Wednesday, February 14.

OUTER HOUSE.

(Lord Ormidale.)

STEWART *v.* STEWART.

Husband and Wife—Divorce—Aliment.

Where the provisions made by the husband in his wife's favour in their antenuptial contract of marriage consisted almost entirely of a liferent of the sums included under certain policies of assurance over his life (means being also provided for the keeping up of the said policies by the trustees); and when, consequently, the said provisions could not become available to the wife until the natural death of the husband,—*held* (by Lord Ormidale, and acquiesced in), that the wife, on obtaining a divorce on the ground of adultery from her husband, was not entitled to aliment from him from the date of the divorce up to and until the time when her conventional provisions under their marriage-contract became available to her.

This was an action of divorce, on the ground of adultery, at the instance of Mrs Annie Smith or Stewart against her husband William Bruce Stewart of Brugh, in Orkney. The pursuer in the action concluded for divorce in the ordinary way; and, with regard to the patrimonial rights involved, she farther concluded that it should be found and declared that the pursuer "has right to the whole dispositions, assignations, and other benefits and rights conceived in her favour by an antenuptial contract of marriage, dated 16th August 1869," entered into between the said William Bruce Stewart of the one part, and the pursuer and her father of the other, in the same manner as if the defender were now naturally dead. The pursuer then went on to specify the particular provisions of the contract (which, on the defender's side, mainly consisted of a conveyance of policies of assurance on his own life), after which her summons bore, "and in the meantime, and until the sums in the said certificates or policies of assurance shall be realised by the death of the defender, the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of £300 sterling per annum in name of aliment."

Decree of divorce having been pronounced in the pursuer's favour, it was on this conclusion for aliment that the real question in the case depended.

The defender at the date of the marriage was entitled to the free liferent of the estate of Brugh, in Orkney, the value of which was variously estimated at from four to six hundred a-year. He was also possessed of certain policies of assurance over his own life to the amount of £4500, and of a sum of £500, heritably secured. On the other hand, the pursuer was possessed of a sum of 4300 rupees, and she was secured in the sum of £1500, payable at her father's death. The terms of the antenuptial contract of marriage between the parties were accordingly as follows—The defender conveyed to the marriage-contract trustees the whole policies of assurance, amounting as above to £4500, with any bonuses, &c.; as also the principal sum of £500; as also his liferent right and interest in the estate of Brugh to the extent of £200 sterling per annum. This property was to be held by the trustees during the defender's lifetime, for payment, out of the interest upon the £500 and out of the £200 of the income of Brugh, of the premiums on the policies of assurance conveyed, the balance, if any, being paid over to him yearly during his life; and upon the defender's death the trustees were to pay to the pursuer the interest upon the sum of £500, and upon the sums recovered under the policies of assurance, as an alimentary allowance. On the other hand, the trustees were to hold her own property of 4300 rupees and £1500 for her own liferent use, excluding the *jus mariti* of her husband; and in the event of the dissolution of the marriage by the death of the defender and without issue, were to pay over the same to her so far as vested in them at the time. The only issue of the marriage died on 6th December 1870.

Under the terms of this contract of marriage it will be seen that the whole provisions in favour of the pursuer were of a nature to be contingent upon the natural death of the defender, and could not come into operation on decree of divorce being pronounced, on the ordinary legal presumption of the death of the guilty spouse. The pursuer accordingly insisted in the claim for aliment, which is contained in the conclusions of the summons above quoted.

The pursuer pleaded, *inter alia*,—"Until the capital sum payable under the certificates or polices of assurance on the life of the defender are realised by the said policies becoming claims on the death of the defender, the pursuer is entitled to aliment from the defender, equivalent to the interest which would accrue on the said capital sums, if the same were now realised in consequence of the defender's death, and she is accordingly entitled to decree against the defender for aliment during her life, in terms of the conclusions to that effect."

This claim the defender opposed, and pleaded—"In the event of the pursuer obtaining decree of divorce, she will only be entitled to her conventional provisions, and not to aliment."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 14th February* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof: Finds that by the minute No 42 of proof, the pursuer has stated that she has resolved not to take any steps for making her marriage trustees parties to this process, and has craved the Lord Ordinary to recal the sist (which has been already done), and to dismiss the action as regards all the conclusions of the summons not yet disposed of, except the conclusions for aliment and expenses: Therefore dismisses the action in regard to all the conclusions not yet disposed of, except the conclusions for aliment and expenses, and decerns: And in regard to the pursuer's conclusions for aliment, assoilzies the defender therefrom, and decerns: Finds the pursuer entitled to expenses down to and inclusive of the 22d of November 1871, when decree of divorce was pronounced, credit being always given for any sum or sums already paid to account of such expenses: Allows the pursuer to lodge an account of the expenses now found due, and remits it, when lodged, to the Auditor to tax and report: And *quoad ultra* finds neither party entitled to expenses, the one against the other.

"*Note.*—The only contested matter in this case is the pursuer's conclusions for aliment. This

conclusion has been resisted by the defender as opposed alike to principle and authority.

"There is no surviving child of the marriage.

"Besides policies of insurance on his life to the extent of £4500, the defender assigned to the marriage-contract trustees, for the benefit of the pursuer, a sum of £500, secured by bond and disposition and security; and also £200 a-year of the income available to him from the estate of Brugh; it being declared by the marriage-contract that upon the death of the defender the trustees should pay the whole free income of the £500, and the principle sums to be received under the policies of insurance to the pursuer during all the days of her life. The defender became also bound to pay the premiums of insurance, and other payments, if any, that might be necessary for keeping up or reviving the policies. These provisions in favour of the pursuer were declared to be in full satisfaction of all legal rights or claims competent to her against the defender in name of terce of lands, half or third of moveables, *jus relictæ*, executry, or in any other manner of way arising out of her marriage.

"On the other hand, the pursuer and her father assigned to the marriage-contract trustees two sums, one of £1500, payable to the trustees on the death of the pursuer's father, in lieu of all she could claim through his death, and a sum of 4300 rupees, to which the pursuer herself had right; and by the third purpose of the trust the defender, in the event of his survivance, was to have the liferent of these two sums.

"These being the provisions of the marriage-contract, subject to certain modifications dependent on contingencies, which it is unnecessary to enter upon, the Lord Ordinary cannot say that it appears to him the pursuer had any cause to complain on their inequality or inadequacy so far as she was concerned. The result consequent on the divorce is that the pursuer will, it is presumed, at once obtain, so far as at present practicable, the full benefit of the provisions in her favour, just as if the defender were dead, while the defender forfeits, and is deprived for ever of all benefit which under the contract of marriage might have been available to him had there been no divorce. The pursuer, however, not content with this result, maintains, in addition, that she is, in the meantime, and until the sums under the policies of assurance come to be realised, entitled to decree against the defender for £300 a-year of aliment. Is such a claim maintainable in the circumstances? The Lord Ordinary is of opinion that it is not.

"All connection betwixt the pursuer and defender is now at an end. She is no longer his wife; nor is she his widow. She is restored to the position she held before her marriage as her father's daughter and a member of his family; and it cannot be doubted that, if necessity required, she could enforce her right to aliment and maintenance against him and his estate like any other of his children. She is also as free to marry again as if the defender were actually dead. And her earnings and *acquirenda* of every description, whether accruing from succession or otherwise, became her own, beyond the reach or interference of the defender in any way. On the other hand, all the rights and advantages which might have arisen to the defender by virtue of his marriage with the pursuer have, in consequence of the divorce, been cut off and lost to him for ever. His *jus mariti* no longer exists; his right of courtesy is gone; and he cannot now claim or acquire any funds or estate accruing through his marriage with the pursuer. Not only so, but the defender continues bound and liable for all the conventional provisions he undertook in favour of the pursuer.

"In this state of matters the Lord Ordinary must own that he has been unable to understand how the pursuer's claims for aliment against the defender can be sustained, either *jure naturæ* or on any other principle. She might, if she had pleased, instead of divorcing the pursuer, have obtained decree against him for separation *a mensa et thoro;* and if she had done so she would have obtained a suitable aliment, just because she would have in that case still continued to be his wife, and to retain his name and status; and because he, on the other hand, would still have continued to retain all the pecuniary advantages—such as his *jus mariti* and right of courtesy—accruing to him as her husband. But the pursuer, although she has resorted to and obtained the remedy of divorce against her husband the defender, is not content with the known and well established consequences of such a remedy, but also, by her present claim for aliment, attempts, in addition, to enforce against him what would have been her right under a decree for separation *a mensa et thoro*, or, in other words, attempts to enforce against the defender, although he is no longer her husband, a claim for which no liability could, in the Lord Ordinary's opinion, attach to him except in that character.

"Nor does the Lord Ordinary think that the pursuer was successful in showing that there is any authority to support her claim. The Lord Ordinary understood, indeed, to be conceded that there was no such direct authority; but several cases were cited as tending, as it was said, indirectly and inferentially to aid her plea. On examination, however, of these cases, the Lord Ordinary cannot say that they appear to him to afford any material assistance to the pursuer. (1) The case of *Craigie* v. *Craigie*, March 11, 1837, 15 S. 836, can scarcely be relied on as an authority in favour of the pursuer, for there the claim for an aliment was refused by the Court, on the ground, no doubt, that the lady (pursuer in that case) declined a proof that the defender, her divorced husband, had any means or estate out of which aliment could be awarded. But, while that was held to be sufficient for the decision, it does not appear from the report that any expression of opinion fell from the Court favourable to the principle on which the pursuer here places her claim; and, indeed, it does not appear that in the case referred to any contest or dispute was raised as to the abstract right of an innocent wife who has divorced her husband to a claim of aliment against him. The defender in that case seems to have been satisfied to plead that he was himself in a state of destitution, and so unable to give any aliment supposing he had been liable for it. And this plea was held by the Court to be of itself sufficient to entitle him to absolvitor, seeing that the pursuer declined to undertake to controvert it by proving that it was ill founded in fact. (2) The case of *Hobbs or Baird* v. *Baird or Munro and Husband*, February 22, 1845, 7 D. 492, is that of a widow suing the heir-at-law of her deceased husband, and has no bearing on such a case as the present, where the pursuer's late husband is still alive, and where consequently she is not and cannot be in any proper sense his widow. It is a mistake to conclude from the expression that the rights generally of an innocent wife, who has

divorced her offending husband, accrue to her as if he were naturally dead—that she is entitled to all the rights which might be available to her as a widow. The expression has come into use as a compendious and convenient one, and, in the general ease, a sufficiently accurate one, but it cannot be allowed, and the Lord Ordinary does not suppose it has been ever held to denote that a woman whose husband is still alive is to be treated as a veritable widow, and entitled to all the rights and privileges of one. She could not, for example, have a right to mournings as the widow of her deceased husband. (3) The case of *Thom* v. *Thom*, June 11, 1852, 14 D. 861, is peculiar, and does not, as the Lord Ordinary reads it, touch the present. There the full right of liferent claimed by and sustained in favour of the innocent husband, in place of being divided with the offending and divorced wife, was held to have vested in the husband before the dissolution of the marriage by the divorce, and it was undoubtedly one of the conventional provisions secured to him by the antenuptial contract of the parties, in respect of which he contracted the marriage; but in the present case the pursuer's claim for aliment, maintained as it is on the footing of the defender being dead, and of her right to be treated as if she were his widow, could not possibly have been vested in her before the dissolution of her marriage, and, unquestionably, was not one of her conventional provisions. And (4) In the case of *Beattie* v. *Johnston*, February 5, 1867, 5 Macph. 340, the only point determined having any bearing on the present is that the innocent wife was entitled at once, on the dissolution of her marriage by the divorce of her husband, to the benefit of her conventional provisions, in respect of which the marriage was contracted by her. But here, as has been already remarked, the pursuer does not and could not contend that her claim for aliment is one of the conventional provisions in respect of which she contracted marriage with the defender.

"It was also contended by the pursuer that she is at least entitled to an aliment from the defender while and so long as the sums in the policies of insurance cannot be realised by his actual death; or, in other words, that as it was his fault that his estate has been so left on the dissolution of the marriage by his divorce that the pursuer's provisions cannot be immediately realised, he is bound to furnish her with a *surrogatum* in the meantime in the form of an aliment as claimed. The Lord Ordinary cannot say that he sees either law or equity in this contention. The pursuer may, in consequence of the dissolution of the marriage by the divorce of the defender be entitled to her conventional provisions, as those have been constituted in her favour and accepted by her in the antenuptial contract of marriage, but the Lord Ordinary knows of no authority for altering and enlarging them in the way contended for. Indeed he thinks that to do so would be contrary to the principles of decision in several cases. Thus, in the case of *The Countess Dowager of Findlater and Seafield* v. *Lord Seafield* and *Colonel Grant*, Feb. 8, 1814 F.C., it was held that a widow who had married abroad, and who, in an antenuptial contract of marriage had accepted a certain provision in lieu of her legal rights under the marriage, is bound by the contract, though drawn in a foreign form, from claiming a locality terce, or aliment out of her deceased husband's estate situated in Scotland,—the Judges remarking, according to the report, that "there was no case on record where aliment had been given by the Court where there was an antenuptial contract. Such a deed settled irrevocably the rights of parties, and it was dangerous for the Court to go against it.' In *Cunninghame Fairlie* v. *Cunninghame Fairlie* (June 15, 1819, F.C.) it was found that under an entail excluding terce, but allowing a certain provision to wives and husbands, a wife who had divorced her husband was not entitled to terce or aliment, or to more than the provisions allowed by the entail even during the life of her husband. In the case of the *Earl of Elgin* v. *Ferguson*, Jan. 26, 1827, where a lady, the presumptive heiress of entail in two estates, was in 1808 divorced for adultery, and she succeeded to the estates in 1822, whereupon her former husband raised an action concluding for possession of these estates, or for an additional tocher stipulated in the marriage-contract to be paid on her succeeding to the estates, and for relief of certain provisions which he had made to the children of the marriage in reliance on this succession, the Court held that he could take no benefit, direct or indirect, from the wife's estate after the decree of divorce, and that he had no claim for damages against her. And in *Donald* v. *Donald* (March 11, 1864, 2 Macph. 843) although the question arose in circumstances different in some important respects from those in the present case, there were indications of opinion by the Court adverse to the principles of the pursuer's claim. Lord Jerviswoode, as Ordinary in the case, stated in the Note to his judgment (which was affirmed) among other things, that, 'In the case of husband and wife, the obligation of the former is to afford aliment to the latter by force of the matrimonial tie, and by that only, but if that tie be severed by a final judgment the Lord Ordinary is unable to see grounds on which the divorced spouse can demand such aliment from him from whom she has thus been completely separated. The band is broken.' And in affirming Lord Jerviswoode's judgment it does not appear that anything fell from their Lordships of the First Division of the Court to the effect of there being any doubt of the soundness of the views which had been expressed by him. Mr Bell, again, in his Principles (S. 1545), while he states what the rights of a wife are in regard to aliment, and that she is entitled to such in the case of her husband's desertion or judicial separation, and during the dependence of an action of divorce, makes no allusion to such a case as the present. And Mr Fraser (Domestic Relations, vol. i, p. 442) says expressly, as the result of his researches, that 'if the parties be divorced, all obligation to aliment the wife ceases.'

"The Lord Ordinary has therefore been unable to come to the conclusion that the pursuer's claim for aliment in the present case is maintainable either on principle or authority. He thinks, on the contrary, that it is opposed alike to both.

"In regard to the question of expenses, the pursuer was of course entitled to them down to the date when decree of divorce was pronounced in her favour; and so far no dispute was raised. And as to subsequent expenses, the defender stated that all he asked was, that neither party should be found entitled to any, and the Lord Ordinary has so found. The pursuer could not well insist for anything more favourable to her, seeing that since the date of the divorce she has been wholly unsuccessful."

In this interlocutor the pursuer acquiesced.

Counsel for the Pursuer—Solicitor-General and Marshall. Agent—William Kennedy, W.S.

Counsel for the Defender—Watson and Rutherfurd. Agent—William Milne, S.S.C.

Wednesday, February 28.

FIRST DIVISION.

JAMES LEITCH LANG *v.* JULIA DOWNIE AND OTHERS.

Process—Multiplepoinding—Consignation.

Where an action of multiplepoinding of executry funds was raised in name of the executrix as holder, while the funds were actually in the hands of her agent, who had undertaken a certain obligation to the cautioner of the executrix and also to parties having a claim against the funds:

Held that, the actual holder having been sisted as a party to the action, it was competent to ordain him to make consignation in the hands of the Clerk of Court, reserving to him all claims of lien which he might have in respect of his obligation or otherwise.

Counsel for the Appellant—Macdonald. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for the Respondents—R. Johnstone. Agent—J. B. M'Intosh, S.S.C.

Saturday, February 24.

SECOND DIVISION.

LORD ADVOCATE *v.* JAMES DRYSDALE.

Teinds—Inhibition—Tacit Relocation—Bona Fide *Perception.*

A lease was granted by the Crown to certain proprietors, for themselves and in trust for the whole other vassals of the Lordship of Dunfermline, of the teinds and feu-duties of their lands, in consideration of a *cumulo* tack-duty of £100. This lease expired on 23d March 1780; but it was admittedly continued by tacit relocation till 1838. In May and June of that year the Crown raised and executed an inhibition of teinds, and also obtained decree in an action of removing, putting an end to the lease as at 23d March 1839, so far as it related to subjects other than teinds. Thereafter the beneficiaries under the lease paid the feu-duties due from their lands to the Crown; but no teind duties were paid or claimed till 1868.

In an action at the instance of the Crown as titular, against one of the vassals of the Lordship of Dunfermline, for payment of arrears of surplus teinds since the date of the inhibition, *held* that the defender had at least a colourable title, sufficient to sustain the plea of *bona fide* perception. *Opinion*, that the inhibition of 1838 was inept on account of its having been too late to affect the crop of the current year; that in any case it had been derelinquished, and that the lease had thus been continued, *quoad* teinds, by tacit relocation down to the date of the action.

In this action the Lord Advocate, on behalf of the Crown, claimed various sums, amounting, exclusive of interest, to £1136, 3s. 0d., being arrears of the surplus teinds of the defender's lands of Easter and Wester Pitteuchar, due to the Crown as titular of the teinds of the Lordship of Dunfermline.

On 2d October 1783 a lease was granted by the Crown in favour of the Earl of Elgin and others, "for themselves and for behoof of the haill other vassals of the said Lordship of Dunfermline, and heritors of lands, the teinds of which, or feu-duties payable out of the same, belong to the said Lordship, and to the survivor or survivors of them and their assignees, and the heir or assignees of the last survivor," of "All and whole the foresaid Lordship of Dunfermline, and all lands, mills, woods, fishings, towns, burrows, annuairents, tenements, customs great and small, kirk's teinds, great and small, tenants' tenandries, as well of burgh as of land, teinds, farms, duties, feu-farms, teind-duties, interests of price of teinds, profits, emoluments, casualties, and others whatsoever pertaining or annexed thereto, or to the patrimony thereof." The tack-duty was fixed at £100 sterling, payable at Whitsunday yearly, and the duration of the lease was to be for nineteen years from and after the 23d day of March 1780. After the expiration of this tack, in 1799, it was admittedly continued by tacit relocation till at least 1811; but the defender averred that it continued till 1838, and the case was argued in the Inner House on that assumption. On 20th and 27th May and 10 June 1838, an inhibition of teinds, at the instance of Her Majesty's Solicitor of Teinds, was executed against the Earl of Elgin (the sole survivor of the lessees named in the tack) and the other heritors and possessors of the lands out of which the teinds were due, "that they, nor none of them, presume nor take upon them, under any colour or pretext, to lead, intromit with, take away, or dispose upon any of the teinds of the foresaid lands, liable in payment of teinds to the said commissioners as having right in manner foresaid this instant crop and year 1838, without tack, license, or tolerance of the said commissioners first had and obtained thereto."

In order to put an end to the tack in so far as it included other subjects than teinds, the Commissioners of Her Majesty's Woods and Forests raised an action of removing in the Sheriff-court of Fife against the Earl of Elgin; and in this action a judgment was pronounced deciding in effect that an end was put to the tack as at 23d March 1839, so far as it related to subjects other than teinds.

In the year 1839 a correspondence took place between the Commissioners of Woods and Forests and the agents of Lord Elgin as to a settlement of arrears of tack-duty. The negotiations were conducted on the footing that the tack was at an end at Whitsunday 1839; and in 1851 the trustees of the Earl paid the whole arrears of tack-duty due at that term, with interest thereon till 1851.

Mr Drysdale, the defender in this action, was one of the vassals of the Lordship of Dunfermline, being proprietor of the lands of Easter and Wester Pitteuchar, the teinds and feu-duties of which were included in the lease above mentioned. Since Whitsunday 1839 the defender and his father had paid the feu-duties for their lands to the Crown; but they paid no proportion of tack or teind-duties for the period subsequent to 1839, either to the Earl of Elgin or to any other person as in right of the lease.