

v. *Niven*, Nov. 8, 1880, *ante*, vol. xviii., p. 65, 8 R. 4.

Counsel for respondent was not called on.

**LORD MURE**—I do not think that there is any doubt upon this case. The claim is to be enrolled as a "joint-tenant and occupant," not as a beneficiary, as in the case of *Anderson v. Niven*. There the claim was to be enrolled as a "joint proprietor" in respect of the beneficial interest. But here it is a claim as a tenant. Now in the first place, in the valuation roll (though I do not say that is conclusive) the trustees are entered as tenants, and very properly so, for we find in the trust-deed that the "trustees shall manage the said farm of Posso and the stocking thereon for the use and benefit of the younger children other than my heir-at-law." The trustees are thus presumptively tenants. The claimant is one of the sons of the truster, and one of the beneficiaries on the estate, and he resides on the farm and manages it for the trustees, but there is no question at all that the Sheriff was right in holding that he is not entitled to be enrolled as joint tenant of the farm.

**LORDS CRAIGHILL and FRASER** concurred.

The Court affirmed the judgment of the Sheriff.

Counsel for Appellant—Brand. Agent—William Archibald, S.S.C.

Counsel for Respondent—Darling. Agents—Gillespie & Paterson, W.S.

## COURT OF SESSION.

Tuesday, November 14.

### SECOND DIVISION.

[Lord Adam, Ordinary.

**M'INTOSH v. M'INTOSH AND BLAIR.**

*Husband and Wife—Divorce—Adultery—Lenocinium.*

A husband who having reasonable grounds for suspecting his wife of infidelity, follows her and keeps a watch upon her movements in order to detect her in the act of adultery, is not barred by *lenocinium* from founding, for the purpose of obtaining divorce, on an act of adultery in which he may in this way succeed in detecting her.

*Observations per Lord Young* on the case of *Marshall v. Marshall*, May 20, 1881, 8 R. 702.

This was an action of divorce at the instance of a husband. The pursuer, William Hatt M'Intosh, a valet, was married to the defender on 29th December 1876. At the time he was a waiter, and she was a domestic servant. They cohabited as man and wife at various places thereafter, the pursuer being, however, a good deal away from his wife at intervals in the course of his duty in his various engagements. One child was born of the marriage. It appeared from the evidence that in October 1881 pursuer obtained a situation as valet to a gentleman in Stirling, and left his wife and child in a house which he had taken in Roslin Street, Edinburgh. The house consisted of a bedroom and kitchen.

Before leaving the pursuer arranged that his wife should take as lodger a clerk who was an old friend of his. This lodger occupied the bedroom. There was also living in the house a servant girl out of place, called Mary Renton, who had been invited by the pursuer. The pursuer alleged in his evidence that in May or June 1879, while he was a waiter in a hotel in North Berwick, and defender was staying in Edinburgh, he became aware that she was corresponding with the co-defender John Blair, who was a stevedore in Granton. Blair was acquainted with both the pursuer and defender, and had been introduced to the latter by the former. On 18th November 1881, the pursuer, who was then in his situation in Stirling, paid a visit to Edinburgh. What he saw of his wife on that occasion aroused his suspicions as to her fidelity. In consequence of this he asked the girl Mary Renton to come to see him in Stirling, as he wished to speak with her, which she accordingly did. He paid her expenses. According to the pursuer, she then told him that his wife had been unfaithful. He arranged to correspond with her on her return, she to let him know "if his wife was still carrying on the way she had been doing." After her return he wrote once to her, and received a reply saying that Blair had been twice staying in the house over night. He also received a letter from White, the lodger, saying he had heard a man in the house late at night. The letters were not produced. In her evidence, Mary Renton admitted the visit to Stirling, but said it was on her own affairs, and had nothing to do with pursuer or his wife, the former of whom she met there merely by chance, and that she paid her own expenses. She admitted writing to pursuer after her return. The pursuer was again in Edinburgh in the beginning of February "to see if he could find anything out of place." He did not see his wife on that occasion, and found nothing further to rouse his suspicions. His own account of subsequent events was as follows:—He came to Edinburgh again on the 18th February with an acquaintance. They saw the defender go into his house with the co-defender Blair. They went into a neighbour's house from which they could see into the lighted windows of pursuer's house, and they saw the co-defender there. After waiting in the neighbourhood for several hours, they broke into the house and found the defender and co-defender both up, but undressed, in the bedroom of the lodger, who was from home at the time. This account was corroborated by the neighbour referred to, as well as by a policeman, whose aid they had asked, and by Mary Renton.

The defence was a denial of the adultery, and (2) *separatim, lenocinium*. The account of the events of that evening given by the defender and co-defender was that the co-defender had met the defender on her way home on the evening in question after he had missed a train to Granton, and when he was much intoxicated; that he having fallen in the mud, she asked him to come into her house close by, where she washed the mud off his clothes; that thereafter she had left him sitting sleeping on a chair in one room while she went to bed in the other; that he had gone to bed in the room where he was, and had awakened and called for a drink, which defender, who had been aroused by the call, was just about to bring him when her husband burst into the house.

The pursuer concluded for damages against the co-defender.

The Lord Ordinary granted decree of divorce, and decreed for £50 in name of damages against the co-defender, with expenses.

The defender reclaimed, and argued that the adultery was not proved, and, even if it was, the conduct of the pursuer amounted to *lenocinium*. It showed a wish that his wife might commit adultery that he might divorce her. Divorce was a remedy to the injured party. *Volenti non fit injuria*.

Authority—*Marshall v. Marshall*, May 20, 1881, 8 R. 702.

Pursuer's counsel was not called upon.

No appearance was made for the co-defender in the Inner House.

At advising—

LORD JUSTICE-CLERK—In this case the Lord Ordinary is satisfied that the pursuer has made out his allegations of adultery against the defender, and I find it difficult to come to any other conclusion. It is clear that he had suspected his wife for some time. They were living apart, and he had a correspondent in the house. I abstain from saying anything one way or the other as to the general credibility of the evidence; but he seems to have had sufficient information to account for the fact of his coming to the house to see what was going on, and for having reasonable suspicions of his wife's infidelity. In these circumstances nothing more is required than what he found in his house on the final evening to lead us to support the Lord Ordinary's judgment. Of the story told by the defender and co-defender I can find not the slightest corroboration in any of its parts. The fact remains that they were found together in the circumstances described in the evidence. I am not disposed to differ from the conclusion of the Lord Ordinary.

LORD YOUNG—I am of the same opinion, and on the facts of the case have really nothing to add. Mr Campbell Smith, however, has referred to the doctrine of *lenocinium*, and to some observations of mine in the case of *Marshall*. That was the case of a man who married a prostitute, and falling himself into dissipated habits was unable to maintain her, and advised her to go back to her former calling, which accordingly she did. Then he came and asked our assistance to get rid of her. That was not a case of an injured husband coming to seek redress. My opinion never was that a husband who does nothing to encourage his wife to misconduct herself, or throw temptation in her way with a view that she should commit adultery, is guilty of *lenocinium* because he takes measures to detect her in her fault. A husband following his wife and her paramour to a distant town, or to a hotel, knowing that she goes there for the purpose of adultery, or setting detectives to catch her in the act, and thus obtaining the redress which he desires, and to which he is entitled—this is not *lenocinium*. It is taking measures to detect a guilty wife in the act, and differs entirely from the case where a wife has been induced to commit adultery by the husband for purposes of his own.

In making these observations I am only desirous to guard myself against being supposed to subscribe to any such view as that contended for by the defender's counsel.

LORDS CRAIGHILL and RUTHERFURD-CLARK concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Low—Urquhart. Agent—W. G. L. Winchester, W.S.

Counsel for Defender (Reclaimer)—Campbell Smith. Agent—Daniel Turner, L.A.

Tuesday, November 14.

## SECOND DIVISION.

[Lord Fraser, Ordinary.]

### WEBSTER v. WEBSTER'S TRUSTEES.

*Trust—Liferent Annuity—Discretion of Trustees.*

A testator directed his trustees to pay "to or for behoof of" his brother, for his personal support and subsistence only "a free liferent annuity of £52 sterling per annum . . . payable at such times and in such proportions as my trustees may from time to time direct." He gave them power, if they should consider it expedient, to retain the annuity in their own hands and to apply it as they thought best, "of which expediency, and the time and manner of exercising this power, my said trustees shall be the sole and final judges." *Held* that the trustees were bound to pay to or apply for behoof of the annuitant the whole annuity of £52 in each year, and were not entitled to retain any part of it during any year.

Andrew Webster, S.S.C., died in 1876, leaving a trust-disposition and settlement, by which he conveyed his whole estate to his widow and Roderick Forbes, law-agent in Edinburgh, as trustees for certain purposes. The second purpose of the trust-disposition provided "for payment to or behoof of my sister Jane Dobie Webster in case she shall survive me, of a free liferent annuity of £70 sterling per annum, and to or for behoof of my brother Henry Webster (the pursuer), in case he shall survive me, of a free liferent annuity of £52 sterling per annum, which annuities shall commence to run from the date of my death, and shall be payable at such times and in such proportions as my said trustees may from time to time direct; with power to my said trustees, if they shall consider it proper and expedient, to retain the said annuities in their own hands, and apply the same, or such part thereof as they may consider necessary, to and for behoof of my said sister and brother respectively, in such way and manner as to my trustees may appear best, of which expediency, and the time and manner of exercising this power, my said trustees shall be the sole and final judges; declaring always that the said respective annuities of £70 and £52 are granted to my said sister and brother for their personal support and subsistence only, and therefore it shall not be in the power of either of them to assign the annuity hereby provided to them respectively, nor shall the same be arrestable for their debts or deeds of any description whatever." The residue of his estate was left to his widow in liferent so long as she should remain unmarried.