the direction will appear in the bill, and you may try if out of these you can draw a legal argument. To me it appears that the only thing for the Court above is, to judge of the law I have stated as applicable to the facts which will apear in the bill. The circumstances are for the jury, not the Court; and the question of whether there must be proof of express malice of forethought, was not taken at the trial.

PRESENT

LORD CHIEF COMMISSIONER.

MACKELLAR *v.* LAMBERT.

1828, May 28.

Finding for the pursuer, on a claim by a married woman for aliment, &c.

AN action by a woman for aliment during her separation from her husband; for a third of his property at the time he was divorced from her; and for the board and education of one of his children.

DEFENCE.—The pursuer deserted the defender's family, and refused to return. She did not pay for the support and education of the child. The defender, instead of having property, is in debt.

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ISSUES.

Whether the pursuer agreed to pay a certain sum as aliment, and failed to do so? Whether by his conduct and his treatment of the pursuer he caused her to live separate from him, and failed to aliment her? Whether she alimented the son, and whether the defender failed to pay? Whether he, at the date of the divorce, was indebted in L.700 as a third of goods in communion and as terce? Or, whether during the period of her absence, the defender required her to return, and whether she failed?

Ayton opened for the pursuer, and stated the facts to be proved: That though they might not have direct evidence of the agreement, there was a receipt in which the defender admitted it: That a father was bound to aliment his child, and when a husband is divorced, the wife is entitled to the same sum as if he were dead.

Parol evidence admitted to prove that an agreement was entered into, though not admissible to prove the contents if the agreement was reduced into writing.

A witness was called to prove that the defender had admitted the agreement.

Murray.—They set forth a letter as containing the agreement, and the acceptance must also have been in writing.

LORD CHIEF COMMISSIONER.—That is a different objection from what I at first understood to be stated. Had the agreement been lost, they might have proved what the defender said as to having entered into an agreement; but if this was an agreement by mutual missives that alters the case, and they cannot prove the acceptance by parol, unless they prove that the writing is lost. But if they merely wish to prove statements by the defender as to separation from his wife, and not as an acceptance of the offer in that letter, it is competent. (The witness having stated a message with which she was sent to the defender's mother, his Lordship said,) We may take from the witness that she was sent to tell his mother that an agreement was entered into to separate, and I am sure the jury will have good sense to see the distinction between proving that there was an agreement to separate, and proving the contents of that agreement.

Acceptance of a written offer may be established by proof of acts of the other party.

The witness was then asked whether she heard the defender read the agreement?

Murray.—They must prove that there was a written acceptance. The letter called for is not stamped, and such agreements are repro-bated by our law, and may be put an end to at any time.

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v.
LAMBERT.

Pyper.—There was no written acceptance, but the defender acted on the terms of a letter sent to him by the pursuer, and gave receipts. We called for this letter from the first, and if produced, we might have had it stamped. *Res non sunt integræ.*

LORD CHIEF COMMISSIONER.—The defender insists on the production of a written acceptance, and the pursuer proposes to prove it by facts, acts, and documents, and this appears to me competent. As the defender now puts in the letter, the question turns on the acceptance; and the pursuer says she will prove what is tantamount to acceptance. That the defender being in possession of this letter, granted a receipt in which it is recognized, and this was an act of homologation. The defender calls for a written acceptance; but if money is paid under the agreement, and a receipt granted recognizing it, is not that pregnant evidence that such an agreement existed, which, though dissoluble, is not dissolved? The receipt being in the handwriting of the defender is evidence that he acted under the letter.

Incompetent to ask a witness questions, the answer to which will degrade her.

When a witness was called, she was asked whether she had ever been in Bridewell?

LORD CHIEF COMMISSIONER.—You may prove by other witnesses the fact that she was; but though I allow every latitude in cross-examination, I am clearly of opinion that you cannot ask questions of the witness to degrade the witness.

Deposition of a witness in a different cause as to the same matter, and between the same parties, inadmissible in evidence unless the witness is dead. Tait, L. of Ev. 409.

The parties having agreed to transfer certain depositions from the process of divorce, and to hold them as evidence, it was proposed that one of them should be read, and reference was made to Mr Tait's work on Evidence.

LORD CHIEF COMMISSIONER.—If this is evidence to be laid before the jury, it must be regularly done according to the rules of the Court. Depositions can only be received where it is impossible to have the witness present in Court. It is according to the course of the Court for the party to admit facts, and if the facts in the depositions are admitted I shall take them; but I can only take facts on the admission of the party or the *viva voce* statement of a witness. There may be good reasons for a Court which decides on depositions without seeing the witness transferring them from one process to another; but this Court is of a quite different constitution. The witnesses, if called, may be so cross-examined as totally

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to change the impression of what they originally stated. Where it is admitted that the witness is dead, the deposition may be read, provided this was a contested case; and I admit this on the principle, that when a witness died between a first and second trial, the Judge's notes of his evidence are read at the second trial, and this being *ad idem*, appears to me better than the notes.

Murray opened for the defender.—The character of the pursuer enters materially into the consideration of the second issue, though it may not be a defence. Parties are not bound by the most formal agreement to separate, and this, which was most informal, was put an end to by the defender stating in an action brought against him that there was no such agreement, and his refusal to pay was a revocation of the agreement. There is no evidence of any payment by the mother for the child; and as she has not paid it, the persons who have, may claim it from the defender, and our paying to her would not free us from that claim.

When a witness is called in replication on a particular point, incompetent for the defender to cross-examine him on the whole case.

A witness being called in replication by the pursuer, to discredit a statement made by one for the defender, Mr Murray wished to cross-examine her on the whole cause.

LORD CHIEF COMMISSIONER.—When a witness is called on the merits, you may examine him on the whole cause; but the case is now closed on the merits, and they call this witness in replication, in consequence of my having stated that I would not reject her after your evidence, if it should be found necessary. They call her to a particular point, and am I to allow you to go into the whole case?

Pyper in reply.—The agreement being clear, the second issue becomes of little importance. If we succeed, we are ready to find security, that no claim shall be made by any other for maintenance of the boy. The evidence of the amount of the defender's funds is not very clear, but you must make a fair estimate of the stock, and give us a third of it.

LORD CHIEF COMMISSIONER.—This is a case of much detail, and as you are in possession of the whole, I shall reverse the order of the issues, and get quit of the superfluous matter first. On the fourth issue, the evidence is extremely vague; and as the pursuer is bound to make out her case, probably the safe way is to find for the defender, as the sum must be small,

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and I cannot advise you to give a conjectural sum. On the third issue there is no doubt that the father, and not the mother, is bound to support the child. If there is an agreement to live separate, and no provision is made for the child, the mother will have a claim for the time he lived with her, or was maintained at her expense. Till he was sent to school, he seems to have been supported by his mother, and that the father took no charge of him; and you must apply your good sense to the evidence which has been given as to the expense of rearing him till he went to school. After he went there, the pursuer can only claim what she has paid, as the claim by the master lies against the father, not the mother. The second issue was most difficult in proof, but is of least importance, as it was only intended to meet the case of a failure on the agreement. The words conduct and treatment are important, and on the evidence there is matter for your consideration. The first and fifth issues must be taken together, and they are both laid as wrongfully done. They rest on the agreement and the recall. You must hold the letter by the pursuer, and the receipt and acts by the defender as an agreement to separate, unless they are done away by other evidence. The evidence given in proof

of a recall by the defender does not appear to me to contain any thing like a distinct call on her to return; but if you think differently, you must consider that he was at the time living with another woman. If you are satisfied that the agreement is made out, then I state to you that he was not in a situation to cancel the agreement, as his house was not pure.

Verdict—For the pursuer on the 1st, 2d, 3d, and 5th issues, damages aliment and maintenance of the boy, L. 360, 12s.—for the defender on the 4th issue.

Pyper and *Ayton*, for the Pursuer.
J. A. Murray and *Russel*, for the Defender.
(Agents, *Ayton and Greig*, w. s. and *Campbell and Burnside*, w. s.)

PRESENT,

LORD CHIEF COMMISSIONER.

COUPER &c. *v.* MARQUIS OF BUTE.

1828. June 18.

AN action to recover the arrears of an annuity contained in a bond for L.100 a-year, granted by the late Marquis of Bute to the late Reve-

Finding that a person was of unsound mind at the time he gave up a bond