accept. The only question remaining is, whether there is such an infirmity of title as to entitle the purchaser to the expense of having his title cleared by decree of Court, and a case was cited to the effect that where a legal difficulty is raised and decided, the purchaser is entitled to have the expenses of the action paid by the seller. But here we have decided no question of law. Besides, an offer was made on 14th February 1894 to clear the record of the alleged burden. Now, it might have resulted that the seller was unable to clear the record, but the purchaser did not give him the opportunity; he met this offer by repudiating the sale. In such circumstances the purchaser cannot say that the seller ought to pay the expenses of this action.

On the whole matter, I think the Lord Ordinary has rightly determined this question also.

LORD KINNEAR — I agree with Lord M'Laren and the Lord Ordinary. I am far from saying that a purchaser is bound to accept evidence extrinsic of the record as sufficient to clear the lands of an encumbrance. But then an infeftment in security of debt may be extinguished by payment or discharge of the debt, and the declaration of a creditor assigning the security that the debt has been paid in part, and that the unpaid balance alone is assigned, is competent evidence of the fact of payment, and necessarily enters the record when the assignation is recorded. It is said, for reasons which did not appear to me very substantial, that the declaration may be erroneous. But even if it were reasonably probable that no part of the debt had been paid, the land in question would still be affected by a security for £200 only, and not for £300. Fraser's trustees were infeft in security of £300. But their infeftment is sopited by the conveyance and infeftment of Anna M'Leod under the declaration that £100 has been paid and extinguished, and the infeftment of their assignee is qualified by the same declaration.

The purchaser might nevertheless have been entitled to have the question tried at the expense of the seller if these proceedings had been taken for the purpose of clearing the title by a judgment. But the seller, over and over again, offers to clear the record, and the buyer's only answer is that the contract is at an end; and therefore it appears to me that the true question raised by this action is not how the title should be cleared, but whether the purchaser was entitled to throw up the contract. I agree with your Lordships that he was not, and he must accordingly pay the expenses of this case.

LORD ADAM—I am of the same opinion. That the £100 had been discharged is clear from the assignation which enters the record. Now, that is sufficient, because if the debt is paid there is an end of the infeftment in security, and there is no necessity to clear the record. As to the question of expenses, the defender has tried to get quit of his bargain, and that is the position he has always taken up. As he has failed in that he must pay expenses.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—Cullen. Agents—P. H. Cameron & Company, S.S.C.

Counsel for the Defender — D.-F. Sir Charles Pearson, Q.C.—Macfarlane. Agents—Rusk & Miller, W.S.

Thursday, January 17.

SECOND DIVISION.

[Sheriff-Court at Edinburgh.

NISH *v.* NISH'S EXECUTOR.

Husband and Wife—Payment of Husband's Debts by Wife—Claim by Wife for Repayment—Presumption.

Evidence which was *held* insufficient to establish that moneys paid by a wife on her husband's behalf during marriage had been advanced out of her separate estate, and were debts due by the husband to the wife at the date of his death.

Mrs Christina Nish raised this action in the Sheriff Court at Edinburgh, in January 1894, against the executor of her deceased husband, for recovery, *inter alia*, of certain small sums of money which she alleged had been paid by her out of her own estate during the marriage in satisfaction of debts due by her husband.

Proof was allowed. It appeared that Mr and Mrs Nish were married on 20th September 1883. Mr Nish died in October 1892. The pursuer deponed that the sums for which she sued had been paid by her out of her own estate. They had been paid respectively in 1885, 1888, and 1890, in satisfaction of (1) a shorthand writer's account incurred by her husband, who was a solicitor, in the course of his practice; (2) the interest due on a small loan obtained by her husband on the security of real estate belonging to him; and (3) legal expenses incurred by her husband in connection with the mortgage. She had never asked repayment during her husband's life. She expected that her husband would leave her his whole estate. In corroboration of her claim pursuer produced receipts for the said alleged payments made by her on her husband's behalf. The receipts bore that the sums paid had been received from her.

Upon July 24th 1894 the Sheriff-Substitute (RUTHERFURD) found in fact and in law that the pursuer had failed to prove that the sums sued for were "debts due to her by her husband at the time of his death," and therefore dismissed the action.

On appeal, the Sheriff (BLAIR) recalled this interlocutor, and decerned against the defender for payment of the sums sued for.

The defender appealed, and argued—The defender had only her own evidence to show that she had paid the sums sued for out of her own estate, and that was not sufficient proof to rebut the presumption that if a wife advanced money it was for the use of the spouses, and not as a creditor. The long delay in bringing the action was also against the pursuer's claim as good—*Annand's Trustees* v. *Annand*, February 6, 1869, 7 Macph. 526; *Fairbairn* v. *Fairbairn*, March 18, 1868, 6 Macph. 640; *Hutchison* v. *Hutchison's Trustees*, June 10, 1842, 4 D. 1399; February 1, 1843, 5 D. 469; *Tennent* v. *Tennent's Executor*, June 28, 1889, 16 R. 876; *Edward* v. *Cheyne*, March 12, 1888, 15 R. (H. of L.) 37.

The respondent argued—The pursuer was entitled to have a proof *prout de jure* in support of her averments, and had proved that she had paid the sums sued for out of her own estate. As regarded the delay in bringing the action, it was satisfactorily accounted for by the pursuer's expectation that she was to succeed to her husband's whole estate. It was proved that the money was paid to the various persons who claimed it as creditors, and the wife took the receipts in her own name, and that raised a presumption that the wife intended to make herself the creditor of the husband—Dickson on Evidence, p. 190.

At advising—

Lord Justice-Clerk—As regards the alleged advances made by the pursuer to her husband after marriage, the burden lies upon the pursuer to prove that she had advanced these sums to her now deceased husband out of her own estate, and that they had not been repaid by him, and I do not think that the evidence she has brought forward is sufficient to establish these two points. It is true that she produces receipts for money paid, taken in her own name, which might indicate that she had advanced the sums stated in these receipts on behalf of her husband, but then she can produce no evidence in support of these receipts except her own statement.

It is true that the Sheriff-Substitute states that he does not consider the pursuer to be an untruthful witness, but the real question is always whether the pursuer has been able to bring forward such an amount of proof that the Court can hold it to be sufficient, and I do not think the pursuer in this case has done so. I therefore think the Sheriff-Substitute is right in his views upon this part of the case.

Lord Young—I am of the same opinion. I have no doubt whatever with regard to the sums said to be paid by the wife after marriage that they are not debts against the husband's estate.

Lord Rutherfurd Clark—On the evidence which we have in the proof before us I am satisfied that with regard to the debts which the pursuer says her husband incurred in respect of advances made by her on his behalf after marriage, she has no proof whatever.

Lord Trayner—I am not quite prepared to say that the record does not show a relevant case for trial, but upon the evidence as it has been taken, I agree with your Lordships that there is no proof whatever that the parties treated the advances made by the pursuer on behalf of her husband as debts due to her, and which are payable out of his estate.

The Court recalled the interlocutor dated 20th November 1894: Found in fact and in law, in terms of the findings in fact and in law of the interlocutor of the Sheriff-Substitute, dated 24th July 1894: And assoilzied the defender from the conclusions of the action, &c.

Counsel for the Pursuer—Macfarlane—W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defender — Dundas — Millar. Agent—John Forgan, Solicitor.

Friday, January 25.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MARQUIS OF BREADALBANE *v.* WEST HIGHLAND RAILWAY COMPANY.

Railway—Compulsory Power to Take Lands—Right to Take Water—Right as Riparian Proprietor—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 16—*West Highland Railway Act* 1889, *sec.* 31, *sub-sec.* 2.

By sec. 16 of the Railway Clauses Consolidation Act of 1845 it is provided that the company may "for the purpose of constructing the railway" make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway, and may do all other acts necessary for making, maintaining, and using the railway.

Sub-section 2 of sec. 31 of the West Highland Railway Act of 1889 provided that the company should be bound to make and maintain a station for passengers, goods, and cattle at Bridge of Orchy.

In order to obtain a supply of water for Bridge of Orchy Station, the West Highland Railway Company, after having constructed its line, gave notice to the proprietor of the neighbouring land that it was their intention to take under their compulsory powers a strip of land, lying within the limits of deviation, of sufficient breadth for a pipe-track from the station to a stream 225 yards distant.

In an action by the proprietor, the Court (*rev.* judgment of Lord Wellwood) *interdicted* the company from encroaching on the land in question, on the grounds (1) that the acquisition of the ground necessary for a pipe-track