expenses which may be found due in the course of the process, and he is personally liable for the whole expenses of the process.' In *Overbury* v. *Peak*, July 9, 1863, 1 Macph. 1058, Lord Deas expresses his view of the liability of a mandatory as follows—'One great object of having a mandatory is that there shall be a party responsible to the Court for the proper conduct of the litigation, which may be material, as regards personal liability for the consequence of any irregularity, as, for example, contempt of Court. The mandatory, in short, has to represent within the jurisdiction the party who is beyond it.' In *Gunn & Company* v. *Cooper*, November 22, 1871, 10 Macph. 116, Lord Kinloch said that the object of sisting a mandatory 'is not only to make the mandatory liable for expenses, but also to secure a party responsible for the proper conduct of the cause, and for the availability of every step taken in the Court;' a definition adopted by the Lord President (Inglis) in *Thoms* v. *Bain*, March 20, 1888, 15 R. 613. These judicial *dicta* do not suggest the liability of a mandatory for an *interim* award of aliment, or for any similar award, yet neither do they exclude it. As to the extent of the responsibilities of a mandatory beyond the expenses of process, these *dicta* have not received much, if they have received any, illustrations in judgments of the Court. The *dicta* of course are of too great authority to be questioned. But I do not know that they are supported by any decision. They afford, however, some ground for the defender's motion. It is contended that the award of aliment is nothing but an order for the due conduct of the cause, and that it is only to be justified and accounted for on that ground seeing it is not concluded for, and that the liability of a husband—pursuer in an action of divorce—to aliment his wife during the process is a condition of this special contract of litiscontestation. It is maintained that it is in the same position as an *interim* award of expenses. It has been decided, however, that an *interim* award of aliment and an *interim* award of expenses do not stand in precisely the same position. In *Dixon* v. *Bayne*, February 17, 1841, 3 D. 559, it was decided that an action of divorce against a wife might proceed though a sum of aliment awarded to her in the course of it against her husband had not been paid, but that the action could not proceed until the husband had paid the wife's expenses of process awarded against him, which comes near to saying that payment of the wife's expenses is a condition of the contract of such a litiscontestation, but that an award of *interim* aliment is not. The view of the defender has appeared to me to be plausible, but as it is not supported by a vestige of direct authority, I have thought that the liability of a mandatory as it has hitherto been understood cannot safely be extended."

Counsel for the Pursuer—Deas. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Defender — Findlay. Agents—Patrick & James, S.S.C.

Wednesday, February 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEVENSON, LAUDER, & GILCHRIST *v.* MACBRAYNE AND OTHERS.

Retention—House-Factor's Lien—Assignation to Rents in Bond—Bankruptcy—Retrocessed Bankrupt.

Three days after a petition had been presented for sequestration of the owner of certain house property, a firm of house-factors employed by him collected the rents of the property.