it necessary for the Court to hold that as laid the indictment is irrelevant.

Lord Justice-Clerk—I entirely agree that the provision of this sixth section is very important, and that it is very desirable that it should receive effect in this end of the island. But I am very sure that the sixth section of this statute does not refer to any securities but those of the Bank of England, and I think it would be a most unfortunate precedent, after the doubts that have been expressed during the whole of this century, and when all the authorities with one exception are one way, to make this provision applicable to Scotland. I shall be very glad to see the Legislature effect that object, and the sooner the better, but in the meantime, looking to the period when the statute was passed, and to the practice that has followed, I do not see that that clause can now be held to include the notes of the banks of Scotland—and for this plain reason, that the phraseology is phraseology appropriate to securities of the Bank of England, and I fancy there are no securities issued by the Scotch banks that would come under that denomination. But what makes it perfectly conclusive is, that if these words had the interpretation now attempted to be put on them they would include the notes of private banks in England, and yet it is conceded that there is not a single instance of their being made to include these notes. It is said that this Act was to extend the law to Scotland, and so it does in many important respects. But this particular section relates to Bank of England notes in Scotland. Therefore on that ground I concur with Lord Young's view that it would not be safe, especially after years of controversy, to sustain this indictment merely on the ground that the matter is very important; because however desirable it might be to have a special statute relating to possession without uttering, it is not, in my opinion, in accordance with the common law that that should constitute an indictable offence. And therefore I think that we should strike out this part of the indictment and sustain the relevancy of the rest.

The Court ordered the indictment to be amended accordingly.

Counsel for Panel—Dickson—Ure. Agent—Alex. S. Drummond, Writer, Glasgow.

Counsel for H. M. Advocate—Innes, A.-D. Agent—Crown Agent.

COURT OF SESSION.

Wednesday, March 15.

SECOND DIVISION.

[Lord Fraser, Ordinary.

STEVENS *v.* STEVENS.

Husband and Wife—Separation—Res judicata.

Cruelty or ill-usage proved by a wife against her husband, and held by the Court sufficient to justify non-adherence on her part, and to afford a satisfactory defence to an action of divorce for desertion at his instance, cannot be pleaded as *res judicata* in her favour in a subsequent action of separation and aliment against him, to the effect of excluding the necessity for proof in that action.

This was an action of separation and aliment by Mrs Catherine Duncan or Stevens against her husband William Stevens, contractor, West Calder. The pursuer alleged a prolonged course of cruelty and ill-treatment, including acts of personal violence and threats against life during fourteen years at various places in Lanarkshire and Midlothian, in consequence of which she was compelled through bodily fear to leave his house in May 1873, and had never returned to it. The pursuer had thereafter supported herself under an assumed name for several years, in the course of which she had repeatedly, through third parties, applied to her husband to send her clothes and aliment, but received neither. In the end of 1880 her husband raised against her an action of divorce for desertion (*ante*, vol. xviii. p. 601). She defended the action, and led proof of her husband's cruelty, in respect of which she was assoilzied by the Second Division of the Court, on the ground that the ill-usage proved by her was sufficient to justify her in leaving her husband's house and not returning to it, without thereby being in that wilful and malicious desertion which would warrant divorce. The summons in the present action contained a conclusion for aliment. The defender denied the allegations of cruelty and ill-treatment, and averred that the pursuer had left his house without cause, offered to receive her back, and pleaded accordingly.

The pursuer pleaded, *inter alia*—"The defender's cruelty is *res judicata* under the action of divorce, and there being no new averments by him further proof is excluded."

The Lord Ordinary (Fraser) repelled this plea and allowed a proof, adding this note:—"The third plea-in-law for the pursuer is in the following terms:—'The defender's cruelty is *res judicata* under the action of divorce, and there being no new averments by him further proof is excluded.' The action of divorce here referred to was one at the instance of the defender in the present action against his wife, the pursuer, wherein divorce on the ground of desertion was craved. Against this action the wife lodged defences to the effect that she was justified in not adhering to her husband by reason of his cruelty to her. The Court sustained the relevancy of this defence, and found it to be proved in fact; and the question now comes to be, whether the cruelty or ill-usage which the Court held in that action of divorce to have been proved, must be taken as *res judicata* in the present action of separation and aliment, in which the wife is pursuer and not defender?

"The Lord Ordinary is of opinion that it cannot be so held. The result of the first action was to find that the wife was not obliged to comply with the husband's demand to adhere to him, and thus, although not formally, at all events practically, there was separation between the spouses which the husband could not at his will disturb. If he had pleaded that the dispute between them as regards separation was thus *res judicata*, and that in consequence the present action was incompetent, the husband would have had a precedent for such a plea in the case of *Geils*

v. *Geils*, 1 Macq. 255. But in accordance with the decision in that case his plea would have been overruled. It is the pursuer in the present action who pleads *res judicata*, with the view of avoiding an order for proof in support of her averments in the present action of cruelty by her husband. She wishes to import into the present case, not the proof that was led in the action of divorce, but the judgment of the Court assoilzieing her from the conclusions of that action. This, however, she cannot be permitted to do. It may be an important fact for her to prove in this action of separation that she defeated her husband's demand for divorce on the ground of desertion, but that will not free her from the necessity of establishing substantively her right to demand judicial separation, which requires proof of personal violence or threats of personal violence, while a proof of lesser ill-usage would justify a defence against an action of adherence or divorce for desertion. The two actions have totally different effects. If the pursuer obtained decree of judicial separation, the *jus mariti* and right of administration of her husband would be excluded, and her domicile would no longer follow that of her husband, as is expressly provided by the Conjugal Rights Act. At present, though she successfully resisted the action of divorce, the *jus mariti* and right of administration are effectual, and the wife's domicile is that of her husband. The point to be determined in the present action was not determined by the judgment in the divorce action, and the husband is now entitled, when he is put upon the defensive, to vindicate himself by adducing other and additional evidence—if he possess it—than what he was able to produce in the action of divorce."

The pursuer reclaimed.

The Lords, without calling on the defender's counsel, and without delivering opinions, unanimously adhered and found no expenses due.

Counsel for Pursuer (Reclaimer) — Nevay. Agent—James Barton, S.S.C.

Counsel for Defender (Respondent)—Rhind. Agent—William Officer, S.S.C.

Wednesday, March 15.

FIRST DIVISION.

SPECIAL CASE—CAMPBELL'S TRUSTEES *v.* CAMPBELL.

Trust—Liferent and Fee—Extent of Liferent Right—Mineral Leases.

Held that a direction by a truster to his trustees to pay to his widow "the whole annual produce and rents of the residue and remainder of my means and estate" did not import any alteration of the general rule of law whereby a liferenter is entitled to the rent under leases of minerals in course of being worked at the death of the truster, or under renewals of such leases, but not of any mineral field subsequently opened up.

30 *and* 31 *Vict. c.* 97 (*Trusts (Scotland) Act*), *sec.* 2—*Power of Trustees to Grant Mineral Leases.*

Question, Whether this section gives power to trustees to grant leases of new mineral fields?

The late Sir George Campbell of Succoth, Bart., died on the 17th of February 1874. He left a trust-disposition and settlement dated 22d October 1873, whereby he assigned and conveyed to certain persons therein named his whole property, heritable and moveable, in trust for the ends and purposes therein specified. The trustees and executors under the said trust-disposition and settlement were the parties hereto of the first part. The said Sir George Campbell left no issue. He was survived by his wife, who was the party hereto of the second part.

The trust-estate consisted of the residue of the *universitas* of the testator's property, the nett annual proceeds of which, after payment of debts, legacies, and expenses, amounted to £13,000 per annum. The estate comprised, *inter alia*, lands in the counties of Dumbarton and Lanark, in which there were valuable minerals. The coal and ironstone contained in one portion of these lands was being worked under leases which were current at the time of Sir George Campbell's death.

In 1879 the trustees, in virtue of the powers conferred upon them by the second section of the Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), granted a lease for a term of years of the ironstone and other minerals in portions of the lands which had never previously been let. By the fifth purpose of the trust-deed the trustees were directed to "pay over to the said Lady Campbell, my wife, in the event of her surviving me, the whole annual produce and rents of the residue and remainder of my means and estate, heritable and moveable, during all the days and years of her life." As part of "the annual produce and rents of the free residue" of the trust-estate the trustees had paid to Lady Campbell the rents received under the leases of the minerals current at the date of Sir George Campbell's death.

A question thus arose upon the opening of the new fields, whether Lady Campbell was also entitled under the said purpose of the trust-deed to the fixed rent or lordship payable in respect of minerals which were not let out or worked during the truster's lifetime, or whether such rent was to be treated as capital, and formed part of the residue of the trust-estate?

The question for the opinion and judgment of the Court was—"Whether under the fifth purpose of the said trust-disposition and settlement the party of the second part (Lady Campbell) is or is not entitled to the lordships or rent of minerals in seams which were not let or worked during the truster's lifetime, but which are now being worked under the lease granted by the parties of the first part (the trustees) in virtue of the powers conferred by the Trusts (Scotland) Act 1867?"

Argued for the first party—This was to a large extent a question of intention. The widow was not entitled to the rents under leases entered into subsequent to her husband's death. The money ought to be accumulated for the benefit of the fiar. Apart from express grant, the liferenter cannot get more benefit from the estate than the truster was deriving at the time of his death. The words used in the fifth purpose, "whole