& 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.

She founded upon the cases of *Crombie* v. *Crombie*, May 19, 1868, 6 Macph. 776, 5 S.L.R. 504; and *Stavert* v. *Stavert*, February 3, 1882, 9 R. 519, 19 S.L.R. 381.

The defender opposed the motion, and argued—*Ex facie* of the pursuer's averments there was no jurisdiction against the defender. How then could such an order be made effectual? He did not prorogate jurisdiction by reclaiming, but merely came to have an incompetent order put right.

LORD ADAM—In this case we have a reclaiming-note by leave against an interlocutor of the Lord Ordinary by which he has granted decree in favour of the pursuer for the sum of £20 to account of her expenses in the action. It appears from the statement made at the bar that the action is one of separation and aliment brought by a wife against her husband, and the husband, as I understand, denies the jurisdiction of the Court, a matter which will have to be decided in the Outer House. But we have nothing to do with that question just now. The present question is, whether or not the defender is to be allowed to proceed without the imposition of any condition as to payment. It appears to me that we have full power in a matter of this sort, and I think that the demand for £10 to enable the wife to proceed is quite a reasonable proposition, and that the sum asked is quite a reasonable amount.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the note for the pursuer, Appoint the cause to be put to the Summar Roll: Further decern against the defender for payment to the pursuer of the sum of £10 sterling to enable her to discuss the question raised by the reclaiming-note for the defender."

Upon the reclaiming-note being called for discussion in the Summar Roll the defender and reclaimer argued—The Court could not give an award where its jurisdiction was challenged, for it might be found that it had no jurisdiction and consequently no right to entertain or consider the cause. Further, the Court would not give an award which could not be made operative, and that was the position here. The defender had no property in Scotland, and no help could be derived from the Judgments Extension Act 1868 (31 and 32 Vict. c. 54), as the defender was in Cape Colony—*D'Ernesti* v. *D'Ernesti*, February 11, 1882, 9 R. 655, 19 S.L.R. 436. This case was to be distinguished from *Stavert* v. *Stavert* (quoted *supra*), because there the defender had property in Scotland.

Counsel for the pursuer and respondent were not called upon.

LORD PRESIDENT—It appears to me that the question which has been argued to us was settled by a judgment of high authority pronounced in the case of *Stavert* v. *Stavert* (9 R. 519), which has regulated the practice ever since. Mr Wilton also told us that in an earlier stage of the case of *Stavert* an interim award of expenses was given. The decision in that case is really *a fortiori* of the present case, because the judgment was pronounced after the Court had found that it had no jurisdiction to entertain the action on its merits. The jurisdiction of the Court to deal with a question of expenses differs from its jurisdiction on the merits, and I should be sorry to disturb a rule which has governed the practice of the Court for so long a period, especially as it seems to be a reasonable rule.

LORD ADAM—I concur.

LORD M'LAREN—The question of the power of the Court to award expenses when the jurisdiction is disputed is by no means confined to consistorial cases. It would be very regrettable if, for example, when an unfounded action was brought against a person over whom there was no jurisdiction, we had not power to award expenses against the party who is found to be in the wrong. In such cases, according to our practice, costs are awarded in the ordinary course against the pursuer. In *Stavert's* case the judgment was rested on the ground that every Court has power to deal with the costs in such a question on the same conditions as it awards costs in all other litigated questions. Now, if that is so, I am unable to see why the fact that the question of jurisdiction raised is undecided should be any obstacle to the exercise of this power, especially as its exercise is necessary in order to enable the question to be tried.

LORD KINNEAR—I also agree. I think the question is decided by *Stavert's* case, and I think we should follow that decision. The defender has been personally cited, and is here maintaining a plea in support of which he proposes to lead evidence. No doubt it is a plea to jurisdiction, and I assume that it may turn out to be well-founded. But whether the Court has jurisdiction or not to dispose of the action on its merits, we certainly have power to determine the question of jurisdiction which both parties submit for our decision; and since that cannot be done without procedure, it follows that each of the parties puts the other to expense in this Court, and there can be no question of the jurisdiction of the Court to decide upon which of the two such expense shall fall.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming-note for the defender against the interlocutor of Lord Kincairney dated 6th December 1901 and heard counsel for the reclaimer, Adhere to the said interlocutor: Refuse the reclaiming-note, and decern: Find the

defender liable to the pursuer in the expenses of the reclaiming-note, and remit," &c.

Counsel for the Defender and Reclaimer—J. C. Watt. Agent—John Robertson, Solicitor.

Counsel for the Pursuer and Respondent — Wilton. Agent — David R. M'Cann, S.S.C.

Saturday, January 25.

FIRST DIVISION.

KING LINE, LIMITED, PETITIONERS.

Company—Memorandum of Association—Alteration—Companies (Memorandum of Association) Act 1890 (53 *and* 54 *Vict. c.* 62)—*Steamship Owners.*

The Companies (Memorandum of Association) Act 1890 enacts as follows:—Section 1—"(1) Subject to the provisions of this Act a company registered under the Companies Acts 1862 to 1886 may by special resolution alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, . . . but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding-up the company . . . (5) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company . . . (*b*) To attain its main purpose by new or improved means or . . . (*d*) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company. . . ."

A company which had been formed for the purpose of carrying on the business of steamship owners in all its branches, by special resolution altered its memorandum of association by adding clauses in which they took power to carry on the business of ship owners, ship brokers, insurance brokers, managers of shipping property, lightermen, warehousemen, wharfingers, ice merchants, refrigerating storekeepers, and general traders, and to make and carry into effect arrangements for amalgamation with any other companies having similar objects.

On a petition by the company under the Companies (Memorandum of Association) Act 1890, the Court *confirmed* the alteration.

Counsel for the Petitioners—Tait. Agents—Davidson & Syme, W.S.

Thursday, January 30.

FIRST DIVISION.

LORD HAMILTON OF DALZELL *v.* CHASSELS.

Superior and Vassal—Casualty—Composition — Payment of Casualty — Special Stipulation — Implied Entry when Fee Full—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

A feu-contract was executed in 1781 by which subjects were feued to be held "expressly of" the superior and his heirs and successors, "and not otherwise." The *reddendo* clause provided for payment by the vassal of one year's feu-duty at the entry of each heir, "and one full year's rent of the subject according to the value thereof at the entry of every singular successor to the said subject, and that within one year and one day of the heir or singular successor succeeding or acquiring right thereto."

In 1884 a body of trustees who were the vassals infeft in the subjects paid a casualty. In 1900 a singular successor acquired the subjects under a duly recorded disposition. The superior having claimed a casualty, the singular successor refused to pay it in respect that the fee was full, one of the trustees being still alive, and that consequently in virtue of the proviso contained in the Conveyancing (Scotland) Act 1874, sec. 4 (3) he was not liable.

Held that prior to the Conveyancing Act of 1874 the superior could not under the provisions of this feu-contract and the law as it then stood have compelled a singular successor to enter while the fee was full; that there was no obligation imposed upon a singular successor by the feu-contract to pay a casualty irrespective of entry; and that consequently the superior was not entitled to payment of a casualty.

Opinion (*per* Lord M'Laren) that even if there was in the original feu-contract an obligation upon every disponee to take entry and pay a casualty within a year and a day, such an obligation was not binding on a singular successor who had not by any express stipulation in his title made himself a party to the original contract.

By a feu-contract dated in 1781 entered into between Captain John Hamilton of Dalzell and Robert Brownlie, Captain Hamilton sold and in feu-farm and heritage perpetually let to Robert Brownlie certain subjects therein described, now part of Windmillhill Street, Motherwell, for payment of the feu-duty and casualties and on the conditions therein expressed.

The feu-contract contained, *inter alia*, the following clauses:—"The said Captn. John Hamilton binds and obliges him, his heirs, and successors, to infeft and seize the said