

the time comes, and to that end to take such legal advice as is open to them. It may turn out, for aught I know, that Sir George Kinloch is personally barred from objecting to the purchases made and debt incurred, and under implied contract to surrender his right *ab intestato* (if he have such right) to the income after twenty-one years, and allow it to be applied in payment of the purchases and debt incurred at his request. Our opinion, to the effect that accumulations beyond the twenty-one years if allowed by the trust-deed are contrary to the Thellusson Act, and that Sir George Kinloch is entitled to the income beyond that term—if that shall be our opinion—clears the case very partially, and leaves the trustees to extricate the estate from the position in which they have placed it, and prepare as they best may to encounter the questions which may arise on Sir George's death.

Sir George received £1000 a-year from the trust during the first twenty-one years, except only in the years prior to 1863, when the allowance made to him was smaller. The trustees might have accumulated all this money to pay for the land they bought. I do not say it would have been judicious to do so, but I do say it was unwarrantable both to buy the land and give Sir George the only money available to pay for it. They may or may not have a remedy against him through the medium of his claims as heir *ab intestato*, according to the facts and the law applicable to them. We only decide that the trustees cannot by virtue of the trust-deed apply the income beyond the twenty-one years to pay for the land they bought, or discharge the debt which they incurred to pay for it, and that nevertheless they must discharge the debt somehow before the entail is executed, unless all parties interested shall otherwise agree.

To the first question I answer that the Thellusson Act applies to the trust from the expiry of the term of twenty-one years from the death of the trusteer.

To the second question I answer that the surplus income belongs to Sir George Kinloch as the trusteer's heir *ab intestato*.

To the third question I answer that the entail cannot now or until the death of Sir George Kinloch be executed.

To the fourth question I answer that the provisions to Sir George Kinloch's children are, in my opinion, portions within the meaning of section 2 of the Thellusson Act, but that I have no such knowledge of the trust affairs or the past management of the trustees as to enable me to give any further answer.

The fifth question I answer in the affirmative.

To the sixth question I answer that the trustees are at liberty to sell land in Glenisla to pay off the debts of the trust. The trust directs the debts to be paid before the entail is executed. Whether when the time comes this condition may be dispensed with by the whole parties interested is at present a speculative question.

The LORD JUSTICE-CLERK was absent, but Lord Ormidale intimated that his Lordship had read and concurred in the opinion delivered by him.

The Court answered the questions put to them in terms of the opinions of Lords Ormidale and Gifford.

Counsel for Robert Smyth's Trustees—Rutherford—Keir. Agents—Skene, Edwards, & Bilton W.S.

Counsel for Sir George Kinloch—Dean of Faculty (Fraser, Q.C.)—Mackintosh. Agent—C. J. Napier, W.S.

Counsel for G. W. A. S. Kinloch—Kinnear—Pearson. Agents—Hamilton, Kinnear, & Beatson.

Counsel for Mrs Whitson's Judicial Factor—Asher—Lorimer. Agents—Scott-Moncrieff & Trail, W.S.

Tuesday, July 20.

FIRST DIVISION.

[Lord Craighill, Ordinary.]

RAMSAY V. RAMSAY AND ANOTHER.

Divorce—Adultery—Evidence—Co-Defender—Corroboration where Defender admits Adultery.

In an action of divorce on the ground of the wife's adultery, which was defended by the co-defender only, the evidence of the wife, who had confessed to her husband, was the only direct evidence of adultery. Circumstances which, being considered proved, were held to amount in law to a corroboration of the wife's story as in a question with the co-defender, no collusion between husband and wife being averred or suggested.

Divorce—Adultery—Confession of Wife to Husband.

Question—Whether evidence by a husband of his wife's confession of acts of adultery, made to him outwith the presence of the co-defender, is competent evidence against the co-defender?

This was an action of divorce by William Ramsay, labourer, Leith, against his wife and John Weir, porter, Leith. The following were the pursuer's averments:—“(1) The pursuer is a labourer, and resides at No. 1 Wilkie Place, Leith. On or about the 3d day of July 1877 he was married to the defender Ann Armit or Ramsay by the Rev. Robert Auchterlonie at Portobello, and the pursuer and the said defender thereafter lived together as husband and wife at Leith. No children have been born of the marriage. An extract from the register of marriages is herewith produced. (2) In or about the month of August 1878 an intimacy sprang up between the said defender Ann Armit or Ramsay and the other defender John Weir, who is a porter, residing in Argyle Street, Leith, and is a married man. Between said month of August 1878 and 19th September 1879 they were often seen in company together, unknown to the pursuer, and were on terms of improper intimacy. (3) On or about 19th September 1879 the pursuer and the defender Weir were engaged as musicians at a ball in Junction Street Hall, Leith. About eleven o'clock on that night, the pursuer having missed the defender Weir from the ball-room, and his suspicions being aroused, went to his house, which was then at No. 6 Johnstone Street, Leith. He found the door bolted from the inside. He then went to the window of the kitchen and dashed in a pane

of glass, and there saw the two defenders alone in the house, and in the act of having carnal connection with each other. The pursuer afterwards succeeded in effecting an entrance into the house, and turned them both out. Since then the pursuer has not lived with his wife, the female defender, and has had no intercourse with her. (4) The defender the said Ann Armit or Ramsay had several times carnal connection with the other defender John Weir, and in particular they had carnal connection with each other in or about the end of March 1879 in the pursuer's house at No. 19 Burns Street, Leith, and in the end of July 1879, and in August 1879, and on or about said 19th September 1879, all in the pursuer's said house at No. 6 Johnston Street, Leith, and the defender the said Ann Armit or Ramsay thus committed adultery with the other defender John Weir on one or more of these dates." The pursuer concluded for £500 damages against the co-defender.

The action was defended by the co-defender only, who denied the allegations both of adultery and of improper intimacy.

On a proof it appeared that the defender had confessed to her husband that she had committed adultery with the co-defender on the occasions libelled, and in her evidence (which, along with that of the other material witnesses, will be found in the opinion of the Lord President, *infra*) she spoke to two of these occasions, viz., in the end of March and the end of July 1879, and also to another occasion on the 8th November 1878, which was not libelled. Her evidence was the only direct evidence of adultery, but there were various independent witnesses who spoke to acts of unusual familiarity; and the pursuer repeated his wife's confessions to him of the various acts of adultery with the co-defender. As regards the occasion of the 19th September above mentioned, the evidence of the husband and wife was substantially in agreement, and supported the facts libelled, except that both parties admitted that adultery had not actually taken place on that occasion. The co-defender in his evidence admitted that he was in the pursuer's house on the night in question, but he denied the allegations of adultery and improper familiarity. As regards the acts of adultery spoken to by the defender the co-defender was not examined. His counsel objected to evidence being led in a question with him of confessions by a wife to her husband at which the co-defender was not present. The Lord Ordinary (CRAIGHILL) repelled the objection, but the counsel for the co-defender felt that he could not consistently examine the co-defender as regarded the acts of adultery which formed the subject of the confession.

The Lord Ordinary granted decree of divorce and found the co-defender liable in £100 damages and expenses.

The co-defender appealed, and argued that there was no sufficient corroboration in law of the defender's story, if her husband's evidence of her confession were thrown out of account, which he submitted it ought to be in a question with him. His counsel intimated, however, that he now desired to examine the co-defender on the acts of adultery spoken to by the defender, which the Court allowed.

Additional proof was therefore led before Lord Shand. The co-defender denied the allegations of

adultery, and with reference to what took place on the 19th September he was asked—“(Q) On the night of 19th September 1879 how long were you in the house with Mrs Ramsay?—(A) About a quarter of an hour or twenty minutes. (Q) What happened in the house that night?—(A) I went to the door, and it was opened by Mrs Ramsay. I went in and sat down and had a bottle of lemonade. This was in the kitchen. She showed me a book on the table. We looked over the book together. She told me her husband did not know that she had the book. I said it was very wrong not to tell him. She said if she told him he would make her return it, or give it back and get the money. It was a life of Christ, illustrated. We looked over the pictures together. (Q) What happened after that?—(A) She put her foot on my knee, and I was going to take her boot off, when pursuer put his hand through the window, and said, ‘I have caught you now,’ or something like that. Then he came in and said to me, ‘Jack, you may go home.’ I said I was just going home, and that I would take a bottle of lemonade before leaving. (Q) Had you connection with Mrs Ramsay that night?—(A) No. (Q) Did you attempt it?—(A) No.”

The case was further argued by both parties.

At advising—

LORD PRESIDENT—This is a case of a somewhat peculiar character, because the proof of adultery depends to a great extent on the evidence of the guilty wife, and the case, in so far as it is before us, is as between the pursuer and the co-defender only. The allegation of the pursuer, in the first place, is that about the month of August 1878 an improper intimacy sprang up between the defender and the co-defender, which continued down to September 1879; and then it is specially alleged that they had carnal connection in the end of March 1879 in the pursuer's house in Burns Street, Leith; and in the end of July 1879, and in August 1879, and on or about the 19th September 1879, all in No. 6 Johnston Street, Leith, to which the pursuer and his wife had removed. Now, in regard to one of these occasions here specially libelled—that in August 1879—no evidence has been led by the pursuer; on the other hand, there is one occasion on which the wife swears that carnal connection took place, which is not libelled, and consequently proof of that act cannot be made the foundation of a decree of divorce or against the co-defender, but it nevertheless is general evidence entitled to very considerable attention.

Such being the allegations on which the action is founded, let us now consider the evidence, and in the first place the evidence of the wife. She says—“I remember the co-defender coming to my house on the day of the Leith games, 24th August 1878. I was in the passage alone with him that day. (Q) Did he use any familiarity with you?—” And on that question being put the witness was very properly warned by the Lord Ordinary; but she replied—“I am here to tell the truth, and I am willing to answer all questions put to me. [Question repeated.]—Yes. He put his arms round my neck and kissed me.” Now, no act of adultery is alleged to have taken place on that occasion; but the allegation that improper intimacy had begun is pretty well established. For

the statement of the wife does not stand alone. She is corroborated by Mrs Arnot, one of her neighbours, who says—"On the 24th August 1878 I heard her speaking in the lobby, and as I wanted to take out a pail of dirty water at the time, and did not wish to brush past any stranger with it, I wanted to see who was in the lobby, and I looked through the keyhole. I saw Weir, the co-defender, take hold of Mrs Ramsay by the hand, and put something into her hands, and then clasp her in his arms and kiss her. I think this would be about five o'clock." There is then as regards the commencement of the improper intimacy a very important corroboration of the wife's evidence. She next says—"I remember the 8th November 1878, when the Restalrig school concert and ball took place. On that night I came down from the ball-room to take a walk with Weir. I think it was about eleven or twelve o'clock. Mr Blackie and Miss Thoms were on the road when we were on it. I went along a good piece of the road with Weir that night, and then turned and came back. He had connection with me on that occasion." Now, as I said before, that as this act is not libelled we cannot take it as the foundation of any decree of divorce, but it is nevertheless a most important fact, which, if true, supports very strongly the evidence of the wife as to the occasions which are libelled. Now, she is corroborated by two witnesses, Jane Thoms and William Blackie. Thoms says—"I remember leaving the ball-room with William Blackie about a quarter past twelve, or between that and one o'clock. Weir and defender were outside walking towards Jock's Lodge. I just passed a remark with them as we passed. They were standing at the time, and Weir had his arms round defender's waist." And Blackie is also called and depones to the same effect. So that here also there is a very material corroboration of the statement of the defender, that she and the co-defender were together on that night, and on terms of improper intimacy. Then she continues—"We removed from Burns Street to No. 6 Johnston Street at the May term 1879. I there attended to a shop we started. The house consisted of the front shop and back kitchen. In the end of March 1879 Weir came to my house one evening about eight o'clock. This was when we were in No. 19 Burns Street. He had connection with me on that occasion." Now, that is one of the occasions libelled. "I remember his coming to my house in the end of July 1879, after we had removed to No. 6 Johnston Street. I do not remember the day of the month. He got hold of me, and placed me against the table, and had connection with me." That is another of the occasions libelled. Then again—"On 19th September 1879, the night that my husband went to the Junction Street ball, Weir came about half-past eleven or a quarter to twelve. I was alone at the time. He knocked at the door, and I let him in, and shut and bolted the door. It was always kept bolted when my husband was out. Weir came and sat down, and I showed him a book, and after we had looked at it he used indecent liberties, and he was in the act of doing so when my husband knocked at the window. The gas had been lowered by that time. At the time that my husband knocked Weir had me in front of the bed with the intention of putting me back. After my husband dashed in a pane and opened the shutters he

came round to the door in the passage. He said, 'I have rather caught you just now,' or something like that."

Now, it is very important in reference to this 19th September to see how far the statements of the husband and the wife concur, and to see whether there is any such discrepancy as to throw suspicion on the one or the other. This is the first occasion on which I have taken into account the evidence of the husband. I do not take into account his evidence of confessions by his wife to himself, because I have great doubt as to whether they are evidence against the co-defender. But here we have an occasion on which the whole three are present—the pursuer, the defender, and the co-defender. And we have the statement of the pursuer. He speaks of being at the ball on the 19th September—"Weir was at my house that night before the concert and ball, and he and I arranged to meet at the hall about ten o'clock. We met at the hall about half-past ten, and he and another musician and I went to enter at the private entrance. Our conductor opened the door to let us in, but Weir happened somehow or other to be shut out. I told our conductor that one of our number was shut out, and he tried to open the door again, but could not. This would be at a quarter to eleven o'clock. As all the seats had not been shifted since the conclusion of the concert I came down to have a chat with Weir. I expected he would have come in the other way. I did not find him there at all. My suspicions had been aroused on the 1st of August 1879, when coming home from a wedding about four o'clock in the morning, my wife told me she had only newly gone to bed. She said she had been making toffee, when Weir, Durie, and two other men came in to supper. When, therefore, I saw that Weir was not in the hall, I went away to my house in Johnston Street, at about twenty minutes to twelve o'clock or so. I went to the private door in the passage leading to the kitchen, and found it bolted from within. I heard voices speaking, and I went round to the window of the kitchen to look in. In the shutter, which was on, there is a square hole for the water-pipe. I looked in and saw the gas burning brightly, and I could see Weir and my wife there. They were looking at a book like the Family Bible. In a few minutes I saw him put his hand up her clothes and undo a few buttons in her breast, and in a very short time he jumped on to her with his legs astride, and seized her by the muscles of the arm, and raised her and put her against the bed. I pushed the shutter off, and dashed in a pane of glass, and said, 'I doubt I have been too sharp for you this time.'" And then he turned them both out. Now, there seems to me to be a very precise concurrence between this statement of the pursuer and that of his wife as to what took place on the 19th of September.

We have therefore the evidence of the wife corroborated on this last occasion by her husband, and on other occasions by independent witnesses. On the other hand, there is no counter evidence except that of the co-defender. I do not propose to dwell on it in detail. I am satisfied that the truth is not with him. I am quite prepared to hold that his denials are untrue.

LORD DEAS—There are two questions here—

first, whether there is sufficient legal confirmation of the wife; and secondly, whether on the whole proof we are to believe her evidence?

I agree with your Lordship that the evidence of the witnesses who saw the co-defender with his arms round the defender's waist is important, as laying the foundation for what follows. Then in March 1879 and July 1879 there are two acts of adultery libelled and spoken to by the defender, which are certainly sufficient if her story is corroborated. Now, I think that there is most important corroboration of these two acts in what followed. What took place in September 1879 does not amount to an act of adultery. But everything took place preparatory to such an act, which was only interrupted by the husband; and there cannot be a more complete corroboration than that the parties were about to commit adultery but were interrupted and prevented from completing the act. There is therefore sufficient corroboration of the two acts libelled. Nothing more is necessary to satisfy the law if we believe the evidence.

Now, for my own part, I have very little doubt of the truth of the evidence. I have little doubt that Mrs Ramsay is speaking the truth. It is a delicate matter in some circumstances undoubtedly, where there may be collusion, but in the present case there is no appearance of collusion. On the whole matter I cannot doubt that we should adhere to the Lord Ordinary's interlocutor.

LORD MURE—I am of the same opinion. I am entirely satisfied that the story of the defender is to be relied on and is sufficiently corroborated in law.

LORD SHAND—I am quite of the same opinion, and I think the case a clear one. I have no difficulty whatever in coming to the conclusion that the Lord Ordinary is right, and even in the absence of the co-defender's additional evidence I should have affirmed the judgment, but I think he has rather confirmed that conclusion than otherwise.

The questions are two—Is the wife to be believed? and is she sufficiently corroborated in law to make out the case? I see no reason to doubt what she says. It is a most natural account. When she is suddenly charged with adultery she denies it, but she afterwards makes a full admission. That is what generally occurs, and what naturally occurs, in such cases. There is no evidence of collusion. If there had been, that would have raised a different sort of case. But it is not a case of the husband leading the wife to fall; and on the whole matter I have no hesitation in believing the wife.

But then there is the second question—Is she sufficiently corroborated in law? Now, here also I think that there never was a clearer case. The corroboration is not of adultery indeed, but of acts of familiarity—of great familiarity; and the corroboration is not the less valuable because the co-defender admitted everything up to the point when full guilt became apparent, and then denied; for Mr Trayner was obliged to concede that on the 19th of September the co-defender was about to assail the defender's virtue. I have therefore no doubt about the case on this branch also.

The Court adhered.

Counsel for Reclaimer (Co-defender)—Trayner—Shaw. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Respondent (Pursuer)—Moncrieff—Watt. Agents—Foster & Clark, S.S.C.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff of Midlothian.

BEATTIE v. PRATT.

Process—Sheriff—Competency of Application to Interdict a Threat to Inhibit.

Inhibition being a diligence which can only competently issue under authority of the Court of Session, a Sheriff has no jurisdiction to suspend or interdict such diligence.

Question—Whether a threatened inhibition on the dependence of an action about to be raised can be interdicted in the Court of Session?

Opinions (per Lord Justice-Clerk and Lord Ormidge) that where malice and oppression can be instantly verified, an application to interdict the threatened use of diligence is competent.

On 25th December 1879 George Pratt, plasterer in Edinburgh, made a written offer to G. Beattie & Sons, architects in Edinburgh, to execute the plaster-work of certain new tenements which were being erected at Tynecastle, for the sum of £119 for each tenement. On 31st December Messrs Beattie "on behalf of the proprietors" accepted the tender as regarded two tenements. The specification referred to in the offer and acceptance provided that the work should be executed in a perfect, substantial, and workmanlike manner, and should be to the entire satisfaction of the proprietors and the architect. Pratt proceeded with the work and at its completion applied to Messrs Beattie for payment. This was refused on the ground that the work had not been done in a substantial and workmanlike manner. The statement of Messrs Beattie, who were pursuers and appellants in this process of interdict, on that subject was as follows:—“(Cond. 3) The defender proceeded with the execution of the work mentioned in the said contract, but he failed to do so to the satisfaction of the pursuers. The pursuers frequently complained of the untradesmanlike and insufficient manner in which the defender was executing the said work, and informed the defender that unless he complied with his contract by executing the work in a tradesmanlike manner they could not certify his account with a view to his obtaining payment of instalments from the proprietor Mr James Sinclair, 52 Morrison Street, Edinburgh.” On 4th June 1880 Pratt wrote to Messrs Beattie as follows—“Unless my account is paid this afternoon you will be served with a summons, and I will inhibit you without further intimation, as I will submit no longer to your unnecessary delay. My agent is Mr Sutherland, Hanover Street, with whom you can address yourselves.” Messrs Beattie handed this letter to their agents, Millar, Robson, & Innes, S.S.C., who