The pursuer concluded for damages against the co-defender.

The Lord Ordinary granted decree of divorce, and decerned 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.

In this action Henry Webster sought to have it declared that "a free liferent annuity of £52 sterling is due and payable to the pursuer from the estate of the said Andrew Webster, and that said defenders, as trustees of the said Andrew Webster, ought to expend or apply for behoof of the pursuer the whole of said annuity each year as it falls due; and that the said defenders are not entitled to withhold payment of or retain said annuity beyond the year in which said annuity falls due and payable." He further concluded for count and reckoning by the trustees of their whole intromissions with his annuity, and for payment of £200 as the balance due to him.

The pursuer alleged that for several years after his brother's death the trustees had paid to him, or expended on his behalf, only £20 to £25 out of the annuity yearly, retaining the balance in their own hands, and that since the end of 1881 they had refused to pay any part of it at all.

The defenders denied that they had refused to pay the annuity. They stated that the pursuer was somewhat weak in mind, and had been irregular in his habits, and that the testator had sent him to board in Arran, where they averred they had desired him to continue to reside. They averred further that they had paid his board there for a time at a higher rate than the testator had done. They admitted that the payments made by them did not exhaust the annuity, but averred that they were sufficient, and that it was prudent to keep something in hand for contingencies. They stated that they were willing to apply such portion of the annuity as they considered necessary for the pursuer's board and maintenance, but that it was imprudent to trust him with money. They explained that he had left Arran and gone to live with a sister in Portobello on terms with which they were unacquainted.

The pursuer pleaded, *inter alia*—"(1) Under Mr Webster's trust-disposition and settlement a free liferent annuity of £52 sterling is due and payable to the pursuer by the defenders. (2) On a sound construction of said settlement, the defenders are bound to pay to the pursuer, or expend yearly for his behoof, the amount of said annuity. (3) The defenders having expended on behalf of the pursuer only a portion, and retained the balance of said annuity yearly since the truster's death, the pursuer is entitled to decree for said balances, with interest since the respective terms of payment."

The defender pleaded—"(1) The trustees having a discretionary power under the settlement to apply the whole or such part of the annuity as they consider necessary for behoof of the pursuer, in such way or manner as to them may appear best, the pursuer is not entitled to demand payment of the full amount of the annuity, or to call on the defenders to count and reckon with him therefor. (2) The defenders being, under the settlement, the sole and final judges of the time and manner of exercising the foresaid discretionary power, the present action is incompetent, and cannot be maintained. (4) It being, in the judgment of the defenders, imprudent and not for the advantage of the pursuer to pay any portion of the annuity directly to him or to his order, they are not bound, and cannot be compelled, to do so."

The Lord Ordinary (Fraser) on 13th July 1882 pronounced this interlocutor:—"Finds that the deceased Andrew Webster by his trust disposition and settlement bequeathed to the pursuer 'a free liferent annuity of £52 sterling per annum,' payable at such times and in such proportions as his trustees might direct, with power to the trustees to retain the annuity in their own hands and apply the same, or such part thereof, as they might consider necessary, and in such manner as to them might appear best,' of which expediency and the time and manner of exercising this power, my said trustees shall be the sole and final judges:' Finds that according to the sound construction of this deed the trustees must pay to or apply for behoof of the pursuer every year the sum of £52, and are not entitled to retain from him, and not to apply for his behoof, any part thereof during any one year: Finds that the truster Andrew Webster died on 21st September 1876, and that the defenders, his trustees, have not during any one year since his death paid to the pursuer, or applied for his behoof, the full year's annuity, which they were bound to do: Therefore finds and declares as concluded for in the summons, and decerns: Appoints the defenders to lodge an account of their intromissions with the said annuity since the same became payable,"&c.

"*Opinion.*—The meaning of the testator plainly was that his brother, the pursuer, should every year obtain the benefit derivable from the expenditure for his behoof of £1 a-week. No doubt ample powers were conferred upon the trustees as to the mode in which the money should be spent. It was left to them to say whether they should pay it over directly every week or every quarter to the pursuer himself, or whether they should, instead of trusting him with the money themselves, pay his rent and his tradesmen's bills. But it was not left to them to determine whether less than £52 ought to suffice for the maintenance of the pursuer, and an annuity was given to him, which means a payment of money amounting to a fixed sum of £52 each year. He settled that amount as the proper sum to be expended for his brother, and gave no power to his trustees to lessen it."

The defenders reclaimed. Argued for them—The trustees here had power under the deed to pay or accumulate for pursuer's behoof, and this contention could only be met by showing that they were retaining it unreasonably, and of that there was no averment on record—*Gisborne* v. *Gisborne*, April 17, 1877, 2 App. Ca. 300.

Argued for pursuer—The truster intended his brother to have £52 a-year, or at least to have that sum spent upon him by the trustees, and that right vested at the truster's death. The word annuity implied that the whole amount should be paid annually to or for the annuitant. The trustees had therefore no right to retain accumulate that which the pursuer was given an absolute right by the deed. The words "personal support and subsistence only" were entirely against accumulations for any contingencies such as the trustees contemplated.

At advising—

Lord Justice-Clerk—I think the Lord Ordinary has read this clause quite rightly. An annuity is given running from the date of the truster's death, payable at such terms and in such proportions as

his trustees should direct. That necessarily vests in the annuitant a right to it, in whatever way it might be paid. Then follows a clause which gives a discretion to the trustees—[*His Lordship here read the clause giving the trustees power to retain the annuity and apply it for the pursuer's behoof, quoted supra*]. That means that instead of paying it the trustees may retain it as they should think proper, and that such part so retained must be applied for behoof of the annuitant. But it is the contention of the trustees that they are entitled to retain any portion they may think proper without applying it in any way for his behoof during the year. I cannot adopt that reading of the clause at all. The right to the annuity is from the testator's death, and it is to the sum of £52 yearly. I think it is plain that the testator intended this to be an annuity, either paid or applied to the benefit of his brother each year by itself, and that there is no ambiguity about the clause at all.

Lord Young—I am of the same opinion, and very clearly so. Mr Strachan admitted, as I think he was constrained to admit, that the pursuer has under this deed a vested annuity of £52, and that it is an alimentary annuity for his personal "support and subsistence only." This is *prima facie* inconsistent with an intention of giving power to his trustees of keeping it back and accumulating it to go to the annuitant's heir, or in contemplation of the possibility of its doing so. The truster might have done that inconsistent thing, but it is not likely and is not to be presumed. He gives his trustees power to lay out the annuity for the support and subsistence of his brother if they did not trust him with the expenditure of it. Now, a truster in making such a provision for a friend or relation may say to his trustees—"If you think he can be trusted, pay it regularly from time to time, or if you think otherwise, then as much as you think fit, or none at all." There a discretionary power is given to trustees to be benevolent in a certain direction, the truster putting it within their power whether they shall or not. But that is in marked distinction from a case like the present, where a vested right is given to an alimentary annuity, and where the testator limits the power of the trustees to applying the amount specially for behoof of the annuitant.

Lord Craighill—I also agree with the opinion of your Lordship in the chair. I think this deed gives a vested annuity of £52. It is true a certain discretion is given to the trustees as to whether they shall pay the yearly amount to the annuitant or retain it to be applied for his behoof. But it is declared that the portion which they may so retain shall be applied for his benefit. They have no discretion to diminish the annuity, and in the last clause we find it said that is to be for personal support and subsistence of the annuitant. It is clear that retaining a portion from each year's annuity and abstaining from applying it for the annuitant's benefit is not carrying out the directions of this testator, for that is to withhold the annuity which he has given. I agree with Lord Young that this is not the least one of these cases where power is given to trustees to give or withhold what they think fit.

Lord Rutherfurd-Clark—I am of the same opinion. I rather imagine it would have been better in the circumstances disclosed here if the testator had allowed his trustees a larger discretion, but as we have it I think there has been given a vested right to the annuity.

Counsel for Pursuer (Respondent)—J. Reid. Agent—Frank Hunter, W.S.

Counsel for Defenders (Reclaimers)—Strachan. Agents—Welsh & Forbes, S.S.C.

Wednesday, November 15.

FIRST DIVISION.

GOLDIE (LIQUIDATOR OF GLENDUFFHILL COMPANY) *v.* TORRANCE.

Public Company — Winding-up — Contributory— Register of Members—Agreement to Take Shares.

The promoters of a limited company placed upon their provisional list of directors, and also after the company was formed upon the register of shares, the name of a person who was expected to take shares, and who had in conversations with one of their number given him to understand that he intended to take shares. He received a letter of allotment and various calls to meetings of directors, and letters intimating calls on his shares, but returned no answer to any of them. The only evidence adduced to show that he had agreed to take shares was parole evidence that he had done so verbally in conversation with one of the promoters. In the judicial winding-up of the company, *held* that the facts proved showed no completed agreement on his part to take shares, but only an intention which he had never carried into effect.

This was a note at the instance of James Goldie, official liquidator of the Glenduffhill Coal Company (Limited), asking the Court, *inter alia*, to settle the list of contributories of the said company, in conformity with a list contained in a schedule annexed to the note. In this schedule there appeared, *inter alia*, the name of William Torrance, lime and coal merchant, as the holder of 100 shares of £10 each. Torrance lodged answers in which he stated that he never applied for or agreed to take shares, and that he had never consented to become a shareholder in the company.

A proof was allowed of the averments in the note and answers, and was taken by Lord Shand. From this proof it appeared that certain coal and mineral fields in the neighbourhood of Glasgow had been leased by a Mr Robert Brand, coalmaster, Coatbridge; that Mr Brand had got into difficulties, and a number of his friends and creditors proposed to start a limited liability company to acquire his properties and mineral leases. By article 8 of the articles of association, prepared for the proposed company, the capital stock of the company was to consist of £50,000, in 5000 shares of £10 each. The company was incorporated, and began business in March 1879. 1420 shares were taken up, of which 812 were issued as fully paid-up shares, and 458 were fully paid up before the liquidation began. Several preliminary meetings were held in Glasgow in the early months of the year 1879, at which draft