

Paterson for the amount of what they represented to be his losses to them. The defender Macqueen carried bill-stamps with him, and upon these stamps, which he had ready for the purpose, the bills or promissory-notes which Mr Paterson was got to subscribe were written.

These averments are followed by an enumeration of eleven bills and promissory-notes which were alleged to have been granted by Paterson to Galbraith, and of three others granted by Kilgour to Paterson, and by him endorsed to Galbraith; and it was stated—

Cond. VIII. No value was given to Mr Paterson for any of the promissory-notes and bills granted by him, above set forth, or for the endorsement of promissory-notes and bill by Kilgour, payable to him, above set forth. There was no consideration therefor, other than the pretence of the money said to have been won from him at cards by the defenders, but which was not won by fair play, but was made, by foul play, to appear to have been won from him, in pursuance of the conspiracy and scheme above set forth. Farther, the bills and promissory-notes were in most, if not in all, instances signed by Mr Paterson when, through intoxication and otherwise, incapable of knowing, and when in fact he did not understand what he was doing, or know the amount of the bills, the date at which they were payable, or any other particulars. The endorsement was written in the same circumstances.

Cond. XIX. Farther, the defenders were equally with Mr Galbraith concerned and participators in the conspiracy and scheme by which Mr Paterson was defrauded out of said sums, and by which the said bills were fraudulently impetrated and obtained. They were partakers in the carrying out of that scheme, and aided and abetted one another in the devices and contrivances by which it was effected, and by which they succeeded, first, in appearing to win money from Mr Paterson at cards, by unfair and false play carried on by them in concert; secondly in procuring bills from him under the false representation that the money for which said bills were granted or endorsed was fairly lost, and when he was in such a state as not to be capable of knowing whether their statement was true or false, or of understanding or transacting business; and, thirdly, in counselling him into payment of the foresaid sums, in the manner above explained, while he was ignorant of the falsehood, cheating, and cozening that had been practised upon him by them.

An issue was allowed by the Lord Ordinary which was lodged and reported to the Court. The defenders argued that the action was irrelevant, and that no issue should be allowed. The Court to-day gave effect to this contention, and dismissed the action with expenses.

The LORD PRESIDENT said—This is a very unpleasant sort of action in every aspect of it. It sets forth a course of proceeding in reference to this gentleman (Mr Paterson) which, if it be at all true, cannot be noticed in terms of too strong reprobation. The question is whether the statement is relevant as a ground of action. It is alleged that there was a conspiracy to cheat Mr Paterson, and that the cheating was to be accomplished by getting him to play at cards, and that there was to be illegal and unfair communications betwixt those playing with him whereby he was sure to lose; and, further, that he was a person generally in a state of inebriety, and occasionally in a state of sobriety, but that his normal condition was that of a person not altogether sober. It is not said that he was a person of such incapacity as to be unable when sober to conduct business. It is not even said that if the play had been fair he was not a match for the others. But it is said that by artifices money was nominally won from him, for which he granted bills, which were afterwards settled. Now, the defenders could not have come here to enforce payment of the bills even although the play had been fair. We do not take cognisance of such transactions;

but in this case it is said that there was cheating. Now, if this Court does not take cognisance of fair play at cards, can we be asked to determine whether there has been unfair play? In order to ascertain this we would in like manner require to make an inquiry into what are the rules of the game. There may be tribunals to settle these points—courts of honour with skill in these matters. But we do not pretend to possess such skill ourselves, nor are we in the habit of remitting to persons of skill in order to obtain information on such a subject. I would not have been surprised if the defenders against whom the charges have been made had demanded the fullest inquiry into them; but our judgment having been asked on the relevancy, I think the action should be dismissed.

Lord CURRIEHILL concurred. The only thing which moved him was the statement made in argument as to Mr Paterson's incapacity, but the action was not laid on that; there was no plea in law founded upon it, nor was it in the issue which was proposed by the pursuer.

Lord DEAS—This action is raised to recover money lost at cards. There can be no action for money so lost and paid in the ordinary case. I do not think that the allegation of cheating makes any difference. I think the object of the law was to discourage persons from playing for money. But it was argued that this is not an action of repetition, but one of damages. If, however, we entertained such an action, we would just be sanctioning in another way a *condictio indebiti*. The only thing which would have made the action relevant is an allegation of incapacity, which there is not. Nor is there any allegation of incapacity when the bills were paid.

Lord ARDMILLAN also concurred.

OUTER HOUSE.

(Before Lord Ormisdale.)

WILSON v. WILSON.

Husband and Wife—Adultery—Separation and Alimnt. Held (per Lord Ormisdale) that adultery by a husband is a good ground for his wife insisting in an action either of separation and aliment or of divorce against him.

Counsel for the Pursuer—Mr A. Asher. Agents—Messrs Menzies & Coventry, W.S.
Counsel for the Defender—Mr Fraser. Agents—Messrs White-Millar & Robson, S.S.C.

This is an action of separation and aliment, at the instance of a wife against her husband, on the ground of the defender's adultery and cruelty. The parties have been living apart for the last nine years, the pursuer alleging that in consequence of her husband's ill-treatment of her she was compelled to absent herself from his society. In 1864, shortly after the date of the defender's adultery, an action of divorce was raised by him against his wife on the ground of her desertion of him. This action was reported to the Inner House on an objection to the competency, and does not appear to have since been moved in. Thereafter the present action was instituted by the wife, and a proof was allowed her as to her husband's adultery. This having been led, the Lord Ordinary has now pronounced an interlocutor granting decree of separation and aliment, to which is appended the following note:—

"It is clear on the proof that the defender has been guilty of adultery; but the defender's counsel maintained in argument, that although adultery was a good ground for the fuller remedy of divorce *a vinculo*, it did not warrant the lesser remedy of separation and aliment. It was, however, at the same time conceded on the part of the defender, that if the defender had committed adultery with a domestic servant or other inmate of the house in which he and the pursuer resided, that would not only have been a sufficient ground for a divorce, but

also for a decree of separation and aliment. The distinction thus suggested is not one which recommends itself to the Lord Ordinary; and he is of opinion, on principle as well as authority, that the husband's adultery, whether committed within or without the dwelling-house of the spouses, is an equally good foundation for a decree of separation and aliment at the instance of the wife as for a divorce *a vinculo*. He can see no reason for holding that the offending husband is to be allowed to dictate to his wife the redress she is to demand, and to maintain that she must divorce him, the very object, it may be, he had in view and was desirous to attain—and so be allowed to derive the benefit of his own misconduct, of not only being made free to marry his paramour, but also to relieve himself from all pecuniary obligation towards his innocent wife. Nor does the Lord Ordinary think that the circumstance of the pursuer in the present case having been living apart from her husband, the defender, at the time he committed adultery is any such speciality as to take the case from within the scope of what he holds to be an established general principle of law, that adultery is a good ground for separation and aliment. The pursuer could not adhere to the defender (her husband) after his adultery had come to her knowledge without forfeiting her right to the remedy not only of separation and aliment but of divorce, and she only asks for aliment for a period subsequent to the adultery; or, to put it differently, the husband's adultery would be an unanswerable defence by her to an action of adherence at his instance; and if so, by parity of reasoning, it appears to the Lord Ordinary to be an equally good ground of action at her instance for a separate aliment.

"The Lord Ordinary was referred to the authorities cited by Mr Fraser (*Domestic Relations*, vol. i., pp. 264-5), and they appear to support the views he has expressed."

Friday, March 16.

SECOND DIVISION.

ALLARDICE'S TRUSTEES *v.* RITCHIE AND OTHERS.

Trust—Legacy—Vesting. A bequest of a sum of money to each of a testator's three grandsons, payable on their attaining majority, held (aff. Lord Jerviswoode) to vest *a morte testatoris*.

Counsel for Mrs Ritchie, &c.—Mr Gifford and Mr John Hunter. Agents—Messrs Morton, Whitehead, & Greig, W.S.

Counsel for Allardice's Trustees—Mr Cook and Mr Spens. Agents—Messrs W. & J. Cook, W.S.

The late Robert Barclay Allardice of Ury died in 1854, survived by a daughter, Mrs Margaret Barclay Allardice or Ritchie, widow of the deceased Samuel Ritchie, and by three grandsons, Robert, Samuel, and David Ritchie, sons of Mrs Ritchie, all in pupilary or minority at the date of his death. Mr Barclay Allardice left a trust-disposition and settlement. The first purpose of the trust is for payment of debts; the second for payment of £3000 to David Stewart, the truster's illegitimate son; the third for payment of an annuity of £100 to Ann Angus, who was the mother of his two natural sons; and of an annuity of £200 to his daughter Mrs Ritchie. The fourth purpose of the trust is for payment of £1000 to each of his said three grandsons, "declaring that said bequests to the said Robert, Samuel, and David Ritchie shall only be payable to them on their respectively attaining majority; but in the event of the previous predecease of their mother, my said trustees shall apply the interests of the said bequests, after that event, in alimenter and educating the said Robert, Samuel, and David Ritchie until they respectively attain majority; which several sums and annuities I hereby leave and bequeath accordingly to the parties respectively before-men-

tioned. In the fifth place, the testator directs his trustees to make over the residue of his estate, heritable and moveable, to Robert Stewart, his eldest natural son by the said Ann Angus, "with full power to my said trustees to apply the annual rents or interests of the foregoing bequests to my said two sons (that is, the illegitimate sons David and Robert Stewart), in alimenter and educating them during their minority, and if found advisable, to apply the principal sums, in whole or in part, in purchasing commissions for them in the army or navy, or otherwise settling them in life; and declaring that, subject to the exercise of these powers, the bequest in favour of my said son Robert shall not take effect until he shall attain the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner." Samuel Ritchie died in the United States in April 1862, before attaining majority. Mrs Ritchie and her two sons are his heirs *in mobilibus*, and as such claim the legacy of £1000 as having vested in him *a morte testatoris*. The trustees raised this action of multiplepounding to have it determined whether this sum of £1000 had so vested, and they claimed it in the multiplepounding as part of the residue of the trust-estate, on the ground that it was not intended to vest in the legatee till majority. The Lord Ordinary (Jerviswoode) held that the bequest vested in Samuel at the death of the testator, and sustained the claim of Mrs Ritchie and his other heirs *in mobilibus*. The trustees reclaimed, and the Court adhered.

The LORD JUSTICE-CLERK agreed with the Lord Ordinary, and thought the case clear. After stating the facts his Lordship said:—"See what the testator does for his two natural sons whom he intended to prefer. The bequest to the second is in the most simple terms possible. Then there is the bequest of the residue. Taking these two bequests together nobody could suggest a doubt of their vesting *a morte testatoris*. But certain provisions apply to both the natural sons. Now, in this part of the deed he gives full power as regards the bequest to David as well as the residuary bequest to Robert. He gives power to spend the interest in alimenter them, and the principal in setting them out in life. He does not mean this bequest to Robert to take effect till he was thirty, unless the trustees should think proper to make it over sooner. Now, it is not the question here whether this part of the estate did vest or not at the testator's death; but it will aid us in coming to the right conclusion as to the legacy of £1000 if we can see the testator's meaning as to the residue. Nothing is more hopeless than to contend that the vesting of the residuary bequest was postponed till Robert's attaining the age of thirty. Did your Lordships ever hear of such an idea? The words are insufficient even to suggest it. The provisions as to the natural children being thus distinct, we come to the daughter and her sons. One purpose of the trust is "for payment to each son of £1000." Stopping there, observe that the words are precisely the same in the specific bequest to David Stewart, the natural son. The words previous to the word "declaring" are words of complete gift in themselves. If the testator gives to trustees for the purpose of making payment, there is as complete a bequest as if it were made directly without the intervention of trustees. If such a bequest is followed by a declaration that the gift is subject to a condition, we must give effect to that condition; but we approach the condition with this fact in our view—that the gift is absolute. Here the condition is that it shall be payable only at majority. But it is said this condition is the same as if it were part of the bequest—as if the bequest and the condition were blended together in one sentence. That is a view which I cannot adopt, and which is quite inapplicable to this deed. The declaration contains words that convey two different ideas. That which he regards as the bequest is not to be payable till the majority of the grandsons, the testator wishing