was then the question whether these persons could intermarry. It was clear that they could not do so in Scotland. I do not, however, adopt the proposition which appeared to recommend itself to the Lord Ordinary, that the Scotch law could not recognise the Canadian marriage, even if lawful in Canada, on the ground established in Fenton *v.* Livingstone. A marriage between them in Scotland would have been null, because Beattie's name was in the decree of divorce, and therefore the parties came within the statutory provision. But apart from that statute, I do not think a marriage between adulterers (after the dissolution of the prior marriage) either illegal or immoral in the eye of the law of Scotland. As for the Gretna marriage, it did not establish anything except the fact of the elopement, and that there was some reason for not being married in Dumfries. The fact of the marriage ceremony in Canada being established, the question arose, Could that be a lawful marriage in Canada? As to this, our knowledge must be derived from the evidence of the Canadian lawyers. Mr Popham's evidence was very clear in the negative. The other witness, Mr Mackay, was more fastidious in giving his evidence. But he comes to substantially the same result, only making great allowance for the ignorance of one party, and the constitution thereby of a putative marriage valid to certain effects in consequence of *bona fides*. Mr Popham said a marriage between two who had "knowingly" committed adultery was bad. Mr Mackay used the words "knowingly and wilfully." I do not see that there is really any distinction between committing adultery "knowingly" and committing it "knowingly and wilfully." The question of fact whether Francis Beattie did know that Jane Pringle was married to another, was a thing to be proved by circumstantial evidence, and the case was as clear as could well be—clear enough to have established a criminal charge against Beattie if we were now in the habit in Scotland of prosecuting adulterers criminally. The result is that the marriage in Canada was invalid.

Lord CURRIEHILL concurred.

Lord DEAS also concurred, observing that it was not necessary to decide the question that would arise if the Canadian marriage had been valid. That question was not solved by the principle of Fenton *v.* Livingstone. Nor was it solved by saying that such a marriage is contrary to general morality or national policy, for we recognise such a marriage, except when the party is named in the decree of divorce. The question is one which must be determined on much narrower considerations.

Lord ARDMILLAN also concurred.

Agent for Pursuers—John Walls, S.S.C.

Agent for Defender—John M'Cracken, S.S.C.

Tuesday, Dec. 18.

SECOND DIVISION.

THE QUEEN *v.* BEATTIE.

Excise—License to Sell Beer by Retail—Trader—Expenses. *Held* upon a case stated by the Quarter Sessions of Perthshire, that, under the Excise Acts, and particularly 6 Geo. IV., c. 81, sect. 26, the penalties to be imposed upon persons selling beer without a license were intended to apply to traders. Circumstances in which that character held not established. Question as to the meaning of a sale by retail under the Excise Acts. *Held* not competent to award expenses in such cases.

This was a case stated by the Quarter Sessions of Perthshire for the opinion and direction of the Court of Session sitting as a Court of Exchequer. The circumstances were shortly as follow:—An information had been exhibited to the Justices of the Peace of the district of Blairgowrie, upon 18th August 1866, against the defendant, setting forth that he, within six calendar months, to wit, upon the 21st July preceding (then and there being "a person selling goods and commodities" for the selling of which a license was required), did sell a pint bottle of beer by retail to be drunk on the premises without taking out a license. The Justices, after evidence, convicted the defendant, and fined him £12, 10s. Beattie appealed to the Quarter Sessions, when it was agreed that the proof should be taken of new, the import of which (upon which the case fell to be decided), and the question arising thereon for the determination of the Court of Exchequer, were thus stated by the Quarter Sessions:—

"The defendant keeps a temperance hotel in Blairgowrie. He has accommodation for and keeps lodgers. On the day set forth in the information, an excise officer, by instructions of his superior officer, entered the defendant's house. He went into the commercial room, and asked from the defendant's wife a bottle of bitter beer (in the absence of the defendant). The wife left the room, and unknown to the officer of excise, sent her servant to a trader in the neighbourhood with threepence and an empty bottle, and who purchased a bottle of Bass' ale or beer, and paid for it threepence. The bottle was uncorked by the wife, and given by her to the excise officer, who asked what was to pay. The wife answered threepence. He then gave her sixpence in silver, and got back threepence in copper money. The officer, after drinking part of the beer, left the defendant's house.

"With these facts, three of the Justices held in law that the facts proved amounted to a sale of the beer by the defendant's wife in his house, to be drunk on the premises, and therefore he had contravened the statute, and was liable in the penalty, and so were of opinion that the appeal should be dismissed and the conviction confirmed. The other three Justices were of opinion that the facts proved did not in law amount to a sale by the defendant's wife to the excise officer, but that she and the servant were only media of the sale between the trader and the excise officer, and therefore voted that the appeal be sustained and the conviction quashed. The bench being thus equally divided, the Justices present agreed to state the facts of the case for the opinion and direction of the Court of Session—Whether in law the proof, as so set forth, warrants a conviction for contravention of the revenue statutes '*by a sale by retail*' of the bottle of bitter beer to be drunk and consumed on the premises."

The LORD ADVOCATE, the SOLICITOR-GENERAL, and A. RUTHERFURD, for the Crown, argued in support of an affirmative answer to the question, and referred to 7 and 8 Geo. IV., c. 53, sec. 84; 6 Geo. IV., c. 81, sec. 26; 24 and 25 Vict., c. 91, sec. 12; 4 and 5 William IV., c. 85, sec. 19; and to the Queen *v.* Gilroys, 4 Macpherson, 656.

R. V. CAMPBELL (with him FRASER) for the defendant, argued in support of a negative answer to the question, and referred to 25 and 26 Vict.,

c. 35, sec. 17; The King *v.* Buckle, 4 East's Reports, 346; and Smith and Others *v.* Mawhood, 26th June 1845, 15 *Law Journal*, Exch. 149.

The 26th section of the Act of 6 Geo. IV., cap. 81, under which the proceedings in this case fell, is partly as follows—"That if any person or persons shall make or manufacture, deal in, retail, or sell any goods or commodities hereinafter mentioned, for the making or manufacturing, or dealing in, retailing, or selling of which goods or commodities, or for the exercising or carrying on of which trade or business a license is required by this Act, without taking out such license as is in that behalf required, he, she, or they shall, for every such offence respectively, forfeit and lose the respective penalty thereupon imposed, as hereinafter follows, that is to say,"

and *inter alios*,

"Every manufacturer of tobacco or snuff so offending shall forfeit and lose £200." . . .

"Every person who shall sell beer, cider, or perry by retail to be drank or consumed in his or her or their house or premises" . . . shall forfeit and lose the sum of £50."

The 2d section of the Act provides for the duties to be paid for a license to sell beer, &c., in this way—

"For and upon every excise license to be taken out by any maker, manufacturer, trader, dealer, retailer, or person hereinafter mentioned," &c.,

and *inter alios*,

"Every person who shall be duly authorised to keep a common inn, alehouse, or victualling house, and who shall sell beer, cider, or perry by retail to be drank or consumed in his, her, or their premises," &c., giving the duties exigible under different circumstances.

The Crown maintained that the defendant should have taken out a license under this section.

At advising,

Lord Justice-Clerk—The object of the information in this case is to enforce the provision of the 6th of Geo. IV., requiring every person who shall be duly authorised by the Justices of the Peace to keep a common inn, ale-house, or victualling house, and who shall sell beer, cider, or perry by retail to be drunk on the premises to take out a license. The penalties are imposed to enforce this provision. If the case for the prosecution is well-founded here, we must assume that the defender should have taken out such a license as would have enabled him to sell by retail these drinks to be consumed on the premises. Now, the enactment of a penalty may vary very much in its terms. The statute might say—If any one sells beer under a certain amount he shall be deemed a retailer of beer, and shall forfeit a penalty of £50 for not taking out a license; and had the statute been so expressed there could be no doubt that this prosecution would have been well-founded. On the other hand, the statute, with the same object in view, might have run in the following terms—If any one who is a retailer of beer within his own premises does not take out a license, and sells beer by retail to be drunk on his premises, he shall incur a certain penalty. Now, the question is, which of these two things does the statute enact in its 26th section? If the former, the prosecution in the present case must be sustained; if the latter, I think it cannot. The way in which I read this section is this: it says that if any one shall make, deal in, retail, or sell any goods hereinafter mentioned, or shall carry on any trade or business hereinafter mentioned, for the making, &c., of any such goods, he shall incur a penalty if he has not taken out the appropriate license. The statute then goes on to describe the persons who must take out the license, and to impose a penalty on each kind of trade or business intended to be included under the provisions of the Act. Thus, for example, manufacturers of tobacco or snuff so offending shall forfeit £200. Now, what does that mean? It means that if a manufacturer of tobacco or snuff shall make or manufacture any such tobacco or snuff without a license, he shall forfeit £200. Nothing can be plainer than that. It means that you must allege and prove that a person who is a manufacturer of tobacco or snuff did manufacture such goods without having taken out a license. It is not sufficient that there be an isolated act of manufacture by some person not answering the particular description; the act must be done by a person exercising the trade of a manufacturer of tobacco or snuff and without having taken out a license. One act of making the article, alleged and proved, is, no doubt, sufficient for the conviction of a manufacturer of tobacco, but then you must, at the same time, establish the character of the offender, namely, that he is a manufacturer of tobacco. I take the case of a manufacturer of tobacco because it is simpler than the one we are dealing with. The form of expression in the statute, as applicable to the present case, is somewhat different, arising very much from the nature of the trade. It runs thus:—Every person who shall sell beer, or cider, or perry by retail to be drunk or consumed on the premises. Now, at first sight, it looks as if it meant that every person whatever who shall, on any single occasion, sell a bottle of beer to be drunk on the premises was intended to be included in this description; but that, I apprehend, is not so. The true construction of that part of the clause is that it is intended to describe the same parties who are ordered by the 2d section of the statute to take out licenses; and this portion of the 26th section describes, therefore, a trader or dealer whom the statute is there contemplating, and against whom the penalty is enacted. Now, what is it that is intended to infer the incurring of this penalty? It is, that a person who is a seller of beer by retail to be drunk on the premises has, upon some particular occasion, sold beer by retail to be drunk on the premises without having taken out the proper license. The way in which the information is laid in the present case confirms me in this construction of the statute, for it alleges—"That within six calendar months past, &c., ... without taking out such license as in that behalf was and is required by the statute," &c. Now, observe that if all that is intended to be alleged here is that David Beattie, no matter what his trade might be, did upon a certain occasion sell a pint of beer by retail to be consumed on his premises, without having taken out a license, all that is contained within parenthesis in this information is mere surplusage. But it is impossible to read it so, for it is the very thing contemplated in that part of the 26th section of the statute which describes the kind of persons by whom the penalty is to be incurred.

Now, if this be the true view of the ground on which the penalty must rest, what are the facts of the present case. They are very short and simple. A person enters the Temperance Hotel kept by the defender—it is of no consequence whether he was an excise officer or not—and asks for a bottle of beer. Then the special case says that the defender's wife, who received this order,

"left the room, and unknown, &c., ... left the defendant's house."

Now, there is strong reason for saying that there were here two sales, for the defender's wife employed her servant to go to the neighbouring public house, and there to buy a bottle of beer and bring it home; and she may be said, I think, according to strict legal principle, to have sold it over again to her customer. But then the question comes to be—Is that an act of retailing beer to be consumed on the defender's premises, by a person falling within the description of the statute, as a person occupied in selling such commodities? For aught that appears on the face of this special case, there never was another bottle of beer, cider, or perry consumed on these premises before or since; and while it requires no more than a single act of selling to subject a party in a penalty if the seller come otherwise under the description of the statute, it would never do, according to the construction of the statute which appears to me to be the true one, to hold that any one, by committing this isolated act of sale, may incur the penalty. It is not intended that every one should take out a license, but only that those who are engaged in the retailing of beer to be drunk on the premises should do so.

My view, therefore, is, that the defender does not come within the description of persons intended by the statute to be subject to the penalty, and, upon that ground, I am for instructing the Quarter Sessions that this conviction cannot be sustained.

I do not think it necessary to go into the question whether we have here "a sale by retail." I think it very doubtful whether we have, because retail, according to its ordinary signification in the English language, undoubtedly means the dealing out in small quantities of a commodity of which the seller has a stock; but it may be contended with some show of reason that in the Excise statutes the word "retail" is used chiefly to distinguish between a sale of a large quantity of a commodity and of a small quantity; and I therefore prefer to rest my judgment upon the ground that I have already indicated, which, I think, is a fair, reasonable, and proper construction of the statute.

Lord COWAN—I concur with your Lordship's judgment, but in doing so I must be clearly understood as concurring only because of the peculiar case with which we have to deal. I don't think it necessary for the Crown, in such a prosecution as this, to prove by evidence in express terms that the offender is a dealer in the particular thing which, contrary to the statute, he sold by retail. I hesitate to say that that must be proved by the Crown by express evidence. But I think the facts set forth must be such as, by necessary, or at least legitimate implication, lead to the conclusion that the party alleged to have infringed the statute was a dealer in these articles. The facts do not entitle me legitimately to infer this in the present case. It would, I think, be a violent inference from the facts stated. But I think that in a different state of facts, and without express proof, it might be legally inferred that the party infringing the statute was truly to be dealt with as a dealer of the kind described in the 2d section of the Act.

Lord BENHOLME—Had our opinion depended on the exact point which caused three of the Justices to differ from their brethren in regard to this conviction, I should have been inclined not to concur in that view, for I think there were two sales here. But I think the view which your Lordship has adopted is a correct one upon the special circumstances set out in this case, for I agree with Lord Cowan, that if a case of simple sale by retail had been made out without anything to infer that it was an isolated instance, but with the ordinary circumstances which would lead one to suppose that it was a mere instance of the trade which the party was carrying on, I should hold that the conviction was good. But the circumstances here are special, and lead me to infer that there was no evidence that this act was done in prosecution of a trade. In the first place, this was a temperance hotel, with no profession of having a license; and, in the second place, the bottle of beer was asked for and the woman sent out for it without any intention of making profit by it, but merely to accommodate the customer. I think that in these circumstances we are entitled to hold that the Crown has not made out that this was such an act of sale as would lead to the inference that it was an instance of the party's trade. It was said that this was to be condemned, because some benefit might arise to the house from so accommodating a customer, and had there been an habitual exercise of such accommodation, I do not know what the inference might have been; but we have nothing of that kind. This is the only one, and in a case of this kind I think it requires more than one instance to take it out of the category of a special case in which the party was not following his usual trade, but was going out of his way to accommodate a customer. Upon these grounds I think that this conviction cannot stand.

Lord NEAVES—I am of the same opinion. I think it is a very clear case. It was suggested that the question was narrowed by the views taken by the Justices, but I do not think that is so. The question is not whether I agree with one set of Justices or another; it is, whether in law the proof "warrants a conviction for contravention of the revenue statutes by a sale by retail of the bottle of bitter beer to be drunk and consumed on the premises." Now, I humbly think it was not such a sale. The person who drew this information evidently understood what it was incumbent on him to prove, because the passage of the narrative within parenthesis is manifestly a setting forth, as necessary to the relevancy of the complaint, and as a thing undertaken to be proved, of the possession by Beattie of a certain character which gives a colour to the whole of what takes place afterwards. "Then and there being a person selling" just means that he is a person occupying that status and position, and it is that which gives the *gravamen* to the act. That is set forth and must be proved either directly or by inference. But here there is no direct proof that he trafficked in these commodities. Nor is there any proof of what might have overcome the presumption arising from this being a temperance hotel—namely, that there was any stock of beer on the premises? The inference here is that he had no beer to sell, and that he had to get it *pro re nata* from an adjoining house. Then we have the utter absence of profit, which is a very material circumstance, for what presumption can there be that a man carries on a trade of buying and selling for the same price. It is not as if the person for whom the beer was got had a running account, showing that the thing was systematic. As far as appears this was an isolated act.

I daresay it is fair enough to say that there were two sales here. At the same time very little would make a difference, because it is quite a mistake to say that there cannot be a sale unless the parties know each other as buyer and seller. There may be an undisclosed principal and an undis-

closed seller, and if a mandate were given to an intermediate person that would be a sale. Probably that was not the case here, as it appears to be part of the duty of excise officers to give parties an opportunity of breaking the law, and the presumption therefore is that the officer did not mean that the transaction should have a legal appearance. Now I do not think that these circumstances bring David Beattie under the description of "a person then and there selling." I cannot overlook the fact that the transaction took place through the defender's wife. It does not appear that she had liquor under her charge. With reference to the word "retail," I do not think it necessary to go into that matter. But I am not moved by the statutes, as they describe persons who make habitual sales, and only prescribe the limit that shall distinguish the dealer in large and small quantities. They do not give the idea that they contemplate an isolated act. We are told that it was proper to bring this temperance hotel under the regulations that other hotels are subject to, for the good of the community, I suppose. I rather think that we are sitting here in exchequer, with a view to the revenue of the Crown, and that in this case morality and public welfare is not what we have to deal with, and I don't think that this case comes before us so as to make a strong appeal to our moral sympathies.

The Court therefore returned their opinion, and gave direction to the effect that the facts did not warrant a conviction, and that the conviction by the Justice of Peace Court at Blairgowrie ought to be quashed.

FRASER, for the defendant, asked expenses, and referred to Quarter Sessions of Perth *v.* Anderson, 18th Dec. 1861, 24 D. 221 ; the Queen *v.* Gilroys, 4 Macph. 656, and 18 and 19 Vict., cap. 90, secs. 1 and 2.

The LORD ADVOCATE was heard in answer, and referred to White *v.* Simpson, 28th Nov. 1862, 1 Macph. p. 72.

The Court refused to award expenses. Their Lordships thought it fixed by the cases of White and Gilroy that the Justices could not give expenses in such matters ; that what was before the Court was merely a consultation by the Justices, and not a cause ; and that it was not competent to award expenses.

Agent for the Crown—The Solicitor of Inland Revenue.

Agent for Defendant—John Galletly, S.S.C.

Wednesday, Dec. 19.

SECOND DIVISION.

THOMAS *v.* THOMSON.

Bankruptcy—Fraud at common law and under Statute 1621, *c.* 18, *and relative Issues—New Trial.* A cautioner for the due execution of a building contract, who had taken no security from his principal, made advances to the principal during the progress of the contract to an extent exceeding the value of securities afterwards taken. Held, at common law, that, after the principal was insolvent, the cautioner was not entitled to take securities from the principal for relief from his advances, past or future, under the cautionary obligation, but that under the statute the securities were not granted without true, just, and necessary cause. Verdict of jury on common law issues sustained, but set aside on the issues under the statute.

This was an action of reduction instituted by James Thomas, trustee for the creditors of the late David Robertson, builder, Dundee, appointed in a process of *cessio bonorum* at Robertson's instance against his creditors, and also himself a creditor of David Robertson, against William Thomson, clothier in Dundee. It was sought to set aside two dispositions of house property in Dundee granted by David Robertson in favour of the defender on 20th January 1854, with the infeftments following on them and a promissory note for £5717, 3s. 1d., granted by Robertson to Thomson on 17th February 1858. The action arose out of the following circumstances :—

In 1851 or 1852 the corporation of the Dundee Infirmary resolved to erect a new infirmary, and the tender of David Robertson to execute the whole work for £9080 was accepted. The contract for the erection of the infirmary was dated 7th May 1852, and under it the defender, who was brother-in-law of Robertson, became cautioner for the due execution of the works. At the time of entering into the contract no security was stipulated for by Thomson, or granted to him. The work was commenced soon after the date of the contract, but before the end of 1852 Robertson found himself unable to go on with it without assistance, and was obliged to apply to the defender for pecuniary aid. The defender made advances to him from time to time, and he avers that at 20th January 1854, the date of the dispositions under reduction, these amounted to above £2000. The consideration mentioned in the dispositions is £1600, but it was admitted by the defender at the trial that though the dispositions were *ex facie* absolute, they were truly intended only as securities. It was further alleged by the defender, that after giving credit for the sum of £1600, the amount of his advances as at 17th February 1858 (the date of the promissory note), was £5717, 3s. 1d.

It appeared that unless certain allowances for extra work were made, the contract would be a losing one. The claims for these allowances were ultimately referred to Mr James Leslie, C.E., Edinburgh. Under this reference Robertson and the defender together gave in a claim for about £7000, but the sum allowed by Leslie only amounted to between £1600 and £1700, and from this time Robertson was undoubtedly insolvent, his solvency having all along depended on his receiving a sum approaching the amount of his claim for extra work, the infirmary having cost him in all about £13,394.

The present action was raised in 1864, and was founded on allegations that the defender's infeftments and promissory note were fraudulently granted both under the Act 1621, c. 18, and at common law. The issues adjusted for trial are printed *ante*, vol. ii., p. 252.

The trial took place in June last, before the Lord Justice-Clerk and a jury, and resulted in an unanimous verdict in favour of the pursuer on all the issues.

The defender now moved to have the verdict set aside as contrary to evidence ; and a rule having been obtained, parties were heard thereon.

SOLICITOR-GENERAL and BALFOUR, for the pursuer.

YOUNG and WATSON, for the defender.

At advising,

Lord COWAN—The defender's motion for a new trial is supported on the ground that the verdict is contrary to evidence ; that the jury had not evidence before them to justify them in arriving at