arises out of this. It might have been a disposition or a bond of annual-rent, and if, as I have said, it had been the latter, this would have been quite sufficient to discharge the obligation. But this was not done, and in the bond there are no words which by the law of Scotland will convey heritage. They may imply an obligation to dispone, but they do not dispone. That essential word is not in the bond, and it is as open to repudiation now as on the day it was granted. As regards usage, the pursuers don't say they ever got more than £1000 Scots in any year. They sometimes complain that they got less; and, on the whole, I cannot say that I find in the usage anything inconsistent with the conclusion I have arrived at that the defender should be assoilzied.

Lord ARDMILLAN concurred. He had no doubt that the will bore the construction put on it by Lord Curriehill. Had a bond of annual-rent been immediately afterwards granted, Sir Alexander would undoubtedly have fulfilled the intention of the testator. Both in the decree and the bond the testament was adopted and held as the ruling deed, and therefore unless its purposes had been clearly innovated, it must still be held to be so. He also agreed that there was no room for pleas of prescription; and had it been necessary to decide that point he could not have supported the defender's contention.

The LORD PRESIDENT said he had had very great difficulty in arriving at a conclusion. He agreed that the original deed had reference to the annual payment of a certain fixed sum. The decree was the least clear of the three documents. It was not easily read. He was not sure that there was any certain reading of it, or any construction free from doubt that could be put upon it. But he was of opinion that the bond which followed rather pointed in the direction of the original will than of the decree, and that this was the more intelligible explanation of it. The delay which took place in the investment was a circumstance in favour of this construction. He was not to invest the money for some time, and the profits during the interval while the money remained in Sir Alexander's own hands, and at his own disposal, were not to be accumulated and invested along with the principal sum, but were to belong to himself. After the bond had been granted, several proceedings took place which could not be very well explained consistently with the arguments of either side. In particular, there was the letter from the defender's ancestor in 1808, as to which he had been anxious to hear the views of his brethren, because it had caused a great deal of difficulty in his mind. This letter had been founded on on both sides. On the one hand it was contended that Sir Alexander knew that unless he were secured by some such proceeding he was liable for the whole rents, and on the other that he had here come to a definite understanding and final agreement with the University as to his liability. He did not think that any such transaction would have relieved Mr Irving from any of his responsibilities. But he thought that there were other reasons which might have prompted the writing of the letter. It was admitted that the full sums due under the will had not been paid, and the writer might have been reasonably apprehensive that he might be called upon to pay over any excess of rents to make up the deficiency. It was also a fact that he had been lately taking grassums, and he could not be sure that the University might not, at all events, make some claim upon him on this account. As to the other matters he thought they were all consistent with the defender's view, although he was bound to say that many of them were also consistent with that of the pursuers.

SECOND DIVISION.

MURRAY'S EXECUTORS *v.* FORBES (*ante*, p. 93).

New Trial. Motion for a new trial (1) on the ground that the verdict was contrary to evidence, and (2) on account of an alleged *instrumentum noviter repertum*, refused.

Counsel for Pursuers—The Solicitor-General and Mr Shand. Agent—Mr Alexander Morrison, S.S.C.

Counsel for Defender—Mr Gordon and Mr Watson. Agents—Messrs Webster & Sprott, S.S.C.

The following issue in this case was sent to a jury at the last jury sittings:—

"It being admitted that on or about the 14th day of January 1859 the defender received from the said deceased Ann Murray a deposit-receipt for £320, granted by the agent of the Union Bank of Scotland at Banff, dated 5th February 1858, endorsed blank by the said Ann Murray:

"Whether the defender uplifted from the branch of the Union Bank of Scotland at Banff the sum of £320, contained in the said deposit receipt, with £6, 1s. 2d. of interest thereon; and is resting owing the said sums of £320 and £6, 1s. 2d., with interest, since 14th January 1859, to the pursuer, or any part of these sums?"

The jury unanimously returned a verdict for the pursuer.

The defender moved for a rule to show cause why a new trial should not be granted, and his motion was supported on two grounds. He said (1) that the verdict was contrary to evidence; and (2) that since the trial he had ascertained that a letter had been written by his agent to the agent of the pursuers, which would have had a most important effect on the minds of the jury. The Court refused the motion on both grounds. The defence which the defender undertook to establish was that he had paid over the money to the deceased Miss Murray; and if that defence had been proved, it was conclusive. But he attempted to prove it by the evidence of himself, his brother, and his two sisters. There was some other evidence, but it was, independent of the evidence of the defender and his brother and sisters, altogether insufficient to establish the defence. Prior to the year 1853, the evidence of the defender himself could not have been admitted, and prior to 1840, that of his brother and sisters was in the same situation. When these relaxations in the law of evidence were proposed to be introduced, it was objected that they would lead to the increase of perjury. But the answer to that argument was that the jury would always have an opportunity of seeing the witnesses, and detecting perjury when it was committed. The matter on which the jury in this case had to form an opinion was the credibility of the defender and his witnesses, and they formed the opinion that the evidence was not credible, because, if true, it undoubtedly established the defence. It was not for the Court to usurp the functions of the jury by reviewing their verdict in regard to a matter so peculiarly within their province. In reference to the other ground, *instrumentum noviter repertum* was a good ground for asking a new trial. But there were two reasons for not sustaining it in this case. In the first place, the document was not material as evidence. The utmost that can be said of it is that if it had been before the jury it would have disarmed an observation which might have been made on its absence. But, in the second place, the letter is not *instrumentum noviter repertum*. It is laid before us as it appears in the letter-book of the agent of the defender himself, and must have been known to exist at the time of the trial by the defender or his advisers.

The LORD JUSTICE-CLERK mentioned the following facts in regard to this case as proving the superiority of jury trials over proofs by commission as a means of ascertaining facts:—"The Sheriff-Substitute of Banffshire allowed a proof on 9th January 1862, which we thought it right to quash as incompetently taken. This proof was taken by commission. Forty-seven witnesses were examined; their evidence occupies 100 printed pages, and the proof was advised by the Sheriff-Substitute on 25th May 1864, more than two years after it was allowed. On the other hand, when it was resolved to send the case to a jury,

issues were adjusted on the 5th December 1865, and the trial took place on the 28th of the same month. It occupied only one day. Six witnesses were examined for the pursuer, eight for the defender, and my notes of their evidence fill only 17 pages, These facts, I think, require no comment."

WEMYSS *v.* WEMYSS.

Husband and Wife—Divorce—Adultery—Lenocinium —Condonation. Circumstances in which defences of *lenocinium* and condonation in an action of divorce held (aff. Lord Kinloch) not proved. Observations (per Lord Justice-Clerk) as to these defences.

Counsel for Pursuer—Mr Patton and Mr Dundas Grant. Agent—Mr James Barton, S.S.C.

Counsel for Defender—Mr Mackenzie and Mr Rhind. Agents—Messrs D. M. & J. Latta, S.S.C.

This is an action of divorce on the ground of adultery. Two acts of adultery were admitted by the wife; but she pleads as an answer to the action (1) *lenocinium*, (2) condonation. The fact on which these pleas were maintained, as the facts were held established by the Court, was that the husband had taken his wife up to a brothel, and had there slept with her. The explanation of that circumstance offered by the husband was that he had taken the wife to the house for the purpose of verifying suspicions which he entertained as to her conduct. The Lord Ordinary repelled the defences, and pronounced decree of divorce. To-day the Court adhered.

The LORD JUSTICE-CLERK, at advising, said—This is a peculiarly disagreeable case, both in its general nature and in the details of the evidence. But we are saved from the consideration of one part of it by the concession on the part of the defender that two acts of adultery are established against her. Her defence is confined to the special pleas of *lenocinium* and condonation. As regards the first plea, it is of great importance that we should understand exactly what the plea means, because it appears to me to have been the subject of a good deal of misconstruction. In the first place, I don't see that any light is to be derived from the cases which were cited from the law of England, where the plea of *connivance* has been stated and sustained in the consistorial courts of that country, in answer to suits of separation. That plea in the consistorial law of England is founded on the principle *volenti non fit injuria*, but the law of Scotland as to *lenocinium* is not founded upon that. I do not say that they don't resemble one another, and that practically they may attain the same end; but it is always unsafe to accept analogies of that kind. But, further, it is necessary to notice that it has been observed that the law as to *lenocinium* has changed, that under the old law it was necessary to establish that the husband had reaped gain through the adultery of his wife. That is a mistake. There is no trace of that in the old law. No doubt it is quite true that some writers mention that the argument had been maintained that *lenocinium* only holds when the husband has made *quaestum de corpore uxoris*. But they only mention it to condemn it. His Lordship then quoted from Sir George Mackenzie, remarking that the passage must be read by light of the fact that adultery in the old law was a crime, and that *lenocinium* was an answer to that. The significance of the answer was that the husband who prosecuted the wife for adultery was himself art and part in the crime. According to Sir George Mackenzie, *lenocinium* was punishable as a crime, and it was punishable as such in the Roman law under the *lex Julia*. His Lordship proceeded—That I conceive to be the law of Scotland now, and there never has been any variance. Bankton has been supposed to state an opinion in support of the proposition that the husband must make gain out of the adultery of the wife to constitute *lenocinium*. (His Lordship quoted from Bankton to show that he held the same opinion as Sir George Mackenzie.) The case of Lander in 1693 expresses the same opinion. Mackintosh *v.* Mackintosh is another authority to the same effect. These are all the authorities, and they are clear that it is not necessary to constitute the crime of *lenocinium*, or to ground the plea, that the husband should make gain from the adultery. It is not necessary to define *lenocinium*. For practical purposes in cases of this kind it is safer to keep to the general definition. But there is no doubt that when a husband is accessory to the commission of adultery, or participant in it, or the occasion of it directly by his conduct, he is obnoxious to the plea of *lenocinium*. His Lordship proceeded to apply these principles to the evidence in the case, holding that the mere fact of the husband having taken his wife to a brothel and slept with her there, did not in presence of the explanation that he had taken her there for the purpose of verifying suspicions which he himself had in regard to her conduct, set up the plea. As to condonation, his Lordship said—It is necessary for a defender in an action of divorce setting up such a plea to prove (1) that the act of condonation was subsequent to the adultery of the wife, and (2) that the act of condonation was done in the knowledge or belief that the adultery had been committed. The evidence instructs neither of these propositions, and I am therefore of opinion that both the defences fail.

Friday, Feb. 9.

BEATTIE *v.* WOOD.

Poor — Relief — Recourse — Statutory Notice — Mora. Held (1) (alt. Lord Jerviswoode) That under section 71 of the Poor Law Act it is necessary to give a statutory notice to the parish of settlement, in order to preserve recourse against it, in the case of a pauper becoming a second time an object of parochial relief, after having ceased for a considerable time to be so; and (2) (aff. Lord Jerviswoode) That the lapse of eleven years is not sufficient of itself to found a plea of *mora*.

Counsel for Pursuer—Mr Fraser and Mr Burnet. Agent—Mr John Thomson, S.S.C.

Counsel for Defender—The Solicitor-General and Mr Millar. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

This is an action by the Barony parish of Glasgow against the parish of Dailly, for repayment of advances to the wife and children of Peter Carlyle, whose settlement was in the parish of Dailly, made betwixt 1853 and 1864, and for relief from the expense of supporting them in time coming. The action was defended at first on the grounds that Peter Carlyle was not the husband and father of the paupers, and that even though he were, he had a residential settlement in the parish of Girvan. On revisal these pleas were given up and the settlement in Dailly was admitted; but it was urged that during the period from 1853 to 1864 the paupers had on several occasions ceased for some time (the longest period being twenty months) to require parochial relief, and that a new notice, in terms of section 71 of the Poor-Law Act ought to have been given to Dailly on each occasion of re-chargeability; and that this not having been done, Barony could not recover. Statutory notice was given on 24th August 1853, from which date it was sought to recover advances. The defender also pleaded that the claim was excluded by reason of *mora*.

Lord Jerviswoode repelled these defences, and decerned for payment and relief as concluded for. The pursuer had been called on to pay for the support of paupers which rightfully the defender ought all along to have borne, and must have borne, had not a ground of defence been set up and maintained which is now admitted to have no sound foundation. Dailly reclaimed, and the Court to-day altered the Lord Ordinary's interlocutor, and sustained the