late with the latter." Now it seems to me that this fourth proposition applies directly to the present case.

But the matter does not rest there; for in the case of *Turner* v. *Cooper and Others*, reported in 8 Macph. p. 222, Lord President Inglis says this—it was a case under the Moveable Succession Act 1855—"If the statute does not apply to the case, it seems to me that all the difficulty raised by this special case is removed. In that event the common law says quite unmistakably that the heirs in heritage, whether the heir be a single heir or whether they be heirs portioners, cannot take a share of the moveable estate along with the other next-of-kin without collating the heritage. I do not think it is suggested that that rule does not apply equally to heirs portioners as to a single heir, and here we have Mrs Turner, Mr Robert Couper, and Mr Thomas Macdonald taking as the three heirs portioners of the intestate and not offering to collate. The consequence is, I think, we must answer the first question in the negative." The first question put in that case was whether Mrs Turner, although one of the three heirs portioners and taking a third of the heritable estate, was also entitled as one of the next-of-kin to a share of the residue of the moveable estate?

It appears to me that the above opinion precisely covers the case we have here. But Mr Hamilton, with some ingenuity, tried to get round it by saying that, while it was not suggested in that case that the rule does not apply equally to heirs portioners as to a single heir, it is suggested by him now for the decision of the Court. But I think the phraseology of the Lord President's opinion goes to show that not only was the suggestion not made, but that he would have been very much surprised if it had been made. At all events I think that the decision is a distinct authority for the proposition that whether there is only a single heir in heritage or whether there are heirs portioners, the rule applies that they can only share in the moveable estate of a deceased intestate on the condition of collation in every case where there are other persons possessing the character of next-of-kin.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

"Answer the first question of law therein stated in the negative, and the second question of law therein stated in the affirmative: Find and declare accordingly and decern: Find the third parties to the special case entitled to their expenses against the second party."

Counsel for the First Parties—Fenton. Agent—D. Hill Murray, S.S.C.

Counsel for the Second Party—Hamilton. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Third Party—Kennedy, K.C.—M. P. Fraser. Agent—D. Hill Murray, S.S.C.

Wednesday, January 15.

SECOND DIVISION.

CONOLLY *v.* NORTH BRITISH RAILWAY COMPANY.

Expenses—Jury Trial—New Trial — Expense of First Trial— What Included.

The expenses of discussing a rule for a new jury trial form part of the expenses of the trial sought to be set aside.

Earl of Fife v. *Duff and Others*, March 3, 1827, 5 S. 524 (n. ed. 492), *followed.*

Thomas Conolly brought an action of damages for personal injury against the North British Railway Company. A jury awarded him £160 of damages. On the motion of the defenders the Second Division allowed a new trial, which resulted again in a verdict for the pursuer and an award of £75 of damages. The defenders again moved for a rule, which was granted, but the Second Division, after the hearing, refused to allow a third trial, and pronounced this interlocutor—"The Lords having heard counsel for the parties on the rule granted by the previous interlocutor, Refuse the said rule, of consent apply the verdict of the jury, and in terms thereof decern against the defenders for payment to the pursuer of the sum of £75 sterling: Find him entitled to expenses, except the expenses of the first trial, and remit the same to the Auditor to tax and report."

The Auditor allowed the pursuer the expenses incurred by him in connection with discussing the rule which resulted in the first trial being set aside.

The defenders, in a note of objections to the Auditor's report, objected to the allowance of these expenses, and contended that they formed part of the expenses of the first trial—*Earl of Fife* v. *Duff and Others*, March 3, 1827, 5 S. 524.

LORD JUSTICE-CLERK — I think these expenses (except, of course, the expenses which Mr Dickson has given up in connection with precognitions) should not be allowed. These are expenses connected with the first trial, and although the word trial expresses generally the idea of going to a verdict, and getting the verdict of a jury, we all know that a verdict has no weight whatever except in so far as it is applied by the Court, the Court having power if they see fit not to apply it on certain grounds, they having a discretion to judge whether the jury have gone so far wrong in their verdict, either in fact or law, that a new trial ought to be granted on the ground that the verdict was either contrary to evidence or contrary to law. I take that to be part of the proceedings of the first trial, and until that has been done nothing effective has been done in the original trial at all. To say that these expenses, which resulted in the pursuer being compelled to enter upon a new trial, are expenses connected with the new trial, seems to me to be

out of the question. They are expenses connected with the trial in which the verdict was bad and had to be set aside, and the party is not allowed the expenses of that trial; and my own opinion, apart from authority, would be that he is not entitled to the expenses incurred when that abortive trial was set aside. But I hold that this view is strongly confirmed by the case quoted to us of the *Earl of Fife* v. *Duff*.

LORD LOW—I have great doubts in this case, but I think it seems to have been decided in the *Earl of Fife* v. *Duff* that the expenses of discussing a rule for a new trial are part of the expenses of the trial to which it relates. That being so, I do not think it would be expedient to disturb a decision upon a question of this sort pronounced so long ago. Therefore I agree in the result which your Lordship proposes.

LORD ARDWALL—I have no doubt about this matter. I am of opinion that the expenses connected with the setting aside of the verdict in the first trial which have been allowed to the pursuer by the Auditor were really part of the expenses of the first trial. The proceedings in connection with the first trial never came to anything; the verdict was set aside and a new trial was granted. When the Court finds a party entitled or not entitled to certain expenses, that is not necessarily confined to the expenses of the specific piece of procedure mentioned in the finding, but includes expenses properly connected with such piece of procedure. When the Court says a party is to be entitled to the expenses of the first trial, or is not to be entitled to the expenses of the first trial, these expenses consist not merely of the expenses of the proceedings before the Judge at the trial, but of everything properly connected with the first trial, including the expenses of the discussion in this Court in obtaining a new trial. That view is entirely in consonance with what was decided in the case of the *Earl of Fife*, 5 S. 524, which has been quoted to us. That was a very clear case of this point coming up for decision, because there were in that case two jury trials which, in consequence of the judgment of the House of Lords, were held to be absolutely useless, and one of the parties got expenses of these trials but no other expenses. Therefore it is a direct decision as to what falls and what does not fall within the expenses of a particular jury trial. On these grounds I am clearly of opinion that the judgment proposed by your Lordships is the right one.

LORD STORMONTH DARLING was not present.

The Court sustained the objection.

Counsel for the Pursuer—Orr, K.C.—Lippe. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Objectors)—Scott Dickson, K.C. — Grierson. Agent—James Watson, S.S.C.

Wednesday, January 15.

SECOND DIVISION.

[Sheriff Court at Selkirk.

HAVERY *v.* BROWNLEE.

Parent and Child—Affiliation—Presumption of Paternity—Admission of Intercourse by Defender at Dates Subsequent to Date of Conception—Corroboration.

In actions of affiliation in which the defender admits an act or acts of connection other than the alleged act or acts founded on by the pursuer, but little corroboration of the pursuer's evidence will be required if the act or acts admitted are prior in date to the act or acts founded on. Where, however, the act or acts admitted are subsequent to the date of the alleged act or acts founded on, the corroboration must be substantial.

Mary Wilhelmina Havery, dressmaker, Galashiels, brought, in the Sheriff Court at Selkirk, an action of affiliation and aliment against Robert Brownlee, dyer, Galashiels.

A proof was taken by the Sheriff-Substitute (SMITH).

The pursuer deponed that she had known the defender for a number of years; that she and her sister had the privilege of drying their washing in the defender's father's stove-house and that the defender often helped them; that upon an evening in the middle of March 1906 the defender was alone with her in the stove-house and that he there had connection with her against her will, as a result of which she gave birth to an illegitimate child on 29th December 1906. She further deponed that the defender had connection with her on other two occasions when they were out cycling in April and in July.

The defender denied that he had connection with the pursuer in March, but admitted the two acts in April and July.

There was no evidence directly corroborative of the stove-house incident; there was evidence that the defender sometimes went to the stove-house with the pursuer and her sister, but none that he had been there alone with her on the occasion in question.

The pursuer's sister deponed that in September the pursuer told her of her condition and that she had had connection with the defender in the stove-house about the middle of March.

There was evidence from various members of the pursuer's and defender's families which showed that the pursuer had at first been willing to marry her when he became aware of her condition, but had subsequently declined, apparently when it had become evident that she was further advanced in pregnancy than he had at first supposed.

The defender averred upon record that the pursuer had repeatedly had connection with another man in March, April, and