the links for drying them. That being the case, it appeared to him that the complainer had the equally unquestionable right to land upon the place where his nets were allowed to lie. He thought it could not be doubted that the complainer was entitled to lay his nets there, and entitled to cross in order to take back the nets. Till they came to this Act of 1825, the complainer was breaking no clause or violating no right. The 14th section of this Act came in in a very singular manner. It was introduced in the form of a favour to these fishermen. Whatever its intention, it came in the guise and shape of something beneficial. It would be very cruel and not quite *bona fide* if that favour shown to them were to be turned round and made a burden upon them by creating an offence. It was not through the means of pretended donations that penalties were to be inferred in an Act of Parliament. These were the grounds on which he thought the complainer was entitled to suspension of the conviction.

Lord Neaves said he was of the same opinion as Lord Ardmillan. This enactment in the 14th section of the Act 1825, if susceptible of the interpretation given to it by the respondent, was a serious infringement of the common law rights of these parties. The complainer's business was to keep the Montrose market supplied with fish; and all he did about his nets was contributory and auxiliary to that end. These fishermen were prohibited from bringing persons across the river who had nothing to do with the fishing, to aid in some operation or proceeding not connected with the bringing in of the fish.

Lords Justice-Clerk and Jerviswoode concurred.

Conviction set aside, and suspender found entitled to expenses.

Agents for Complainer—Henry & Shiress, S.S.C.
Agents for Respondents—Webster & Will, S.S.C.

*Monday, June* 17.

MURRAY *v.* JONES.

(Before Lord Justice-Clerk, Lords Neaves, Ardmillan, and Jerviswoode.)

*Sentence—Review—Acquiescence—Contagious Diseases (Animals) Act,* 1869 (32 *and* 33 *Vict. c.* 70).

A person was convicted by two Justices of an offence against the Contagious Diseases (Animals) Act, 1869, and adjudged to pay a penalty of £10, and failing immediate payment to suffer imprisonment for thirty days, and he thereupon paid the fine. On his appealing to the Quarter Sessions against the sentence, it was objected that the appeal was incompetent in respect that the sentence had been implemented, and the objection was sustained. *Held,* in a suspension, that the Quarter Sessions had exceeded their powers in refusing to hear the appeal on its merits, and conviction set aside.

Counsel for Suspender—Millar, Q.C., and Campbell Smith. Agent—G. K. Livingston, S.S.C.
Counsel for Respondent—Solicitor-General and Johnstone.

# COURT OF SESSION.

*Friday, June* 21.

## FIRST DIVISION.

FRASER *v.* WALKER.

(*Ante,* vol. viii, p. 586.)

*Husband and Wife—Adultery—Divorce—Counter Actions—Goods in Communion*—Communio bonorum.

In conjoined actions of divorce at the instance of a husband and wife against each other, decree of divorce was pronounced against both parties. *Held* (affirming judgment of Lord Ormidale, and overruling judgment of Lord Mure in *Donald* v. *Fraser and Others,* October 17, 1871), that the wife was not entitled to one-half or any part of the so-called goods in communion between her and her husband at the date of the dissolution of the marriage by decree of divorce.

The Court having by interlocutor of 23d June 1871 found both spouses guilty of adultery, and pronounced decree of divorce against both, the cause was remitted back to the Lord Ordinary (Ormidale) to dispose of the remaining conclusions of the summons at the instance of Jane Ann Fraser against William Walker. These conclusions had for their object to enforce implement against Mr Walker of certain provisions made in her favour by post-nuptial contract, there having been no antenuptial contract between the parties. Mrs Fraser now raised a supplementary action against her late husband, concluding that in the event of her not being found entitled to the conventional provisions, she should be found entitled to terce out of her late husband's heritable estate, and also, *jure relictæ,* to one-half of the goods in communion between her and the defender at the date of the divorce.

After the case came into Court, the pursuer obtained leave to amend the summons and pleas in law in the last-mentioned action. Instead of claiming one-half of the goods in communion *jure relictæ,* she now claimed that "in respect that the society constituted by the marriage between her and the defender has been dissolved, she is entitled to a half of the goods which were in communion between her and the defender during the marriage."

It was stated for Mr Walker, and not denied, that the pursuer had no estate of her own at the date of the marriage.

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

"*Edinburgh, 9th January* 1872.—The Lord Ordinary having considered the argument and proceedings in the action at the instance of Mrs Jane Ann Fraser against her late husband, William Walker, and in the conjoined counter actions of divorce between these parties, conjoins the first-mentioned action with said conjoined actions of divorce: assoilzies the defender, William Walker, from the conclusions of the summons against him in said conjoined actions of divorce, so far as not formerly disposed of; also assoilzies Mr Walker, the defender, in the first mentioned action at Mrs Fraser's instance, from the whole conclusions thereof, and decerns: And in regard to the summons of divorce at the instance of

Mr Walker against Mrs Fraser (being one of the said conjoined actions of divorce), in respect that the whole conclusions thereof were disposed of by interlocutor of the First Division of 23d June 1871, finds that no further decree can be pronounced therein: Finds neither party entitled to expenses, the one against the other, in any of said actions, so far as not already found due.

"*Note.*—In the counter actions referred to, the parties—husband as well as wife—were by interlocutor of the First Division of the Court, of date the 23d of June last, found guilty of adultery, and on that ground divorced, under a reservation of the effect of such divorces 'on the patrimonial rights of the parties respectively;' and, by the same interlocutor, the conjoined counter actions of divorce were remitted to the Lord Ordinary 'to dispose of the remaining conclusions of the summons' at the instance of Mrs Fraser against Mr Walker—there having been no conclusion except for divorce in the summons at the instance of Mr Walker.

"The remaining conclusions in the summons of divorce at the instance of Mrs Fraser have for their object to enforce implement against Mr Walker, her late husband, of the conventional provisions constituted in her favour by a post-nuptial contract of marriage; and, in her other action, now conjoined with the actions of divorce, Mrs Fraser concludes against Mr Walker that, in the event of her not being found entitled to implement of her conventional provisions, she should be found entitled to payment and satisfaction of her legal rights of terce and *jus relictæ*, or one-half of the goods in communion between her and the defender at the date of the divorce. The defender, Mr Walker, pleads, in defence to these conclusions, that the pursuer having been divorced from him on the ground of her adultery, has no claim against him either legal or conventional; and he pleads specially in defence to the pursuer's conclusions for implement of her conventional provisions, that the post-nuptial contract on which she founds her right to these provisions having been revoked by him during the subsistence of the marriage, her claim in respect thereof is without any foundation or warrant.

"At the debate the pursuer, Mrs Fraser's, counsel did not attempt to support her claim to the alleged conventional provisions; but, on the contrary, stated that she did not insist for these provisions, explaining that the conclusion for them had been inserted in the summons merely to meet the contingency of the defender pleading, which he had not done, that her claim to the legal provisions was excluded by her conventional ones.

"In this state of matters, the controversy has turned entirely on the question—whether the pursuer has, in the circumstances, any maintainable claim to her legal right of terce and *jus relictæ*, or whether that claim is not barred and excluded by the decree of divorce which has been pronounced against her on the ground of her adultery? That this is a new question, and not hitherto the subject of judicial determination, except by Lord Mure in the case of *Donald* v. *Fraser and Others*, as afterwards noticed, was admitted on both sides; and that it is one of considerable difficulty cannot, the Lord Ordinary thinks, be well disputed.

"Where a marriage has been dissolved by divorce in respect of the adultery of one of the parties, the rule of law, generally stated, is well established to the effect that the innocent party has the benefit of all rights accruing through the marriage, whether conventional or legal, just as if the other party were naturally dead; while the latter, that is, the offending party, forfeits all benefit accruing through the marriage. It is only just and reasonable that this should be so, that is to say, that the party by whose delict the marriage was dissolved should alone suffer in regard to patrimonial rights, and that the innocent party should be saved and protected as far as possible from pecuniary loss occasioned by no fault of that party. This rule, however, is difficult of application in such a case as the present, where the contract has been broken, and the marriage dissolved, through the misconduct equally of both parties. To hold, in such a case, that an exact count and reckoning should take place, so that each of the guilty parties may be dealt with as they stood when the marriage was entered into, is plainly an inadmissible course, incapable of extrication, and inconsistent alike with authority and principle. Accordingly, it was not maintained by either party that any such course could be adopted. Neither was it maintained on either side that the question could be held to turn, in any respect, on the priority in guilt of the parties; it being assumed by both, in conformity with established law, that the date of the dissolution of the marriage can alone be considered.

"After full consideration, the Lord Ordinary has come to the conclusion that the only sound rule that can be adopted in such a case as the present, where both parties have been equally guilty, is, that the aid of the law as regards their patrimonial rights, consequent on the dissolution of the marriage, ought not to be given to either; and that they should be allowed to sustain the loss accruing to them respectively in respect of their patrimonial rights as they stood at the date of the dissolution of the marriage, a dissolution brought about by the fault of both. Nor can it be well objected to this rule, that it is calculated to operate unfairly or unequally between the parties; for under it there will not, in the general case, be any hardship or advantage on one side without a corresponding hardship or advantage on the other. Thus, while on the one hand the husband will forfeit or lose, from the date of the divorce, all the benefit which might have accrued to him if there had been no dissolution of the marriage, from his *jus mariti* and right of courtesy; the wife will, on the other hand, lose and forfeit, from the date of the divorce, all the benefit that might have accrued to her if the marriage had continued to subsist till its natural termination, from her terce and *jus relictæ*. And so in regard to conventional provisions. Neither does the Lord Ordinary think it of any consequence to say that, in the present, or any other particular case of mutual divorce, it may happen that, according to the rule now suggested, its operation would result very unequally, inasmuch as here the wife, having no heritable or moveable estate, and perhaps no prospect of acquiring either, while the husband is possessed of both to a considerable extent, the former must be left in a state of destitution, and the latter will retain and continue in the exclusive enjoyment of the goods in communion, and of the whole of his heritable estate, freed alike from terce and *jus relictæ*. That may, no doubt, be the result in the present, as it might be the result in other particular cases; but it might also as well have happened in the present, as it might happen in many other cases, that the

condition of the parties would just be the reverse; that is to say, that the husband might be left with nothing, there being no goods in communion, and no heritable property belonging to him, while the wife might have right to large heritable estate, and also the all but certain prospect of acquiring by succession and otherwise large moveable means, all of which would be left to her exclusive enjoyment, free from her husband's courtesy and *jus mariti*. All these are accidental results which cannot be provided for by any general rule, and ought not, the Lord Ordinary thinks, to be allowed to affect, far less to control, the general rule. It is better, and will be a less departure from principle, that there should occasionally be an inequality adverse to the wife, than that she should suffer no forfeiture and no hardship whatever,—for that would be substantially the result in the present case if the claims maintained for her behalf were sustained. The Lord Ordinary is unable to see that it would be agreeable to law or equity to hold that a guilty wife is to be treated as if she were innocent, merely because her husband has also been guilty. And, again, the Lord Ordinary has to observe that, although the rule he has adopted may, in the particular circumstances which occur in the present case, result more unfavourably for the wife than for the husband, that is matter of accident, and the reverse might as well have happened, while, in regard to either contingency, it may be remarked, *potior est conditio possidentis*.

"It was, however, very ably argued, on the part of the wife in the present case, that the one-half of the goods in communion to which she now lays claim, must be held, on the footing that she and her husband were co-partners as regards these goods, to have been, at the date of the dissolution of the marriage, as much hers as one of the *socii*, as the other half was his, although he may have had the power of administering the whole; and this view was supported by an appeal to various authorities. The Lord Ordinary is disposed to think that the weight of authority, as well as sound principle, is against any such view, and in favour of the doctrine that, till the dissolution of a marriage, the husband must, where there is nothing of the nature of fraud, be held to be the *dominus bonorum*, the absolute proprietor and uncontrolled possessor of what are called the goods in communion. The point is elaborately treated, and the authorities bearing on it are noticed in detail by Mr Fraser (Domestic Relations, vol. i, p. 322 *et seq.*), who also states his own opinion in terms strongly adverse to the views maintained for the pursuer, and in favour of that which the Lord Ordinary has taken to be the correct one. The Lord Ordinary does not, indeed, see how any other view could be taken, consistently with the case of *Shearer* or *Kirby* v. *Christie and Others* (Nov. 18, 1842, 5 D. 132), which was determined by the whole Court. In that case, a widow possessed of certain household furniture, bequeathed to her by the will of her deceased husband, by whom she had three children, married without an antenuptial contract a second husband, who had no property. This party contracted a debt, and a postnuptial contract was subsequently executed, whereby he renounced in favour of his wife his *jus mariti* over the furniture, declaring it to belong to her. It was held, in a question with the husband's creditors, who poinded the furniture for the debt, that the renunciation of the *jus mariti* was to be regarded as a *donatio inter virum et uxorem*, and consequently revocable at the pleasure of the husband, and thus that the wife could not effectively take the furniture from the creditors of the husband, but that they were entitled to have the matter regarded as if he had revoked. The opinion of the whole Court was taken, when judgment to the effect now stated was concurred in by nine judges. In delivering their opinions, the doctrine of *communio* was referred to, and was thus dealt with:—'We do not think that the writing founded on was sufficient to vest in the wife the property of the furniture, and to exclude the right of the husband therein. The wife's original property in it had been extinguished by the marriage, by which it became the property of the husband, just as much as his own moveable property was. Both, no doubt, fell under the name of *communio bonorum*. But we cannot regard that as giving to the wife any real right of property during the subsistence of the marriage. The absolute power of use and disposal being in the husband, we must consider the goods nominally in communion as truly his, and not at all the wife's property.' And, in addition to this and various other authorities referred to by Mr Fraser, there are the more recent cases of *Wight* v. *Brown*, Jan. 27, 1849 (11 D. 459), and *Muirhead* v. *Muirhead's Factor* (Dec. 6, 1867, 6 Macph. 95), in which opinions appear to have fallen from the Court to the same effect. In the latter case, Lord Curriehill said (p. 99), 'We must guard against being misled by the manner in which the expression *communio bonorum* is occasionally made use of, from which an idea appears to have arisen that these words denote a fund forming a kind of partnership capital, of which the husband is merely the administrator for behoof of his wife and children, as well as himself. Unquestionably, the wife and children have ultimate interests of very great importance in the effects belonging to the head of the family, but during the marriage he is absolute proprietor of the whole moveable estate, with unlimited powers of administration. It is not till his death that any division of the property takes place, and that which then forms the subject of division is his executry estate, one-third of which belongs to the widow *jure relictæ*.'

"If, therefore, the Lord Ordinary be right in holding that till the dissolution of a marriage the whole moveable estate, or what are called the goods in communion, belong to the husband, the decision of Lord Mure in the case of *Donald* v. *Fraser and Others*, 9 Scot. Law Rep. p. 1, as well as the main argument employed for the wife in the present case, which proceed on the opposite assumption, must be erroneous. And it also follows that the opinions of Mr Fergusson in his work on Consistorial Law (p. 194), and of Mr Fraser (1 Dom. Rel. p. 73), founded on by Lord Mure in support of his judgment, to the effect that, in cases of mutual divorce, neither party can claim any right or interest in the estate of the other that would have been competent to him or her had divorce been obtained on one side only, in place of being adverse, is favourable to the rule which has been adopted and given effect to by the Lord Ordinary in the present case. And the Lord Ordinary observes that the opinion by Professor Moir, as given in a foot-note by Mr Guthrie in his recent edition of Erskine's Principles, in these words—'The effect of mutual guilt is not to bar the right of divorce, but to give a right to mutual divorces, the consequences of which would seem to be that neither of the spouses can claim any right or interest in the

estate of the other,'—is in accordance with the principle of his decision in this case.

"But even supposing that the true nature of the *communio bonorum* was such as the wife in the present case maintains it to be, the Lord Ordinary does not see that it would follow that her claim to one-half of her late husband's moveable estate is well founded. She has been divorced in respect of her adultery, and supposing that no guilt had attached to her husband, it is unquestionable that she would have had no claim on the goods in communion, on the ground that one half of them had all along been hers; but if so, can it make any difference, not that she is innocent, but that her husband is also guilty? The Lord Ordinary thinks that both having been guilty, and the marriage-contract and relation between the parties having been broken and brought to an end by their mutual misconduct, the claims of neither, as against the other, ought to be sustained. He has been unable to satisfy himself that Mrs Fraser, who is neither wife nor widow, nor yet the innocent party in an action of divorce, but, on the contrary, is one who has herself been divorced in respect of her adultery, should be treated as if no guilt had attached to her, and as if the marriage had been dissolved by the actual death of her husband.

"Although the Lord Ordinary has decided against Mrs Fraser, he thinks that, in the very peculiar and special circumstances of the case, neither party ought to be found entitled to expenses."

Mrs Fraser reclaimed.

Solicitor-General and Balfour, for Mrs Fraser, based her claim on the *communio bonorum*. A fund existed, viz., the moveable property of the spouses *ad sustinenda onera matrimonii*. That fund is as much the wife's as the husband's, though during the marriage, in consequence of the husband's unlimited power of disposal, the right of the wife is inoperative. The marriage being now dissolved, in such a way that neither party could plead forfeiture or personal bar against the other, the wife is entitled to one-half of that fund.

Lancaster and Macdonald, for Mr Walker, maintained that the doctrine of *communio bonorum* was little more than a fiction introduced to account for two rights—the wife's *jus relictæ*, if she survived her husband; and the right of her next kin, if she predeceased her husband, to one-half of the moveable estate. The latter right had been abolished by statute (18 Vict. c. 23), and the former had been found to be a claim of debt against the husband's executry. Nothing, therefore, remained of this supposed right of property in the wife; Erskine, i, 6, 28; *Muirhead*, Dec. 6, 1867, 6 Macph. 95, Lord Curriehill's opinion.

For a reference to other authorities, see Lord Mure's Note in *Donald*, Oct. 17, 1871, *ante*, p. 1.

At advising—

Lord President—In the conjoined actions of divorce—the first at the instance of the husband against the wife, and the second at the instance of the wife against the husband—we pronounced judgment on 23d June 1871, decerning in terms of the conclusions of both actions, and at the same time reserving the effect of the two decrees of divorce on the patrimonial rights of the parties respectively. The summons of divorce at the instance of the wife contained conclusions following upon the conclusions for divorce, by which she demanded certain conventional provisions settled upon her by a post-nuptial contract, in the same manner as if the marriage had been dissolved by her husband's death. Since our judgment was pronounced, she has brought an additional action, concluding alternatively, in the event of her not being found entitled to the conventional provisions, for what may be called her legal provisions—viz., terce and *jus relictæ*. So the summons stood when the record was made up. It has been since amended. Instead of claiming her *jus relictæ*, she now claims that, in respect that the society constituted by the marriage between her and her husband has been dissolved, she is entitled to a half of the goods which were in communion between her and her husband during the marriage. The claim for terce is not withdrawn, but the argument has been pretty much confined to the other claim in its new form—I suppose chiefly because it is the most valuable part of the claim, the husband not possessing heritable property to any great extent.

The question which is raised is one of some novelty. In the previous case of *Donald*, Lord Mure pronounced in favour of such a claim. In this case Lord Ormidale has taken the opposite view. We are called upon to consider the question for the first time. The difficulty lies in the nature of the divorce which has taken place, the decrees of divorce against both spouses having been simultaneously pronounced in one judgment, and the marriage dissolved because of the adultery of both spouses. Where the marriage is dissolved by reason of adultery or desertion at the instance of one spouse, the rule is well settled. It is stated by Stair, 1, 4, 20, "marriage dissolved by divorce, either upon wilful non-adherence (or wilful desertion), or adultery, the party injurer loseth all benefit accruing through the marriage (as is expressly provided by the foresaid Act of Parliament, 1573, c. 55, concerning non-adherence), but the party injured hath the same benefit as by the other's natural death." The injured party is dealt with as the surviving spouse. If the wife is the injured party, she is entitled either to her conventional provisions, or, in the absence of any such, to her legal provisions of terce and *jus relictæ*. But that is, of course, only when she is the innocent party, who has obtained decree of divorce against her husband. On the other hand, the guilty party can take no benefit through the marriage or through the dissolution of the marriage. The question comes to be, Whether a guilty party can take any benefit through the marriage or the dissolution of the marriage, because the other spouse is guilty also? It is not easy to see how that can be held, consistently with the rule which has been fixed in the case where one party is guilty and the other innocent. The logical consequence of that rule is, that, where both parties are guilty, neither can take any benefit through the marriage or the dissolution of the marriage. The reclaimer's counsel seemed much impressed with that view, and not inclined to insist upon what may be called the legal provisions, terce and *jus relictæ*, but advanced an argument which seemed to proceed on the fact that the marriage was dissolved, and therefore, they argued, the estate, which was held in law to belong to the spouses during the marriage, must suffer a bipartite division (there being no children). They argued that, because the society was dissolved, the goods of the co-partnery must be divided among the former partners. This argument is founded on the *communio bonorum*. I do not find it necessary in

giving judgment in this case to trace with any minute accuracy the extent to which the doctrine of *communio bonorum* has been adopted in our law. I shall only say that, in regard to its practical results, all we know of the *communio bonorum* is, that when the husband predeceases the wife the wife is entitled *jure relictæ* to one-third or one-half of the husband's moveable estate, or of his free executry; and, until the law was altered by a recent statute, that when the wife predeceased the husband and left no children, the next of kin of the wife were entitled to claim one half of that moveable estate, or, as it was called, the goods in communion. That right of the executors of the wife has been abolished by statute, whether she dies testate or intestate. So that the only practical result of the *communio bonorum*, if indeed it be a result of that at all, is the *jus relictæ*. But setting these questions aside, the question which I put is this—If this lady is entitled to one-half of the goods in communion in consequence of the dissolution of the marriage, is she or is she not taking any benefit through the marriage or its dissolution? The goods in communion, as she calls them, are nothing more or less than the personal estate of her late husband. It is not said that she had any property of her own. As to whether that would make any difference, I give no opinion. In the absence of any allegation to that effect, what she calls goods in communion is simply the moveable estate of her late husband. If, then, she is entitled to claim one-half of that moveable estate, it must be because she was his wife, and is so no longer—in other words, she is claiming it through the marriage and its dissolution, which, as a guilty party in an action of divorce, I am of opinion that she is not entitled to do. I therefore think that the Lord Ordinary is right.

Lord Deas—I arrive at the same result, and I agree with your Lordship that it is of little moment in the present question what is the precise nature of the *communio bonorum*. The rule of law laid down by Stair has been always acknowledged and acted upon, that in a divorce the guilty party loses all benefit by the marriage, while the injured party takes the same benefit which he or she would have taken had the marriage been dissolved by the death of the other spouse. That is the case where one party only has been found guilty. It has long been settled that recrimination is no bar to an action of divorce. It necessarily follows that when there is guilt on both sides, the parties must be entitled to mutual divorce; otherwise, the most unjust consequences would be produced, viz., that one of the guilty parties would be reaping advantages from the dissolution of the marriage, and the other would be losing the advantages. There is no other way to prevent these unjust consequences except to pronounce mutual decree of divorce. This was what was done in the case of *M'Intyre*, 8th December 1821, 1 S. 199. Both parties being guilty, neither is entitled to any benefit through the marriage. The question comes to be, can this lady claim the benefit which would have resulted from the death of her husband? It necessarily follows that she cannot. The mere fact that it is only by death that she could be entitled to anything is of itself conclusive against the claim. To entitle her to any benefit she must be in the position of the surviving or innocent party. If decree of divorce is equivalent to death, both spouses died at once. It seems admitted on both sides that no attention is to be paid to the question, who first committed adultery? Neither party asked a finding on that point. The decree of divorce is the only thing to be looked at. The marriage was dissolved by one and the same judgment, as if both had gone to the bottom of the sea in one ship. There is no room, on the most technical grounds, for this claim.

Lord Ardmillan—A very serious and difficult question has been raised in this case in regard to the doctrine of *communio bonorum inter virum et uxorem* in our Scottish law. The investigation of this question is very interesting, and from a wide field of Scottish and foreign jurisprudence we have had an ample citation of authorities. The dissertation by Mr Fraser on the point in the first volume of his work on the law of Personal Relations, has been particularly referred to, and is extremely able; and no one can apply to the study of the subject without deriving the greatest benefit from that dissertation. It is not, however, advisable to enter on so large a field of abstract enquiry, if the case immediately before us can be disposed of on grounds simpler and less open to controversy.

In the present case I do not think it necessary to deal with the question of *communio bonorum*. I think the case may be decided on simpler grounds. I agree with your Lordship in the chair that the effect of a decree of divorce for adultery is, that the party divorced in respect of adultery cannot claim any right or benefit arising out of the relation of marriage so terminated by divorce. This, I think, has been conclusively settled by authority, and is well understood in the law and practice of Scotland. I need not refer to the decisions on this point. They are quite conclusive.

It appears that prior to her marriage with Mr Walker, this lady, Jane Anne Fraser, had no fortune, or at least no fortune of any considerable amount. Her claim now is for her share of the property and funds said to belong to both spouses during the marriage, but not said to have been previously her own, or to have been brought by her into the mutual stock. This claim resolves into a demand for some right and interest arising to her as a wife, in respect of the marriage. Such a claim on the part of a wife divorced for adultery is not well founded.

If there had been here only one decree of divorce, and that decree pronounced against the wife, I should have had no difficulty in refusing this claim, and refusing it without entering on the interesting speculation in regard to the origin, nature, and extent of the *communio bonorum*.

But there has in this case been guilt on the part of both spouses, and there has been simultaneous decree of divorce against each of the spouses. If that decree, proceeding on the proved guilt of both spouses, is well founded as a dissolution of the marriage tie, each spouse being divorced, and each guilty, then, in disposing of this claim made by the divorced wife, I cannot do otherwise than concur with your Lordship in the opinion which you have expressed. If there can be simultaneous decree of divorce, the result must be that neither party can take benefit from the marriage.

But, to my mind, there are the gravest objections to simultaneous decree of divorce for adultery, where both spouses have been guilty.

I still retain the opinion which I have more than once expressed on the subject of divorce at the

instance of a party who is himself or herself guilty of adultery; or, in other words, on the subject of simultaneous divorce when both parties are guilty. I think that such a divorce is contrary to sound principle, both legal and moral. I am aware that in recent times it has been otherwise decided; but no decision on the point has yet had the authority of the House of Lords; and the old Scottish law was in accordance with the opinion which I have now expressed.

Marriage is the most important, the most solemn, and the most abiding of human contracts. The mutual marriage vows of adherence and fidelity are binding till death part. Marriage, therefore, cannot be dissolved by mutual consent, nor by mutual guilt.

It is a mistake to say that marriage is *ipso facto* dissolved by the act of adultery. It is not so. The act of adultery is a fact which must be proved as ground for action at the instance of the spouse who has been wronged, concluding for decree of divorce against the spouse who has done the wrong. The action rests on the marriage, and can only be prosecuted at the instance of the spouse. The marriage must be proved by the pursuer of the action of divorce; and in that action the pursuer must assume and maintain, as the basis of the action, the abiding force and sacredness of the marriage vows. The pursuer of the action must allege the contract, and the breach of the contract which is to him a wrong; and that wrong must be proved, and must consist in the defender's violation of marriage vows. The action of divorce is, in my opinion, the recognised mode of approaching the Court in seeking remedy for a wrong. The decree of divorce is the remedy which, on proof of the wrong, the law grants to an injured spouse.

In dealing with other bipartite contracts, we are in the habit of saying that one party who has wilfully violated the contract cannot claim the interposition of the law to enforce it against the other party. Both must be bound, or neither; and the more serious and solemn the contract, the more important and appropriate is this rule. If one of the spouses has broken the solemn vow of fidelity till death which was taken at marriage, and, after doing so, brings into Court an action of divorce, pleading the marriage, and concluding for decree of divorce against the other spouse, is not the pursuer of that action approbating and reprobating the contract, breaking it and seeking to enforce it, and claiming redress as for a wrong in the violation of vows already trampled on?

Put the case, by way of illustration, of two married couples living in the same street. Suppose that the husband in each home commits adultery with the wife in the other home; in other words, assume all four parties to be guilty of adultery; suppose them criminally to change partners. In such a case, shall the law interpose at the instance of both of these guilty parties, and by a decree of simultaneous divorce, recognise and sustain the arrangement, and liberate all four from the restraint and obligations of marriage in respect of their common guilt? Shall the guilt of both spouses set both free from the restraints of marriage? Each spouse has solemnly vowed to be faithful till death. Their vows are mutual: counterparts of each other. If one of the spouses commits adultery, the law gives to the other spouse, being the injured spouse, the remedy of divorce. But if both spouses commit adultery, neither of them can honestly plead the contract which both have broken, or complain of the guilt which both have incurred; and really I can scarcely understand the principle on which the law of a Christian country, rightly estimating the sanctity of marriage, can release both spouses from their mutual vows, in respect of their common guilt.

In our older Scottish authorities, recrimination was sustained as a good defence against an action of divorce for adultery. This is the opinion of Balfour ("Marriage," p. 99, and M. 339), and of Bankton (B. 1, tit. 5, sec. 6), and the opinion is in accordance with the authorities in the Roman Law. In the case of *Jardine* v. *De la Motte*, 9th March 1787 (M. 338), the Court, dealing with the question as one of pleading, and not doubting the relevancy of the defence if competently pleaded, directed a counter action at the defender's instance. In the subsequent case of *Lockhart* v. *Henderson*, 7th Dec. 1799 (M., *voce*, "Adultery," App. 1), it was found that recrimination is not a bar to divorce, and could not be pleaded as a defence in the action of divorce; but must be stated in a counter action. This has been followed by subsequent decisions, and I do not mean to doubt that, in the action of divorce, recrimination cannot, as matter of pleading, be stated as a bar to divorce.

But the point of pleading is quite distinct from the effect of mutual guilt when proved; and simultaneous divorce is not necessarily or legitimately the result of the decisions on the point of pleading. Lord Stair expressly says that "adultery and desertion do not annul the marriage, but are just occasions upon which the persons injured may annul it, and be free" (Stair, 1, 4, 7); and in another place he says, speaking of divorce for adultery, "the party injurer loseth all benefits accruing from the marriage, but the party injured hath the same benefit as by the other's natural death." (Stair, 1, 4, 20.) Mr Erskine says, in very similar terms, that "adultery or desertion do not necessarily dissolve marriage; but are occasions or handles which may be laid hold of towards obtaining a divorce," if "the injured party desire it." (Ersk. 1, 6, 43.) In another place Mr Erskine says that, for parties "to disengage themselves from the sacred tie of marriage by their own consent," would be "contrary to the first law of marriage." (Ersk. 1, 6, 45.) Both Lord Stair and Mr Erskine represent marriage as a very solemn and enduring contract, not dissolved by the act of adultery, but dissolved only by decree of divorce, and both represent that decree of divorce as a remedy to an injured spouse. Professor Bell, after stating, on the authority of the case of *Lockhart*, that "recrimination is no bar to divorce (though admitted as such in the Roman, Canon, and English laws"), adds, "but it may entitle the party first injured to have divorce preferably to the other, with all the benefits thence accruing." (Bell's Prin., par. 1535.) This is entirely in accordance with the view which I now present. It accepts the rule on the point of pleading. But it gives no sanction to decree of simultaneous divorce for mutual guilt; and the learned author suggests that the party first offending may be divorced at the instance of the party first injured, for it is assumed that at the date of that first wrong the spouse who was injured had not been guilty,—at that time there was no mutual guilt.

I understand that, according to the law of England, it is settled that a party guilty of adultery cannot obtain decree of dissolution of marriage in respect of the adultery of the other spouse;

certainly not when the plaintiff's adultery was the earliest in date.—(See cases of *Clark* v. *Clark*, 34 Law Journal, p. 94; *Joseph* v. *Joseph*, 34 Law Journal, p. 96; Brown on the Law of Divorce, p. 95.)

To my mind, there is no principle of Scottish law, and no principle of Christian morals, which can sustain the dissolution of the marriage tie in respect of mutual guilt. Against a simultaneous decree of divorce, where both spouses have been proved guilty of adultery, I humbly repeat the protest which I have on other occasions stated. When there is a decision on the point by the House of Lords, that must be conclusive. Till then, I think I am entitled and bound to state that I adhere to the old law of Scotland on the subject.

Lord Kinloch—The fact out of which the present question arises is, that, on 23d June 1871, this Court pronounced a judgment finding that both Mrs Walker and her husband had committed adultery, and on this ground granting to each a divorce against the other. This mutual divorce was granted on a principle long settled in our law, and I think wisely settled; though I consider it would be entirely out of place to bring the matter into present discussion.

Mrs Walker has raised the present action to enforce a claim of terce, and alleged right to one half his moveable estate, against her late husband. She does not say that she had herself any separate estate, unaffected by the *jus mariti*. But she says that at the date of the divorce Mr Walker was proprietor infeft in heritable property of the value of £3500, yielding a free return of £250 per annum, and of moveable estate to the amount of £10,000. From the one she claims terce; of the other the one half, as her alleged share of moveables.

The claim of terce was, as I understood, not pressed before us; and it is plainly untenable. This cannot in any view be set forward as a claim for what is her own; it is, in the most exclusive sense, a claim against her husband's estate. As a divorced wife she clearly cannot urge this claim. That he has been equally guilty with her cannot vary the matter. His guilt may prevent him from claiming anything from her estate, if she has one; it cannot give to her guilt any other than its proper legal result in regard to his.

There remains the question as to the moveable estate; and it appears to me that the Lord Ordinary takes at once a simple and sound mode of solving the question, by saying that the mutual guilt of the parties infers that neither can make a claim against the other in respect of provisions, conventional or legal, arising out of the marriage. If either has a separate estate, held independently of the marriage, the result may be different. But in regard to provisions arising out of the marriage, conventional or legal, the mutual guilt destroys all claim on either hand. If one is guilty, the other innocent, the admitted result is that the guilty party forfeits all rights arising from the marriage, and the innocent enters on these rights in the same way as if the guilty party was dead. If both are guilty, the same forfeiture of rights equally affects both. I confess that this presents to my mind the short and simple view of the whole matter, beyond which it is scarcely necessary to go.

But we have had presented to us an elaborate and ingenious argument in support of the claim to one half the moveables, to the effect that in urging this claim Mrs Walker is only sueing for her own property. It is said that during the existence of the marriage the whole moveables belonging to the spouses constitute a society or partnership stock, to which the law has given the name of *communio bonorum*; and in which, where no children exist, the husband and wife are equally interested, each to the extent of one half. When the marriage is dissolved, in any way, the wife's half, it is said, is claimable by her or her representatives, as properly her own. In the event of dissolution by the predecease of the wife, this half is, or was till a recent statute, transmitted by the wife to her representatives, on no other footing than that of its being her own. In the event of dissolution by the predecease of the husband, this same one half, still her own, goes to herself directly, under the name of *jus relictæ*. When the dissolution is by divorce on the ground of adultery by both parties, the wife is equally, as in these other cases, entitled to claim her own one half. The case of mutual guilt is the same in its result as that of mutual innocence: that is to say, it prevents either party from claiming any advantage over the other. The dissolution of the marriage works its natural effect: in other words, each party takes his and her own proper share of the goods in communion. Such is the argument of the pursuer, of which I think I am called on to make a special disposal.

In so far as the mere phrase is concerned, there can be no doubt that a *communio bonorum* is recognised by our law as existing between husband and wife in regard to their mutual moveable property. The phrase is used by our institutional writers in very many passages; and has been frequently employed by the Court in determining the mutual rights of married persons. But in the present argument we must not be led astray by a mere phrase; but must carefully inquire into what the phrase has truly signified. Pursuing this investigation, it becomes obvious that no such thing has ever been denoted by the expression as a proper partnership or society between the spouses during the subsistence of the marriage. Emphatically the reverse has been again and again held. During the subsistence of the marriage, the husband is not merely administrator, he is the *dominus*, or absolute proprietor of all the moveable estate belonging to both parties. Whatever is the wife's passes to him by an implied legal assignation, and becomes his as much as what is primarily his own. He can dispose of it at pleasure, without any accountibility. It is all liable for his debts to the very last farthing. The wife has no right of disposal to the extent of one shilling; nor can she withdraw any part from her husband's power; nor in any way interfere with his absolute proprietary right. All this is *triti juris*. It is in vain, therefore, to say that during the subsistence of the marriage a society or partnership, or anything resembling it, exists between the spouses. The wife is destitute of any right. The whole belongs to the husband. To call any part of the effects the wife's own during the subsistence of the marriage is a legal solecism.

But so soon as the marriage is dissolved by the death of either party, there arises, at least arose until the recent statute, a right to both to share in the moveable estate which previously was exclusively the husband's. When the wife predeceases, without children existing, she had, till the recent statute, a right to transmit one-half to her legal representatives. When the husband predeceases she had, and still has, a right to one-half as *jus relictæ*. These two rights include the whole of

any participation in the moveable estate ever competent to the spouses by our law. It is to the effect of comprehending these rights, and to no other effect whatever, that the phrase *communio bonorum* can ever be legitimately employed. If indicating anything more, the phrase has been illegitimately used. It has been reasonably suggested that the phrase came to be employed as a supposed philosophic exponent of the rights arising at dissolution; and that, so far from a *communio bonorum* giving rise to the rights emerging at dissolution, it was the existence of these rights which brought the phrase *communio bonorum* into use. At all events, nothing else was ever legally comprehended under that name except the two rights referred to. *Communio bonorum*, in the law of Scotland, means these two rights and nothing else.

What, then, can the pursuer claim in respect of either of these two rights, in the circumstances of the present case?

In regard to the right competent to a wife on the dissolution of the marriage by her own predecease, to transmit one-half of the moveables to her representatives, the right was finally abrogated and taken away by the Act 18 Vict., cap. 23. By the 6th section of that statute it was enacted, "When a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy, or bequest, or testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof." It is now out of the question to refer to this right on the part of a wife as arising out of the so called *communio bonorum*, or to rest any claims on its assumed existence. No such claim now exists. This one of the only two rights ever held by a wife under the name of *communio bonorum*, has been unknown to the law since the date of the statute on 25th May 1855.

The result is, that no right is capable of being claimed on the ground of the so-called *communio bonorum*, except the other of these two rights, viz., the *jus relictæ*. When the case is thus reduced to its legal points, I think it clear that all the claim by the pursuer at once falls to the ground. I cannot regard the *jus relictæ* as anything else than the right held by a widow over a certain part of her deceased husband's estate. It is the widow's provision out of that estate. The pursuer cannot claim this provision. She is not Mr Walker's widow. In place of surviving him, she is constructively dead, and his own guilt does not re-vivify her, but only makes him partner in her decease. The claim, at any rate, is one arising out of the marriage against the husband's estate. It is forfeited by her adultery. Her husband's adultery may forfeit any claim made by him. But it cannot re-habilitate her.

I think the argument of the pursuer, founded on the alleged *communio bonorum*, fails thus at all points. It is at best an argument founded on mere words, and is only successful on a *petitio principii*. The pursuer takes the words *communio bonorum*, and assumes that they imply a true and real partnership existing during the subsistence of the marriage, and she thence infers that the dissolution of the marriage, however or whensoever brought about, gives the wife one-half of the effects as her own. The law contains no such doctrine, nor any in the least supporting the claim by the pursuer. No such thing is known to our law as a division of the moveable estate of the two spouses when both are alive, which is what the pursuer demands. The law once gave a right against the husband's estate to the representatives of a predeceasing wife. It gives that right no longer. And besides this, the present claim is not by the representatives of a predeceasing wife, but by a living wife herself, a claim which never was known to the law. It still gives a surviving widow her *jus relictæ*. But the pursuer is not a surviving widow. She is a simultaneous adulteress, claiming during her life a right of participation in her husband's estate. And this, again, is a right such as the law never knew.

I have thought it necessary to go so far into this subject, because we have two Lords Ordinary expressing opinions directly opposed to each other in regard to this very matter of the *communio bonorum*, considered in its application to the present case. I think it right to state the special grounds on which I think the one of these Lords Ordinary right, and the other wrong. But I revert in the close to what I said in the opening: that it is enough to dispose of the pursuer's claim that it is a claim for something which arose to her out of the marriage, and for nothing else, and this her adultery has forfeited.

I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

The Court adhered, and found no expenses due to either party.

Agents for Mrs Fraser—J. B. Douglas & Smith, W.S.

Agent for Mr Walker—W. G. Roy, S.S.C.

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## *Friday, June 21.*

### LIGERTWOOD *v.* BROWN.

*Triennial Limitation—Act* 1579, *c.* 83—*Aliment—Bastard.*

The claim against the father of a bastard child for arrears of aliment, furnished by a stranger in circumstances which implied a contract between him and the father, *held* to fall under the triennial limitation.

This was an appeal from the Sheriff-court of Aberdeen.

On 14th September 1871 George Ligertwood, shoemaker, Ythan Bank, Ellon, raised an action against John Brown, farmer, Aquorthies, Tarves. The summons concluded for payment of £26 sterling, being the amount of aliment due to the pursuer by the defender, after giving deductions for the payments made by him to account, for aliment and maintenance of a female child, given birth to by Ann Lewas, on the 24th day of June 1850, (of which child the defender is the father), from the 19th September 1851 to the 24th June 1860, when the said child arrived at ten years of age; and also of £19, 5s. 9d., being the interest on the said arrears of aliment to 13th September 1871.

The minute of defence was as follows:—"The defender's procurator stated that the defence was a denial of being due the sums sued for, and prescription. That the defender never contracted with the pursuer to keep the child in question, and never agreed to pay him for doing so, but, on