

Margaret Small subject to the burden I have mentioned, and I humbly think that the codicil must receive effect.

LORD SHAND was absent.

The Court answered the first branch of the first question in the affirmative.

Counsel for First and Third Parties—Macfarlane Agents—H. & H. Tod, W.S.

Counsel for the Second Party—Guthrie. Agents—Tait & Crichton, W.S.

Thursday, November 8.

## SECOND DIVISION.

[Lord Lee, Ordinary.]

HENDERSON v. HENDERSON.

*Expenses—Husband and Wife—Divorce—Wife's Expenses of Reclaiming-note.*

*Held (diss. Lord Young)* that a wife who had unsuccessfully reclaimed against a decree of divorce on the ground of adultery, and who had by her own earnings acquired separate estate to the extent of £500, was bound to pay her own expenses in both the Outer and the Inner House.

Upon 25th January 1888 Isabella Middler Burd or Henderson, wife of Andrew Henderson, blacksmith, Little Collieston, Slains, Aberdeenshire, brought an action of divorce against her husband on the ground of adultery, and upon 12th March 1888 the said Andrew Henderson brought an action of divorce against his said wife also on the ground of adultery. These actions were conjoined, and after hearing evidence the Lord Ordinary (LEE) upon 22nd June 1888 pronounced decree of divorce in both actions, and with regard to expenses found the wife entitled to the expenses incurred by her in the action at her instance, and *quoad ultra* found neither party entitled to expenses. The wife reclaimed to the Second Division, but unsuccessfully.

It was admitted that for some years the husband had absented himself from his wife, and had not contributed anything to her support; that the wife had maintained herself by carrying on business as a farmer and innkeeper, and that by her earnings she had amassed a sum of £500, which was her own separate estate.

Upon the question of expenses it was argued by the claimer—She was entitled, in accordance with a well-established rule, to her expenses in both Courts, even in the action in which she was defender. In the case of *Hoey*, June 6, 1884, 11 R. 905, the wife, although unsuccessful, was found entitled to the expenses of her reclaiming-note, and that too from a perfectly innocent husband. It was only where a reclaiming-note was manifestly hopeless that expenses were refused. Here the evidence was such as to justify a reclaiming-note.

Argued by the respondent—If the rule was well fixed, the exception was as well established, that a wife with estate of her own must litigate at her own expense, and this specially applied to

the case of a guilty wife reclaiming with a judgment of the Lord Ordinary against her—Fraser on Husband and Wife, 1231, 1235.

At advising—

LORD YOUNG—It is my opinion that the general rule is as stated by Mr Young, that where a husband raises an action of divorce against his wife he must pay not only his own expenses but hers also, even although her defence has been unsuccessful. That is the general rule, and it was stated with some emphasis by the Lord President in a recent case cited to us, where a wife had reclaimed against a judgment which was against her. She had unsuccessfully defended the action; she had unsuccessfully reclaimed; and yet she was held entitled to get her whole expenses in both Courts, and that too in a case where she alone had been the guilty party. I understand an exception will be allowed where a wife has separate estate—that is, where she has independent means, but I would be loth to bring under that exception, which only may and not necessarily must be acted upon, a case where the wife has maintained herself for so many years, and where all her separate estate is due to her own earnings and savings. If out of this little account of savings she were to pay her expenses in this action, it would leave her practically with nothing to live upon. I think that because of a balance in the bank in her favour from the fruits of her own industry we should not take this case out of the general rule. But I look also to the behaviour of the husband, who has never performed towards her the duty of a husband. I think he ought to be subjected to the whole expenses of this action, which will have the effect, not that she will get one farthing out of him, but that her earnings will be protected from his claims.

LORD RUTHERFURD CLARK—I have no doubt about the general rule. Even although guilty of adultery a wife is entitled to her expenses in the Outer House, and in the Inner House also if there are reasonable grounds for her reclaiming. The question here is, whether this case should be brought under the exception to this rule. The ground for so bringing it is that the wife has separate estate of her own to the extent of £500, and on that ground the Lord Ordinary did not find the husband liable to the wife for the expenses incurred by her in the Outer House. I am not disposed to hold that a wife when she has such estate of her own, and is guilty of adultery, should be allowed to throw all the expense of the action upon her husband. I am therefore for affirming the Lord Ordinary's interlocutor as regards the expenses in the Outer House, and for finding no expenses due to or by either party in the Inner House.

LORD LEE—I concur with Lord Rutherford Clark.

LORD JUSTICE-CLERK—I concur with the majority of your Lordships. I think there is not much room here for sympathy with either party. The wife has separate estate, she is in

fault, and is therefore bound to pay her own expenses.

The Court adhered.

Counsel for the Reclaimer—A. J. Young—Salvesen. Agent—D. Howard Smith, Solicitor.

Counsel for the Respondent—Comrie Thomson—Rhind. Agent—William Officer, S.S.C.

Friday, November 9.

## FIRST DIVISION.

[Exchequer Cause.

THE AUSTRALASIAN MORTGAGE AND AGENCY COMPANY (LIMITED) v. THE COMMISSIONERS OF INLAND REVENUE.

*Revenue—Stamp Act 1870 (33 and 34 Vict. cap. 97), sec. 48.—Bill of Exchange—Clause of Exemption—Security—Renewal of Debenture—Coupon.*

By the Stamp Act 1870, sec. 48 (1) the term "bill of exchange" includes any document (except a bank note) entitling any person, whether named therein or not, to payment by any other person of any sum of money therein mentioned. The schedule to the Act charges a duty of 1d. on bills of exchange payable on demand, but exempts "(9) coupon or warrant for interest attached to and issued with any security." Where the term of payment of a debenture was by minute of renewal extended for a definite period, and additional coupons were issued relative to the interest for the extended period—held that these coupons not being issued with the security did not fall under the clause of exemptions, and that they were each chargeable with the stamp-duty of 1d.

This was a case stated by the Commissioners of Inland Revenue under sec. 19 of the Stamp Act of 1870 at the request of The Australasian Mortgage and Agency Company (Limited), to enable them to appeal to the Court of Exchequer against a determination of the Commissioners imposing a stamp-duty of 1d. upon a coupon issued by the said company.

By the Act there are charged the following stamp duties, as set forth in the schedule thereto, viz.—"bill of exchange, payable on demand, 1d." Section 48 (1) of the Act is as follows:—"The term 'bill of exchange,' for the purposes of this Act, includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank note), entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned."

Under the head "bill of exchange" in the schedule to the said Act appear certain exemptions, and the ninth of those exemptions is as follows:—"coupon or warrant for interest, attached to and issued with any security."

In May 1883 The Australasian Mortgage and Agency Company (Limited) borrowed from Ralph

Erskine Scott, C.A., Edinburgh, the sum of £2000, and granted therefor a debenture in ordinary form. The loan was for five years, and it bore interest at 5 per cent. per annum.

The debenture was stamped with the *ad valorem* duty applicable to a mortgage, viz., £2, 10s. Unstamped coupons or warrants for interest payable each half-year during the currency of the debenture down to and including 15th May 1888 were attached to and issued with the debenture.

In May 1888 the term of payment was by consent of parties extended to 1893, in terms of the following minute of renewal endorsed on the debenture:—"It is hereby agreed that the term of payment of this debenture shall be extended from the fifteenth day of May Eighteen hundred and eighty-eight, being the date of payment within mentioned, to the fifteenth day of May Eighteen hundred and ninety-three, and coupons for interest at the rate of 4½ per centum per annum have been delivered to the said M/C trustees of Mr and Mrs John Bruce of Sumburgh, for the interest to become due at and prior to the date of payment hereby agreed on." The new set of coupons issued was attached to the debenture by being pasted thereto, after which the debenture as renewed, along with the coupons attached, were handed back to the holder.

In July 1888 the company presented to the Commissioners (having obtained it for the purpose from the holders thereof) the first of the new set of coupons in order to have their opinion if it was chargeable with stamp duty in pursuance of the Act of 1870. The document was in these terms—"No. 1. The Australasian Mortgage and Agency Company (Limited), £42, 10s., will pay to the bearer, at the Office of the Royal Bank of Scotland, Edinburgh or London, on surrender of this coupon, the sum of forty-two pounds ten shillings sterling, on the 11th day of November 1888, for interest due at that date on debenture No. 2711.—R. & E. Scott, Secretaries."

The Commissioners expressed their opinion that it was a bill of exchange payable on demand, and that it fell to be stamped with the duty of 1d.

The company declared themselves dissatisfied with the determination of the Commissioners, on the ground that the coupon in question fell within the exemptions to sec. 48 of the Act of 1870, as being a "coupon or warrant for interest attached to and issued with any security," and was not liable to stamp duty.

The question for the opinion of the Court was—"Whether the said document was liable to the said duty of 1d. applicable to a bill of exchange payable on demand, or if not, whether it was liable to any duty, or whether it was exempt from duty as a coupon or warrant for interest attached to and issued with any security?"

Argued for the Australasian Company—The coupon in question fell under the exemptions to sec. 48; as it was not of the nature of a promissory-note it was not liable to stamp-duty. It contained no order to pay a sum, but simply a notice that upon presentation of the coupon the money would be paid. A promissory-note itself constituted the obligation, but here the coupon added nothing to the onerosity of the debenture; it was only a receipt. Its contents might have been inserted in the body of the debenture without affecting its character. It only added to the