the whole claims of parties together and against each other, and by striking the resulting balance. Thus a general submission as much excludes the notion of an arbiter giving effect to a plea of compensation as a special reference. For these reasons I am perfectly clear that the referee in this case could not entertain this plea. What then comes of the arguments that this was competent and omitted or proponed and repelled? It was neither the one nor the other. It was not omitted, for it was brought under the notice of the arbiter, and he decided that it did not fall within the submission. Nor was it proponed and repelled, for it was not entertained and disposed of, just because the arbiter decided that he could not competently entertain it. In these circumstances the present charge is given for the sum awarded to Middleton, less a payment made to account. The suspender objects to the charge, saying, "I don't dispute the justice of the award in your favour, but I object to the charge, because you are indebted to me in a large amount, on an account the balance of which has been ascertained and forms partly the basis on which your claim is made up." In short, he says, "Had it not been that it was found that Middleton was owing me, he could not have had this claim against me." But it is said that such a plea as this can't be entertained in a suspension. Now, I give no opinion on the abstract question, as to whether a plea of compensation can be raised in a suspension. But I think that this is not, properly speaking, a plea of compensation, but one of retention, founded upon the most manifest principles of equity. It appears that part of this debt was really not money advanced, but was the amount of a cautionary obligation undertaken by the firm for behoof of Middleton, on which, however, the firm had not been distressed, and which was afterwards paid by Middleton himself. Now this is the best practical illustration which could be given of the plea of retention. Suppose the whole of the debt had been a claim of relief by the firm as cautioners. This is the very position in which a partner is entitled to plead retention and refuse to pay until relieved of that obligation. But will it make any difference if, in place of being merely a claim for relief, it is one for money actually advanced? I think, on the contrary, it makes the case much stronger. It does not vary its nature. The two cases are founded on the same principles exactly. It is as if M'Ewan said, "While you don't do your duty to me, you can't ask me to do mine to you." I confess I have not the smallest difficulty in giving effect to this contention by refusing to allow this charge to proceed till Middleton has done his duty to the other party.

Lord COWAN—I think it is not at all necessary to go into any consideration of questions in the law of compensation. Leaving the law on that subject in perfect entirety, we have here a case where a sum charged for has been brought out by an arbiter by placing on the other side of the account a sum due by the charger to the suspender. That debt goes to make up the balance decerned for by the arbiter. Every pound taken off the one goes to diminish the other. In these circumstances, could there be anything more unjust than that, while Middleton refuses payment of the sum due by him, he should require M'Ewan to pay him the sum due to him? Although a question of compensation has been pressed into the case, it has nothing to do with it. The arbiter could not competently entertain such a plea. I can't help thinking that the 5th plea in law for the suspender is well founded, and that Middleton is personally barred from charging for the sum found due to him while he keeps up that which he owes.

Lord BENHOLME—I entertain the same views with regard to this case as those which your Lordships have expressed, and I would only in addition suggest the analogy of a mutual contract. The matter betwixt the parties and the relative obligations arise out of the same transaction. In these circumstances, is the suspender to be debarred from pleading retention because of what took place before the arbiter? I think not. The arbiter did quite rightly. He was bound to keep to the matters submitted, and it would have been beyond his province altogether to have taken up a plea of compensation. I think, however, the sum at the charger's debit was clearly ascertained and liquidated in the course of the submission. In these circumstances, is the charger to be entitled to decree and payment of a share of the assets without discharging his debt to the company? I think that the principles of the law of retention are clearly applicable to a case of this kind.

Lord NEAVES—I am of the same opinion. I think the case a very clear one indeed. The charger gives a charge for about £400 under a certain deduction. What is that £400? It is, *inter alia*, the one-half of the sum due by Middleton to him on the property account. *There is* room here for the application of the maxim "frustra petis," &c. The right of the one party is identical with that of the other. The two things are inseparable; they are based on the same foundation. Can, then, Middleton ask M'Ewan to pay when he is owing him about an equal sum on the basis on which the arbiter proceeded? I am of opinion that he cannot—that he is barred from doing so.

The Court therefore recalled the Lord Ordinary's interlocutor; found that so long as the charger failed or delayed to pay the debt due by him on the property account he was not entitled to charge the suspender under the decree-arbitral, and found the suspender entitled to expenses, and to uplift the consigned money.

Agent for Suspender—John Ross, S.S.C.
Agents for Charger—Maconochie & Hare, W.S.

Friday Dec. 14.

FIRST DIVISION.

BEATTIE AND OTHERS *v.* BEATTIE.

Husband and Wife — Legitimacy — Succession — Canadian Law. In a question as to the right of succession to heritable property in Scotland raised by persons claiming to be lawful children, *held* that they were not legitimate, their parents having been before their alleged marriage "knowing adulterers" with each other, who by the law of Canada could not validly contract marriage.

This is an action brought by certain parties claiming to be the lawful children of the late Francis Beattie, for the purpose of setting aside certain services carried through by the defender, and of establishing their right to heritable subjects in Scotland as the lawful children of their father, the said Francis Beattie. On behalf of the defender, it is maintained that the pursuers have no title to sue, in respect that they are illegitimate, their mother having been the wife of another man when she was married to their father. A proof having been allowed and taken,

the Lord Ordinary (Kinloch) pronounced an interlocutor sustaining the objection to the pursuer's title, finding them illegitimate, and dismissing the action. The facts of the case appear from the following note, which his Lordship appended to his interlocutor :—

The preliminary question in the case, and that on the decision of which the title to pursue depends, is whether the pursuers are, as averred by them, the lawful children of Francis Beattie, junior. It is the opinion of the Lord Ordinary that they have not established this.

It is said that their father and mother, Francis Beattie and Jane Pringle, were, on or about the 11th November 1813, married at Gretna Green. This marriage is not proved. The alleged contract of marriage of 22d October 1822, in which the fact is said to be set forth (supposing that this was sufficient evidence of the fact), has not had its authenticity and the genuineness of the signatures proved in such a way as to make it competent evidence in our Courts.

But even if such a marriage had taken place, it was wholly invalid, because at that time—as the Lord Ordinary considers clearly proved—Jane Pringle was the wife of James Crombie, from whom she had eloped with Francis Beattie. The Lord Ordinary holds it fully established that Jane Pringle was married to James Crombie on or about 26th November 1805. The fact is proved by the hearsay of one witness who was present at the marriage—by the evidence of several witnesses who knew the parties as man and wife—and by the document entitled "indictment of irregular marriage," the signatures to which of Messrs Shortt and Staig (now both dead) sufficiently attest the acknowledgment mentioned in it to have been made.

James Crombie is proved not to have died till 24th July 1823.

The Lord Ordinary holds it to be established that, on 26th October 1822, Francis Beattie and Jane Pringle, who had previously emigrated together to Canada, were formally married at Montreal by the Rev. John Bethune, Rector and Dean of Montreal. This marriage was, of course, as invalid as that alleged to have taken place at Gretna Green (Crombie not having died till nine months afterwards), except for the alleged operation of a decree of divorce said to have been obtained by Crombie against Jane Pringle in the Commissary Court of Edinburgh, on 16th July 1819.

This decree of divorce has not been recovered : and the Lord Ordinary doubts whether any substitute short of a decree of proving the tenor, is legally admissible. The documents, however, are clearly such as would prove the tenor ; and both parties agreed to hold the decree established. Its terms are proved by a duplicate kept in the Commissary Court books, marked by the initials of Mr George Ross, the commissary. From this duplicate the judgment appears to have been the following :—"Edinburgh, 16th July 1819.—The commissaries, having considered the proof adduced, and whole process, find facts, circumstances, and qualifications proved, relevant to infer the defender's guilt of adultery with Francis Beattie, mentioned in the proof ; find her guilty of adultery with him accordingly. Therefore divorce and separate. Find and declare in terms of the conclusions of the libel, and decern.

(Intld.) "G. R."

By this decree Jane Pringle was divorced from James Crombie more than three years before her marriage in Canada to Francis Beattie. But it is contended that, notwithstanding this, the marriage was invalid ; and the Lord Ordinary concurs in thinking that it was so.

It is proved by the opinions of Canadian counsel that, by the law of the country, adulterers cannot afterwards marry. Mr Popham being asked—"Is it not a rule of Lower Canada law that the parties who have committed adultery together can never lawfully marry each other?"—replied, "Yes, if they have knowingly committed adultery with each other." Mr Mackay, in like manner states—"Two persons, wilful, knowing adulterers, can never marry together lawfully in Lower Canada."

If, therefore, the law of Lower Canada (where it seems to be beyond a doubt that Francis Beattie had established a domicile) is to rule the validity of the marriage at Montreal in October 1822, the marriage is invalid, having been contracted between adulterers.

The pursuers endeavoured to avoid this result by pleading that Francis Beattie's connection with Jane Pringle was begun and maintained in ignorance of her being a married woman ; in which case the Canadian counsel indicate an opinion that the putative marriage would be sufficient to legitimatise the children. The Lord Ordinary finds it unnecessary to enter on the legal discussion which this point raises, because, as he conceives, there has been an entire failure to prove that Francis Beattie was ignorant of Jane Pringle being a married woman when he eloped with her in 1813. The contrary is the fair inference from the proof, and the Lord Ordinary has no doubt was the fact. Jane Pringle had in 1813 been more than eight years married to James Crombie, and had lived with him, and been known as his wife. She was living in that year in Dumfries, under the name of Mrs Crombie, with her husband Crombie coming to her regularly every Saturday, his work lying at some distance. She had several children by Crombie living with her. Her acquaintance with Francis Beattie seems to have been commenced by her getting employment in binding hats for the hat manufactory carried on by Beattie's father ; and there is no reason to doubt that she got this employment under the married name by which she was then known. When Francis Beattie eloped with her in November 1813, and took her with him to Carlisle, where they lived together for the next six years, it is impossible to suppose that he did not know her true position. Indeed, the fact of the elopement is itself strong evidence on the subject, as he need not have carried an unmarried mistress away from Dumfries, and only did so to break the claims of the unfortunate James Crombie. If the pursuers were to set up a case of *bona fide* ignorance on Francis Beattie's part, the *onus* clearly lay on them to prove such exceptional case. But so far from the proof establishing such a case, it appears to the Lord Ordinary fairly to establish the reverse. The parties were, as he thinks, "wilful, knowing adulterers" prior to the date of the marriage in Montreal in 1822 ; and, according to the law of the country, the marriage was invalid.

But the Lord Ordinary has to observe, in conclusion, that, had the law of Canada been different, he would not have been prepared to hold the marriage valid by force of the Canadian law. The question is now raised in the Supreme Court of Scotland. And although, in questions of *status*, international law requires that respect be paid to the law of the domicile, it is a trite qualification

of the rule, that the principle does not hold where the law sought to be applied is at variance with that of the tribunal of decision, in regard to a fundamental point of national policy or general morality. The doctrine to this effect was expressly laid down in the decision by the House of Lords of the well-known case of Fenton *v.* Livingstone, which regarded the validity of a marriage with a deceased wife's sister. (Fenton *v.* Livingstone, House of Lords, 15th July 1859, M'Queen iii. 397.) Under the operation of this doctrine, the Scottish Courts will not recognise a marriage as valid which is held by their own law to be objectionable, as contrary to morality, and therefore null.

By the Scottish Act of Parliament 1600, c. 20, it is enacted that "all marriages to be contracted hereafter, by any persons divorced for their own crime and fact of adultery from their lawful spouses, with the persons with whom they are declared by sentence of the Ordinary Judge to have committed the said crime and fact of adultery, be in all time coming null and unlawful in themselves, and the succession to be gotten by such unlawful conjunctions to be inhabile to succeed as heirs to their said parents." This enactment strikes directly at the case of Francis Beattie and Jane Pringle. And whatever might have been the law of Canada, the Lord Ordinary would have felt himself compelled to hold, in this Court, the marriage in Montreal to be invalid, and the pursuers illegitimate.

It is an additional ground for so holding, that the present action is not simply for declaring status. It is for the purpose of enforcing a claim to heritable property within Scotland. The action seeks to set aside certain services carried through by the defender, and thereby to establish certain heritable rights alleged to belong to the pursuers, either *ab intestato*, or by virtue of dispositions in favour of Francis Beattie's lawful children. It is familiar that all questions concerning real property are to be determined by the law of the country in which the real property is situated. The pursuers cannot succeed to real property in Scotland if, by the law of Scotland, they are illegitimate.

W. P.

The pursuers reclaimed.

FRASER, SCOTT, and BRAND, for them, argued—

1. Assuming that there was a clandestine marriage between Jane Pringle and James Crombie in 1805, the fair inference from the evidence is that when Jane Pringle and Francis Beattie, jun., left Dumfries together, the latter was quite ignorant of the alleged relationship between Pringle and Crombie.

2. This ignorance on Beattie's part continued during their residence in Carlisle, where they are proved to have lived as husband and wife, and up to and after their leaving for Canada in 1819. Therefore the marriage which took place between them in Montreal in 1822, *in facie ecclesiæ*, was, by the law of Lower Canada, as proved in this case, a lawful marriage to the effect of legitimating the issue, and enabling them to succeed to heritable property in Scotland.

3. By the Canadian law, the pursuer, Mrs Elizabeth Beattie or Thomson, though born prior to the ceremony in Montreal, is lawful issue *per subsequens matrimonium*.

4. Jane Pringle and James Crombie were never married. The proof of such alleged marriage only shows there was some irregular concubinal connection.

5. But if they were married they were afterwards divorced by decree of the Commissary Court of Edinburgh in 1819, a date prior to the Canadian marriage, and therefore there was no impediment to that marriage; and the female pursuer was born in 1821, long subsequent to the decree of divorce.

6. The domicile of Francis Beattie, jun., and Jane Pringle is admitted to have been Canada, and therefore their status and that of their issue falls to be determined by the law of Canada, and as by that law the marriage was valid and the issue lawful, so in this country they are entitled to the legal rights of lawful issue.

7. The Act 1600, cap. 20, has no application, because it is merely local, and in its nature penal. And the case of Fenton *v.* Livingstone has no application, because it is clear that unless for the Act 1600, cap. 20, the Canadian marriage would be lawful and the issue of that marriage legitimate. The pursuers cited Story's Conflict of Laws, 6th ed., sections 29 and 30 and 117; 2 Huber, Lib. 1, tit. 3., De Conflictu Legum, sec. 2; 1 Hertii, Opera, De Collis, sec. 4, art. 8, p. 123; Stair, More's Notes, p. 16; Little *v.* Smith, 9th Dec. 1845, 8 D. 265; Inhabitants of West Cambridge *v.* Inhabitants of Lexington, October 1823; 1 Pickering (Amer. Rep.), p. 506; Stair, 3. 3. 42.

SOLICITOR-GENERAL, PATTISON, and A. BLAIR, for the defender, argued—

1. The proof shows that James Crombie and Jane Pringle were irregularly married in 1805. They were declared married persons by judgment of the Justice of Peace at Dumfries on 26th November 1805.

2. Of this marriage Francis Beattie, jun., was proved to have been aware when he left Dumfries for Carlisle, and subsequently for Canada, with Jane Pringle. He was therefore a "wilful, knowing adulterer." Hence:—

3. The alleged marriage in Canada was bad, as having been celebrated between wilful, knowing adulterers; and this, both by the law of Scotland and by the law of Lower Canada, as proved in pursuers' own evidence.

4. The Canadian marriage is bad and the issue illegitimate, under the Act 1600, cap. 20. Francis Beattie, jun., having all along been *in mala fide*, that Act applies directly to the present case, the estate to which it is sought to give the pursuers a title being heritable estate situated in this country.

5. The pursuers are unlawful issue, on the authority of the case of Fenton *v.* Livingstone, as, though the Act 1600, cap. 20, did not apply, the marriage would be contrary to the public policy of Scotland, as also to the national morality. The defenders cited Act 1600, cap. 20; Hamilton *v.* Wyllie & Son, 26th May 1827, 5 Shaw, 716; Broun *v.* Johnston, Ferg. Con. Law Reports, p. 229; Fenton *v.* Livingstone, 1859, H. L., 3 M'Queen, p. 497; H. M. Ad. *v.* Sharpe or M'Fie, H. C., July 10, 1843, 1 Broun, 568; H. M. Ad. *v.* Langley, H. C., June 9, 1862, 4 Irvine, p. 190.

The Court unanimously adhered to the Lord Ordinary's interlocutor.

The LORD PRESIDENT said—The first question was whether Jane Pringle was the wife of Crombie. As to this I can have no doubt—the proceedings in a prosecution at the instance of the Procurator-Fiscal against Crombie for a clandestine marriage with her, in which they compeared and judicially acknowledged the clandestine marriage, being in evidence. The next question was as to the elopement with Francis Beattie. There could be no doubt as to the identity of the parties both in the question as to the elopement and as to the decree of divorce in which Beattie's name appears. There

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.,