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LEGRAND v. STEWART.

RICHARD LEGRAND, Esq. - - *Appellant;*
MARIA STEWART, his Wife, - - *Respondent.*

House of Lords, 31*st May* 1782.

DIVORCE—REMISSIO INJURIÆ.—In order to found a relevant defence of *remissio injuriæ*, it must be proved that the offended party was in the *certain knowledge* of particular acts of adultery, such as would found a divorce, and nevertheless cohabited thereafter with the guilty party.

In 1770 the appellant was married to the respondent, but soon thereafter he gave himself up to low company, dissipation, and violence, to such a degree as that the respondent was forced to leave his house, her life being endangered from his violence, and to take refuge with her mother. Having somewhat reformed, she was induced to return to his society and house, on which occasion he executed a trust-deed of his estate in favour of his agent, for certain purposes, chiefly the payment of his debts and support of his family, and which bore this clause :—"And whereas my spouse has been obliged " to leave the house of Bonnington, and separate herself from " me, and was about to raise an action of divorce on the head " of adultery ; but upon my granting these presents, and pro- " mising to amend my future life, she has agreed to come " home." But the appellant returning to his former dissolute life, she was obliged to raise the present action of divorce against him on the head of adultery. His defence was, 1. That he was not guilty of adultery; and, 2. Supposing he was, the action was barred by *remissio injuriæ*, as the pursuer had cohabited with him after she had come to the knowledge of his guilt; and referred to her letters to prove her knowledge. These letters having been produced, the

Nov. 23, 1781. Commissaries, of this date, pronounced this interlocutor :—
" Find the defence of reconciliation not proven by the let- " ters produced; find the alleged cohabitation not relevant " to bar the present divorce, unless the pursuer at the time " was in the knowledge of her husband's adultery: And or- " dain the defender to condescend whether he offers to " prove that fact, and by what mode of proof."

Dec. 11, 1781. They afterwards found " the evidence condescended on " by the defender not sufficient to instruct the pursuer's " certain knowledge of the defender's adultery, during the " period of the cohabitation urged as a preliminary defence " against this action, and repel the defence, and allow the

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"pursuer proof of her libel." On reclaiming petition, the Commissaries adhered.

An advocation being brought, the appellant chiefly founded on the deed and the clause therein above quoted, which, he contended, proved her previous knowledge of the injury. To which it was answered, that this deed was executed by himself—that she was no party to it, and quite ignorant of its contents or its existence, and did not prove that she was then in the knowledge of the adultery.

Feb. 25, 1782.

The Lord Ordinary pronounced this interlocutor:—"Refuses the bill, but remits it with this instruction, that the "Commissaries repel the defence of *remissio injuriæ hoc* "*statu;* and, before further answer, allow the pursuer a "proof of her libel, and the defender a conjunct probation "in common form."

Mar. 16, 1782.

Proof being taken, and six witnesses being examined, the defender's guilt was established in the clearest manner. But the appeal to the House of Lords of the above interlocutors was then resorted to.

Pleaded for the Appellant.—The party who sues for an action of divorce ought at least to come into Court with clean hands; but here the respondent, though she states the appellant to have been going on in a continued train of guilt from 1772 downwards; though she swears she had a secret conviction of his crime for several years, and though she actually instructed a proctor in 1778 to raise an action of divorce, yet was pleased in that year to make up her peace with him for a sum of money and good settlements, and thereupon came home. This deed, and the letters taken in connection together, at once prove her previous knowledge. And the injury being once forgiven, and cohabitation following upon that reconciliation, was a complete bar to the action. Separately, the vague and general terms of the libel admitted to proof are extremely exceptionable. It sets forth, that during the years 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, and 1780, and part of the year 1781, and upon one or other of the days of the months of the said years, the appellant has been guilty of adultery in Scotland and in Ireland, particularly with seven women named. These women are admitted as all of bad fame, and proposed to be witnesses, so that it was impossible to say whether the vagueness of the libel, or the evidence offered, was the most exceptionable.

Pleaded for the Respondent.—In actions of divorce on the

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head of adultery, it is an incontestible point of law, that if the party offended forgive the injury to her, in the full knowledge of the offence, and is in possession of the evidence sufficient to prove it, this amounts to an implied forgiveness, and such forgiveness, express or tacit, will be a sufficient bar to the action. But, in order to found this objection, it must be clearly proved that the party was in the *certain* knowledge of the adultery, and of its particular acts, and nevertheless cohabited with the guilty party, as it is only cohabitation, after a wife is possessed of this *certain* knowledge of the particular acts of adultery, which imports that *remissio injuriæ* which in law bars the action. In the present case, there is no such certain knowledge proved; and the deed granted by himself in 1778 cannot be construed into a *remissio injuriæ*, and so cannot be evidence of her knowledge of its contents; but it is needless to refer to it, because the acts of adultery proved were committed long posterior to that deed. And during the respondent's cohabitation with the appellant, she did not know of any particular acts of adultery committed by him, which could be the foundation of a process of divorce.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *G. Hardinge, T. Erskine.*
For Respondent, *Alex. Murray, Dav. Rae*

Note.—Not reported in the Court of Session.

[M. 12,683.]

ALEXANDER MORE, - - - *Appellant;*
JANET M'INNES, Widow of Captain FAIRBAIRN, late of the 62d Regiment of Foot, - } *Respondent.*

House of Lords, 25*th June* 1782.

CONSTITUTION OF MARRIAGE.—Circumstances in which a written declaration of marriage, written after pregnancy, was not held to constitute marriage.

The appellant, while living in Aberdeen with his father, and then very young, had become acquainted with the respondent, who passed as an officer's widow. He was only