for expenses cannot be resisted so far as the second trial is concerned. But, as to the first, the pursuers have clearly failed in their duty in not bringing such evidence as might be reasonably expected to lead to a verdict in their favour. There may not be any case in the books entirely on all fours with the present, but the rule at any rate, where the verdicts in the two trials have differed, has always been that the party ultimately succeeding does not get his expenses in the first trial. Here it was found that the pursuers, through their own fault, ought not to have succeeded in the first trial, and the rule therefore should be the same.

(LORD PRESIDENT—The principle on which the rule is founded is rather that the party losing a verdict is not to get the expenses of that trial.)

SOLICITOR-GENERAL—I can only refer to two cases—those of *Millar* v. *Hunter*, 24 Nov. 1865, 4 Macph. 78, and *Urquhart* v. *Bonar*, Nov. 21, 1866, 5 Macph. 45. The ground upon which I maintain that the pursuers are not entitled to the expenses of the first trial, is simply that it was their fault in not properly preparing for the trial that they were not successful at once. If they had come as well prepared to the first trial as they did to the second, there would have been no need of such second trial.

LORD ADVOCATE, in reply, contended that, as far as he was aware, there had been no case in the Courts in which a pursuer, having succeeded in both trials, had not got the whole expenses of the cause. There was indeed an apparent exception to this in the case of *Stewart* v. *Caledonian Railway Co.*, 4 Feb. 1870, 7 Scot. Law Rep. 277, but there the Court went on the ground that though the verdict in both trials was nominally for the pursuer, yet as the first was set aside on his own motion, it must be considered as substantially against him, and that it was only upon a second trial that he got a right verdict. In the case of *Millar* v. *Hunter*, quoted, the verdicts, though both for the pursuer, were not by any means the same. If the pursuer brings evidence which convinces the jury which he has to meet of the justice of his case, he has discharged all that can reasonably be expected of him. That the pursuers did in this case in both trials. And the end of all this litigation is that you find that there is that public right of way here for which the pursuers have all along been contending, and that, through the defender's opposition, it is only after two trials that the ends of justice have been attained. The pursuers have been successful throughout, and should have their whole expenses, unless some real miscarriage of the case can be brought home to them, which the defender here has failed to do.

The Court (*diss.* Lord Deas) awarded the pursuers their expenses in both trials, on the ground that the difference in the amount of evidence adduced at the two trials was not sufficient to take the case out of the general rule, which gave full expenses to a party successful in both trials.

Counsel for Pursuer—Lord Advocate (YOUNG) Fraser, and Hunter. Agents—W. F. Skene & Peacock, W.S.

Counsel for Defenders — Solicitor-General (CLARK) and Crichton. Agents—Duncan, Dewar, & Black, W.S.

Friday, November 3.

R. M. TRAPPES, PETITIONER.

Statute 22 *and* 23 *Vict. c.* 63—19 *and* 20 *Vict. c.* 79 (*Bankruptcy Act*). Case remitted by the Court of Chancery in England for opinion of the Court of Session, on the application of the Bankruptcy (Scotland) Act 1856.

Certain questions involving the law of Scotland having arisen in a suit in the Court of Chancery for the distribution of the estate of an English testatrix, the Lord Chancellor ordered a case to be adjusted for opinion of the Court of Session.

R. M. Trappes, one of the parties to the suit, presented the present petition to the Court to appoint an early day for the hearing of the case.

The case was stated as follows:—"Mrs Graham, a testatrix domiciled in England, by her will, dated the 16th of February 1863, after reciting that she 'was enabled to appoint by will (subject to the life interests of her mother, Anna Maria Payne,') certain property, which she referred to in her will as 'the trust-premises,' bequeathed and appointed the same to trustees, upon trust, that the said trustees should out of the trust-premises pay certain legacies; and then the will proceeded as follows (being, for convenience of reference, divided into clauses).

"Clause 1. And upon further trust, that my said trustees shall, out of the income of the said trust-premises, or if that shall be insufficient, then out of the principal thereof, pay to my husband an annuity of £100 during his life (but subject to the provisoes with respect to the said annuity hereinafter contained), the said annuity to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after the decease of the survivor of me and my said mother.

"Clause 2. Provided always, and I hereby declare, that if my said husband shall become bankrupt, or shall assign, charge, or incumber, or attempt or affect to assign, charge, or incumber, the said annuity of £100, or do or suffer any act whereby the same annuity, or any part thereof, would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity shall not be payable, or shall cease to be payable, as the case may require, in the same manner as if my said husband were dead.

"Clause 3. Provided also, and I hereby further declare, that it shall be lawful for my said trustees or trustee, if they or he shall, in their or his absolute discretion, think fit, and without assigning any reason for so doing, at any time or times, to refuse or discontinue the payment to my said husband of the said annuity of £100, or any part thereof, during the whole or any portion of his life, and in such case the said annuity, or such payment or payments thereof as my said trustees or trustee shall refuse to make to my said husband as aforesaid, shall sink into the income of the said trust-premises for the benefit of the person or persons for the time being entitled to such income, it being my wish and intention that the payment of the said annuity to my said husband shall be according to the discretion of my said trustees or trustee in all respects.

"The facts are as follows:—On the 7th May 1861, Mr Graham, the husband of the testatrix, whilst residing at Portobello, was sequestrated on

his own petition by the Court of Session. On the 20th May 1861 Mr Balgarnie was appointed trustee under the sequestration. Mr Graham, under 19 and 20 Vict. cap 79, sec. 81, made up and delivered a statement of his affairs, in which he stated that he had no assets of any value, and that his debts amounted (as the fact was) to more than £1500. The entire assets recovered by the trustee did not exceed £10, and debts to the extent of more than £1500 remain unsatisfied. Mrs Graham's will, as before stated, was dated the 16th February 1863. Mrs Graham died the 21st June 1864. Mrs Payne, the mother of the testatrix, on the expiration of six months after whose decease the first payment of the annuity was to become due, died on the 4th of April 1868. The first half-yearly payment of the annuity, therefore, became payable on the 4th of October 1868. Mr Graham never offered to his creditors any composition, in terms of the 137th and 139th sections of 19 and 20 Vict. cap. 79. Mr Graham never at any time notified to Mr Balgarnie, the trustee, the fact of the bequest of the said annuity. No such petition was presented by the trustee under the sequestration as is referred to in section 103 of the said Act. Under the circumstances above-mentioned, Mr Graham, on the 29th day of August 1868, before the first payment of the annuity fell due, obtained his discharge without any consent of creditors or composition, from the Sheriff of Edinburgh, in terms of the 146th and 147th sections of 19 and 20 Vict. cap. 79, having previously, as required by the 147th section of the 19 and 20 Vict. cap. 79, made a declaration upon oath before one of the Sheriff-Substitutes of Edinburgh that he had made a full and fair surrender of his estate. On the 10th February 1869, Mr Balgarnie, the trustee, believing that Mr Graham had made a fair discovery and surrender of his estate as mentioned in the 146th section of the Act, and that there were no further assets, applied for and obtained his discharge as trustee. On the 13th day of May 1870, a petition was presented to the Court of Session by John Christie and Son, clothiers in Edinburgh, creditors of the said Mr Graham, for the purpose of obtaining the appointment of a new trustee or new trustees under the said sequestration. On the 1st June 1870 Mr Graham filed his answer to the said petition. On the 19th July 1870 the petitioners were allowed to withdraw their petition on the payment to the respondent of £5, 5s. of expenses. There is now no trustee under the sequestration.

"The opinion of the Court of Session is desired by the Court of Chancery in England on the following questions:—

"(1) Whether the annuity given by clause 1 of the said will to Graham, assuming it to be by the English law an interest capable of legal alienation at and from the death of Mrs Graham on the 21st June 1864, would, if clauses 2 and 3 had not been contained in the said will, have fallen under the sequestration; and whether, under the circumstances hereinbefore stated, supposing clauses 2 and 3 had not been contained in the will, the said annuity could now be claimed under the sequestration, regard being had to sections 102 and 103 of 19 and 20 Victoria, chapter 79, and the interpretation of the word 'estate' in section 4 of the same Act?

"(2) Assuming the first question to be answered in the affirmative, whether clause 3 has any effect, by the law of Scotland, in preventing the annuity from falling under the sequestration, the fact being that the trustees of the will had not, prior to June 27, 1870, made, or refused to make, any payment to Graham in respect of the said annuity?

"(3) Whether the omission by Mr Graham to give notice to Mr Balgarnie, the trustee under the sequestration, of the fact of the bequest of the annuity having been made, would have any and what effect upon the discharge obtained by Mr Graham?

"(4) Has a discharge, obtained without consent of or composition with creditors, the effect of annulling the sequestration with respect to property vested in and disposable by a bankrupt before discharge, but not actually payable to him until after the date of the discharge?"

The SOLICITOR-GENERAL and BALFOUR were heard for the petitioner.

The DEAN of FACULTY and RHIND for Mr Graham (the annuitant).

The Court returned the following answers—

1. By the law of Scotland a right or estate in expectancy or *spes successionis* may be sold and assigned so as to give the purchaser a good title, in a question with the seller, to the right, estate, or succession when it comes to be vested in the seller. But such right or estate in expectancy or *spes successionis* is not attachable by the diligence of creditors of the person in expectancy or entitled to succeed, and would not be carried to the trustee in his sequestration, if he should be discharged before such right, estate, or succession was vested in him. Therefore, assuming (1) that the annuity was settled and regulated entirely by the first clause of Mrs Graham's will, and that the second and third clauses were not contained in the said will; and (2) that the right to the annuity vested in Mr Graham before the date of his discharge under the sequestration, so as, if he had been solvent, to be attachable of his creditors, the annuity would fall under the sequestration and be carried to the trustee, and could be now still claimed under the sequestration for the benefit of Mr Graham's creditors.

2. The third clause of the will, taken by itself, and apart from the second clause, would have no effect in preventing the annuity from falling under the sequestration, so long as the trustees under the will do not exercise the powers thereby conferred on them to refuse or discontinue payment of the annuity. But the trustee and creditors under the sequestration can take this right and interest of the bankrupt only *tantum et tale* as it stood vested in the bankrupt, and subject to all the conditions and qualities legally attaching to it.

3. The omission of Mr Graham to give notice to the trustee in the sequestration of the bequest of the annuity having been made, would have no effect on the discharge obtained by Mr Graham, because the terms of the will, and, in particular, the second clause, taken either alone or in connection with the third clause, prevented the annuity from falling under the sequestration. If the annuity had vested in the bankrupt so as to be carried to the trustee in the sequestration, the omission to notify the fact to the trustee would, under section 103 of the Bankruptcy (Scotland) Act, 1856, have had the effect of annulling his discharge as one of the "benefits of the Act," which by that omission he forfeited. But in the circumstances of this case, and looking especially to the conditions of the will respecting the annuity, it cannot be held to be an estate acquired by the bankrupt, or descending or reverting to him within the

meaning of section 103, because, supposing the annuity to have been otherwise a right of such a nature as to vest in him before the date of his discharge, so as, if he had been solvent, to be attachable by his creditors, and therefore, in case of insolvency, to be carried by his sequestration, it was prevented from so vesting by the second clause of the will, and was forfeited by the existing bankruptcy of the person in whom, on the above supposition, it would then otherwise have vested.

4. A discharge obtained without consent of or composition with creditors has not the effect of annulling the sequestration with respect to property vested in or disposable by the bankrupt before his discharge, though not actually payable to him till after the date of the discharge.

Agents for Petitioner—C. & A. S. Douglas, W.S.
Agent for Respondent—John Latta, S.S.C.

Friday, November 3.

SPECIAL CASE—LADY MONTGOMERY CUNINGHAME AND MRS VASSALL.

Interest—Loan—Legacy. Held, under special circumstances, that the interest on a debt due but not uplifted before the death of the testatrix, was carried by a bequest of the debt to the debtor's mother, and did not fall unto the general executry of the testatrix.

In the year 1829 the deceased Sir James Boswell obtained from his aunt, the late Mrs Leslie Cuming, a loan of £2000. The debt was constituted in the following manner:—Mrs Leslie Cuming gave Sir James Boswell a cheque upon her bank account for £2000, dated 30th January 1829. In return, Sir James granted the following receipt:—

"*Edinburgh, January 30th,* 1829.—Received from Mrs Leslie Cuming the loan of Two thousand pounds sterling on the thirtieth of January Eighteen hundred and twenty-nine.

"JAMES BOSWELL."

Sir James Boswell cashed the cheque the same day, drew the money, and appended to the cheque a receipt in the following terms:—"Received the above, James Boswell." The cheque, with Sir James Boswell's receipt for the money annexed, Mrs Leslie Cuming afterwards got up from her bankers. During her life Mrs Leslie Cuming took no steps to recover payment of the sum of £2000, or of any interest thereon, from Sir James Boswell while he lived, nor from his representative after his death, which took place in November 1857. Ten days after the date of the loan Mrs Leslie Cuming bequeathed the debt to Grace Lady Boswell, mother of Sir James, by a testamentary writing, in the following terms:—

"£2000. *Springfield, Feb.* 10, 1829.

"I give the Two thousand pounds I lent Sir James Boswell, my nephew, to his mother Grace, Lady Boswell, at my death.

(Signed) "JANE LESLIE CUMING.

"To Grace Lady Boswell, Feb. ten, Eighteen hundred and twenty-nine."

This document is holograph of, and signed by Mrs Leslie Cuming, and it was addressed in her handwriting on the back thus:—"Grace Lady Boswell." It was found in Mrs Leslie Cuming's repositories after her death, along with her cheque and Sir James' receipt. Mrs Leslie Cuming left several other legacies, but no settlement of her general estate, and died on 22d February 1863.

After Mrs Leslie Cuming's death, her executor-dative Sir Thomas Montgomery Cuninghame raised an action against Lady Boswell, Sir James Boswell's widow and executrix, for payment of the sum of £2000, with interest at 5 per cent. from the 30th January 1829 till payment. The Lord Ordinary (ORMIDALE) decerned in terms of the conclusions of the summons, and the Second Division adhered; 29th May 1868, 6 Macph. 890. 5 Scot. Law Rep. 557. Lady Boswell appealed to the House of Lords; but, before judgment, the action was compromised with consent of all parties interested, Lady Boswell paying to Sir T. Cuninghame, as Mrs Leslie Cuming's executor, the principal sum, with interest at 3 per cent. from the 30th January 1829 to the date of payment.

Grace Lady Boswell survived the testatrix, but is now dead, and represented by her daughter Mrs Vassall.

It was admitted that Mrs Vassall, in right of her mother, was entitled to the principal sum of £2000, with interest from the date of Mrs Cuming's death; but a question arose in regard to the interest prior to Mrs Cuming's death. This was claimed, on the one hand, by Mrs Vassall, as part of the bequest to her mother by Mrs Leslie Cuming, and, on the other hand, by Sir T. M. Cuninghame (and thereafter by his widow and executrix), as part of Mrs Leslie Cuming's general executry.

The question submitted to the Court was the following:—

"Whether Mrs Vassall, as representing her mother the deceased Grace Lady Boswell, is entitled to the interest accruing prior to the death of Mrs Leslie Cuming upon the said sum of £2000, lent by her to the late Sir James Boswell, and bequeathed by her to the said Grace Lady Boswell?"

MACKINTOSH, for Mrs Vassall, the second party to this case, referred to Digest, b. 32, t. 34; *Chaworth* v. *Beech*, 4 Vesey 555.

MARSHALL, for Lady Cuninghame, the first party, referred to *Morris* v. *Harrison*, 2 Maddock, 268; *Rollo* v. *Irving*, 4 Paton, 521; *Cumming*, Feb. 26, 1824, 2 S. 743; *Loch* v. *Venables*, Dec. 16, 1859, 27 Bevan, 598.

At advising—

LORD PRESIDENT—This case is attended with great difficulty. The facts are very peculiar, though they are few and easily stated. Mrs Leslie Cuming's sister was Lady Boswell, mother of Sir James Boswell. Upon 30th January 1829 Mrs Leslie Cuming lent £2000 to her nephew Sir James. She took an acknowledgment of the loan. He received the money in the form of a cheque, cashed it, and noted on the cheque that he had received the money. The cheque was sent by the bank to Mrs Leslie Cuming, and put up by her with the receipt for the loan. In the course of ten days Mrs Leslie Cuming wrote another document, a bequest to her sister Lady Boswell, of this debt. All these papers were found in her repositories after her death. She died in 1863. During the whole interval from 1829 to 1863 no interest was ever paid, or, as far as we know, asked on that £2000. The question whether interest for thirty-four years was notwithstanding due, and could be recovered by Mrs Cuming's executors, was, I think, a question of the greatest possible difficulty. But we have not to determine it. It has been settled by the Second Division that in-