for the decree there is, I think, a short and conclusive answer. The claim of the present defenders was for £5 and the expenses of the small-debt summons. The present pursuer met that claim by sending not money but a cheque, and that cheque not for the £5 and expenses, but for £5 only. Now, the only tender that could have legally disentitled the present defenders to proceed to take decree was a legal tender for all they claimed—that is to say, a tender in money of the full amount sued for. As we are here in an action of damages, the question is, not whether the conduct of the defenders was commendable, but whether it was illegal, and in my opinion it was not illegal. It is impossible to build up on the mere fact that the cheque was not returned, any agreement not to take decree or any bar against taking it.

This being a sufficient ground of judgment, I do not proceed at all on the series of cases about the finality of small-debt decrees referred to in the Lord Ordinary's note, and I have no occasion to consider whether their principle would exclude an action of damages for breach of an agreement not to take decree. I am for adhering.

LORD M'LAREN—As to the first head of damage I have no doubt. I have felt the second question to be one of difficulty, because while it is very true that a cheque is not a legal tender, yet if a cheque is sent in payment of a debt, and the creditor does not mean to accept it, good faith prescribes that he should return the cheque before proceeding with legal measures for the enforcement of his claim. I should not wish to be understood as saying that in no circumstances would a creditor who retains a cheque sent to him, be barred from taking decree. But in the present case the tender (such as it was) did not include expenses; there was not much time for ascertaining whether the cheque would be honoured, and no special damage is alleged. And so my doubts on this subject are not so strong as to induce me to dissent from the Lord Ordinary's judgment, which I understand is approved by the majority of the Court.

LORD KINNEAR and LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—Horne. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders — Jameson, Q.C.—Crabb Watt. Agents—Clark & Macdonald, S.S.C.

Friday, June 24.

SECOND DIVISION.

[Lord Pearson, Ordinary.

SHARP *v.* SHARP.

Husband and Wife—Separation and Aliment — Defence that Marriage Null — Husband of Previous Marriage not Proved to be Dead—Presumption of Life —Exception—Onus.

In 1868 a woman entered into a regular marriage with A, who was then 25 years of age. A deserted her in 1871, and she had not heard of him since that date. In 1875 she went through the form of a regular marriage with B. In 1897 she brought an action of separation and aliment on the ground of cruelty against B, who pleaded in defence that he was not her husband. The pursuer admitted the facts above stated as to her marriage with A, and a certificate of that marriage was produced. There was nothing apart from the lapse of time to indicate that A was dead even at the date when the action was raised. *Held* (*diss.* Lord Moncreiff) that A must be presumed, in the absence of evidence to the contrary, to have been alive in 1875, that it lay upon the pursuer to prove that he was then dead, that apart from evidence to this effect her marriage with B was not proved, and that consequently she had no title to sue the present action. Action accordingly *dismissed.*

The facts of this case sufficiently appear from the opinion of the Lord Ordinary (PEARSON), which was as follows:—"This is an action of separation and aliment. The pursuer's case is that she and the defender were regularly married on 14th May 1875, and that after a long course of cruelty and maltreatment on his part she was obliged to leave him in January 1897. During those 22 years they lived together as man and wife in and near Kirkcaldy. There are no children of the marriage.

"The cruelty is clearly proved. I can give no weight to the defender's denials, as against the evidence adduced by the pursuer, which (as I think) is entirely trustworthy on this head.

"The defender, however, pleads that the pursuer had been previously married to a man named Scott, who was alive in 1880 and may still be alive, and that the marriage now founded on is null. The facts on this part of the case are these:—The pursuer was regularly married to Thomas Scott, banksman at a coal pit, on 18th December 1868, their ages at that time being 25 and 26. Scott left her in February 1871, and she has not heard of him since. If he is still alive, his age is 55. Apart from the lapse of time, there are no circumstances proved which tend to show that he is dead.

"After waiting four years and three months, the pursuer went through the form of a regular marriage with the defen-

der. On her own showing, she could have obtained a divorce from Scott on the ground of desertion. What she did was to consult a lawyer (now dead), whose advice to her was, according to her recollection, that there was no obstacle to her taking another husband, but that if Scott turned up she would need to go back to him. It is difficult to believe that this is an accurate statement of the advice given. But I take it that it expresses the footing on which she lived with the defender.

"Whether the defender's *bona fides* was of a higher order may be doubted. But his own account is, that before the marriage he asked her 'if her man was dead,' and she replied that she had made inquiries and was at liberty to marry.

"In these circumstances a question of some difficulty presents itself, arising from the absence of evidence, and the application of certain legal presumptions. There is a presumption in favour of innocence, and in favour of the validity of a reputed and ostensibly regular marriage. There is, on the other hand, the presumption of life which, though largely modified by statute for certain limited purposes, remains unaltered at common law.

"In the present case it can hardly be said that these presumptions run counter to one another. The leading presumption, and the one which attached first in point of time, is the presumption that Thomas Scott, who disappears in 1871, was alive in 1875, when the pursuer and defender went through the form of marriage. In the circumstances of this case, and knowing what we do of the mind of the parties, I cannot hold that the strength of the presumption of life is in any degree abated by the fact that the second marriage was public and regular or by the semblance of married life which followed upon it. Nor is the pursuer's case bettered by the consideration that she was in a position, and is still in a position, to divorce her first husband. Our law admits of divorce after four years' desertion, and persons may have their status authoritatively changed by adopting that remedy. But if they do not, their status as married persons remains unaltered, and a new connection, begun under these circumstances, can hardly develop into lawful marriage by mere lapse of time, however formally it may have been gone about. Thomas Scott may possibly have died before 1875, in which case the second marriage is good from the beginning. Or he may have died since 1875, in which case I am willing to assume that the pursuer might make good a marriage by 'habit and repute' from the date when the impediment was removed. But until one or other of these things is proved by facts sufficient to displace the common law presumption of life, Thomas Scott must be presumed to be alive in all questions between the pursuer and the defender in which no third party is interested.

"The principle, which I think is the sound one, was applied by Lord Moncreiff to a case of declarator of nullity of marriage (*Mackenzie* v. *Macfarlane*, January 23, 1891; unreported).

"We are here, however, in an action for separation and aliment. In the ordinary case of an action for aliment there would, I suppose, be an interim award of aliment, or at the least a sist of the action until the defender proved his defence of nullity. And I am not disposed to treat this case as one in which I can affirm the nullity of the marriage so as to affect status. But the pecuniary claim is founded on the judicial separation of two married persons; and the presumption being in my opinion against the validity of the marriage, I think the basis of the pecuniary conclusion fails.

"I think the proper course in that state of matters is to dismiss the action, and I find neither party entitled to expenses."

His Lordship accordingly pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, dismisses the action: Finds neither party entitled to expenses, and decerns."

The pursuer reclaimed.

After hearing counsel their Lordships of the Second Division, on 3rd March 1898, recalled the interlocutor reclaimed against *hoc statu*, and continued the cause in order to enable the respondent, if so advised, to raise an action of declarator of nullity of marriage.

No proceedings at the instance of the respondent having been taken, the reclaimer presented a note to the Lord Justice-Clerk requesting his Lordship to move the Court to recal the interlocutor reclaimed against *simpliciter*, and to pronounce decree in the reclaimer's favour as concluded for.

Argued for the pursuer and reclaimer—The pursuer was entitled to sue the present action in respect that she and the defender had entered into an *ex facie* regular marriage, which must be presumed to be valid until declared not to be so. The defender could not establish his defence that the marriage was null *incidenter* by way of exception in this action, but only by an action of declarator of nullity. Authorities cited:—Act 1503, cap. 77; Hope's Minor Practics, tit. i., section 21, Spottiswood's note, *voce* Exception; Bankton's Institute, iv. 34, 7; *Wright* v. *Sharp*, January 16, 1880, 7 R. 460, Sheriff's note at p. 463; *Mackenzie* v. *Macfarlane*, January 23, 1891, 5 S.L.T. 292 (No. 359). [LORD TRAYNER referred to *M'Donald* v. *Mackenzie*, February 6, 1891, 18 R. 502.]

Argued for the defender and respondent—The pursuer had no title to sue the present action. The form of marriage which she had gone through with the defender was *ipso jure* null. All the facts necessary to establish the respondent's defence were admitted by the pursuer, and there was no necessity for a declarator of nullity, the Court being entitled in the state of the facts as admitted by the pursuer to treat the second ceremony as null. This action ought consequently to be dismissed. Authorities cited:—Fraser, Husband and Wife, vol. i. 135; Pothier, Traité du Contrat de Mariage, sections 105, 106.

At advising—

LORD JUSTICE-CLERK—The pursuer sues for separation and aliment from the defender on the ground that she was married to him in May 1875, and that he has been guilty of cruelty to her. There is now no dispute between the parties that if the pursuer is entitled to sue the action as the wife of the defender she is entitled to succeed, but the defender maintains that the pursuer cannot succeed, because when she went through the form of marriage with him she was a married woman. He avers that in 1868 she was married to one Thomas Scott, then a man of twenty-six years of age, and that there is no evidence to prove that he is dead. The pursuer admits these facts, and explains her marrying the defender when she did by saying that her husband deserted her; that she had not heard of him for more than four years, and that she was led to believe that she was at liberty to marry again. But she admits the significant fact that the person she consulted told her that if her husband should again make his appearance he would be entitled to claim her, and she would have to return to him.

The first marriage is proved by a marriage certificate under the hand of the registrar, and its application to the pursuer is sufficiently proved by her own admission of the marriage to Scott.

The defender declines to bring any action of nullity of marriage, and therefore the sole question to be decided is this—is the pursuer entitled to have a judgment in her favour upon the footing that the defender is her husband, and ordaining him to pay aliment to the pursuer as his wife in respect of there being ground for a decree of separation *a mensa et thoro*. The Lord Ordinary has held that she cannot, and I am of the same opinion. I think that the pursuer is proved to have been married on 18th December 1868 to Thomas Scott, aged twenty-six, and that there being no presumption either that he was dead at the time of her marriage with the defender or that he is dead now, she cannot found upon evidence to establish a marriage with the defender, which could only be legal if at the time she was not a married woman. The Lord Ordinary has, I think, taken the proper course of dismissing the action. This in no way decides or prejudices any question which may arise should the pursuer be able at any future date to prove that she is the defender's wife. That is all open. It is only held that she cannot now competently sue such an action, and prove the averment that she is married to the defender. All that is decided now is that she cannot enforce any right in this action seeing that there stands against her evidence of a previous marriage, as to which there is no evidence that it is not still subsisting.

LORD TRAYNER—The pursuer in this case avers that she is the wife of the defender, married to him in May 1875, that he has treated her so cruelly that she is entitled to live separately from him, and that he is bound to aliment her. The defence is that the defender is not the husband of the pursuer; that the ceremony of marriage gone through between them is null, in respect that at the time of that ceremony the pursuer was a married woman, her husband being alive. The facts are, that the pursuer was married to a man named Thomas Scott in December 1868, which is established not merely by the admission of the pursuer, but by the extract from the register of marriage produced; that Scott deserted the pursuer in February 1871, and she has not seen or heard of him since. The pursuer says she believes Scott to be dead, but she does not aver that he was dead before her alleged marriage with the defender, or that he is dead now. In short, she knows nothing about him. In these circumstances I think the Lord Ordinary was right in dismissing the action, the pursuer's title to sue it not having been established.

There is no presumption in favour of the view that Scott was dead in May 1875; on the contrary, the presumption is in favour of life. At that date Scott was (if alive) quite a young man, about twenty-seven or twenty-eight years of age. But if alive at that date, as without any evidence to the contrary I must (for the purposes of this action) take him to have been, then the alleged marriage between the pursuer and defender was no marriage; it neither conferred on the pursuer the rights of a wife, nor imposed on the defender the obligations of a husband. The pursuer, however, has no other title to sue this action.

It may be, however, that Scott was dead before May 1875, and if the pursuer can prove this in another action she will have all the rights of a wife against the defender. But the burden of proof, I think, lies upon her in the circumstances with which we have here to deal. It appears to me to be enough to warrant the Lord Ordinary's decision that the marriage with Scott is established, and that there is nothing to prove that he is dead. The presumption is that he was alive in May 1875, and that, indeed, he is alive still. The result of the Lord Ordinary's judgment is not to find that the marriage ceremony between the pursuer and defender was null, but only that the pursuer has failed to show that it was valid. The decision now pronounced leaves the status and rights of the parties exactly as they were when this action was brought.

LORD MONCREIFF—I have not been able to free myself from my doubts as to the competency of sustaining by way of exception the defence of nullity of marriage in a consistorial cause, even when the pursuer of the action makes such admissions in regard to the marriage which is alleged to be null as would, aided by the presumption of life, otherwise infer that the second marriage was null. While there is authority for holding that in a prosecution for bigamy the nullity of a marriage may be established by proof, although the mar-

riage has not been declared null judicially, we have not been referred to any civil case in which this has been done.

Where a question of *status* is involved it is desirable that it should be determined with formality and once for all. If such a defence is allowed by way of exception and without declarator in a process of separation and aliment it will be difficult to refuse to sustain it in an action of divorce.

But as regards the present case I am not sorry that your Lordships do not share these doubts, because I think that the judgment which you propose to pronounce is the best for the pursuer of this action. If the defender were compelled to bring a declarator of nullity he would probably obtain decree simply on proving the previous marriage, relying on the presumption that the first husband was alive when the second marriage was contracted; and if the pursuer were ever in a position to establish that the first husband was really dead at the date of her second marriage, she would be put to the expense and trouble of reducing the decree of nullity. I prefer not to say what I think of the defender, who, after living twenty years with a woman as his wife, and knowing, as I believe he did, as much as she did about her first husband's probable existence at the date of the second marriage, instructs such a defence as this to be pressed. He is within his rights. But he has been well warned that he must not regard the present judgment as dissolving his marriage with the pursuer, or as having any other effect than in the meantime refusing her claim for aliment.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer — C. D. Murray. Agent—R. G. Bowie, W.S.

Counsel for Defender — W. Wallace. Agent—James M'William, S.S.C.

Friday, June 24.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

STEWART & M'DONALD AND ARTHUR & COMPANY, LIMITED *v.* BROWN (SMITH & RITCHIE'S FACTOR).

Bankruptcy — Sequestration — Dissolved Company — Notour Bankruptcy — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 13.

For the sequestration of the estate of a dissolved company at the instance of creditors, notour bankruptcy is an essential condition.

A firm was dissolved by the death of the partners, and the creditors of the firm presented a petition for sequestration of the estates of the firm and of the partners. The petition set forth that the firm carried on business in Scotland, that the partners died subject to the jurisdiction of the courts of Scotland, and that a judicial factor was appointed on the estate of the firm, but there were no averments, and no evidence was produced in process, of the notour bankruptcy of the firm. The Court *dismissed* the petition.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79) provides in section 13, subsection 1, that sequestration may be awarded "In the case of a living debtor subject to the jurisdiction of the Supreme Courts of Scotland—(B) On the petition of a creditor or creditors, in the case of a company being notour bankrupt, as hereinbefore provided, if it have within such time (*i.e.*, within a year before the date of the presentation of the petition) carried on business in Scotland, and any partner have so resided or had a dwelling-house, or if the company have had a place of business in Scotland." In sub-section 2 it is provided that sequestration may be awarded in the case of a deceased debtor who at the date of his death was subject to the jurisdiction of the Supreme Courts of Scotland—"(B) On the petition of a creditor or creditors qualified as hereinafter mentioned." And in section 15 it is enacted that "petitions for sequestration of the estates of a deceased debtor at the instance of a creditor may be presented at any time after the debtor's death, but no sequestration shall be awarded until the expiration of six months from the debtor's death, unless he was at the time of his death notour bankrupt, or unless his successors shall concur in the petition or renounce the succession."

On May 12th 1898 a petition was presented by Stewart & M'Donald and Arthur & Company, Limited, creditors of the dissolved firm of Smith & Ritchie, auctioneers, Edinburgh, for sequestration of the estates of that firm and of the deceased James Herdman Smith, and of the also deceased Robert Ritchie, the sole partners of the dissolved firm,

The petition set forth that both of the deceased partners of the dissolved firm were at the time of their deaths, which occurred respectively in April and June 1897, subject to the jurisdiction of the Supreme Courts of Scotland, and that in December 1897 a judicial factor had been appointed on the estate of the firm. It contained no averment that the firm had been rendered notour bankrupt or that it was insolvent, and no evidence was produced in process to that effect.

On 15th April the Lord Ordinary on the Bills (KYLLACHY) pronounced the following interlocutor:—"Finds that no averments have been made in the petition, and no evidence has been produced in process, of the notour bankruptcy of the dissolved firm of Smith & Ritchie: Therefore dismisses the petition, and decerns."

The petitioners reclaimed, and argued—Section 4 of the Bankruptcy Act declared that the word "debtor" should apply to