his decree because he took that way, and therefore I agree with your Lordship.

The Court pronounced this interlocutor:—

". . . Sustain the second, third, and fifth pleas for the defenders: Repel the reasons of reduction: Assoilzie the defenders from the conclusions of the action, and decern."

Counsel for Pursuers—R. Johnstone—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defenders—D.-F. Mackintosh—Dickson. Agents—Ronald & Ritchie, S.S.C.

Thursday, February 25.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

BANNATYNE *v.* BANNATYNE.

Husband and Wife—Divorce—Evidence of Adultery — Witness — Criminating Question — Evidence Further Amendment Act 1874 (37 *and* 38 *Vict. cap.* 64), *sec.* 2.

Section 2 of the Evidence Further Amendment Act 1874 enacts that "no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery." . . . *Held* that it is the duty of the Court to remind a witness called to give evidence as to his own alleged adultery, of the protection afforded to him by the statute, and then to allow his examination to proceed or not according only as he expresses willingness or otherwise to submit to examination.

Observations on *Cook* v. *Cook*, Nov. 4, 1876, 4 R. 78, and *Hebblethwaite* v. *Hebblethwaite*, Dec. 18, 1869, L.R. 2 Prob. and Div. 29.

This was an action of divorce raised by a wife against her husband on the ground of his alleged adultery. One of the acts of adultery was stated on record in Cond. 5 as follows—"The defender further committed adultery with Elizabeth Gilbert, formerly a servant in a hotel in Stirling, and now residing in Bridge of Allan, in or about the months of June and July 1884, in his rooms in the Arcade, Stirling, where he had invited Gilbert to meet him."

The action was defended and went to proof before the Lord Ordinary (M'Laren). Elizabeth Gilbert was called as a witness for the pursuer. Her examination was thus reported in the shorthand writer's notes:—"*Examined*—(After being duly cautioned by the Lord Ordinary that she was not bound to answer any question tending to show that she had been guilty of adultery) . . . Defender called to see my master and mistress. He spoke to me. He spoke to me familiarly. He spoke to me again. (Q) Did the defender ever attempt any familiarities with you?—(A) Not at that time, not till he asked me up into his class-room. He attempted familiarities with me in his class-room." (The Lord Ordinary at this stage stopped the examination of the witness).

Section 2 of the Evidence Further Amendment Act 1874 provides—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

The Lord Ordinary on the whole proof found that the pursuer had failed to prove her averments, sustained the defences, and assoilzied the defender from the conclusions of the libel.

"*Note.*— . . Next, as to the charge of adultery committed with Elizabeth Gilbert, a servant in a hotel at Stirling—Gilbert was adduced as a witness for the pursuer's case, and she assented to a question put by pursuer's counsel as to whether on one occasion the defender had attempted familiarity with her in his class-room. I informed the witness that she was not bound to answer any question tending to prove adultery committed with herself, and as she did not offer to make a statement I held her excused from giving further evidence. No corroborative evidence was offered upon this charge, and I do not think that any inference adverse to the defender can legitimately be drawn from the silence of the witness Gilbert.". . .

The pursuer reclaimed, and with regard to this matter she argued—The Lord Ordinary had mistaken the law with reference to the examination of Elizabeth Gilbert. The duty to caution her had been discharged at the beginning of the examination, and on her showing her willingness to answer the questions put to her the Lord Ordinary should have allowed her examination to proceed. Leave should now be given to the defender to ask her if she was willing to dispense with the protection of the statute, and if she should appear to be so willing then the defender should be allowed to ask her the questions he had intended to ask her at the proof. The true interpretation of the 2d section of the Evidence Further Amendment Act 1874 sanctioned this course, which had received the sanction of the English Court in the case of *Hebblethwaite* v. *Hebblethwaite*, Dec. 18, 1869, L.R., 2 Prob. and Div. 29. The leading authority in Scotland was *Cook* v. *Cook*, Nov. 4, 1876, 4 R. 78.

The defender replied—The Lord Ordinary had in the course which he had followed acted according to the sound construction of the statute on the subject. He had indeed only construed the statute strictly. Under it it was clear that the Legislature intended that the witness should not be exposed to say whether she will give evidence or not, and meant to protect the witness from being put in that position by not giving her the option. The witness might volunteer ultroneously to give evidence, but that must be without invitation. The reasonable time to do so was immediately after the witness had been cautioned. That happened in *Hebblethwaite supra.*

At advising—

Lord Young—This is an action by a wife against her husband concluding for divorce on the ground of adultery, and one of the acts of adultery charged is thus stated on record, in the 5th article of the condescendence—"The defender further committed adultery with Elizabeth

Gilbert, formerly a servant in a hotel in Stirling, and now residing at Bridge of Allan, in or about the months of June or July 1884, in his rooms in the Arcade, Stirling, where he had invited Gilbert to meet him." In order to prove this charge Elizabeth Gilbert was brought forward as a witness, and after being duly cautioned by the Lord Ordinary that she was not bound to answer any questions tending to show that she had been guilty of adultery, questions were put to her, and she was brought by these questions to the *locus* of the adultery alleged on record, saying, in answer to a question—"He attempted familiarity with me in his class-room." The Lord Ordinary at this stage stopped the examination of the witness, and in his note he says—"Gilbert was adduced as a witness for the pursuer's case, and she assented to a question put by pursuer's counsel as to whether on one occasion the defender had attempted familiarity with her in his class-room. I informed the witness that she was not bound to answer any question tending to prove adultery committed by herself at the beginning of the examination." I suppose the Lord Ordinary meant to refer to the caution he had previously given her "and as she did not offer to make a statement, I held her excused from giving further evidence. No corroborative evidence was offered upon the charge."

The Lord Ordinary's opinion—plainly founded on the new Act of Parliament which has been argued before us—was that unless the witness offered voluntarily to give her evidence, in the sense of giving it ultroneously, her examination should not be proceeded with. The language of the Act is this—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding." That is copied from an English statute, and was necessary, because by a previous Act by which parties to a cause were rendered admissible as witnesses, an exception was made if they were parties in an action founded on adultery, and the words I have read remove that exception. I have now to read the part of the section which is here of importance—"Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery;" and then follows an exception with which we are not interested here.

Now, two constructions or interpretations of the words have been submitted to us, and we have heard argument on the question which of these was the true one. One construction was, that no witness should be permitted to be examined in such proceedings on the question whether he or she had been guilty of adultery; that however willing a witness may be to submit to examination on the question, the law will not allow it, nor permit a question to be put to the witness on the subject. Of course if that view is taken absolutely, I need not point out that the witness would not be competent, because a witness is not competent on a question upon which it is not lawful to put a question to him or her. But short of that it was suggested and contended that the interpretation was, that the witness might volunteer in the sense of offering ultroneously without invitation to give evidence though affecting her character, but that it would not be competent to ask her to give it—whether or not the witness was willing to submit to examination—but only that if without being asked she should say ultroneously that she was willing, then questions might be put, or the witness might, without questions being put, say what he or she desired to say without them. The other interpretation contended for was, that this was a protection to witnesses to whom adultery was imputed, that they should not be obliged to answer questions or be submitted to examination on questions put in succession on that subject.; but if the witness was willing to renounce the protection and be examined, the examination might proceed, and the evidence be good, the section being for the protection of witnesses who desired that protection and for the purpose of excluding such evidence if the witness did not desire such protection and was willing to give it. Now, I am of opinion that the latter is the true construction, and I have not been able to see that any other is compatible with the witness being admissible. I understand the suggestion that the witness is not to be exposed to say whether he or she will give evidence or not, because saying "I am not willing," or indicating in any way unwillingness, will give rise to unfavourable observation, and the intention of the Legislature was to protect the witness from being put in such a position by not giving the witness the option. But that is excluding the witness altogether. I think the true view is, that the party to the cause desiring to adduce a witness who, he is informed, can give evidence in support or corroboration of the case he makes—but the subject-matter of the litigation being adultery against that witness—shall put the witness in the box. He will only do so usually after having ascertained the witness's willingness to give evidence. It may go against the grain of the witness to give the evidence. But having ascertained that the witness is prepared to give evidence on the subject, the party puts him or her into the box, and informs the Court that this witness is in the position of having adultery imputed to him or her in this case, but is willing, it is believed, to renounce the protection given by the statute and to submit to examination. I think if I had been the Judge in the Outer House, and the witness did not plead the protection of the statute, but expressed willingness to be examined, I should have acted upon that. I should first have informed myself of the fact by evidence satisfactory to my mind, and I should have told the witness that there was an Act of Parliament which protected her against a question or series of questions being asked her involving her guilt, but that she need not plead that protection unless she pleased, and then asked her if she desired to have that protection. By that means the purpose of the statute would be satisfied, and the witness I think might be satisfactorily examined. I see no answer to that, and there is no other way of ascertaining the witness' willingness. To say that it must be given ultroneously without a question being asked is what I cannot myself sanction. I think the true alternative is in the two views urged in the case of *Hebblethwaite* v. *Hebblethwaite*, which was decided by Lord Penzance, viz., whether the evidence was admissible at all. A witness with whom adultery was

alleged was put into the box by the Queen's Proctor. Dr Spinks, Q.C., objected to the question being asked her, and argued that the words of the statute 32 and 33 Vict. c. 68, which is just precisely the same as the Scottish one, were precise and clear. It was not only that she was not bound to answer, but that she was not liable to be asked such a question. The Attorney-General replied that it was for the witness and not for the other side to take the objection, though she might if she pleased claim the protection of the proviso. The Judge-Ordinary said—"I am very clear as to the intention of the Legislature, although I cannot say that the language that they have used is not capable of the interpetration put on it by Dr Spinks. The general intention was to protect the witnesses whose evidence was rendered admissible by statute. The provision was not intended to apply to the evidence by which the case of either side was supported independent of the evidence of the parties; it was not intended to narrow the sources of evidence for or against a petitioner or respondent, but to protect the witnesses; and I doubt whether it was competent to any counsel in a case to take advantage of it. It is the duty of the Judge to see that the witnesses have the protection given them by the statute. What is the meaning of the words 'no witness shall be liable to be asked or bound to answer?' They refer clearly to the position of the witness. The meaning is this. When a person is called into the witness-box, and it is proposed to question that witness for the purpose of obtaining a statement that he or she has been guilty of adultery, the witness may claim the protection of the statute, and say that he or she is not desirous of being interrogated on the subject. I think that the words 'no witness shall be liable to be asked' are not surplusage, because without them a string of questions might be put one after the other to a witness, who would have to refuse to answer them one by one, whereas the use of those words makes it the duty of the Judge to refuse to allow any of the questions to be put as soon as the witness claims the protection of the statute." The Judge-Ordinary, the report goes on to say, told the witness that she was not bound to answer any question as to her alleged adultery with Mr Hebblethwaite unless she pleased; but she said she had no objection to give evidence, and she was accordingly examined.

That is exactly my view of the law on our statute, which in its language is precisely similar to the English Act. I do not think the case of *Cook* v. *Cook* [*sup. cit.*] has any bearing on this. I rather think, if I may make bold enough to say so, that the word "volunteers" does not accurately express the meaning of the Lord President there. I think he only meant "be willing," not ultroneously and unasked. I think, however, it is that expression which has misled the Lord Ordinary. I think the witness should have been asked whether she was willing or not to submit to examination, and if she were willing, then her examination might have proceeded. She might decline if she chose, but she was not to be prevented from doing so if she was willing. I think the words "liable to be asked" are equivalent to "bound to submit to be asked" questions on the subject; but that is consistent with being willing. The words are not surplusage.

I am therefore of opinion that we ought to allow the evidence of this witness to be taken. It will be gathered sufficiently from what I have said that the Judge before whom the evidence is to be taken will tell her of the existence of the statute in the sense which I have explained, and having ascertained her willingness or otherwise to give evidence will act accordingly.

Lord Rutherfurd Clark—I am of the same opinion, and I have no doubt whatever about the matter. I can only further say that my own practice in the Outer House was in conformity with what has been expounded by Lord Young in conformity with the English case of *Hebblethwaite* v. *Hebblethwaite*. I have always considered that that case and the case of *Cook* v. *Cook* were precisely in conformity with one another, and I have always looked upon them as containing a broad exposition of the law on the question.

Lord Justice-Clerk—When I first heard the case argued I must own my impression was against the larger interpetration of the clause. It seemed to me not a sufficient fulfilment of the injunctions of the clause to say that the witness was not bound to answer. I thought the words of the clause meant more—that not only was the witness not bound to answer, but not liable to be asked, and I am still of that opinion.

But I come on consideration to the result arrived at by Lord Young. I am clear that the witness is competent to give evidence, and I did not understand that the argument from the bar led to a different conclusion. But the question is, what is the privilege of a witness when examined? I think he is not to be asked any question tending to criminate himself. But then—and I fairly admit I did not draw distinction at first between allowing a witness to be asked a disparaging question, and asking a witness whether he or she was willing to be examined at all—after some information on the previous practice of the Court and further consideration of the statute, I think the latter is the true course to follow. I think it a just and equitable interpretation, and I have had doubts whether that had not been the course adopted by the Lord Ordinary. In the notes of the evidence we have no statement whether the witness elected to answer or not. In the meantime I should think the witness had better be examined by one of ourselves, and she should be warned of the provisions of the Act of Parliament, and she may then object to any question being asked to that effect.

Lord Craighill was absent.

The Court allowed further proof relative to the pursuer's averment of the defender's adultery with Elizabeth Gilbert.

Gilbert was examined before Lord Rutherfurd Clark.

The Court on considering the whole proof as thus amended, adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—D.-F. Mackintosh—Shaw—A. S. D. Thomson. Agents—Cumming & Duff, S.S.C.

Counsel for Defender—M'Kechnie—M'Lennan. Agents—Murray, Beith, & Murray, W.S.