has been pointed out on several occasions that there is no absolute rule. While I am far from wishing to countenance the idea that when a will is challenged trustees are entitled to defend at the expense of the trust estate no matter what the circumstances may be, there is one consideration which will weigh with the Court, and it is this, "What is said about the trustees." Now, in the present case I do not think it necessary to pursue the inquiry minutely, further than to say that both Lord M'Laren, who tried the case, and my brother Lord Kinnear and myself, who gave the case very careful and special consideration, think that the trustees should be allowed expenses.

As to the scale on which these expenses ought to be taxed, it seems to me that once the trustees have been allowed their expenses, these expenses really become expenses of administration and not expenses of litigation. Accordingly, I do not see how we can apply to such expenses a scale which is appropriate to the domain of "litigation" and is not appropriate to the domain of "administration." No doubt the administration of an estate may have been so conducted as to disentitle trustees to any expenses, but in the present instance I see no reason why the trustees should not be allowed expenses as between agent and client.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court found the pursuer entitled to expenses both against the compearing defenders (Mrs Leckie's trustees) and also against the trust estate, and found the defenders entitled to expenses as between agent and client (except the expenses in connection with the motion for a new trial) out of the trust estate.

Counsel for the Pursuer—Watt, K.C.—Lippe—Lyall Grant. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders—Crabb Watt, K.C.—Scott Brown—W. J. Robertson. Agent—John Robertson, Solicitor.

Thursday, February 20.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HENDERSON (SOMETIME WILKIE) *v.* WILKIE.

Husband and Wife—Nullity of Marriage—Donation—Mutual Purposes—Recoverability—Analogy of Marriage Dissolved by Divorce—Opinions obiter.

Opinions (*obiter*) by Lords Stormonth Darling and Ardwall (*contra* Lord Mackenzie, Ordinary) that, as bearing on the question whether after decree of nullity of marriage one of the supposed spouses can recover from the other the amount of a donation made during the subsistence of the supposed marriage and spent on mutual purposes, no analogy can be drawn from the law applicable in similar circumstances to the case of a real marriage dissolved by decree of divorce.

In April 1906 Mrs Elizabeth Henderson or Wilkie raised this action against her husband, in which she sued him, *inter alia*, for £100.

Her averments were substantially that her father shortly after her marriage to the defender presented her with £100; that she asked her husband to lodge this sum in her bank account for her; that instead of doing so he, without any right or authority, appropriated the money to his own purposes.

The defender averred that the pursuer had given him the money as a donation, and that he had spent it with her knowledge upon mutual purposes. He further averred that the pursuer had committed adultery, on account of which he was raising divorce proceedings. The pursuer denied donation, consent to, or knowledge of, the expenditure of the £100 on mutual purposes, and adultery.

The pursuer pleaded, *inter alia*—"(1) The defender being due and resting-owing to the pursuer the sum of £100 and interest, decree should be granted therefor in terms of the first conclusion of the summons. (2) The said sum having been the property of the pursuer, and having been appropriated by defender without her consent, she is entitled to decree therefor as craved."

The defender pleaded, *inter alia*—"(4) The sum of £100 having been gifted to the defender, decree of absolvitor should be pronounced. (5) *Separatim*, the said sum of £100 being a donation between spouses, and the pursuer having been guilty of adultery, she cannot sue for the return thereof."

Subsequent to the raising of the action, on 12th May 1906, the husband raised an action of divorce against the wife on the ground of adultery, and the defender having denied adultery and averred that she was a virgin, on 21st November 1906, he brought an action of declarator of nullity of marriage on the ground of the wife's impotency. Decree of nullity of marriage was pronounced on 19th January 1907, and the wife was assoilzied in the action of divorce.

In June 1907 a proof was taken in the present action, and on 7th June the Lord Ordinary (MACKENZIE) assoilzied the defender from the petitory conclusion of the summons, and decerned.

Opinion.—"The first conclusion of this action (the only one about which there is dispute) is for payment of £100. The pursuer was married to the defender on 16th September 1902. They parted company on 6th March 1906, and decree of nullity of marriage was pronounced on 19th January 1907, in an action at the husband's instance.

"The £100 sued for represents the proceeds of a cheque which the wife handed

her husband on 25th September 1902, £80 of which he paid in to his bank account, the remaining £20 being handed to his wife, and applied, as she depones, in payment of bills in connection with her husband's business of hotel-keeper.

"The facts in connection with this cheque are, in my opinion, proved to have been as follows—The money was a present from the pursuer's father to her. She had assisted him in his business before her marriage without wages, and he had promised her the present. On 24th September he took the cheque produced, drawn payable to himself and endorsed, and gave it to her in her husband's hotel. He gave it to her to keep for herself, and to bank in her own name. It appears that previously he had been asked to become cautioner for an overdraft to the defender, but had declined. He had not a good opinion of the defender's financial position, and says he gave his daughter the money to make sure she should have something in case anything happened to her husband's affairs. The defender says the pursuer's father told him that day he had handed the cheque to his daughter to give him to help in his business. This is denied by the father, who says he never told the defender he had given his daughter the cheque. I believe the evidence of the pursuer's father. The pursuer told her husband of the cheque that evening. On the following day the defender got the cheque from his wife, as she says, to lodge in bank in her name. She was unable to say whether this was to be on deposit or not. Of the £100 the pursuer received £20, which she states was applied in paying accounts in connection with the hotel business. It is not very clearly proved what was done with the money, but in the view I take it may be assumed it was so applied. Shortly afterwards, when she looked at the defender's bank book, she saw that the remaining £80 had been placed to his credit. Her evidence is that she complained of this to the defender, and continued to do so, and that she asked for a receipt. She spoke to her father about it a fortnight later and on other occasions, but he seems not to have said anything to the defender about it. I think that the pursuer must very soon have come to know that the £80 had been drawn out of the bank by the defender, and spent either on his business or in paying household accounts.

"The question is whether the pursuer, who, during the time in question, occupied the position of the defender's wife, can now recover from him moneys which she must be held to have known were being applied for mutual purposes. If this were the case of a marriage dissolved by decree of divorce it would, I think, be plain from the decision in *Fenton Livingstone*, 44 S.L.R. 503, and the cases there referred to, that she could not.

"It has been maintained, however, that the case here, being one of nullity, is different. That it must be held there never was a marriage—*nec vir, nec uxor, nec nuptiæ, nec matrimonium, nec dos intelligitur*—Fraser, Husband and Wife, i, 149; Ersk. Inst. i, 6, 43—and accordingly that there must be mutual restitution of property. I am of opinion that the principle of the case above referred to applies to moneys spent on mutual purposes during the period the pursuer and defender believed they were married persons. I am accordingly of opinion that the defender is entitled to be assoilzied from the petitory conclusion.

"It was suggested that, as the decree in the nullity case only ordained the wife to make restitution to the husband, the former could not insist in her present demand. That, however, appears to me not tenable. There is nothing in the decree to prevent her claiming restitution if otherwise entitled to it.

"Parties have agreed that the pursuer is entitled to decree for delivery of the articles specified under the heads (1), (2), and (4) of the minute."

The pursuer reclaimed, and argued—The pursuer was entitled to the £100 on the simple ground that the money was her private property and had been illegally appropriated by the defender. The evidence showed that she never made a donation of it to the defender; that she never knew that it was being spent on mutual purposes, if it was so spent, of which there was no evidence; that she repeatedly asked the defender to repay it, and that he never did. The case therefore involved no intricate questions of law, but depended for its solution upon the elementary proposition that a person to whom another entrusts a sum of money for a special purpose (in the present case, that it might be lodged in bank) must perform that purpose or else produce the money. A wife was a good creditor against her husband even when her funds were immixed with his—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), section 1 (4). The Lord Ordinary, however, apparently thought that the case involved a consideration of the question of what was the effect of a decree of nullity upon the patrimonial interests of parties. Even if it did, the result was the same to the pursuer. The effect of a decree of nullity was stated by Ersk. Inst. i, 6, 43, as follows, (approved by Fraser, Husband and Wife, vol. i, 149)—"as marriages in themselves void can have no legal effects, everything must, on a declarator of their nullity, return *hinc inde* to its former condition;" see also *A B* v. *C B's Trustees*, 1907, 15 S.L.T. 108. Accordingly, even if the £100 had in any way got into the husband's hands legitimately for matrimonial purposes, at the dissolution of the marriage it reverted, *ipso facto*, to the wife. There was this radical difference between a marriage dissolved by decree of nullity and one dissolved by decree of divorce, viz., that in the former case there never had been, in the latter there had been, a marriage; hence the doctrine of *Fenton Livingstone*, 44 S.L.R. 503, was inapplicable to a marriage dissolved by decree of nullity. That case apparently

settled that on the dissolution of a marriage by divorce a spouse could not recover a donation of money which had been spent on mutual purposes; that doctrine was however inapplicable to a marriage dissolved on the ground of nullity, for there having been no marriage there could have been no proper mutual purposes. Even, however, if there were not this distinction, *Fenton Livingstone* did not help the defender, for he had failed to prove three facts held essential in that case, viz.—(1) That there was donation. (2) That there had been expenditure on mutual purposes. (3) That the money was no longer extant. *Hedderwick* v. *Morison*, November 22, 1901, 4 F. 163, 39 S.L.R. 124, and *Hutchison* v. *Hutchison's Trustees*, June 10, 1842, 4 D. 1399, were quite different, for there the wife had herself expended the money on household purposes.

Argued for the respondent—The facts showed that the wife had made a donation of the money, and that it had, with her knowledge and consent, been spent on mutual purposes. Under these circumstances she could not recover it—*Fenton Livingstone*, *cit. sup.*; *Hedderwick*, *cit. sup.*; *Hutchison*, *cit. sup.* There was in a question like the present no distinction between true spouses subsequently divorced, parties who erroneously thought they were spouses and who were subsequently separated by decree of nullity, and parties who had knowingly lived together in concubinage and subsequently separated. While they were together they had mutual purposes, and in regard to such matters as donations, &c., their attitude of mind was similar. This was a case of consumption and not immixture of funds, and therefore the Married Women's Property Act 1881, sec. 1 (4), had nothing to do with the case.

LORD JUSTICE-CLERK—I am of opinion that the Lord Ordinary's interlocutor must be recalled. The facts are simple and lead to only one conclusion. The pursuer handed over a cheque for £100 to the defender on the understanding that he was to pay it into bank in her name. He did not do this, but instead paid £80 of it into his own account and gave the pursuer the remaining £20 to pay the ordinary business bills of the hotel, in circumstances which would not necessarily lead her to suppose that the £20 formed any part of the £100 she had handed to him. Her evidence is that she often asked him for the £100, and, in particular, requested him to give her a receipt, and that he always told her it was all right, and that he would give her her money when she really required it. Now, the Lord Ordinary believed her evidence. That being so I cannot see how he arrived at the conclusion he did. If her evidence is true the money was originally hers; she never gave it to the defender or authorised him in any way to spend it, and I entirely fail to see why she should not now be found entitled to repayment.

LORD STORMONTH DARLING—I concur with your Lordship. There is no doubt that the £100 originally belonged to the pursuer. Her father gave it to herself as a present for her own purposes, in recognition, it would appear, of the services she had for a long time rendered to him without wage or remuneration. That being so, the money would never have found its way at all into the defender's hands had the pursuer not asked him to pay it into bank in her own name. She handed it over to him for that purpose alone, and that purpose he never carried out. Instead of doing so he, without any justification, paid it into his own account. The money therefore was never his, and I accordingly think that he must now restore it, there being no evidence in the case to show that she ever consented to its being spent for household or other purposes, or in any way waived her right to demand the money as her own.

It was argued to us that, as the money had in fact been spent for mutual purposes, the pursuer could not now recover it, even although she had never given it to the defender or actually authorised the expenditure, the argument being founded on the supposed analogy of a marriage dissolved by divorce, in which case, apparently, there is authority for the proposition that neither of the spouses can on the dissolution of the marriage recover from the other money which has in fact been spent for their mutual benefit. The Lord Ordinary gives effect to this supposed similarity of principle by assoilzieing the defender from the petitory conclusion of the summons. But I am of opinion that there is no analogy between a marriage dissolved by divorce and one annulled on the ground that it never was truly contracted. In the former case down to the date of decree the parties were married persons; in the latter they never were married persons at all, and therefore could have no properly mutual purposes. To use the words of Erskine (Inst. i, 6, 43) "As marriages in themselves void can have no legal effects, everything must, on a declarator of their nullity, return *hinc inde* to its former condition."

LORD ARDWALL—I agree with your Lordships. I think that there is no record for the ground on which the Lord Ordinary has decided this case. There is no averment and no plea that the money was spent for mutual purposes. The only specific plea which is stated for the defender is that the money was a donation to him. In face of the evidence this plea is not maintainable, and was not maintained at the debate. Neither party maintains that the money in question formed the subject of a loan, and on the evidence it is proved that it never formed the subject of a donation to the defender. I should therefore have been prepared to hold that the defender's case as set forth on record has wholly failed.

But it is right to take notice of the ground on which the Lord Ordinary has decided the case. That ground is stated

by him as follows:—"The question is whether the pursuer, who during the time in question occupied the position of the defender's wife, can now recover from him moneys which she must be held to have known were being applied for mutual purposes. If this were the case of a marriage dissolved by decree of divorce it would, I think, be plain from the decision in *Fenton Livingston*, 44 S.L.R. 503, and the cases there referred to, that she could not. . . . I am of opinion that the principle of the cases above referred to applies to moneys spent on mutual purposes during the period the pursuer and the defender believed they were married persons." Now I differ from the Lord Ordinary, because I do not see how the pursuer can be held to have known that the money was being applied for mutual purposes unless she knew for what purposes it had been withdrawn from the defender's bank account, and this she has no means of knowing. Whether it had been withdrawn for the purposes of speculative investment or for the purpose of making additions to the stock of the hotel business she could not know. She would not assume that the cheques which she received for the purpose of paying the hotel bills came from the £100 in question. The defender assured her to the contrary, and led her to believe that the money was all right and that she could get it at any time.

Still less is there any room for a plea of acquiescence, for the pursuer says—"After the end of September, when I knew Mr Wilkie had diverted the money for his own use, I repeatedly complained to him about it. I was always put off with excuses"; and again—"I knew it was in his name and that there was an overdraft, but he said he would give me back the £80." These passages show clearly that the pursuer did not acquiesce in the money being spent by the defender for current expenses or otherwise. I believe her statement, and I do not believe the contrary statements of the defender. In these circumstances I do not see any foundation in fact for a plea of acquiescence or taciturnity.

The case of *Fenton Livingston*, besides being differentiated from the present case by the fact that the marriage was dissolved by decree of divorce, is also differentiated from the present by the fact that in that case the money came into the husband's hands by way of donation from his wife and was applied to mutual purposes, such as the payment of jewellers' bills and the husband's personal expenses. In the case of *Hedderwick*, 1901, 4 F. 163, the wife herself had expended her own money on household purposes, and she was held not entitled to recover it as a debt from her husband. The case of *Hutchison*, 1842, 4 D. 1399, does not appear to me to have much bearing on the present case. So far as it goes it appears to me to be adverse to the defender's contentions. I think, therefore, that none of these cases support the defender's argument.

I agree with my brother Lord Stormonth Darling that the case in which the married life of the parties is brought to an end by a decree of nullity is very different from the case where a marriage is dissolved by a decree of divorce, and this is an additional reason for holding that the case of *Fenton Livingston* does not apply to the present.

LORD LOW was absent.

The Court recalled the interlocutor reclaimed against, and ordained the defender to make payment to the pursuer of the sum of £100.

Counsel for the Pursuer (Reclaimer)—Scott Dickson, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender (Respondent)—M'Clure, K.C.—Spens. Agents—Cunningham & Lawson, Solicitors.

HOUSE OF LORDS.

Tuesday, March 17.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lord Macnaghten, Lord James of Hereford, Lord Robertson, Lord Atkinson, and Lord Collins.)

COLQUHOUN *v.* GLASGOW FACULTY OF PROCURATORS' WIDOWS' FUND SOCIETY.

(In the Court of Session, December 22, 1904, 42 S.L.R. 271, and 7 F. 345.)

Insurance — Statute — Contract—Society—Widows' Fund — Rights of Contributor to Insurance Fund for Benefit of Widows of Members of a Society on his Expulsion from the Society—Glasgow Faculty of Procurators' Widows' Fund Act 1833 (3 *Will. IV, cap. lxiv.*)—*Glasgow Faculty of Procurators Act* 1875 (38 *Vict. cap. vi*).

The Faculty of Procurators in Glasgow, incorporated by Royal Charter in 1796, granted annuities to the widows and children of deceased Members of the Faculty. In 1833 it obtained an Act of Parliament for the better establishing and securing a fund for this purpose, and a society called "The Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow" was thereby incorporated. In 1875 another Act limited those interested in the "Widows' Fund" to the then annuitants and the then contributors. A Member of the Faculty, who had joined it and become a contributor to the Widows' Fund in 1870, was expelled from the Faculty in 1900, having been convicted of embezzlement.

Held (*per* the Lord Chancellor (Loreburn), Lord Macnaghten, Lord James of Hereford, and Lord Atkinson—*diss.* Lord Halsbury, Lord Robertson, and Lord Collins), *rev.* decision of the First