

points out what, he says, appears to him to be a strong piece of evidence of such intention. I agree with your Lordship with reference to all the questions.

LORD MACKENZIE—I am of the same opinion.

LORD M'LAREN and LORD PEARSON, who were sitting in the Division at the advising, gave no opinion, not having heard the case.

The Court answered the first branch of the first, fourth, and fifth questions, and the second branch of the third question, in the affirmative, and the second branch of the second question, as to the sums under heads "b," "c," and "d," in the affirmative, and as to the sums under head "e" in the negative.

Counsel for First Parties—Sandeman.
Agent—W. B. Rankin, W.S.

Counsel for Second Party—Chree. Agent—A. P. Nimmo, W.S.

Wednesday, February 17.

FIRST DIVISION.

(SINGLE BILLS.)

JAFFRAY v. JAFFRAY.

Expenses—Husband and Wife—Divorce—Reclaiming Note for Husband (Pursuer)—Motion by Wife in Inner House for Payment of Expenses Incurred by Her in Outer House before Hearing of Reclaiming Note—Interim Award.

In an action of divorce for adultery at the instance of a husband the Lord Ordinary assolizied the defender and found her entitled to expenses. The pursuer having reclaimed, the defender, who had already received three interim awards of £15 each towards her expenses, presented a note in the Inner House in which, on the narrative that she had no money to instruct her agents to support the judgment, she craved the Court to ordain the pursuer to pay the balance of her Outer House expenses, being £222 odds, or to remit the account to the Auditor for taxation with a view to decree.

The Court, without dealing with the Outer House expenses, *decerned* against the pursuer for £15 towards his wife's expenses in connection with his reclaiming note.

Hoey v. Hoey, October 23, 1883, 11 R. 25, 21 S.L.R. 23, and *Johnston v. Johnston*, January 27, 1903, 5 F. 336, 40 S.L.R. 302, *commented on*.

Robert Jaffray, tailor, raised an action of divorce on the ground of adultery against Mrs Jane M'Dougall Duncan or Jaffray, his wife.

On 30th June 1908 the Lord Ordinary (GUTHRIE) *decerned* against the pursuer for payment to the defender of £1 per week in name of interim aliment and of

£15 to account of expenses in the cause. On 20th October and on 3rd November 1908 the Lord Ordinary gave decree for two further sums of £15 to account of expenses.

On 10th December 1908 the Lord Ordinary (GUTHRIE), after a proof, assolizied the defender and co-defender from the conclusions of the action and found the pursuer liable in expenses to the defender and co-defender, allowed accounts thereof to be lodged, and remitted the same to the Auditor to tax and report.

On 31st December 1908 the pursuer reclaimed against the Lord Ordinary's interlocutor, and on 6th January 1909 the case was sent to the roll.

On 17th February 1909 the defender presented a note to the Lord President, in which she stated—"... The account of expenses incurred by the defender to her agents amounts to £267, 11s. 3d., to account of which she has received from her husband, the pursuer, the sum of £45, leaving a balance due by him thereon of £222, 11s. 3d.; that the defender is destitute, and has no money to instruct her agents to support the judgment of the Lord Ordinary, and accordingly she is under the necessity of craving your Lordship to move the Court to ordain the pursuer to pay to her said balance of £222, 11s. 3d. within six days or such other time as your Lordships may appoint, or to remit the said account to the Auditor to tax and report, and thereafter to ordain the pursuer to pay the taxed amount thereof within said period, or to do otherwise as to your Lordships may seem proper."

Argued for the defender (respondent)—The defender was entitled at this stage to payment of the expenses incurred by her in the Outer House—*Hoey v. Hoey*, October 23, 1883, 11 R. 25, 21 S.L.R. 23.

Argued for the pursuer (reclaimer)—The Court at this stage should not deal with the question of expenses, the whole case, including the award of expenses, being before the Division for review—*Johnston v. Johnston*, January 27, 1903, 5 F. 336, 40 S.L.R. 302.

LORD PRESIDENT—This is a case in which a husband brought an action for divorce against his wife on the ground of adultery. In the Outer House the Lord Ordinary has pronounced an interlocutor, in which he finds that the pursuer has failed to prove his averments, and therefore sustains the defences, assolizies the defender, finds the pursuer liable in expenses to the defender and co-defender, allows accounts thereof to be lodged, and remits the same to the Auditor to tax and report. Against that interlocutor a reclaiming note has been taken by the pursuer, and the motion made before your Lordships to-day by the defender's counsel is to remit that account to the Auditor for taxation, in order that when the account comes back the defender may get decree for the sum brought out. There have been three interim awards of expenses of £15 each made in the Outer House, and the defender has received payment of the sum of £45, to which these awards amount, but

we are told that the actual account, subject to taxation, amounts to over £200. Your Lordships' attention has been called to the two cases of *Hoey v. Hoey*, 1883, 11 R. 25, and *Johnston v. Johnston*, 1903, 5 F. 336. There seems to be some difficulty in reconciling these two cases, and therefore your Lordships have had to consider the matter afresh. I do not think that there is any doubt as to the principle to be applied in such cases. If a husband seeks to divorce his wife, and the wife is without means, she is entitled to have paid to her such funds as shall from day to day be sufficient to allow her to make good her defence. As to the amount to which she is from time to time entitled, that can only be arrived at by a rough estimate. Of that principle I think there can be no question. But if during the progress of the case the wife manages to carry on her case by means of her own funds, or of funds which she has succeeded in borrowing for the purpose, the necessity for interim payments is over, and her ultimate right to expenses will be left to be determined at the end of the day according to the ordinary rules. But if the wife has won her case in the Outer House and is brought to the Inner House, she is absolutely entitled to maintain her decree, and to be put in funds for that purpose, and if we see that the sum brought out in the account of expenses is considerably in excess of the amount already advanced, we are entitled to assume that the wife's resources are exhausted; and therefore a liberal view may well be taken if an application is made to us for an interim award to enable her to carry through the proceedings in the Inner House. If this case were in such a position that it might be in the roll within the next week or so, no doubt she could have claimed at this stage a sum sufficient for the instruction of competent agents and counsel. That, however, is not the case here, and the application is in a measure premature. But I think she is entitled to get something. No doubt the main expense of the reclaiming note at this stage is that of printing, and the printing has to be done by the husband. But the wife is entitled to have the printing revised on her own behalf, and to see that those documents are printed which are necessary for the proper presentation of her case; as we all know, additional prints for the respondent are often required. I am therefore prepared to assent to an interlocutor making an interim award of £15, and when the case is within reasonable distance of being put out for hearing, I shall be prepared to listen to a renewed application.

LORD M'LAREN—I am of the same opinion. The Lord Ordinary has granted absolvitor with expenses to the wife, which of course means with taxed expenses in so far as these are not covered by the interim payments already made. At this stage we cannot interfere with the finding of the Lord Ordinary, and in any case these interim awards are not brought under review by the reclaiming note. We have therefore to consider what interim award

is necessary to enable the lady to continue her defence in the Inner House. It seems to me that there are several reasons for providing for her on a comparatively liberal scale. In the first place, a certain presumption of her innocence may be drawn from the Lord Ordinary's interlocutor. Then it is clear that she has not been fully reimbursed for the expenditure which she has already incurred. A third reason, perhaps, is that it is comparatively easy to estimate what expenditure is likely to be incurred in the Inner House. Here there will be only a debate upon the proof and documents, and there is a marked difference in this respect from the position in the Outer House, where the expenditure cannot be even approximately estimated, because it depends to a large extent upon the duration of the proof and the number of witnesses to be examined. I agree with the award proposed by your Lordship.

LORD KINNEAR—I agree with your Lordship in the chair.

LORD PEARSON was absent.

The Court decreed against the pursuer for payment to the defender of £15 to account of her expenses in connection with the pursuer's reclaiming note.

Counsel for Pursuer (Reclaiming)—Spens. Agents—John C. Brodie & Sons, W.S.

Counsel for Defender (Respondent)—Gunn. Agents—Mackay & Young, W.S.

Friday, February 19.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

ADAMSON v. FIFE COAL COMPANY,
LIMITED.

Process—Sheriff—Jury Trial in Sheriff Court—Motion for New Trial on Ground that Questions not Properly Adjusted—Competency—Adjustment of Questions for Jury—Appeal—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), secs. 27, 28, 31, 32, and First Schedule, Rule 144.

The Sheriff Courts (Scotland) Act 1907, section 31, makes provision for trial by jury in the Sheriff Court of cases under the Employers' Liability Act 1880, and directs that the verdict of the jury shall be applied by an interlocutor of the Sheriff, which shall be appealable to the Court of Session only on the grounds (1) that the verdict has been erroneously applied, or (2) that it is contrary to evidence, or (3) that the Sheriff had unduly refused or admitted evidence or misdirected the jury, or (4) that their award of damages is inadequate or excessive. Section 32 makes it competent for the Sheriff, where jury trial has been ordered, to fix the question or questions of fact to be put to the jury. By sections 27 and