

## SCOTLAND.

(COURT OF SESSION.)

BOYES - - - - - *Appellant.*BAILLIE - - - - - *Respondent.*

PROOF of indecent familiarities between a wife and a medical attendant in the family of the husband, held to afford a presumption of adultery, and a sufficient ground for a divorce.

After sentence of divorce in the Commissaries Court, affirmed by the Court of Session, a verdict and judgment subsequently obtained in an action for damages, finding the adultery not proven, is not admissible, upon an appeal, to affect the sentence or the judgment of affirmance. Such subsequent facts may be stated by leave of the House in an additional case.\*

THIS was a proceeding which originated in the Commissaries Court of Edinburgh to obtain a divorce for cause of adultery. The case on the part of the Respondent was supported by evidence of the grossest acts of indecency, affording inferences, short only of ocular demonstration, that a criminal intercourse had existed between the Appellant and a person who visited in the family, partly as an acquaintance, and occasionally as a medical attendant.

\* Other points were decided by the interlocutors in the Court below; viz. that reasons of reprobator against the Respondent's witnesses on the ground of insanity, immorality, and undue influence, were irrelevant; that objections to the competency of a witness were admissible only to her credibility; and that the costs of an agent in Edinburgh, to conduct the defence of the Appellant, ought to be disallowed.

1821.

BOYES  
v.  
BAILLIE.

Upon the presumptive evidence in the cause the Court of Commissaries, on the 19th of May 1815, pronounced a judgment, finding “ facts, circumstances, and qualifications, proved relevant to infer the Defender’s guilt of adultery with James Bryson, &c. find her guilty accordingly; therefore divorce, &c.”

In the course of the proceeding, before taking proof on the condescence of the Respondent, a protest, of reprobators, was instituted by the Appellant against the Respondent’s witnesses, on the ground of insanity, immorality, and undue influence; and after the proof had been taken for both parties the Appellant was allowed to give in a condescence of reprobator; upon advising which the Commissaries found the reasons of reprobator as condescended on not relevant; to which judgment they adhered upon a reclaiming petition.

The Appellant thereupon petitioned for leave to present a bill of advocation to the Court of Session on the question of reprobators, which was refused.

Objections were also taken by the Appellant to the admissibility of *M. W.* when brought forward for examination as a witness for the Respondent: her deposition was allowed to be taken, but appointed to be sealed up, and to lie *in retentis*.

On advising the pleadings of the parties as to the admissibility of her evidence, the Commissaries “ allowed the depositions of *M. W.* to be opened, “ and to form part of the process, reserving to the “ Court to consider what effect any apparent inconsistency in the depositions of the witness, already “ in process, may have on her credibility when the

1821.

BOYES  
v.  
BAILLIE.

“ merits of the cause come to be advised;” to which judgment they adhered on petition, and refused to permit the Appellant to bring this point under view of the Court of Session by bill of advocacy.

Upon the question of costs, objections having been taken and sustained to the Appellant's account of expenses in conducting her defence, she petitioned the Commissioners that they might be allowed, or at least to remit, the account to the auditor, with directions to allow the expenses of the Appellant's agent in Edinburgh. The prayer of this petition was refused, and thereupon the Appellant presented a bill of advocacy to the Court of Session, praying

“ a remit with instructions to the Commissioners to  
 “ alter their interlocutor of the 19th of May 1815,  
 “ &c. and to allow a proof of the circumstances she  
 “ has relevantly offered to establish, both in repro-  
 “ bator and as additional evidence, &c. and to find  
 “ her entitled to full expenses, conform to her agent's  
 “ accounts, which are not alleged to be improperly  
 “ stated, but modified in respect she should not have  
 “ had the aid of an agent, and also to sustain the  
 “ other charges disallowed.” The Lord Ordinary having refused the bill, the Appellant presented a petition to the Lords of the second division of the Court of Session, praying them “ to remit to the  
 “ Lord Ordinary to alter his interlocutor,” and to  
 “ the Commissioners to alter, &c. ; and to find that  
 “ the facts, circumstances, and qualifications proved,  
 “ do not infer the defender's guilt of adultery ; or  
 “ &c. to allow the defender a proof of the reprobato-  
 “ rs, and also of the *alibi* of Mr. Bryson on the  
 “ night and morning particularly condescended on

1821.

BOYES

v.

BAILLIE.

“ in the body of the petition.” The prayer of this petition having been refused, an appeal to the House of Lords was presented from the several interlocutors of the Commissioners the Lord Ordinary, and the second division of the Court of Session. After the appeal had been presented, and the cases laid on the table of the House, the Appellant obtained leave to print, and accordingly printed and presented an additional case, stating the following facts :

The Respondent, in June 1812, brought his action in the second division of the Court of Session against James Bryson, for reparation and damages in regard to *the alleged adultery* ; concluding that the defender, Mr. Bryson, should be decerned to make payment to the Pursuer of the sum of 10,000 *l.* of damages, with 500 *l.* of expenses of process.

After various proceedings in this action the Court directed an issue therein to be sent to the Jury Court to be tried by a Jury. In consequence of this direction the following issue was settled for the purpose of trying the question between the parties :

“ Whether the defender did on the 1st day of  
 “ January 1808, or at any time between that time and  
 “ the 1st day of January 1812, seduce and maintain  
 “ an adulterous connection, and did commit adultery  
 “ with Mrs. Elizabeth Cross, or Boyes, then the  
 “ wife of the Pursuer, at the Pursuer’s house of  
 “ Carnbroe, or in the neighbourhood thereof.”

A trial was accordingly had upon this issue, before the Jury Court, on the 12th and 13th days of March 1818 : when a verdict was given by the jury impanelled to try the said issue, finding “ that

“ in respect of the matters of the said issue proven  
 “ before them, they find the fact of adulterous con-  
 “ nection between the 1st of January 1808 and the  
 “ 1st of January 1812 is not proven.”

When this verdict was reported to the Court of the second division, the Pursuer applied to the Court for a new trial, upon two grounds;—first, that the verdict had been given contrary to the evidence; and secondly, that certain facts which he alleged, and offered to prove, as showing the defender's guilt, had come to his knowledge since the trial. Upon this application the Court directed counsel to be heard in their own presence.

After hearing counsel accordingly, the Court, on the 10th of July 1818, pronounced an interlocutor, refusing the application for a new trial, in so far as the same is founded on the ground of the verdict being contrary to evidence; but before further answer, ordaining the Pursuer to put in a special articulate condescendence of the facts which he alleges to have come to his knowledge since the trial, and which he avers and offers to prove, and also of the circumstances which he avers, and offers to prove, in order to establish that the said facts were *res noviter venientes ad notitiam*, with certification.

In consequence of that interlocutor a condescendence was given in by the Pursuer which was followed with answers, replies, and duplies. The Court thereupon, after hearing counsel on the 2d of February, 1819, pronounced an interlocutor, sustaining the verdict, and refusing the application for a new trial, &c.

The matter of the application for a new trial

1821.

BOYES

v.

BAILLIE.

having been thus disposed of, the Court afterwards, on the 9th of February 1819, pronounced this judgment in the cause :

“ The Lords having advised the verdict of the  
 “ jury find the fact of adulterous connection  
 “ between the 1st day of January 1808, and 1st day  
 of January 1812, is *not proven*, &c.

Upon the facts appearing in this additional case it was insisted, on behalf of the Appellant,

1st. That in the action against Mr. Bryson the very same point was at issue which was tried in the action of divorce, namely, the alleged adultery between her and Mr. Bryson during the same period of time, and on the same specific facts, attempted to be proved by the same witnesses who had been brought forward in the question of divorce out of which this appeal arises.

2d. That the trial in this action of damages was had in that Court, which is best fitted to investigate and pronounce upon all questions of fact ; that the Pursuer in that action examined all such witnesses as he chose to bring forward ; and in that trial the Defender obtained a verdict with expenses.

3d. That the application made by the Appellant for a new trial was made in the same division of the Court of Session which previously had under its consideration the question of divorce ; and though such application was pressed upon every ground of the verdict being contrary to evidence, and of *res noviter venientes ad notitiam*, the Court rejected such application for a new trial, with expenses in favour of the defender.

For the Respondent :

1821.

BOYES  
v.  
BAILLIE.

The presenting an additional case, stating matters which occurred subsequent to the appeal, is contrary to practice and to principle: The action of divorce and the action for damages are distinct processes pending in different Courts. If the Appellant had reason to object, as she did in the action for damages, against the introduction of the case and process in the Consistorial Court, the Respondent has equal reason to exclude the verdict and process in the Jury Court. The verdict of the Jury would have been inadmissible as evidence in the action for divorce. The Jury Court Act virtually excepts Consistorial Cases from its operation. If the verdict itself be excluded, the evidence on which the verdict was given is *à fortiori* excluded.

On the 23d of May 1821, the judgments of the Courts of Commissaries and of Session were affirmed without observation.