pelled." I read the plea as meaning either that evidence of a previous conviction of the accused was inadmissible, or that if it was admissible then it was improperly admitted, because the police register which touches the conviction ought to have been noted. Now it is perfectly clear that the Sheriff-Substitute admitted the evidence of Sergeant M'Arthur, because he notes that the objection to this evidence was repelled, and it is of no consequence whether we are to treat the police register as having been admitted or not, because it is not disputed that Sergeant M'Arthur was called to prove a conviction under the Cruelty to Children Act 1904, and the only question is whether evidence of such a conviction was admissible.

It was not a conviction of the same offence for which M'Lean was on his trial, because a man may be liable to conviction under the 80th section of the Poor Law Act without being guilty of cruelty or of any act tending to endanger life. It follows that the conviction under the Cruelty to Children Act was not an aggravation (in the legal sense) of the offence of desertion of children. Neither was the conviction competent evidence for proving guilty intention. I do not say that evidence of the fact of cruel conduct to the children would not be relevant to prove that the case was one of wilful desertion. But the cruelty in the case supposed must be proved by the evidence of eye-witnesses and not by the production of a conviction in a previous process.

In this, as in almost all cases on admission or rejection of evidence, the question arises what is the bearing of the erroneous ruling on the conviction.

I can imagine a case where a question was improperly allowed or a document received in evidence neither of which could have had any prejudicial effect on the case of the accused person. When evidence has been admitted we can always (if the parties are not agreed) find out what it was in substance and effect, and if the evidence turns out to be quite innocuous the conviction may be allowed to stand. But in the present case the evidence, although inadmissible in the form in which it was offered, was not irrelevant to the subject-matter of the complaint, because if the Sheriff held it proved that the accused had been cruel to his children he might the more readily infer that the subsequent desertion of these children was not due to poverty, but was the result of wilful neglect. We do not know what weight the Sheriff-Substitute gave to the previous conviction, but in my opinion there was such a connection between the two things that the admission of the conviction, or of evidence of the conviction, was calculated to affect the decision of the case, and I accordingly move your Lordships that the conviction be suspended on this ground.

I shall say nothing regarding the other grounds of suspension except that I think there is more ingenuity than substance in them.

LORD KINNEAR—I agree. We heard a great many objections to this conviction, most of which were very unsubstantial, while others might require some consideration, were it not that the ground on which your Lordship proposes to proceed is sufficient for the decision of the case.

The Sheriff-Substitute has undoubtedly admitted incompetent evidence, and therefore the only question is whether or not that improper evidence may have had any effect in determining the judgment. Now it appears to me a conclusive answer to that question that the admission of the evidence was objected to, and the objection was repelled by the Sheriff-Substitute. It follows that in his judgment it was both competent and relevant, and therefore he was bound to take it into account in coming to a decision. But since it was wrong to give it any weight whatever, and we cannot know the effect which it had on his mind, the conviction ought to be quashed.

LORD PEARSON—I am of the same opinion. Whatever may be said to the other matters argued, the objection dealt with by your Lordship stands out clearly as raising a question of vital importance. This was a prosecution under section 80 of the Poor Law Act. A witness was tendered to prove, and I assume did prove, a prior conviction of an offence under the Prevention of Cruelty to Children Act 1904, notwithstanding an objection on the part of the complainer. That seems to me to have been entirely incompetent. The only explanation given by the respondent is that the admission of this evidence was duly considered by the Sheriff-Substitute, who "allowed the said evidence to be led *quantum valeat*," but for anything we know it may have led directly to the conviction. I therefore think the case falls within the rule as to the admission of incompetent evidence.

The Court suspended the conviction.

Counsel for the Complainer — Paton. Agents—Gill & Pringle, W.S.

Counsel for the Respondent — A. A. Fraser. Agents — M'Nab & MacHardy, S.S.C.

COURT OF SESSION.

Thursday, May 30.

FIRST DIVISION.

[Single Bills.

GRIEVE'S TRUSTEES *v.* GRIEVE AND OTHERS.

Expenses — Decree in Name of Agent-Disburser — Compensation — Decree for Expenses Awarded by House of Lords and Payment made under the Judgment thereby Recalled.

In a multiplepoinding brought by

trustees, the First Division on a reclaiming note found the testator's widow entitled to the liferent of £10,000, and the trustees paid the beneficiary £500 to account. Subsequently the House of Lords reversed this finding and awarded expenses out of the estate to all claimants. In a petition to apply this judgment, *held* that the widow's agent was not entitled to decree for expenses in his name as disburser, the trustees having a right of set off in respect of the sum of £500 paid by them to her on account.

Munro v. *Bothwell*, September 16, 1846, Arkley's Justiciary Reports, 118, *disapproved.*

John Grieve, sometime hotel proprietor in Edinburgh, died on 23rd March 1903, leaving a trust-disposition and settlement dated 22nd January 1894 with various codicils, all registered in the Books of Council and Session on 9th May 1903. The truster was survived by (1) his widow, Mrs Elizabeth Simpson or Barclay or Grieve, (2) a son James Grieve, and (3) two daughters, Mrs Ferguson and Mrs Nisbet. Difficulties having arisen as to the meaning of the testamentary writings, Frank Hunter, W.S., Edinburgh, and others, the trustees, raised an action of multiplepoinding against the widow and surviving children in which the widow Mrs Elizabeth Grieve claimed, *inter alia*, a liferent of the sum of £10,000.

On 22nd June 1904 the Lord Ordinary (KYLLACHY) pronounced an interlocutor, *inter alia*, repelling Mrs Grieve's claim *quoad* the liferent of £10,000, but on 16th November 1904 their Lordships of the First Division, on a reclaiming note, pronounced an interlocutor recalling that of the Lord Ordinary and ranking and preferring her to the said liferent.

On 30th December 1904 Mrs Grieve received a payment of £500 to account of her liferent and granted a simple receipt therefor.

On 14th November 1905 James Grieve, Mrs Ferguson, and Mrs Nisbet, claimants in the multiplepoinding, appealed to the House of Lords, and on 29th May 1906 their Lordships gave judgment reversing the interlocutor of the First Division of 16th November 1904, *inter alia*, *quoad* the provision of the liferent of £10,000 to Mrs Grieve, and awarded costs out of the estate to all the parties.

The claimant and appellant James Grieve having died on 22nd December 1906, his testamentary trustees presented a petition to the Court to apply the judgment of the House of Lords.

Counsel for the claimant Mrs Grieve moved for decree for expenses in name of the agent-disburser and argued—Decree for the expenses should be in name of the agent-disburser so as to prevent any debt being set off against them—*Russell* v. *Greig & Peddie*, January 28, 1826, 4 S. 406; *Miller* v. *Geils*, June 22, 1848, 10 D. 1384; Bell's Prin., 1389. That was the rule, and it applied to prevent even a principal sum recovered in the suit being set off against such expenses—Begg on Law Agents, p. 193; *Munro* v. *Bothwell*, September 16, 1846, Arkley 118, Lord Moncreiff at 120. The only exception was where it was sought to set off another set of expenses against those claimed—*Gordon* v. *Davidson*, June 13, 1865, 3 Macph. 938, Lord Justice-Clerk Inglis at p. 939, approving Bell's Com., vol ii, p. 36. *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, January 22, 1907, 1907 S.C. 442, 44 S.L.R. 364 (to which the Lord President had referred), was a case of one set of expenses being set against another.

Argued for the pursuers—*Esto* that *Gordon* v. *Davidson* (*ut supra*) laid it down that extrinsic claims were not to be set off against an award of expenses, here the case was different, for the claim sought to be compensated by the expenses arose out of this very action. It was a claim for money paid to Mrs Grieve under an order of the Court which had been recalled on appeal. Compensation was pleadable, and the trustees should not be deprived of the right of pleading it by decree being granted in name of the agent disburser.

LORD PRESIDENT—The facts on which this controversy arises are these:—A certain lady, Mrs Grieve, was a claimant in a multiplepoinding which had to do with the estate of her deceased husband John Grieve. In the Court of Session there was a finding pronounced which affirmed her right to the interest on a sum of £10,000. After that finding was pronounced Mrs Grieve made application to the trustees and the trustees made a payment to her of £500. Another claimant thereafter took an appeal to the House of Lords, which reversed the finding of the Court of Session to which I have referred and determined that Mrs Grieve had no right to any interest on the sum of £10,000. At the same time the House of Lords awarded expenses to all the claimants out of the fund *in medio*.

On a motion to apply the judgment the agent for Mrs Grieve asks that decree for expenses be pronounced in name of the agent-disburser. This motion is resisted by the trustees, who point out that if decree is granted as craved they will lose their right to retain the sum found due as expenses against the £500 paid by them to Mrs Grieve out of the estate.

The point is really settled by the judgment in *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 44 S.L.R. 364. I had occasion in that case to go into the general principles determining the right of an agent to get a decree in his name, and the judgment in that case was based on the judgment of Lord Justice-Clerk Inglis in *Gordon* v. *Davidson*, June 13, 1865, 3 Macph. 938. The point is found shortly stated in a sentence quoted in the opinion of Lord Inglis in that case from Lord Glenlee—"I have no idea that the agent in a cause is in any better situation that the principal party, barring extrinsic claims of compensation." Applying that, I have no doubt that this is not an extrinsic claim. Part of the fund *in medio* has been paid to this lady, and it is difficult to see why the

trustees should be deprived of their right to claim retention as compensation. We are not deciding as to whether the lady herself may not have a good defence against this claim.

I may add that the case of *Munro* v. *Bothwell*, September 16, 1846, Arkley's Justiciary Reports, is in conflict with the other decisions, and cannot be looked on as an authority. That judgment, though by a judge of great eminence, was given on circuit, when there is naturally less time for deliberation than in cases determined by a Division of the Court. In view of other decisions I think that that case is not law.

LORD M'LAREN—I concur not only in the result but in all the grounds of your Lordship's decision.

LORD KINNEAR and LORD PEARSON concurred.

The Court refused the motion.

Counsel for the Pursuers and Respondents (John Grieve's Trustees) — Chree. Agents—E. A. & F. Hunter, W.S.

Counsel for the Petitioners, Claimants and Appellants (James Grieve's Trustees)—Macmillan. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Claimant and Respondent (Mrs Grieve)—Grainger Stewart. Agents—Morton, Smart, Macdonald & Prosser, W.S.

Counsel for the Claimant and Respondent (Mrs Fraser)—MacRobert. Agents—Kirk, Mackie, & Elliot, S.S.C.

Tuesday, June 11.

SECOND DIVISION.

(SINGLE BILLS.)

GRAHAM (LIQUIDATOR OF JAMES DONALDSON & COMPANY, LIMITED).

Company—Liquidator—Caution—Bond of "Approved Guarantee Company" Authorised—Premium on Bond Charged as Expenses in the Liquidation, but this to be Considered in Fixing Liquidator's Remuneration — Act of Sederunt 15th July 1904.

In a note presented by the liquidator in a liquidation under supervision the Court *authorised* the acceptance of a bond of caution by an "approved guarantee company," *i.e.*, a company approved for the purposes of judicial factories under the Act of Sederunt of 15th July 1904, the premium on such bond to be charged against the liquidation, but such charge to be considered in fixing the liquidator's remuneration.

Company—Liquidator—Caution—Amount.

Where the assets of a company in liquidation amounted to about £9000, the Court fixed the amount of caution to be found by the liquidator at £6000.

The Act of Sederunt of 15th July 1904, as to the finding of caution in judicial factories and the procedure therein, and as to the remuneration of factors, provides—Sec. 2 (*d*)—"The Accountant shall in January yearly prepare and submit a list of approved guarantee companies for the consideration and approval of the Court." Sec. 3—"The Accountant of Court shall allow as a charge against the factory estate (1) the premium paid by the factor where a company bond of caution has been accepted, or such part thereof as he deems proper, and (2) the expense of the necessary procedure in obtaining the approval of a bond of caution or the limitation of the amount, but the fact of such charge shall be taken into account by the Accountant of Court in fixing the factor's remuneration." Sec. 5—"This Act shall not affect the procedure as to bonds of caution in bankruptcy and in the liquidation of public companies."

On 11th June 1907 James Maxtone Graham, the liquidator of James Donaldson & Company, Limited, presented a note to the Lord Justice-Clerk stating, *inter alia*, that the assets of the company amounted to £9000 or thereby, and praying his Lordship "to move the Court to restrict the caution to be found by the liquidator and to authorise a bond of caution by the Law Guarantee and Trust Society, Limited, to be accepted, and further to authorise the premium on the said bond of caution to be paid by the liquidator out of the estate of the said James Donaldson & Company, Limited, and further to direct that the expenses of this note should be expenses in the liquidation."

The Law Guarantee and Trust Society, Limited, was one of the companies approved of for the year 1907 in terms of sec. 2 (*d*) of the Act of Sederunt.

Counsel for the liquidator referred to *M'Leod (Liquidator of Alexander Forrester, Limited)*, February 21, 1907, 44 S.L.R. 393.

The Court without giving opinions pronounced this interlocutor:—

"The Lords having considered the note for James Maxtone Graham, C.A., the liquidator appointed on the estates of James Donaldson & Company, Limited, and having heard counsel, fix £6000 as the amount for which caution shall be found by him, and authorise the Clerk to accept a bond for that amount by the Law Guarantee and Trust Society, Limited: Further authorise the liquidator to charge the premiums payable in respect of such bond against the liquidation, but declaring that such charge shall be taken into account at the fixing of his remuneration as liquidator: Also authorise the expenses of said note to be charged against the liquidation."

Counsel for the Liquidator—Constable. Agents—Davidson & Syme, W.S.