other words of this section, and accordingly we find it goes on to provide that where in the opinion of the Magistrates it would be for the public convenience that any such carriage-way . . . should be made-up, constructed, and put into a state of temporary repair, or should be made-up, constructed, causewayed, or paved, the Magistrates and Council may by notice require the owner of lands and heritages in any such private streets, or such part thereof, in the case where houses or permanent buildings have not been erected on three-fourths of the ground fronting such private street, to make-up, construct, and put into a temporary state of repair, or in the case where houses or permanent buildings to the extent aforesaid shall have been erected, to make-up, construct, causeway, or pave the same to their reasonable satisfaction; and then comes the alternative that should the owners neglect to execute the necessary work after notice has been duly given to them, then the Magistrates may get the work executed and recover the costs so incurred. Now, taking the language of this section in its application to the present case, if the private street shall not have been made-up, constructed, causewayed, or paved, or shall only have had these operations partially performed, then as buildings have not as yet been erected upon three-fourths of the ground, all that the owners can be called upon to do is to execute a temporary repair till that amount of ground is built upon, to enable section 119 to be acted upon.

Does, then, the case provided for by section 120 arise here. On that matter I quite agree with what the Lord Ordinary says in the part of his note which deals with this point. The question is not whether a road of the best possible construction had been made originally, but whether a road or street was made-up, constructed, causewayed, or paved within a fair meaning of the 119th section. On that matter I am satisfied with the evidence of those who made this road, that it was a proper and sufficient road for the requirements of the feuars at the time when it was constructed. No doubt at the time when the attention of the pursuers was drawn to the condition of this road in 1878 and 1880 it had been cut to pieces by heavy traffic, and had been reduced to what one of the witnesses describes as a quagmire, and no one looking at a quagmire could tell whether it had ever been a made-up and constructed street. But this state of matters was not one for which the owners of the lands adjoining it were responsible, or can be made answerable, because they were not under any obligation to maintain this street for the purposes of facilitating building traffic upon ground lying beyond their own. Or, again, if this road came to be cut to pieces through the passing over it of a large general traffic, I do not see how the feuars can in any way be called upon to maintain and uphold it as they are now called upon to do by this action. Besides, it is specially provided under section 122 that the Magistrates may, in the case of private streets open for public use, make such temporary repairs as they may deem necessary, and such repairs they are authorised under section 123 to provide for out of the public rates. On the whole matter, therefore, I entirely agree with the Lord Ordinary both in the view he takes of the facts and also upon his construction of the statute.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuers—Comrie Thomson—Boyd. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defender — Trayner — Young. Agent—Party.

HOUSE OF LORDS.

Thursday, March 6.

(Before the Lord Chancellor, Lord Watson, and Lord Fitzgerald.)

MACKIE *v.* HERBERTSON AND OTHERS (GLOAG'S TRUSTEES).

(In the Court of Session, March 9, 1883, *ante*, vol. xx. p. 486, and 10 R. 740.)

Succession—Donation—Husband and Wife—Provisions in Antenuptial Contract for Child of Previous Marriage—Jus crediti.

A widow having children by her first marriage entered into a second, in contemplation of which she, by antenuptial contract with the second husband, conveyed to trustees her property, heritable and moveable, for behoof of herself in liferent only, excluding the *jus mariti*, and for behoof of the children "procreated or to be procreated" of her body in fee, in such proportions as she might appoint, or failing such appointment equally. The trustees were infeft in the heritable property thus conveyed, and they entered into management of the estate. There were no children of the second marriage, and the wife died leaving a settlement by which she affected to exercise the power of appointment and deal with her whole property. By this settlement she left only a small legacy, payable, in the discretion of her trustees, to one of the children of the first marriage. *Held* (*rev.* judgment of Second Division) that the marriage-contract conferred upon the children of the first marriage a *jus crediti*, and was not *quoad* them a merely testamentary provision, and therefore that their mother could not by her settlement defeat this child's claims under it.

The facts of this case are fully detailed *ante*, vol. xx. p. 486.

William Cross Mackie, the pursuer, appealed to the House of Lords *in forma pauperis*.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is a case which depends entirely upon the true and proper construction of a marriage-settlement dated the 12th of December 1855. It is not in dispute that it was in the power of the lady to whom this property belonged, and who beyond all doubt conveyed it in trust by that marriage-settlement, to make a good title by gift to living persons, whether those persons were within the consideration of marriage, strictly speaking, or not, provided that she intended it to be an irrevocable gift, and took the proper means for giving effect to it. Nor do I understand it to be at all in dis-

pute that such a conveyance by such a trust as this, to trustees upon trusts declared, subject to their proper construction, might have been effectual for the purpose of immediately vesting the property in the persons indicated by the words declaring the trusts in an irrevocable manner, provided that an intention to do so could properly be collected upon the true construction of the terms of the instrument.

Now, the propositions, as I understand them, upon which the judgments in the Court below depend are in substance these—That according to the true construction of this instrument, having regard to the manner in which the consideration of marriage is viewed by the law of Scotland, there is, as it was put by the Lord Advocate, a gift of one kind, and with one class of legal incidents, to the future children of the then intended marriage, giving them a *jus crediti*, and a gift of another kind, with another class of legal incidents, to the children already born of the lady, which is revocable and testamentary. Of course, my Lords, if there had been words drawing that line between the two classes of children, or if the nature of the interests given to them had been such that, being ascertained by construction, the law of Scotland would have regarded them in those two different lights, in that case no doubt the judgment given in the Court below might have prevailed. But, as it appears to me, our first duty is to construe this instrument, and no authority has been cited, nor, in the absence of authority, can I conceive of any principle, why because the instrument is a marriage-settlement it should not take effect according to the intention to be collected from its terms upon those principles of construction which ought properly to be applied to those terms as they stand in the deed. Well, as I have said, as far as the form is concerned, and as far as the conveyance to the trustees is concerned, there is nothing wanting in this deed which is requisite to make a complete and a perfect title immediately effectual for the purposes of the trust. There are certainly no words indicating an intention that any part of it should be revocable, either on the footing of power or on the footing on which all testamentary instruments are revocable. There is nothing to show that this was to be testamentary; and I cannot help pausing to observe that the argument on the other side really requires that it should be regarded as testamentary and not as a reserved faculty or power independently of property.

My Lords, the form being admitted to be amply sufficient for the purpose, if according to the true construction the instrument has that effect, we must look at the words and see what they mean. There is first of all a declaration that "the subjects are to be held in trust for the ends, uses, and purposes following." The first purpose is "for behoof of" the lady, "in liferent for her liferent alimentary use of the annual proceeds thereof allenarly." That is perfectly intelligible, and disposes of the whole usufruct and beneficial interest during her life, Then there is a renunciation of the *jus mariti*, which I assume, with the majority of the Judges in the Court below, to be a complete renunciation as to the *corpus* of the trust-estate, and not as to the income during the wife's life only. Therefore we have the whole period of the wife's life provided for by giving her a life interest inalienable for herself alone, and no more than a life interest; and though I do not at all mean to say that if the true result in point of construction or of law had afterwards been to show that she was to have more than a life estate, the use of the word "allenarly" would have prevented its operating accordingly, yet, on the other hand, so far as intention is concerned, I conceive this to be an indication that she was meant to have, not the fee but a life estate, and that life estate as a burden upon the fee. Then it goes on, "and for behoof of the children procreated, or to be procreated of the body of the said Mrs Helen Campbell or Mackie, in such proportions and on such terms and conditions as the said Mrs Helen Campbell or Mackie may appoint by a writing under her hand, which failing equally among them, share and share alike, and their heirs and executors whomsoever in fee,"—words completely and absolutely sufficient to carry the fee to the class of children there described, of whom two were then in life, namely, those who were already born of the previous marriage.

We are now dealing with the question of intention as discoverable from the words of the deed; and to me it is as plain as anything in the world can be that the intention was to make of all the children a single class, which class were to take equally among them, share and share alike, subject to a power of appointment, which, if exercised in good faith, might be exercised so as to give the members of that class, whether of a former marriage or of the present marriage, such shares as the mother might think fit. To my mind anything more absolutely inconsistent with the intention discoverable from these words than the suggestion that some of them were to take vested interests as they came into existence, in the nature of a *jus crediti*, and that others were to take nothing at all except subject to the testamentary power of the wife, is inconceivable. How could they possibly take *modo et forma*, as those words direct, without taking equally among them share and share alike? Can any intention possibly be made clearer by words than the intention expressed by these words that they should form a single class, and for the purpose of the succession to their mother in this property stand *pari passu* equally *inter se* except so far as she—not in favour of anybody else, but in favour of some of the members of that class—might think fit to create inequality? Therefore, if it is to be regarded as a question of intention discoverable from the words of the deed, I cannot see how there is any room whatever for serious doubt or question as to the intention; and it being admitted that all the conveyancing part of the operation is amply sufficient to vest the fee, subject to the mother's liferent—two of the members of that class having been in existence at the time when the thing was done—and it being admitted that it could be legally done, I am wholly unable to understand on what grounds it should be held not to have been legally done.

But, my Lords, the argument seems to be this—that this is a marriage-contract, and that when you are dealing with a marriage-contract the law recognises, without more, the consideration of marriage as extending to the spouses and to the children or issue to be procreated of that marriage, and that all the provisions for any other persons,

whether children of either of them by any other marriage or not, are outside the marriage consideration. But how does that proposition tend to alter the construction of the words of the contract? Is there any law which says that because it is a marriage-contract, and because the previously born children are outside the matrimonial consideration as such, therefore a deed conceived in apt and proper terms and form, with a plain intention that they should take *pari passu inter se*, is not to prevail? My Lords, no principle has been stated for that, no positive rule of the law of Scotland, and no authority. The cases which were cited by Lord Fraser I will not comment upon at length, but they seem to me to furnish not a vestige of authority for such a construction of these words. In the only one of those cases in which the words were at all similar, namely, *Clayton* v. *Lord Wilton* (and singularly enough Lord Fraser treats them as if they were not similar) the decision was in favour of the child of an earlier marriage, and not against that child. Nor is there anything in the *dicta* of any of the learned Judges which seems to me to shew that the idea prevailed with them that upon such a marriage-contract, if the intention was to put the children of two classes on an equality and to make them into one class that intention should not prevail. Of course, my Lords, if there were a rule of law to that effect the proposition advanced by the Lord Advocate that there should be no levelling up without a clear indication of intention, might possibly be true, but I can only say that if that proposition is to be regarded as applicable here at all, I do find that clear indication of intention. What possible indication of intention to level up can be clearer than that which in express terms puts the postponed members of the class upon a footing of absolute equality with those who otherwise would be the preferred members of that class.

My Lords, I really do not think that I need make any further observation upon the case than this, that if any English authorities were fit to be regarded in a question of this kind as to what is and what is not within the consideration of the contract, I think the case of *Newstead* v. *Searle*, and the case of *Clayton* v. *Lord Wilton* would be very much to the purpose. *Newstead* v. *Searle* was a case of this kind—there was a marriage contract, and there was a gift in remainder to the existing children of a former marriage, subject to letting in those who might afterwards be born of the intended marriage; and when they came into existence the state of things would be such as we have here. Upon those circumstances Lord Hardwicke, a very great judge, entertained no doubt that the considerations of the contract included the earlier children, because their interests and those of the children of the marriage which afterwards took place were so dealt with that it was plain that the stipulations for those children who were within the marriage consideration were dependent upon the agreement that the others should take as they did. The children within the consideration were to take upon certain terms; and without giving them either more or less than that which the contract gave them, one could not disappoint the others. Exactly the same was the principle of the case of *Clayton* v. *Lord Wilton*, though the form in which the question was raised was different, because it was a limitation by way of remainder occurring after a gift to those who were within the consideration of marriage, and before another gift to those who were in the like situation.

My Lords, I should hesitate very much to rely upon English authority in any case in which there was really Scotch authority to the contrary, even when the matter decided in the English cases was upon a point which in reason must be common to the jurisprudence of all countries, namely, whether a particular consideration does or does not extend to particular persons. The considerations of the contract, though founded on marriage, must, I apprehend, extend to all the terms of the contract on which depend the interests of those who are within the consideration of marriage, and when they take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then, not the matrimonial consideration properly so called, but the considerations of the mutual contract, extend to and comprehend them.

The only other point which I need notice at all is this, that it was suggested in the argument, and seems, I think, to have been thought by some of the learned Judges in the Court below, that whatever might have been the view of the case if there had been children born of this then intended marriage—the second marriage—yet that it is different when there are none. Now, I apprehend that upon the construction of this deed, its effect and operation must be determined at the time when it was executed, and not according to the course of subsequent events. If, indeed, it had been expressed thus (as I put it in argument to the Lord Advocate)—"After the life interest of the wife, subject thereto, to the wife in fee, provided that if any child shall be born of the marriage, then the same shall be for the children of both marriages,"—then the children of both marriages would only have taken if that event had happened. When that event did happen, then I take it the position of things would be very much the same as it is now, but if that had been the case I agree that if the disposition in their favour was to depend upon the consideration of there being a child born of the second marriage, they would have taken nothing if no such child had been born, and of course the mother would have had the property in the meantime. But those are not the words of the deed, and without the greatest violence to all principles of construction your Lordships cannot, I think, interpolate any such words into the deed. Taking the deed as it stands, there were living persons, children of the first marriage, who were to be members of the class which was to comprehend children of the second marriage, if born, and who were capable of taking, and in my opinion did take, a beneficial interest in the fee. There is nothing testamentary, there is nothing to make the interest revocable, and consequently I must move your Lordships that the appeal be allowed, and that the interlocutors pronounced in the Court below be reversed.

Lord Watson—My Lords, I cannot agree in this case with the result at which the Lord Ordinary and the majority of the learned Judges of the Second Division have arrived; but at the same time I am not inclined to find fault with the exposition which they have given of the

general principles of law applicable to the construction of clauses of a certain kind occurring in a marriage-contract. On the contrary, I think that the error into which they have fallen arises from their having brought within the scope of these principles a case which does not fall to be ruled by them.

The general rule of law is, I think, very clearly laid down by Mr Erskine in his work, b. iii. tit. 8, par. 39, where, viewing the side of the husband, he says—"The father lies under no degree of restraint in favour of the substitutes who are called by the marriage-contract after the issue of the marriage, and who acquire no right by such substitution;" and the learned author then goes on to explain the considerations upon which that rule rests. "For," he says, "no contract can have effect beyond the interest of the parties contracting; and the wife and her relations, who are the only contractors with the husband, are not interested in succession except in so far as it is provided to the wife's issue."

At the date when Mr Erskine wrote, the introduction of the machinery of a trust into a marriage-contract was scarcely known; and his observations plainly refer to the usual form in which marriage settlements of land were made in those days, destining the settled estate to the institute, the heir of the marriage, and failing that heir to substitutes who were not within the family. But it was found in course of time that certain inconveniences resulted from that form of settlement, because it left the parents fiars, and so exposed the fee which was destined to the children of the marriage to eviction at the instance of creditors and onerous assignees. Accordingly, the machinery of a trust was introduced, which divested the parents of the fee, and had the twofold effect of protecting the estate of the fiars absolutely and also enabling the spouses to attain what they had had some difficulty in effecting before, namely, giving the wife an alimentary provision out of the estate which truly belonged to herself, and excluding from that the diligence of her own creditors.

Now, after that device of a trust was generally adopted, the Courts still continued to construe clauses occurring in a trust-deed in the same manner as they had previously construed clauses in a destination; and although the trust existed they held that it had been constituted and existed, and must be so read, except when it clearly appeared to the contrary, as having been constituted simply for the purpose of protecting in the meanwhile the interests of the wife and of the children of the family; but they held that provisions made by the wife in favour of strangers, which in an ordinary unilateral deed of destination, or in a marriage-contract, would be construed as testamentary, ought not to be interpreted in any other sense when they occur in a disposition of trust constituted for the purpose of a marriage-contract. The rule has in this case been extended by the Court quite beyond the scope of the doctrine of Mr Erskine. These children of the second marriage in the present case are not, in any sense of the word, substitutes—it is a most inaccurate expression to apply to them; and certainly the word "substitute" as used by Mr Erskine could never apply to or comprehend such a case. They are institutes in this case; they are not even conditional institutes, taking upon the failure of the children of the marriage in immediate contemplation; they are institutes taking along with the children of the marriage, at the same time, and to a great extent (for that must be conceded) on the same conditions. No doubt an attempt was made to show, by the authority of a very useful text-book [Fraser, ii. 1410], that the doctrine must be more widely extended; and three cases are referred to in a note appended to that work as supporting the doctrine which the Lord Advocate cited, and which seem to support the proposition that the principle laid down by Mr Erskine is expressed in too limited terms, and that when a provision is made not only to the children of the marriage in contemplation, but also to the children of a former marriage, the provision in favour of the one must be held as onerous and irrevocable, and the provision in favour of the other as revocable and testamentary. Now, I venture to say that of these three cases, *Macleod* v. *Cunninghame* [July 20, 1841, 3 D. 1288—*aff.* 5 Bell's App. 210], and *Edgar* v. *Johnston* [M. 3089—*aff.* May 31, 1742, 1 Pat. App. 334], have not the remotest bearing upon the principle in question, and the case of *Wilson* v. *Niblie* [Jan. 15, 1825, 3 S. (o.e.) 420], if it were an authority for anything at all (which to my mind is not at this moment a very clear proposition), is an authority distinctly against the respondents in this case.

My Lords, the case not being within the rule, the House has in my apprehension to deal with this as an ordinary question as to what is the intention of the maker of this deed. I am assuming in favour of the respondents at this moment that the lady settled this property at her own hand, and without any bargain or paction with her husband, and viewing the destination or disposition in that light, it does not appear to me to be at all doubtful that what she intended to confer upon the children of her first marriage was an estate and interest absolutely identical with that which was being pactionally secured to the issue of the marriage into which she was entering.

I entirely concur with the observations which have been made by the noble and learned Lord on the woolsack as to the point of time to which we must look in construing a clause like this. It is impossible to read it in the light of the events which have occurred. That would lead to very strange results, for in that case the same clause inserted in deeds of marriage settlement for the same purposes would be differently read upon every occasion according to what might chance to have followed in regard to the two families upon which the settlement was made. Therefore we must look at it as at the date of the marriage—as at the time when there was a possibility of issue of that second marriage—and so looking at it I do not think there can be the least doubt that it was the intention of the wife to give her children of the first marriage an estate equal in all respects in quality to that which she was conferring upon the children of the second marriage with the assent of her husband. The power of apportionment attached to the gift to the two families appears to me, if it were necessary, to make the intention still more clear.

If the case fell within the doctrine of Mr Erskine, and the principle laid down by the majority of the learned Judges in the Court

below, it would follow that the wife remained as much the fiar of what she had given to her second family as if it was property of her own as an unmarried woman, in regard to which she had executed a settlement that was in her repositories—she could revoke it at any time. But the execution of a settlement does not in the least degree affect the interest of the maker of it in his own estate; and accordingly if that be so this lady remained the undoubted owner and proprietor of these shares which she had given by testamentary bequest to the children of her first marriage if the doctrine of Erskine applies. But can it be held to be consistent with the intention of the parties to this deed that that lady was to come in herself under that power of apportionment, or that an assignee of hers was to come in under that power of apportionment instead of the children of the first marriage, or that creditors were to have the right of coming in against her expressed wish and desire, and carry off the provision which she had made for those children, making a forcible apportionment. And if they came in, what were they to take? What was she to apportion to herself, she being the owner, and what was she to apportion to a creditor or to an assignee? The two things appear to me to be utterly inconsistent; and indeed the able and ingenious argument of the Lord Advocate was put in a way which seemed to betray his consciousness of the difficulty which that apportionment clause presented, because he seemed to argue that the power given to the lady was not a power given to a person who had simply made a testament, but was a power given to a person who had actually given away the right, with the permission to take it away from one of the classes to whom she had given it and to bestow it upon another—that that was her only power.

My Lords, all these considerations satisfy me more thoroughly, if it were necessary, that the intention of the wife by this clause was to give to the children of the first marriage an absolute and indefeasible interest; and that being so, she might, before the deed was issued, and as long as it was under her control, have destroyed it, or have put an end to that right. But it is impossible, after what has taken place, and particularly after what took place immediately on marriage by the constitution of the trust, that she could recall it. Accordingly, I have no hesitation in agreeing with your Lordship that the whole of the interlocutors under appeal, beginning with that of the Lord Ordinary of the 19th of July 1882, ought to be reversed, and that the cause should be remitted to the Court below for further procedure, because I am very sorry to see that the judgment of the House will not dispose finally of the litigation between these parties.

Lord Fitzgerald—My Lords, concurring as I do in the two judgments which have just been delivered, perhaps it is scarcely excusable in me to add a word; but from the beginning, when I had read this case, it struck me that if it was a case to be determined according to the principles of English law, there could be very little doubt as to the result, and that one would necessarily arrive at the conclusion that upon the peculiar terms of this settlement the children of the first marriage come within the consideration of the marriage-contract, and it is not to be forgotten that it was a settlement which could not have been carried out without the assent of the then intended husband to the whole of it—he is an assenting party, indeed an executing party to the instrument. But I did not of course shut my eyes to this consideration, that it was a case to be determined not by English law, but by the law of Scotland, if there was any rigid rule of law requiring us to come to a different conclusion. I entirely concur in what has fallen from the noble and learned Lord on the woolsack, and from my noble and learned friend opposite upon the subject; and I am only desirous of saying one word as to the construction of the contract itself, and upon the rules which I think applicable in both countries—not the rule of English law only, but the rule applicable to Scotland also. Mr Will was in danger, as I thought, of making an admission in favour of the respondent, and I immediately wrote down what I took to be the rule of English law. I expressed it thus:—In ascertaining the intention of the parties, and the construction of the instrument, we must look to the state of facts existing at the time, or which were then possible, and not to the facts as they did afterwards occur and actually emerge. The facts existing at the time when this instrument was made were these:—This lady had an estate. She had three children by her first marriage, and there was the possible event that there would be children of the second marriage, and she proceeds to provide for those children. Applying that rule, we have to look at what is the true condition of this contract, and upon its true construction derived from the terms of the instrument itself. I can entertain no doubt whatever that the settlor intended it to be an irrevocable disposition, and one taking effect immediately, by which the two classes of children are placed, as institutes, in the same position and with the same rights, and with rights so interwoven as to be inseparable.

If that was her intention, and if that intention has been adequately expressed in the terms of the instrument, the next question is, is there any rule of Scotch law which we ought to apply so as to prevent that intention from taking effect? The Lord Advocate in his most able argument has called our attention to a great number of authorities, but he has failed to satisfy us that there is any such rule of law, and the ordinary consequence must therefore ensue, namely, that we must give effect to the intention of the party as expressed in the instrument. It is very singularly expressed, and the sequence of events is actually as I have described. In the first instance the object of the deed is to provide for pre-existing children. She does not in the first instance provide for children to be born of the second marriage. This singular instrument says, "And for behoof of the children procreated or to be procreated of the body of said Mrs Helen Campbell or Mackie, in such proportions and on such terms and conditions as the said Mrs Helen Campbell or Mackie may appoint by a writing under her hand, which failing equally among them, share and share alike." My Lords, I am not aware of any rule of law which prohibits us from giving effect to that clearly expressed intention, which, in my humble judgment, admits of no doubt whatever; and

that being the case, I entirely concur with your Lordships that the interlocutor should be reversed.

The House reversed the interlocutor of the Second Division and declared that the second plea-in-law of the defenders and respondents [viz., "the provisions contained in the marriage-contract of Helen Campbell or Mackie and John Gloag in favour of the children of the said Helen Campbell or Mackie by her first marriage were not onerous or irrevocable, and the pursuer had and has no *jus crediti* therein, and the said provisions being testamentary and revocable, the present action cannot be maintained"] ought to be repelled; Ordered that the "respondents pay the costs following on the reclaiming-note in the Court below, and such costs in this House as have been incurred by the appellant in appearing *in forma pauperis*, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments with the usual provisions for diligence in the case of non-payment, as in the case of *Mackenzie* v. *The British Linen Company* [11 Feb. 1881, 8 R. (H. of L.) 9]; the costs prior to the reclaiming-note to be dealt with by the Court below as costs in the cause;" and remitted the cause to the Court of Session to do therein as shall be just.

Counsel for Appellant (Pursuer)—Shiress Will, Q.C.—M'Clymont—C. M. Le Breton. Agents—A. Beveridge—W. Officer, S.S.C.

Counsel for Respondent (Defender)—Lord Adv. Balfour, Q.C.—Webster, Q.C. Agents—Martin & Leslie—J. & J. Ross, W.S.

COURT OF SESSION.

Friday, March 7.

FIRST DIVISION.

[Lord Lee, Ordinary.

WHYTE *v.* WHYTE.

Proof—Divorce for Adultery—Evidence of Single Witness—Corroboration.

In an action for divorce at the instance of a wife against her husband on the ground of adultery alleged to have been committed with a female servant in his house—*held* that evidence of improper familiarities by the defender towards other servants with whom adultery was not libelled was competent as corroborative of the oath of the *particeps criminis*.

This was an action of divorce on the ground of adultery at the instance of Mrs Robina Cameron Harkness or Whyte against the Rev. John Whyte, minister of the parish of South Queensferry. The acts of adultery libelled were alleged to have been committed in the manse with two of the defender's servants, named Janet Marshall and Margaret Young. The former denied ever having committed adultery. The latter swore to several acts, the last of which was on 26th April 1882. She had a child on 17th February 1883, 297 days after the last act of connection to which she deponed. In corroboration of her oath proof was led of indecent conduct by the defender towards other servants in his employment with whom adultery was not libelled. The evidence is sufficiently indicated in the opinion of Lord Mure.

The Lord Ordinary (Lee) found adultery proved with both Marshall and Young, and in his Opinion made the following remarks upon the question whether the evidence of Margaret Young was supported by corroboration where corroboration might have been reasonably expected. "But the evidence of one witness alone may be sufficient to establish adultery in a case where several acts of adultery are libelled; and I hold that this rule applies not only to the case of several acts of adultery with the same person, but to cases, like the present, of adultery with several persons, particularly where these persons stand in the same relation of servant to the alleged adulterer. It appears to me that the reason upon which one witness may be sufficient proof in the one case is equally applicable to the other; and I think the conduct of the alleged adulterer, upon other the like occasions, is relevant as affording corroboration. It has been so held in England, where one witness uncorroborated is not sufficient—(see *Soilleux* v. *Soilleux*, 1 Hagg. C. R. 373; *Foster* v. *Foster*, 1 Hagg. C. R. 144; *Taylor* v. *Taylor*, 1849, Thornton's Notes of Ecclesiastical Cases, vol. vi. p. 558). The evidence disallowed in the case of *King* (4 D. 590) was very different. For what was proposed there was to lead proof as to the conduct of the alleged paramour towards other women. In considering whether Margaret Young's story is credible in itself, I therefore think it competent and necessary to have regard to the defender's conduct towards his female servants on other occasions."

The defender reclaimed, and argued—There was no reported case in Scotland in which evidence of improper familiarities with persons other than the alleged *particeps criminis* had been admitted. The case of *King* v. *King*, 4 D. 590, had carried the law as far as it had gone in allowing evidence of facts not specially averred on record to show personal intimacy between the defender and the *particeps criminis*.—Fraser on Husband and Wife, 1154, 1161. In *Forster* v. *Forster*, 1 Hagg. C. R. 144, 152, the evidence was offered to support a plea of recrimination in bar, not an original accusation of adultery. In *Taylor* v. *Taylor*, 6 Thornton's Notes of Cases, 558, adultery was alleged to have been committed with the persons towards whom the defender had used improper familiarities.

At advising—

Lord Mure—In this action of divorce decree is sought to be pronounced against the defender for adultery with two young women, named Janet Marshall and Margaret Young, in the manse occupied by the defender in South Queensferry, and in the house in South Queensferry where the former of these women lived after her marriage. The adultery with the girl Marshall, now Mrs Walters, is charged as having been committed in 1878-79-80, and that with Margaret Young during the years 1881-82. The Lord Ordinary has pro-