witnesses were allowed to make any explanations; but that is not a re-examination on the whole cause. On the whole case, I can have no doubt that the proceedings in the Quarter Sessions were quite contrary to statute.

Lord Mure—From the first time I read the 84th section I had no difficulty in coming to a conclusion, for the words there could not be more imperative. The Justices are specially required to proceed by rehearing upon oath, and to reconsider the same evidence. Now, what was done here? They did not rehear upon oath, but came to the conclusion that the Clerk of Court should read a deposition taken for the convenience of the Petty Session, and then they ask whether they were not right according to statute. Nothing can be more different. A witness is re-examined and reheard in order that the Quarter Sessions may form an opinion of what a witness says, and on his credibility or incredibility, according to the way he says it. If an agreement had been made by the parties that the evidence should be laid in writing before the Quarter Sessions, the question must have been different, but this course is certainly not allowable by statute, and seems to me to be a course which if adopted would defeat the ends of justice. I can conceive no worse way to consider evidence than that a clerk should read it over to the Justices in a monotonous tone. One-half of it I am sure would convey no meaning to their minds at all.

Lord Shand—I confess that throughout much of the discussion I was rather of opinion that the objection was too narrow, and that there had been a substantial compliance with the Act—and when I say a substantial compliance I do not mean that something equivalent had been done, but that the respondent was in a position to say that the statute had been complied with. For one cannot fail to see that the witnesses were fully examined in the whole case. The parties could put any questions they chose; but the peculiarity in this case is that a record taken by a shorthand writer was read over to the Justices, and taking that fact into consideration I have come to the same conclusion as your Lordships, and therefore I am of opinion that the appellants are entitled to have the proceedings set aside.

I concur with Lord Deas that the words "same evidence" in the statute means documentary evidence laid before the Petty Court; but it must be kept in view in construing the Act that there is nowhere in previous parts of the statute a provision authorising a record to be made up in the lower court. The parties must decide on purely *viva voce* evidence. That being so, unless with consent of the parties,—even if that would have been enough,—the justices in the Quarter Sessions were not entitled to take cognisance of the fact that a record was made up in the lower court. The appellants were perfectly entitled to claim that this record should be set aside and the evidence taken entirely anew. It may be that the objection that evidence when read over will not tell so strongly upon the judicial mind as it would have if heard in question and answer is somewhat critical, but I cannot say that I do not think some weight should be given to it, and if any weight should be so given, then it should be given to the appellants, as according to statute they were entitled to have it so taken. If the appellants had not objected at the time, I will not say that it would be sufficient to state it now, but the objection was taken, and I think that the Justices were not entitled to take the course they did in face of that objection.

Counsel for the respondent then moved that the case should be remitted back to the Quarter Sessions in order that it might be tried over again in proper form.

Counsel for the appellants argued that the whole conviction should be quashed in respect of the illegal proceedings of the Quarter Sessions.

The Court issued the following interlocutor:—

> "The Lords having heard counsel on the case as amended, Find that the mode adopted by the Justices in Quarter Sessions of rehearing the evidence was not a sufficient compliance with the provision of section 84 of the Act 7 and 8 Geo. IV. cap. 53, but was in violation of the said provision: Therefore set aside the deliverance of the Quarter Sessions, by which they dismissed the appeal and confirmed the conviction of the Petty Sessions; and decern and direct the Justices in Quarter Sessions to rehear the cause in terms of the statute; and find no expenses due."

On the question of expenses, counsel for the appellants moved for the expenses of the Special Case, and founded on the Act 19 and 20 Vict. c. 56, sec. 24, and *Somner* v. *Middleton*, June 6, 1878, 15 Scot. Law Rep. 594.

Counsel for the respondents argued that the Court had no power to give expenses, and founded on these cases—*The Queen* v. *Beattie*, Dec. 18, 1866, 5 Macph. 191; *The Queen* v. *Gilroys*, March 20, 1866, 4 Macph. 656; *The Queen* v. *Caird*, Jan. 18, 1867, 5 Macph. 288; *White* v. *Simpson*, Nov. 28, 1862, 1 Macph. 72.

The Court refused expenses, holding the point ruled by the cases last quoted above.

Counsel for Appellants — Dean of Faculty (Fraser) — M'Kechnie. Agent — W. G. Roy, S.S.C.

Counsel for Respondent — Solicitor-General (Macdonald)—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Thursday, October 17.

SECOND DIVISION.

[Sheriff of Berwickshire.

STOTT *v.* FENDER AND CROMBIE.

(*Ante*, vol. xv. p. 734.)

Expenses—Double Appearance by Two Defenders having Similar Interests.

Where there are two defenders to an action with the same or similar defences, the Court will not allow the whole expense of a double defence.

Circumstances in which the Court *allowed* the expenses of one defender, with a watching fee added for counsel and agent of the other

defender, the loss in consequence of the second account being disallowed to be borne rateably by both defenders.

The circumstances of this case have been already reported (July 20, 1878, 15 Scot. Law Rep. 734). This discussion arose on the motion for approval of the Auditor's report, when both defenders claimed payment of their accounts.

Argued for pursuer—In this case there was only one defence (Sheriff's note), and on appeal only one statement was made, and one appearance was quite sufficient—*Burrel* v. *Simpson & Company*, July 19, 1877, 4 R. 1133; *Consolidated Copper Company*, January 17, 1878, 15 Scot. Law Rep. 274.

The defenders argued that in the circumstances of the case the double appearance was absolutely necessary.

At advising—

LORD JUSTICE-CLERK—I think it is the duty of agents to conduct cases of this description if possible without a double defence, and the expense of double agency and double appearance of counsel, and there is, as a rule, no difficulty in doing so. The present case depended on Crombie's liability, and it was only if we had found him liable that the question of Fender's liability could arise, but we found him not liable. It seems to me that the best course to follow here is to take the two accounts as one, and to modify it. What we propose is to add £21, as watching expenses for the second defender, to the larger account, and to disallow the rest, the part disallowed to be borne rateably by both defenders.

LORDS ORMIDALE and GIFFORD concurred.

Counsel for Pursuer (Respondent)—Trayner. Agent—H. B. Dewar, S.S.C.

Counsel for Crombie (Defender and Appellant)—Mair. Agent—W. Steele, S.S.C.

Counsel for Fender (Defender and Appellant)—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S.

Thursday, October 17.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

BEATTIE OR MASON *v.* BEATTIE'S TRUSTEES.

Husband and Wife—Effect of Decree of Divorce for Desertion pronounced in Absence—Where Subjects settled on Wife after Marriage, the Fee to be conveyed on Death of Husband—Statute 1573, *cap.* 55.

A wife who had obtained decree of divorce against her husband for desertion claimed from her father's trustees a conveyance of subjects settled on her and her children by her father's trust-deed, executed after the husband had been three years absent. The trust-deed bore that "during the subsistence of the marriage between her and the said J. M., or otherwise during their joint lives," the trustees were to pay her the income of the subjects "until the dissolution of her marriage with the said J. M. shall take place by the death of one of them." It was further provided that in case she "shall survive me and the said J. M." the subjects should be conveyed to her in fee.

Held that the deed not being a marriage-contract, nor granted *intuitu matrimonii*, the presumption of law that divorce was equivalent to death under the Act of 1573 did not arise, and that from the words of the deed the term which the testator had in his mind must be presumed to be the natural death of the husband, and that therefore the subjects could not be conveyed to the wife till that term.

James Beattie died on 18th January 1873 leaving a trust-disposition and settlement dated 14th March 1872, under which the defenders in this case were the acting trustees. The sixth purpose of this deed contained a provision in favour of Alexandrina Beattie, the deceased's daughter, the pursuer, in the following terms:—"*Sixthly*, In case Alexandrina Beattie or Mason, my daughter, spouse of James Mason, shoemaker, formerly in Arbroath, now in Australia, and her said husband, shall be both alive at the time of my death, I direct and appoint my said trustees to hold the subjects and others belonging to me . . . in trust for behoof of the said Alexandrina Beattie or Mason, and that during the subsistence of the marriage between her and the said James Mason, or otherwise during their joint lives, and to make payment to my said daughter of the rents and duties of the same from the period of my death until the dissolution of her marriage with the said James Mason shall take place by the death of one or other of them . . . and further, in case Alexandrina Beattie or Mason shall survive me and the said James Mason, her husband, then I direct and appoint my said trustees to convey and make over the said subjects and others in Colville Place to the said Alexandrina Beattie or Mason, my daughter, and her heirs and assignees whomsoever, in absolute right, and with right to the rents and duties thereof from and after the dissolution of her marriage as aforesaid, or from and after the period of my death, as the case may be, and in all time coming: But it is expressly provided and declared that in case the said Alexandrina Beattie or Mason shall predecease the said James Mason or die before me, then in either of these cases I direct and appoint my said trustees to hold the said subjects and others in Colville Place for behoof of the children of the said Alexandrina Beattie or Mason and their heirs as aftermentioned." Then followed a power of sale in favour of the trustees upon the succession opening to the children, the proceeds to be divided among the latter. The deed further contained a bequest of residue to the pursuer, and a declaration that the whole provisions therein in favour of the truster's daughter were exclusive of the *jus mariti* and right of administration of their husbands, and not affectable for their debts.

The pursuer was married in 1857 to James Mason, then living in Arbroath, at the time of this action in Australia. Her husband having deserted her and gone to Australia, she raised an action of divorce against him. The Lord Ordinary (YOUNG) found that the pursuer had failed to prove desertion, and dismissed the action, but on a reclaiming note the First Division recalled this judgment (*ante*, June 29, 1877, 14 Scot. Law