

The Scottish Law Reporter.

WINTER SESSION, 1871-2.

COURT OF SESSION.

Tuesday, October 17.

OUTER HOUSE.

(Before Lord Mure.)

MARGARET THOMSON OR DONALD *v.*

ROBERT FRASER AND OTHERS.

Husband and Wife—Adultery—Divorce—Counter-Actions—Goods in Communio—Jus Relictæ. In conjoined actions of divorce on the ground of adultery at the instance of a husband and wife against each other, decree of divorce was pronounced against both parties, the judgment containing a special finding that the wife's adultery was prior in date to the husband's, and a reservation of the effect of the judgment on the patrimonial rights of parties. *Held*, by Lord Mure—in a subsequent action at the instance of the wife against the representatives of the husband, now deceased—that she was entitled to insist for payment of one-half of the goods in communion between her and her husband at the date when the marriage was dissolved by the decree of divorce.

Counter actions of divorce on the ground of adultery were raised by the pursuer of the present action and the deceased James Donald, her husband, against each other. The summons at the instance of the wife was signed 12th November 1859, and the summons in the counter action on 10th January 1861. The actions were conjoined; and on the 20th May 1862 the Lord Ordinary (ORMIDALE) pronounced an interlocutor finding Mrs Donald guilty of adultery, and divorcing her from her husband; and also finding James Donald guilty of adultery, and divorcing him from his wife. The interlocutor contained a special finding that Mrs Donald was proved to have committed adultery before the date of the adultery proved to have been committed by James Donald, and an express reservation of the effect of the judgment on the patrimonial rights of parties. This interlocutor was adhered to by the First Division on the 30th March 1863, (1 Macph.) and became final. On the 4th May 1870 James Donald died intestate and without issue, possessed of considerable estate. Mrs Donald raised the present action against his representatives in moveables, claiming, *jure relictæ*, one-half of the goods in communion at the dissolution

of the marriage by the decree of divorce, with interest thereon.

The defenders pleaded, *inter alia*—(1) The pursuer has no title to sue. (3) The pursuer having been divorced from the said James Donald on the ground of her adultery, has no legal claim as his widow against his executors estate.

The Lord Ordinary (MURE) pronounced the following interlocutor:—

“29th March 1871.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, Finds that, on the 20th of May 1862, an interlocutor was pronounced by Lord Ormidale, and adhered to by the First Division of the Court on the 30th of March 1863, in the conjoined actions of divorce which were raised by the pursuer of the present action and by her husband the late James Donald against each other, by which interlocutor these parties were, of the same date, respectively divorced on the ground of adultery: Finds that the action of divorce at the pursuer's instance was raised in the month of November, and brought into Court in the month of December 1859, and that the action at the instance of the said James Donald was raised and brought into Court in the month of January 1861, and that it appears from the interlocutor in the conjoined actions that it was proved that the pursuer committed adultery before it was proved that the said James Donald had committed adultery: Finds that by the said decree no decision was pronounced relative to the patrimonial interests of the parties, but that the effect of the judgment upon those interests was expressly reserved: Finds that the late James Donald died on the 4th of May 1870, intestate, and without issue: Finds that between the date of the decree of divorce and the death of James Donald no decision was pronounced or arrangement come to between the parties relative to their patrimonial rights, and that these rights must now be determined with reference to the relative position of parties at the date of the decree of divorce upon the 20th of May 1862: Finds, in these circumstances, in point of law, that the pursuer is entitled to insist for payment of one-half of the goods in communion between her and the said James Donald at the date when the marriage was dissolved by the said decree; and to that extent repels the defences, and appoints the case to be put to the roll, in order that an account may be taken of the amount of the goods then in communion between the parties, and reserves all questions of expenses.

“*Note*.—The Lord Ordinary has felt the main question raised in this case to be one of very considerable difficulty, and his opinion has fluctuated

a good deal in the course of his examination of the authorities bearing upon it. But, after repeated consideration of those authorities, he has not been able to see his way to any other solution of the question than that embodied in the last of the above findings.

"The general rule of law relative to the effect of the dissolution of a marriage by divorce for adultery on the patrimonial rights of parties, where one of the spouses only is guilty, appears to be clearly fixed, viz., that the innocent party has the just benefit of all legal and conventional provisions, just as if the offenders were naturally dead, while the guilty party forfeits all benefit accruing through the marriage. The law is so laid down in Stair, i, 4, 20; Bankn. i, 5, 134; and in Erskine, i, 6, 46, and 48, and has been authoritatively recognised in disposing of the case of *Thom*, 11th June 1852, and the more recent case of *Johnston*, 5th February 1867. But while these institutional writers are thus explicit as to the effect of divorce upon the respective rights of an offending and of an innocent spouse, they are silent as to its effect where the guilt of the parties is mutual, probably because at the time when they wrote recrimination was understood to operate as an absolute bar to divorce. And the opinion of Professor Bell that recrimination or mutual guilt may entitle 'the party first injured to have divorce preferably to the other, with all the benefits thence accruing,' does not seem to be borne out by the case of *Cunningham Fairlie*, 3d July 1815 (6 Pat. Appeals, p. 117), to which he refers.

"Mr Ferguson, again, in his work on Consistorial Law, although he gives no decided opinion on the point, speaks (p. 194) of the 'defence which arises from mutual guilt and injury against the forfeiture of the patrimonial rights of a pecuniary description which would accrue to the survivor from dissolution of the marriage by natural death of the spouse, or to the successful party in an ordinary action of divorce for adultery,' thus evidently implying that in such a case the forfeiture of pecuniary rights would probably not be held to take place in the same way as in the case where one party only was guilty. And, in dealing with this subject, Mr Fraser (vol. i, p. 673) indicates the opinion that in such a case 'neither party can claim any right or interest in the estate of the other that would have been competent to him or her had decree been obtained on one side only.' The Lord Ordinary, in the absence of all express authority on the subject, is disposed to think that the solution of the question raised in the present case may be found in the application of the principle here pointed out by Mr Fraser.

"In considering this question, it appears to the Lord Ordinary to be important to keep distinctly in view the manner in which the ordinary rule of law would operate where one party only is guilty. In that case the offending wife, if there had been a contract of marriage, would, as the Lord Ordinary conceives, have forfeited the tocher and conventional provisions, and her share of the goods in communion; and had she been possessed of heritable estate, the husband would have been entitled to his courtesy as if the wife had been naturally dead; *Inverwick*, March 1589, D. 329. If, on the other hand, the wife had been the injured party, she would have had right to her conventional provisions, to her terce, and to her share of the goods in communion at the date of the divorce;

and the husband, on the other hand, would have forfeited all right of courtesy, or, in other words, would have been deprived of the administration which, in respect of his *jus mariti*, he had had during the marriage of the rents of the heritable estate of the wife.

"Under the operation of this rule, then, there would thus be a forfeiture on the part of an offending wife, in favour of an injured husband, of all benefit provided to her by the marriage-contract, and also of her share of the goods in communion, and of her right to the rents of her own heritable property; and the justice of so applying the rule seems clear when it is borne in mind that, but for the dissolution of the marriage through the guilty conduct of the wife, the husband would have been entitled to continue, during the subsistence of the marriage, his uncontrolled administration both of the whole goods in communion and of the rents and profits of the heritable property of the wife. But when the husband is also an offending party, there seems no good reason why this rule should be applied to the extent of allowing him either to continue the administration of the wife's share of the goods in communion, or to draw the rents of her heritable property, any more than there would be for allowing her to claim terce out of his heritable estate; and the fair rule, in such circumstances, appears to the Lord Ordinary to be that neither party should be allowed to claim any right or interest in the estate of the other.

"The propriety of applying this rule with reference to any heritable property which may belong to the spouses does not, in the opinion of the Lord Ordinary, admit of question. Each spouse ought, he thinks, in that case to be allowed to take full and complete possession of her or his respective properties. But its application relative to the goods in communion is attended with more difficulty. Because, although they are property in which the spouses have a common interest, and the wife takes absolute possession of the half when a marriage is dissolved, the right of administration during the marriage, which belongs to the husband alone, is of so exclusive a nature as to be almost equivalent to a right of property in him, inasmuch as the whole goods may be expended and disposed of by him, or attached by his creditors for debt. A husband's right of administration, however, is in this respect not more absolute than it is in regard to the rents of the wife's heritable estate, which belong exclusively to the husband during the marriage, and his right to which may be attached by his creditors by adjudication. And as this right so to deal with each depends solely upon the *jus mariti* which comes to an end by the dissolution of the marriage, it appears to the Lord Ordinary that there is no sufficient ground for holding that the husband should be allowed to retain the wife's share of the goods in communion any more than he would have been to retain the rents of her heritable estate in a case where, as here, the marriage has been dissolved in consequence of the guilty conduct of both.

"Such is the view which the Lord Ordinary thinks must have been taken of the case had the question been raised immediately after the date of the divorce; and he does not see, nor did he understand it to be pleaded, that there was room for the application of any different rule now that the husband is dead. The plea in law founded on the discharge granted by the pursuer when the appeal to the House of Lords was withdrawn, was

not insisted on before the Lord Ordinary; and as the three first pleas in defence appear to him to depend substantially upon the same question, he has thought it better, instead of dealing with those pleas separately, to dispose of the case in the meantime by a finding relative to what he conceives to be the nature and extent of the pursuer's right and interest in the property in question on the dissolution of the marriage, the more so as it appears to him that the claim is not, strictly speaking, one in name of *jus relicta*, but one which depends upon the wife's right, in the special circumstances of the case, to demand one-half of the goods in which she and her late husband had a common interest at the date of the divorce."

The defenders lodged a reclaiming-note, but the case was compromised.

Agent for Pursuer—William Officer, S.S.C.
Agents for Defenders—Mackenzie, Innes, & Logan, W.S.

Friday, October 20.

FIRST DIVISION.

CHRISTIE v. MATHESON.

Interest—Loan. Circumstances in which it was held that advances of money made by a person to his half-brother did not bear interest.

This was an appeal from the Sheriff-court of Dundee.

In September 1861 James Christie, then resident in California, remitted £50 to Alexander Matheson, his half-brother, a draper in Dundee. In a letter which accompanied the remittance, Christie, after referring to Matheson's circumstances, which appear to have been embarrassed, says he sends £50, and adds, "I would rather avoid to answer questions on the subject. All I have to say about it is, that this and all other remittances which I may in future make, I wish you to take your full use of, as if they were your own; when it becomes unnecessary (which I hope, for your own good, it may), then dispose of it to the best advantage." In 1862 another £50 was remitted, and a like sum in 1863. The principal sums were afterwards repaid by Matheson, but a question arose in regard to interest, in consequence of which Christie raised the present action, claiming 5 per cent interest on the sums from the dates of the advances till payment.

The Sheriff-Substitute (CHEYNE) found that the pursuer was entitled to interest, on the ground that the advances must be held as loans and not as gifts, and that there was nothing to take the case out of the ordinary rule, that *ex lege* interest is due on loans; 1 Bell's Com., 7th Ed., 692-3; *Garthland's Trustees v. M'Dowal*, 26th May 1820, F.C.; *Cuninghame v. Boswell*, 29th May 1868, 6 M. 890, 5 Scot. Law Rep., 559.

On appeal, the Sheriff (MAITLAND HERIOT) recalled the interlocutor of the Sheriff-Substitute, and found that no interest was due. The Sheriff considered that the case turned on what was the intention of parties; and that, looking to the whole circumstances, the pursuer sent the money, and the defender received it, on the understanding that no interest was to be paid; *Forbes v. Forbes*, 4th Nov. 1869, 8 M. 85, 7 Scot. Law Rep. 49.

The pursuer appealed to the Court of Session.
STRACHAN for him.

TAYLOR INNES, for the defender, was not called on.

At advising—

LORD PRESIDENT—I have no doubt that the Sheriff has arrived at a sound conclusion. The Sheriff-Substitute is quite right in his general view of the law, but he has overlooked the very peculiar circumstances of this case. The passage quoted in the pursuer's letter can have but one meaning. The defender was in business in Dundee. The pursuer, aware of his embarrassments, sends him £50, and writes—(*reads letter*). That means that the money which he then sent, and which he was afterwards to send, was to be used by the defender in his business on terms very different from those that regulate the ordinary relation of debtor and creditor. Telling him to take the full use of the money as if it was his own, is as nearly as possible saying "use without interest." This is rendered still more clear by what follows. After he finds the money unnecessary he is to dispose of it to the best advantage,—implying that till then the sole advantage was to be with the defender.

The other Judges concurred.

Defender assolizied.

Agent for Pursuer—David Milne, S.S.C.
Agents for Defender—Lindsay & Paterson, W.S.

Saturday, October 21.

PARK v. ROBSON.

Bankruptcy—Examination under 19 and 20 Vict. c. 79, § 90—Party resident in England—32 and 33 Vict. c. 72, § 74. Where the trustee in a sequestration depending before the Sheriff of Lanarkshire desired to examine a person residing in London, in order to obtain information regarding some of the bankrupt's affairs,—held that the proper course to pursue, under section 74 of the English Bankruptcy Act of 1869, was for the Sheriff, on the application of the trustee, to pronounce an order for the examination of such person, adding thereto a request addressed to the London court having jurisdiction in bankruptcy to aid and be auxiliary to the Sheriff in carrying out the said order, and that no specific directions should be given, but the time, place, and method of examination be left to the English court.

Remarkd., that in the conduct of such examination the English court would be guided by the rules adopted in Scotch practice, so that the party being examined would suffer no hardship from the English practice differing from the Scotch.

The respondent in this process of suspension and interdict was Mr George Robson, accountant in Glasgow, who had been appointed by the Sheriff of Lanarkshire trustee upon the sequestrated estate of George Lambie, grocer, wine merchant, and ship-owner in Glasgow and Helensburgh. In the course of his investigations into the affairs of the bankrupt, the respondent ascertained that he and the complainer Mr James Park, merchant, Adelaide Chambers, 52 Gracechurch Street, London, had both been engaged in transactions connected with the ship "Ferdinand de Lesseps," which, in the interest of Mr Lambie's creditors, it was his duty to bring to light. It appeared that the ship had