ham, a witness for the said John Nimmo & Son, Limited, and as a haver in terms of the joint specification, and the arbiter respectfully recommends the Lords of Council and Session to sanction and confirm the appointment of the said commissioner named by the arbiter, and to require and enforce the attendance of the said D. W. Rees before the said commissioner."

"The arbiter, having considered the joint specification of documents for which diligence is craved by the parties, respectfully recommends the Lords of Council and Session to grant diligence against havers at the instance of both or either of the parties for recovery of the documents called for in the said joint specification, and the arbiter grants commission to J. Wright Forbes, Esquire, Advocate, Edinburgh, to take the oaths and receive the exhibits of the havers, to be reported *quam primum.*"

John Nimmo & Son, Ltd., accordingly presented this petition.

The petitioners stated that in order to carry the said orders into effect it was necessary that diligence should be granted for citing witnesses and havers, and that authority should be interponed to and the appointment of the said commissioner in Rotherham named by the arbiter sanctioned and confirmed, and warrant granted for letters of diligence for citing the said D. W. Rees as a haver and a witness to appear before the said commissioner, and that in common form of law at the instance of the petitioners.

The prayer of the petition craved (1) warrant to cite havers, (2) warrant to cite witnesses, and (3) in particular "to interpone authority, sanction and confirm the appointment of the said commissioner in Rotherham named by the writer, and to grant warrant for letters of diligence at the petitioners' instance for citing the said D. W. Rees as a haver and a witness to appear before the said commissioner, or to do otherwise or further in the premises as to your Lordships shall seem proper."

The petition was unopposed. Counsel for the petitioners cited the following cases in support of the application:—*Blaikies Brothers* v. *The Aberdeen Railway Company*, July 8, 1851, 13 D. 1307; *Highland Railway Company* v. *Mitchell*, May 30, 1868, 6 Macph. 896.

[The LORD PRESIDENT referred to the Act 6 and 7 Vict. c. 82, cited in the two cases above referred to.]

Counsel moved the Court to grant the prayer of the petition.

LORD PRESIDENT—We shall appoint your commissioner to be the commissioner and he can cite his witnesses. If the witnesses do not obey his citation he can apply to the Court in England. We shall adjust an interlocutor.

The Court pronounced an interlocutor which *quoad* the first two craves of the prayer was in the usual form, and as regards the remaining crave was as follows:—"and (3) interpone authority to and sanction and confirm the appointment of the Mayor or Town Clerk of Rotherham as commissioner for citing D. W. Rees, Secretary of the North Central Wagon Company, Limited, Rotherham, as a haver and witness to appear before the said commissioner, and for his examination as a witness in the matter of the said reference."

Counsel for Petitioners—Horne. Agents—Drummond & Reid, W.S.

Wednesday, December 6.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles, at Edinburgh.

MITCHELL (ALEXANDER'S EXECUTOR) *v.* MACKERSY.

Executor—Eadem persona cum defuncto—Compensation—Debt Due by Law-Agent to Executor in respect of Executry Estate Compensated with Debt Due to Law-Agent by Deceased in respect of Business Account.

The law-agent of a deceased lady, who at her death was his debtor for the amount of a business account, was employed by her executor to realise her estate. The estate turned out to be of less value than the amount of the business account.

In an action by the executor against the law-agent for payment of the amount realised by the deceased's estate, *held* (1) that the executor was not a trustee for the creditors of the deceased, but was simply the representative of the deceased and debtor to her creditors and creditor to her debtors, and (2) that consequently the pursuer's claim was extinguished by compensation.

Globe Insurance Company v. *Mackenzie*, August 5, 1850, 7 Bell's App., 296; and *Stewart's Trustee* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739, 33 S.L.R.. 570, *followed. Gray's Trustees* v, *Royal Bank*, November 27, 1896, 23 R. 199, 33 S.L.R. 140, *disapproved.*

Expenses — Process — Appeal — Failure to Inform Sheriff as to Position of Authoritative Decisions a Ground for Refusing Successful Party Expenses of Appeal.

A Sheriff in an action before him granted pursuer decree following a decision of one of the Divisions of the Court of Session founded on by the pursuer. That decision was contrary to a previous decision of the House of Lords, which had not been quoted to the Division. The defender failed to point out this omission to the Sheriff.

In an appeal, the Court, while following the House of Lords decision and recalling the Sheriff's judgment, allowed no expenses in the Court of Session to either party, both being responsible for the position which made the appeal necessary.

On 17th December 1904, James Mitchell, residing at 4 Picardy Place, Edinburgh, executor of the late Mrs Catherine Mitchell or Alexander, who resided at Bowman Cottage, Liberton, raised in the Sheriff Court at Edinburgh an action against William Robert Mackersy, Writer to the Signet there.

The following narrative of facts in the case is taken from the opinion of Lord Kyllachy—"The pursuer in this action, which comes up from the Sheriff Court, is the brother and executor-dative of a lady who died in 1904 leaving a very small estate—an estate consisting only of some policies of insurance and household furniture, the whole being valued at about £44. The defender had been the lady's law-agent, and was, or claims to have been, at her death, her creditor for a sum of about £52—a sum arising upon a business account which has not yet been taxed but is otherwise not disputed. There are, it appears, some other creditors whose claims are of small amount, but sufficient—along with the defender's claim—to make the estate insolvent. This, however, was not at first realised, and the pursuer employed the defender, who had made the deceased's will, to ingather the estate such as it was. The defender thus became debtor to the executry in a sum of £28 odds, which it is now admitted was the net sum realised after deducting the expenses of realisation. For this sum he is now sued by the executor, the summons being restricted to the amount mentioned."

The pursuer stated, *inter alia*, the following pleas—"(1) The defence stated is irrelevant. (2) The defender being due and resting-owing to the pursuer the sum sued for, decree should be pronounced for same, with interest and expenses as craved."

The defender stated, *inter alia*, the following plea—"The said deceased . . . at the time of her death, and the defender, being mutually debtor and creditor, the defender pleads compensation to the extent of the sum sued for, in partial extinction of her said indebtedness to him."

The Sheriff-Substitute (HENDERSON), on 3rd March 1905, pronounced an interlocutor sustaining the first plea-in-law for the pursuer, and granting him decree for the sum sued for.

Note.—" . . . The pursuer . . . refuses to recognise the defender's right to retain the balance to meet to any extent the business account said to be due by the deceased. In taking this view of his rights I think the pursuer is quite correct. On the authority of the case of *Gray's Trustees* v. *Royal Bank*, November 27, 1895, 23 R. 199, it seems perfectly clear that the executor here never was a debtor to the defender for the earlier account. The funds now claimed are executry funds ingathered by the defender as agent for the executor, and as such cannot be retained by the defender in compensation of any claim which he may have against the deceased. . . ."

The defender appealed to the Sheriff (MACONOCHIE), who on 31st March pronounced an interlocutor adhering to the interlocutor appealed against.

Note.—" . . . With regard to the question argued to and decided by the Sheriff-Substitute, I am clearly of opinion that the view of the law stated in the note to the interlocutor appealed against is sound; indeed, no argument was seriously stated against the decision. On these grounds I dismiss the appeal, but in respect it is admitted that the defender has recently paid £9 towards the sum for which decree has been granted, the decree must be varied to that extent."

The defender appealed to the Court of Session, and argued—An executor being *eadem persona cum defuncto*, the defender here, as a creditor of the deceased, was entitled to set off the deceased's debt to him against his debt to the executor—*The Globe Insurance Co.* v. *Mackenzie*, February 16, 1849, 11 D. 618, and August 5, 1850, 7 Bell's Appeals 296; *Stewart's Trustee* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739, 33 S.L.R. 570; Erskine, bk. iii. tit. ix. 46. The case founded on by the Sheriff (*Gray's Trustees* v. *Royal Bank*, November 27, 1895, 23 R. 199, 33 S.L.R. 140) was a bad decision, in which the *Globe Insurance Co.* was not cited to the Court.

Argued for the pursuer and respondent—The maxim *eadem persona*, &c., was not applicable to a case of this sort. *Gray's Trustees*, a Second Division case, was authoritative in this Division, and must be followed in preference to *Stewart's Trustee*, a First Division case. *Gray's Trustees* had been followed by Lord Stormonth Darling in *Hewitt* v. *Symons & Macdonald*, January 10, 1896, 3 S.L.T. 234 and 333.

LORD KYLLACHY—[*After narrating the facts as given above*]—Now in this position of matters—the defender being creditor of the deceased for say £52, and debtor to the executry for say £28—there would not seem to be much doubt as to the defender's rights, if we are to apply the law settled in 1850, after a good deal of controversy, in the leading case of *The Globe Insurance Co.* v. *Mackenzie* (11 D. 618, *aff.* 7 Bell's App. 296), a case which received very careful consideration and in which the judgment of this Court was affirmed by the House of Lords. That law was, as I understand it, this—that an executor in the pursuer's position is not a trustee for the deceased's creditors, but simply the representative of the deceased, that he stands simply in the deceased's shoes, being debtor to her creditors and creditor to her debtors, and, in short, that he is (subject to one limitation not here important) *eadem persona cum defuncto*. Applying that law, it would seem to be not doubtful that the defender here has, as against the pursuer, all the rights which he would have had against the deceased had she been alive, and that he is therefore entitled to cross accounts with the pursuer, and so to extinguish the latter's claim.

The pursuer, however, not accepting this view of the matter, brought, as I have said, the present action, and on the defender

pleading that he was entitled to cross accounts, maintained in reply that that was incompetent. He did so on the authority of a certain judgment of this Division pronounced in 1895 in the case of *Gray's Trustees* v. *Royal Bank* (23 R. 199). The defender somehow omitted to point out, as he should in answer, that in that case the ruling case of the *Globe Insurance Co.* had been overlooked and was not in view of the Court. And the result was that the Sheriff-Substitute and the Sheriff, considering quite naturally that they were bound by the later decision, repelled the defender's plea and gave decree for the amount claimed.

Now, in these circumstances, we might perhaps have had some difficulty as to our procedure if there had been no judgment of this Court subsequent to the case of *Gray's Trustees*—no judgment reaffirming the law as laid down in the case of *The Globe Insurance Company*. I am not sure that even on that assumption we should have been justified in ignoring, or hesitating to give effect to, a judgment of the House of Lords, a judgment plainly applicable and of indisputable authority. But we are I think relieved of any difficulty on that head by the fact that, in a case which shortly followed the case of *Gray's Trustees* (I refer to the case of *Stewart's Trustee* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739) the decision in the *Globe Insurance Company's* case was considered and its authority recognised. Having regard to that circumstance, we are I think not only entitled but bound to recal the Sheriffs' judgments and to remit for further procedure.

As to expenses, these, so far as incurred in the Sheriff Court, may depend upon the ultimate issue of the cause—that is to say, upon the question how far the defender's claim is well founded on its merits. But as regards the expenses in this Court, I should be for allowing no expenses to either party, both parties being responsible for the position which made the appeal necessary.

LORD STORMONTH DARLING—I concur.

LORD LOW—I have had the advantage of reading the opinion which your Lordship has just delivered and I entirely concur.

The LORD JUSTICE-CLERK was not present.

The Court sustained the appeal.

Counsel for Pursuer and Respondent—Hunter—Monro. Agent—John Forgan, S.S.C.

Counsel for Defender and Appellant—Maclennan, K.C.—A. M. Anderson. Agent—W. R. Mackersy, W.S.

HOUSE OF LORDS.

Thursday, June 8, 1905.

(Before Lord Macnaghten, Lord Davey, Lord James, and Lord Robertson.)

GRANT *v.* GRANT AND ANOTHER.

Expenses — Divorce — Wife's Expenses— Taxation as between Agent and Client.

It is a rule of the law of Scotland that where a wife is successful in her defence to an action of divorce she is entitled to her expenses as between agent and client.

This was an appeal from a judgment of the Second Division of the Court of Session in an action of divorce on the ground of adultery brought by James Grant, distiller, Glengrant, against his wife, Mrs Fanny Seivewright or Grant, and a co-respondent. The Lord Ordinary (STORMONTH DARLING) assoilzied the defenders on the ground that the evidence for the pursuer did not carry conviction to his mind. On 2nd February 1904 the Second Division of the Court of Session (The LORD JUSTICE-CLERK, LORD YOUNG, and LORD TRAYNER, with LORD MONCREIFF *dissenting*) adhered, holding that the adultery was not proved. On 11th April 1905 the House of Lords (LORD MACNAGHTEN, LORD DAVEY, LORD JAMES, and LORD LINDLEY, with LORD ROBERTSON *dissenting*), on appeal, affirmed with costs the decision of the Court below, stating that the question was one of fact only.

A petition with regard to the respondent's costs now came before their Lordships. The appellant (pursuer) argued that the respondent (defender) was not entitled to her costs as between agent and client owing to the suspicious character of her conduct, the respondent arguing that she was so entitled, and that it was a rule of the law of Scotland—*Mackenzie* v. *Mackenzie*, May 16, 1895, [1895] A.C. 384, at p. 416, 22 R. (H.L.) 32, 32 S.L.R. 455; *Collins* v. *Collins*, February 18, 1884, 9 App. Ca. 205, at p. 242, 11 R. (H.L.) 19, 21 S.L.R. 579.

Costs between agent and client given as being the rule in Scotland.

Counsel for the Pursuer and Appellant—The Dean of Faculty (Asher, K.C.)—M'Clure. Agents—Hagart & Burn Murdoch, W.S.—Trinder, Capron, & Co., London.

Counsel for the Defender and Respondent—Clyde, K.C.—Cooper, K.C.—W. A. Fleming. Agents—Forbes, Dallas, & Co., W.S.—Burchell, Wilde, & Co., London.