

APPENDIX.

PART I.

ADULTERY.

1799. December 7. JEAN LOCKHART *against* JAMES HENDERSON.

JEAN LOCKHART raised an action of divorce against her husband James Henderson for adultery.

He pleaded recrimination in defence, and also brought a counter-action of divorce.

His defence and counter action were founded entirely on alleged acts of guilt known to him before a reconciliation between the parties in November 1793.

In the former action, the Commissaries (15th September 1797) “sustained the defence founded on alleged acts of adultery committed by Jean Lockhart, the pursuer, whether prior or posterior to November 1793, as sufficient, if proven, to elide the libel,” and allowed a proof.

In the counter action, the Commissaries, of the same date, “found it proven by the letter in process, dated November 1793, and by the pursuer’s own admission, that he was reconciled to the defender, and cohabited with her so late as the said date of November 1793; and in respect of such reconciliation and subsequent cohabitation, dismissed the libel so far as founded upon acts of adultery, which came to his knowledge prior to November 1794,” and before answer, ordered a condescence as to posterior acts alleged by him.

A petition for Jean Lockhart, against the first interlocutor, was refused by the Commissaries.

No step having been taken by Henderson in either action for some months, his wife obtained circumduction against him. She afterward led a proof in absence, and decree was pronounced in terms of the libel at her instance.

The Commissaries having refused to reponne Henderson, and allow him a further proof, he presented a bill of advocation, upon which Lord Armadale remitted to the Commissaries, “with this instruction, that in terms of their interlocutor of 15th September 1797, (meaning the first-mentioned interlocutor of that date), they allow the complainer a proof of the facts alleged by him, and there found relevant in defence.”

No. 1.
Recrimination, being no bar to divorce, cannot be pleaded in defence. Proof of alleged acts of guilt known prior to a reconciliation, is incompetent.

No. 1. A bill of advocation having been presented by Jean Lockhart against the same interlocutor of the Commissaries, Lord Craig ordered memorials to the Court; and, in case of objection to the competency of the bill, appointed the complainer to lodge a petition against Lord Armadale's interlocutor.

Memorials were lodged for both parties, and a petition for Jean Lockhart, who

Pleaded: Recrimination is no bar, either in law or expediency, to obtaining a divorce, though, when the crime is established to have been mutual, it may affect the patrimonial consequences resulting from the dissolution of the marriage.

Upon this principle, recrimination cannot be stated in defence, but must be established by a counter action; 14th February 1726, Campbell against Lamont, (not reported); 9th December 1778, Davie against Grant, (not reported); 9th May 1787, Jardine against De la Motte, No. 13. p. 338. At all events, the proof ought to be restricted to acts alleged to have occurred posterior to November 1793, as the reconciliation then admitted to have taken place bars all inquiry with regard to facts then known to the husband. It so far puts parties in the same situation as if the marriage had only then commenced; Ersk. B. I. Tit. 6. § 43. In this respect, the two interlocutors of 15th September 1797, are completely at variance with each other.

Answered: Adultery does not *ipso facto*, dissolve marriage, but merely gives the injured party right to complain; Stair, B. I. Tit. 4. § 7.; Ersk. B. I. Tit. 6. § 43. But the complainer must be innocent: A woman, herself guilty, cannot bring a divorce; D. l. 13. § 5. *Ad leg. Jul. de Adult. l. 39. Solut. Matrim.* Upon the same principle that *lenocinium* on the part of the husband bars the same action at his instance; D. l. 47. *Solut. Mat.* 28th February 1745, Mackenzie, No. 10. p. 333. Recrimination therefore may be competently pleaded by exception. The cases quoted by the complainer do not establish the contrary.

The reconciliation was properly sustained in bar of proof of prior guilt, in the action at the instance of Henderson, who could not complain of what he himself had pardoned, but was as properly refused the same effect in the other action, because it did not remove the personal objection to the action being raised, by a party not herself innocent.

The Court were clearly of opinion, that recrimination is no bar to divorce, though mutual guilt may affect patrimonial consequences; that on this account it can be stated only in a counter action; and that reconciliation is a complete objection on both sides to proof of prior guilt then known to the parties.

The cause was "remitted to the Commissaries, with instructions to alter their interlocutor in the action of divorce, at Jean Lockhart's instance, of 15th September 1797; repel the defence of recrimination there pleaded, in so far as respects the conclusion of divorce, and afterward to proceed in the cause as they shall see just."

Lord Ordinary, Craig.
D. D.

Act. Jo. Clerk, Ja. Miller.

Alt. Macgrugar.

Fac. Coll. No. 147. p. 329.