v. *Hunter*, November 24, 1865, 4 Macph. 78, 1 S.L.R. 39.

LORD ADAM—I think the pursuer is entitled to the expenses of both trials.

LORD M'LAREN—I am unable to concur in the proposed judgment. If there had been a settled rule as to the awarding of expenses in such cases as the present I might have considered myself bound to follow it, though I am not prepared to admit that we are bound by precedents in regard to the awarding of expenses. In my experience the cases are rare where a verdict which had been found by the Court to be contrary to evidence and set aside is repeated on a second trial. In my view the cases are not so numerous as to establish an invariable rule, and no authority for the existence of such a rule was quoted to us.

If we are free to consider what is reasonable and just in the matter of expenses, my opinion would be that the pursuer is entitled to the expense of the second trial in which she obtained a verdict which has not been set aside, although we did not agree with it. In regard to the verdict obtained in the first trial, we were all of opinion that it was contrary to evidence and that a new trial should be granted, and I think that neither party should be allowed the expenses of the first trial. If we are to act on the rule proposed in regard to such cases it must proceed on the assumption that if there is a second verdict in favour of the pursuer after a previous verdict in his favour had been set aside as contrary to evidence, the second verdict must have proceeded on different evidence. The assumption would not be in accordance with the facts of the present case; but even if we are to consider it theoretically true, I fail to see why the defender should pay for two trials if the cause of the second trial was the fault of the pursuer in not bringing forward all his evidence at the first trial.

I agree with the opinion of Lord Deas in the case of *Mackintosh* v. *Moir* (10 Macph. 29), and I observe that the other judges, although agreed as to awarding expenses in the particular case, disclaimed the intention of establishing an invariable rule.

LORD KINNEAR—I agree with Lord Adam. I think we must follow the general rule that a successful litigant is entitled to the expenses of obtaining a judgment in his favour. The pursuer has obtained a verdict which the Court has refused to set aside, and I think we are bound to assume that that verdict is right. The expenses in question were necessarily incurred in obtaining that verdict, and I do not see why the unsuccessful attempt of the defenders to obtain a verdict in their favour on a second trial when a verdict had been given against them on a first should make any difference in the application of the general rule. No doubt the first verdict was set aside. But that only means that there ought to be a second trial; and the party who insists on a second trial takes his risk of the second verdict being against him, and consequently of its turning out that he has put his opponent to additional expense without altering the result.

LORD PRESIDENT—I agree with Lord Adam.

The Court pronounced this interlocutor:—

"Decern against the defenders for payment to the pursuer of the sum of fifty pounds sterling: Find the pursuer entitled to expenses in the Sheriff Court and in this Court, including the expenses of the first trial and the rule following thereon, and remit," &c.

Counsel for the Pursuer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—T. B. Morison. Agents—Webster, Will, & Company, S.S.C.

Saturday, January 25.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SCOTT'S TRUSTEES *v.* W. M. LOW & COMPANY, LIMITED.

Bankruptcy—Illegal Preference—Act 1696, *cap.* 5—*Indorsation of Bill of Exchange within Sixty Days of Bankruptcy—Reduction—Right of Trustee to Recover Payment from Indorsee—Bill ultimately not Met.*

Where a bill of exchange had been indorsed to A by a bankrupt within sixty days of bankruptcy, and this indorsation was admittedly reducible under the Act 1696, cap. 5, but the bill, although paid to the ultimate holders at maturity, was so paid with money supplied for that purpose to the acceptors by a subsequent indorsee, and debited by him in account to A, with the result that A had not obtained any payment or ultimately even any credit in account for the bill; *held* that the trustee on the bankrupt's sequestrated estates was not entitled to recover payment of the amount contained in the bill from A.

This was an action at the instance of Richard Brown, C.A., trustee upon the sequestrated estates of John Scott & Company, shipbuilders and engineers, Kinghorn, against W. M. Low & Company, Limited, the Burgh Sawmills, Leith, in which the pursuer concluded (1) for reduction of an indorsation to the defenders of a bill drawn by the bankrupts upon and accepted by the Scottish Pulverising Company, on the ground that said indorsation had been granted by the bankrupts within sixty days of bankruptcy in satisfaction or security of a pre-existing debt and was reducible under the Act 1696, cap. 5, and (2) for payment of the sum of £225, 17s., being the sum in the bill referred to in the first conclusion.

It was not disputed that the pursuer was entitled to reduction as concluded for, but the defenders objected to decree for payment being pronounced as concluded for in the second place, upon the ground that they had never received payment for the bill in question.

The defenders offered (Ans. 6) to hand back the bill to the pursuer with the Scottish Pulverising Company's acceptance thereon and with the other indorsations cancelled, and also to hand to the pursuer another bill, which was substantially a renewal of the bill first referred to, with the Pulverising Company's acceptance thereon, and with all indorsations cancelled.

The pursuer pleaded, *inter alia*—"(2) The said bill having been paid at maturity, the pursuer, as trustee foresaid, on decree of reduction being granted as craved, is entitled to recover in terms of the petitory conclusions of the summons. (4) The defenders' offers not being such as would restore the pursuer to the *status quo ante*, they cannot be pleaded in bar of decree."

The defenders pleaded, *inter alia*—"(3) The pursuer, by the decree of reduction of the indorsation and by the offers made by the defenders, being completely restored against the indorsation complained of, the defenders should be assoilzied from the remaining conclusions of the action. (4) The defenders not having received payment of the contents of the bill in question should be assoilzied from the conclusion for payment thereof."

Decree of reduction was pronounced by the Lord Ordinary (KINCAIRNEY) on 24th January 1901, and by the same interlocutor the Lord Ordinary, before further answer, allowed the parties a proof of their averments in reference to the petitory conclusion of the action.

The facts as determined by the proof and by a minute of admissions lodged by the parties may be summarised as follows:—

In December 1899 Scott & Company (upon whose sequestrated estates the pursuer was trustee) were creditors of the Scottish Pulverising Company to the extent of £225, 17s. For this sum Scott & Company on 16th December 1899 drew a bill upon the Scottish Pulverising Company at four months date, which was duly accepted. That bill Scott & Company on 22nd December 1899 indorsed and delivered to the defenders Low & Company, Limited, who were then Scott & Company's creditors in a sum larger than that contained in the bill. The estates of Scott & Company were sequestrated on 27th December 1899, less than sixty days after the indorsation of the bill. After the defenders had received the indorsed bill they on 29th December 1899 handed it to creditors of their own, Messrs Buchanan & French, who on that date credited the defenders in account with the amount, viz., £225, 17s. When the bill became due on 19th April 1900 the Pulverising Company (the acceptors) intimated to the defenders and Buchanan & French that they "would be unable to pay the said bill," and as Buchanan & French had indorsed the bill to their bankers they had to see to its retirement. The course which they adopted was to send to the Pulverising Company a sum of £223 to retire the bill, and to debit the defenders with this sum. After the bill had been retired the defenders drew upon the Pulverising Company a bill for £226 odds (the sum in the first bill with discount added), and this bill was duly accepted by the Pulverising Company. This bill the defenders indorsed to Buchanan & French, who again credited the defenders in account with this amount. When this second bill fell due it was not paid by the acceptors. It was retired by Buchanan & French, and the amount was debited by them to the defenders in account with them.

It was admitted in the minute of admissions that the defenders had not received in cash either the sum of £225, 17s. in the first-mentioned bill, or the sum of £226, 10s. 6d. in the second-mentioned bill, or any part thereof.

On 23rd July 1901 the Lord Ordinary pronounced this interlocutor:—"Finds (1) that the defenders W. M. Low & Company Limited, are not bound to pay to the bankrupt the sum in the bill libelled, but are bound to pay or account for such sums as they have received and possess in respect of said bill either in money or in credit; (2) finds that the offer by the defenders in answer 6 on record fully meets the defenders' obligations in the circumstances; continues the cause for application of these findings; Reserves expenses; Grants leave to reclaim."

Opinion.—"In this action by the trustee in a bankrupt estate for reduction under the Act 1696, c. 5, of the indorsation of a bill granted by the bankrupt the indorsation was reduced by interlocutor dated 24th January 1901, and a proof was allowed before answer. A minute of admissions has been adjusted and a short supplementary proof has been led, and the cause has now to be decided. The bill is for £225, 17s., is dated 16th December 1899, and is payable four months after date. It is drawn by the bankrupt upon and accepted by the Scottish Pulverising Company. It was indorsed blank by the bankrupts, and was handed by the bankrupts to the defenders W. M. Low & Company, Limited, and was accepted by them in part payment of a debt of £320, 16s. 3d. due by the bankrupts.

"It was conceded or assumed that the indorsation of the bill was reducible under the Act 1696, c. 5, as a preference granted within sixty days of bankruptcy. But the summons concludes not only for reduction of the bill but also for payment of its whole amount, £225, 17s. The conclusion is not for any less sum, but for the whole; and the question to be now decided is, whether they are entitled to decree for that amount.

"John Low, one of the shareholders and directors of the defenders W. M. Low & Company, Limited, was the sole or at least the principal partner of the Scottish Pulverising Company, and the transaction appears to have arisen from that relation, but I do not know that it affects the case in

point of law. It may perhaps conduce to clearness to treat W. M. Low & Company and the Scottish Pulverising Company as totally different. No fraud at common law is alleged.

"The material circumstances ascertained by the minute and proof, omitting such as do not seem to affect the legal question, are, I think, as follows:—

"The bill in question is dated 16th December 1899. It is for a debt due by the Scottish Pulverising Company to the bankrupts. It was indorsed by the bankrupts and handed to Low & Company, the defenders, creditors of the Company, on or about 22nd December, and sequestration was awarded on 27th December. This summons was not raised until 14th May 1900, but I think it appears that the trustee had not until that date been fully imformed about the transaction. The bill formed a part of the bankrupt estate, and the indorsation of it and the transference to Low & Company was an assignation of the bankrupts' estate and fell undoubtedly under the Act 1696, c. 5. The Act declares such an assignation to be void and null; but the Act says nothing about the consequence of the assignation otherwise. If the reduction of the indorsation had been pronounced at this point it would have vested the bill in the trustee and would have satisfied his rights. But no reduction was then raised.

"The bill was passed by Low & Company to Buchanan & French, timber merchants, who were in intimate business relations with Low & Company, and was placed by them to the credit of Low & Company, who thereby took benefit to the extent of the bill, and if the indorsation had been reduced at this stage I think that Low & Company might have been bound to pay to the trustee the amount in the bill as *surrogatum* for the bill itself. But the reduction was not then raised.

"Buchanan & French sent the bill to their bank for collection, and in ordinary course the bank when it fell due would have presented it to the Pulverising Company. Had that been done, and had the Pulverising Company honoured the bill, the result would have been that the course of the bill would have been exhausted and Low & Company would have benefited by the transaction to the amount of the bill because of the credit given them in account with Buchanan & French.

"But that was not precisely what happened. The Pulverising Company were unable to pay, and Buchanan & French advanced the necessary funds. The sum they advanced was £223, and with that sum and a small balance the bill was taken from the bank. This is rather an obscure part of the case. It is not quite clear whether Buchanan & French paid the money to the Pulverising Company or to Low & Company; nor is it very clear who took the bill from the bank, whether Low & Company or the Pulverising Company. But I do not know that that matters. I think that the bill was really paid, and I do not think it is now a current bill. It is stamped by the bank as paid. I am not satisfied that anything can now be made of it. Buchanan & French debited Low & Company with this payment, and I think that in this case that must be held to balance the credit payment formerly entered. There may have been a small balance which probably was afterwards adjusted. But no question in this case was raised about that, and Mr Buchanan depones that Low & Company had taken no advantage in account with them from the bill.

"It certainly appears to me that at this stage the bill ceased to exist as a bill, seeing that it was paid by or on behalf of the Pulverising Company with money advanced for behoof of the Pulverising Company. The Pulverising Company were no doubt debtors for the sum so advanced, but I do not see that they could be debtors on this bill. This transaction took place on 19th April 1900, when the bill fell due, and had the reduction been then raised an intricate question would have arisen. In that case Low & Company would certainly have taken no benefit from the bill other than this, that they would probably have been creditors of the Pulverising Company.

"Perhaps the legal question which would then have arisen is not materially different from what now arises.

"In fact the transaction was not closed in this way. The settlement left the Pulverising Company a debtor, and the transaction which followed amounted substantially to a renewal of the bill. It took the form of a bill at three months, dated 19th April 1900, drawn by Low & Company upon and accepted by the Pulverising Company. It was not due when this action was raised. It fell due on 22nd July 1900. It was handed to and credited by Buchanan & French. It appears from the minute that it was not met by the Pulverising Company, and was taken up by Buchanan & French and debited to W. M. Low & Company.

"I confess I do not clearly understand the present position of this bill, but it seems to be the property of the defenders Low & Company, and to represent and to be all that represents the original bill.

"I do not think I need to go into the slight differences between the sums which have been mentioned. Some explanations not very clear are given by Mr Buchanan, but they are not of consequence to the general argument and did not enter into it.

"It is agreed (Art. 11 of the Minute) that the defenders 'have not received in cash either the sum of £225, 17s. in the first-mentioned bill, or the sum of £226, 10s. 6d. in the second-mentioned bill, or any part thereof;' and it is, I think, proved that the defenders have taken no benefit from the bill in account with Buchanan & French.

"Now, the defenders have made this offer, 'to hand back the bill to pursuer, with the Scottish Pulverising Company's acceptance thereon and with the other indorsations cancelled, and to restore the pursuer to the position in which he would have been had the bill not been granted. They . . . further offer to hand to the pursuer the renewed bill drawn by the defenders upon and accepted by the Scottish Pulveris-

ing Company with the Pulverising Company's acceptance thereon. Said bill is produced with all indorsations cancelled. This would have the effect of allowing the pursuer to operate for the sum claimed against the Pulverising Company.'

"The pursuer argues that these offers, though implemented, would not restore him to the position in which he was before the indorsation, partly because the indorsed bill has been paid and has really ceased to exist and partly because of the change in the position of the debtor, the Pulverising Company, which has it appears, been converted into a limited company.

"But I do not see that the Statute 1696, c. 5, confers on the pursuer a right to be restored precisely to his former position. No authority to that effect was quoted. The terms of the Act do not support it, and I think that the defenders have offered all that they are bound to offer.

"The pursuer's second plea is—'The said bill having been paid at maturity, the pursuer, as trustee foresaid, on decree of reduction being granted as craved is entitled to recover in terms of the petitory conclusions of the summons." That plea comes to this, that the defenders are bound to restore the subject assigned in the same condition in which it was when assigned. But, as I have said, I can find no warrant for that in the statute. The statute simply nullifies the transaction challenged, but it does no more. Suppose that the case had been about the reduction of a bill which by the time it was reduced had suffered prescription, I do not see that, without some great specialty, a defender would be bound to pay the amount.

"That the mere circumstance that the bill indorsed had been paid and had therefore ceased to be of value as a bill does not of itself warrant the inference that the defender in the reduction must pay the amount of it was decided in *Drummond* v. *Watson*, January 24, 1850, 12 D. 604, a case which, though special, is of much importance in this case. In that case it was held that the indorsee could only be called upon to pay the amount received by him from or by means of the bill; and even that was rather matter of concession than of decision.

"That case proceeded to a considerable extent on the *bona fides* of the indorsee. But in this case also I do not understand that the *bona fides* of the defenders are questioned. Here, as in the case of *Drummond*, they were left to act as they thought fit in reference to the indorsed bill; and on the authority of that case I think their liability cannot be carried beyond the amount of the bankrupt estate which they received. If they have received or retained no part of the bankrupts' estate it is not easy to see how the statute can reach them.

"But it may be that, if they are found in possession of the bankrupts' estate or of property which comes in its place, they may be called on to give that up, although I am not sure that any decisions have gone so far. But I would not be prepared to decide that they would not be bound to give up to the trustee the new bill for what it is worth. But I understand that that is what they have offered to do, and I have not heard any argument which convinces me that it may not be still a bill effectual against the Pulverising Company.

"I do not see that I can, consistently with the above views and with the case of *Drummond*, take into account any changes which may have taken place in the position and constitution of the Pulverising Company. These are contingencies for which the Act 1696, c. 5, seems to make no provision.

"On the whole, I am unable to affirm the pursuer's second plea-in-law, which is that the bare fact of the payment of the bill at maturity subjects the defenders to liability for its amount, and I consider that the offer made by the defenders is in the circumstances sufficient. I shall continue the cause, that the defenders' offer may be implemented if it be accepted."

The pursuer reclaimed, and argued—The Pulverising Company got money to pay the bill, and it is immaterial whether the money was got on loan or otherwise. The bill was taken up by the acceptors and paid to a holder in due course, and so was discharged—section 59 of the Bills of Exchange Act 1882. Low & Company had by their actings so altered the position of matters that the pursuer could not now proceed against the Pulverising Company on the original terms, and Low & Company were therefore bound to pay the sum in the bill. The case of *Drummond* relied on by the respondent had no bearing on the present case. It was very special in its circumstance and turned on a question of *mala fides*. The defenders here had got a security for a prior debt within sixty days of bankruptcy, and were bound to make it good to the trustee. It was no defence to say that they had transferred it to another.

Argued for the defenders—The bill had been paid for and on behalf of the defenders. This was clear from the books of Messrs Buchanan & French, who had debited Low & Company with its payment. The cases of *Drummond* v. *Watson*, January 29, 1850, 12 D. 604, and *Currie* v. *Misa*, February 11, 1875, L.R. 10 Ex. p. 153, were in point. The bill had not in fact been paid by the acceptors, nor had payment been made on their behalf. Therefore there was no payment in due course, and the section of the Bills of Exchange Act relied on by the pursuer was not applicable to the circumstances of the present case. As the defenders offered to restore to the pursuer the bill originally granted by the Pulverising Company as it stood before the illegal indorsation, they in so doing really offered to restore all they themselves had got.

At advising—

LORD TRAYNER—The facts of this case as stated on record and in the minute of admissions by the parties are at first sight somewhat complicated, but when what is material is once ascertained the case does not, in my opinion, appear to be one of difficulty. The facts are these. In Decem-

ber 1899 Scott & Company (upon whose sequestrated estates the pursuer is trustee) were creditors of the Scottish Pulverising Company to the extent of £225, 17s. For that sum Scott & Company drew a bill upon their debtors at four months date, which was duly accepted. That bill Scott & Company indorsed and delivered to the defenders, who were then Scott & Company's creditors in a sum larger than that contained in the bill. This indorsation, however, was made by Scott & Company within sixty days of their bankruptcy, and was therefore reducible under the provisions of the Act 1696, c. 5. The first conclusion in the summons before us, accordingly, is for reduction of that indorsation. This was not opposed by the defenders, and decree of reduction has been pronounced. But the pursuer seeks further to have decree against the defenders for the amount contained in the bill. The Lord Ordinary is of opinion that the pursuer is not entitled to the decree which he asks, and I agree with him.

It is clear that if the defenders got payment of the sum contained in the bill indorsed to them, then they obtained by virtue of the indorsation a part of Scott & Company's assets, namely, the sum due to them by their debtors the Pulverising Company. Such a payment the defenders could not retain, but would be bound to pay to the pursuer as Scott & Company's trustee for behoof of the general body of creditors, otherwise the defenders would be obtaining within sixty days of bankruptcy a preference to the prejudice of other creditors. If, on the other hand, the defenders got no such payment, then the indorsation, challenged and reduced, conferred no preference upon them, and did not diminish the assets of Scott & Company, who still remain, as they were before the indorsation of the bill, the creditors of the Pulverising Company. Whether, therefore, the defenders did or did not receive payment of said bill from the acceptors, the Pulverising Company, is the main question of fact. With regard to it, on the admission of parties, the case stands thus—After the defenders had received the indorsed bill they on 29th December 1899 handed it to creditors of their own, Messrs Buchanan & French, who of that date credited the defenders in account with the amount, viz., £225, 17s. When the bill became due on 19th April 1900, the Pulverising Company (the acceptors) intimated to the defenders and Buchanan & French that they "would be unable to pay the said bill," and as Buchanan & French had indorsed the bill to their bankers they had to see to its retirement. The course which they adopted was to send to the Pulverising Company a sum of £223 to retire the bill, and they therefore debited the defenders with this sum. This practically wiped out the credit entry in favour of the defenders made when the bill was handed to Buchanan & French, and left the defenders' debt to Buchanan & French and the Pulverising Company's debt on the bill to Scott & Company or the defenders (their indorsees) as it stood at the date of indorsation. No part of the bill for £225 17s. was paid by the debtors therein or received by the defenders.

The pursuer maintains that when the Pulverising Company retired the bill with the cash furnished by Buchanan & French they thereby extinguished the debt due by them to Scott & Company, with, of course, a resulting benefit to the defenders, and that it is immaterial to inquire whether the money with which the bill was retired was taken from their own pockets or lent to them by Buchanan & French or any one else. I agree that if the acceptors of the bill had retired it as on their own account with money which they had the right to dispose of as they pleased it would be immaterial to ask whence the money came which enabled them to do so. But the Pulverising Company did not retire the bill on their own account; they did so really as the servants or agents of Buchanan & French, with money supplied for that purpose by Buchanan & French, and money which the Pulverising Company could not lawfully apply to any other purpose. This is apparent from what followed. After the bill above referred to had been retired the defenders drew upon the Pulverising Company (who accepted) a bill for a sum of £226 odd (the sum in the first bill with discount added); this the defenders endorsed to Buchanan & French, who again credited the defenders in account with that amount. When that bill (the second bill) fell due it was dishonoured by the acceptors, was retired by Buchanan & French, and the amount debited in account to the defenders. It thus appears that in sending the money to the Pulverising Company to take up the first bill Buchanan & French were not lending or advancing money to or in the interest of the Pulverising Company, but merely (in a manner very familiar in commercial circles) financing a transaction in such a way as was best for themselves and their debtors the defenders, and keeping up appearances with their bankers. In fact the Pulverising Company have not yet paid to the defenders or to anybody any part of their debt to Scott & Company for which the first bill was granted, and the pursuer is in right of the claim now just as Scott & Company were before sequestration.

Now, if what I have stated is the truth and substance of the facts of the case, the pursuer's claim against the defenders fails. They have received no part of the debt due by the Pulverising Company to Scott—have therefore received no part of Scott & Company's estate under or by virtue of the indorsation challenged—have secured or taken no preference, and have therefore nothing to repay. They offer to the pursuer the bill originally granted by the Pulverising Company as it stood before the illegal indorsation, and in doing so they offer to return all that they got.

It was said by the pursuer that the defenders if they got no money by virtue of the indorsed bill had at least got the advantage of an extended credit from Buchanan

& French. But that has no bearing on this case. If the defenders got such extended credit, that formed no part of Scott & Company's estate taken by way of preference by one of their creditors over another. But it does not appear that Buchanan & French would have given the defenders less credit than they did even had the bill in question never been offered or indorsed to them.

Lastly, the pursuer made a point of this, that had the defenders handed back to him, as they should have done, the indorsed bill when it was demanded of them on 1st March 1900 (six weeks before the bill became due) he would have been in a better position to operate payment against the Pulverising Company than he is now. Well, it does not appear that the Pulverising Company are better or less able to pay now than they were on 19th April 1900. But if the pursuer thinks he can maintain a claim for damages against the defenders on the ground that they by unwarrantably retaining the indorsed bill prevented him from making effectual his claim against the Pulverising Company, he may do so. The present decision is no barrier to such a claim. No such claim, however, is made or can be considered in this action.

I am therefore of opinion that the present reclaiming note should be refused.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—Clyde, K.C.—J. C. Dove Wilson. Agents—Mackenzie & Kermack, W.S.

Counsel for the Defenders—W. C. Smith—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Saturday, January 25.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LINDER *v.* LINDER.

Expenses—Husband and Wife—Interim Award of Expenses — Separation and Aliment — No Jurisdiction Pleaded — Reclaiming - Note — Further Interim Award—Jurisdiction.

In an action of separation and aliment at the instance of a wife against her husband, where the defender pleaded no jurisdiction, the Lord Ordinary made an interim award of expenses in favour of the pursuer. The defender, with leave of the Lord Ordinary, reclaimed against this interlocutor. When the case appeared in the Single Bills the pursuer moved for a further interim award to enable her to discuss the question raised by the reclaiming-note. The Court *granted* the motion.

In an action of separation and aliment at the instance of a wife the defender pleaded no jurisdiction. *Held* (*aff.* judgment of Lord Kincairney, Ordinary) that notwithstanding this plea the Court had jurisdiction to make an interim award of expenses in favour of the wife, and that she was entitled to such an interim award.

Stavert v. *Stavert*, February 3, 1882, 9 R. 519, 19 S.L.R. 381, *followed.*

This was an action at the instance of Mrs Margaret Bonthron or Linder against her husband Alfred Linder, designed in the summons as "builder, Newlands, Cape Colony," in which the pursuer concluded for decree of separation and aliment in respect of the defender's alleged adultery.

The pursuer averred that the defender was a domiciled Scotsman, but from her condescendence it appeared that with the exception of a few months he had lived in South Africa since 1881.

The defender appeared and lodged defences, in which he averred that he was by birth an Englishman, that he had resided since 1881 in Cape Colony, where he had gone *animo remanendi*, that his home and business and other interests were there, and that he had never acquired a Scottish domicile. He pleaded—"(1) No jurisdiction."

On 6th December 1901 the Lord Ordinary (KINCAIRNEY) decerned against the defender for payment to the pursuer of the sum of £20 to account of her expenses, and on the motion of the defender granted leave to reclaim.

Note.—"I have consulted with Lord Stormonth Darling, who gave the decision in *Pike* v. *Pike* (6 S.L.T. 410), which followed the case of *Stavert* v. *Stavert*. I think I must regard the decision in *Stavert* v. *Stavert* as conclusive of the question of the power of the Court to grant expenses in such cases. No doubt the decision there was given at a different stage of the case. It was given after the whole facts had been ascertained and the conduct of the parties was before the Court. I do not think the opinion delivered can be regarded as the opinion of the Lord President only, although that would be quite enough. I think it was the opinion of the whole Court, and, although there is no report of any argument, it was pronounced in presence of the parties. The same opinion seems to have been held by Lord Stormonth Darling. I think I am therefore bound to follow the decision in *Stavert*. I confess it does not seem to me to be altogether satisfactory, and I am afraid the decree for expenses cannot easily be worked out. But merely following the decision, I think I must make an award of expenses, and I accordingly award £20. I do not know if I can give a decerniture. The claim is a novel one in the circumstances stated, and it is not a particularly strong case for giving any expenses."

The defender reclaimed.

On September 17th 1901, when the case appeared in the Single Bills, the pursuer moved for a further interim award of £10.