

of parties stand it is necessary to go back to the time when the first innovation upon the mutual obligations took place. If, when the defender built over the well, the pursuer had brought an action to have the counterpart obligation rescinded, or to interdict the defender from putting up the buildings, would he have prevailed? In my opinion the Court would have granted him neither the one remedy nor the other, but would have given him compensation for loss of the water right either in the shape of money, or in the form of a substitute well, because if water can be found in any definite spot, it can always be found in a spot a few yards distant, and equally convenient. Such, I think, was the right of the pursuer after the well was covered over, viz., a right to compensation, not to rescission of the counterpart obligation.

There is a good deal of evidence to the effect that this water right was of little value at the beginning, and became of no value at all in consequence of the introduction of the water supply, and if so it is very easy to infer acquiescence by the pursuer in the defenders' operations which were destructive of the right, because it is more easy to conclude that there has been abandonment of a worthless than of a valuable privilege. I am accordingly very much disposed to think that the evidence goes to prove the abandonment of the right to the well. If this were clearly established it would be sufficient for the decision of the case, but there is at least some evidence to the contrary, because an attempt was made, perhaps after the lapse of some time, by the pursuer to extract from the defender a promise to form a new well. If however the facts do not amount to abandonment, I reach the same conclusion, because the fact that the interference with the right to the well was made without the pursuers' consent, but at the same time without his active opposition, does not give him a right to demand rescission of the defenders' right of access, but only to have compensation for the right he has lost. I give no opinion on the question whether the pursuer has a right to a well, but I am clearly of opinion that the action directed against the defender to interdict him from using his right of access is not well founded, and that the defender is entitled to absolvitor.

The Court recalled the Sheriff's interlocutor of 21st March 1889, repeated the findings in fact in the interlocutor of the Sheriff-Substitute of 26th October 1888, refused the interdict, and decerned.

Counsel for the Pursuer (Respondent)—Asher, Q.C.—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Defender (Appellant)—Wilson. Agent—John Kinmont, S.S.C.

Friday, January 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

STRAIN v. STRAIN.

(Ante, vol. xxiii. p. 90.)

*Husband and Wife—Separation and Alim-ent—Cruelty—Adherence—Jurisdiction—Competency.*

A wife obtained decree of separation, "a mensâ et thoro in all time coming," on account of her husband's cruelty and in consequence of his having communicated to her venereal disease. Four years afterwards the husband raised an action against his wife to have it declared that there no longer existed any ground for the defender living separate from him, and that the decree of separation should be recalled and the defender ordained to adhere to him. The defender refused to adhere. Held that the Court could not recal its own finding pronounced in a decree *in foro*, and that the decree in question was not revocable except by the joint consent of the spouses, and the action dismissed as incompetent.

In January 1885 Mrs Mary Thomson or Strain raised an action of separation and aliment against her husband Hugh Strain junior, colliery manager, Merrybank Cottage, near Airdrie, on the ground of cruelty.

In the proof allowed by the Lord Ordinary it was established that the defender had communicated venereal disease to the pursuer.

On 20th March 1885 the Lord Ordinary granted decree of separation, and ordained the defender to separate himself from the pursuer *a mensâ et thoro* in all time coming. To this interlocutor their Lordships of the First Division upon 4th November 1885 adhered.

On 19th February 1889 Hugh Strain junior raised this action against his wife to have it declared that there no longer existed any ground for the defender living separate from him, and that the decree of separation should be recalled. He averred that he was now entirely free from venereal disease, that he had put himself under the care of several medical men of eminence in Glasgow for treatment, and he offered to produce certificates from them in support of his averments, or to submit himself for examination to any medical man whom the defender might name. He also professed affection for the defender, and expressed penitence for the past. The defender refused to resume cohabitation with the pursuer, and pleaded *inter alia* that the present action was incompetent.

On 21st June 1889 the Lord Ordinary (M'LAREN) found that the decree of separation and aliment in the action at the defender's instance against the present pursuer, pronounced by the Lords of the First Division on 4th November 1885, was not subject to recal, and he dismissed the action.

"Opinion.—In this case the pursuer asks for a declaratory judgment to the effect

that a decree of separation and aliment pronounced against him has become void through change of circumstances, and concludes for a decree of adherence against his spouse. In the condescence he professes penitence for the injury which he caused to his wife, and seeks to satisfy the Court that there is no reasonable probability of its recurrence.

"If I had thought that it was within the jurisdiction of the Court of Session to recal its own decree of separation I should have reported the case to the Inner House, because it seems to be more consistent with our system of administration of justice that the decree should be reconsidered by the Division of the Court which pronounced it rather than by a single judge whose decision could not be considered as of equal authority to the decision which is brought under review.

"But I have not been able to satisfy myself as to the existence of the jurisdiction on which the action is based, and I have therefore no alternative but to dismiss the action.

"In all questions of jurisdiction usage seems to be the chief, and generally the determining element, and especially is this the case where the question is as to the finality of a decree, or the measure of authority to be attributed to a decree in a prescribed form. I have not been referred to any case in which the Court of Session has recalled a decree of separation *a mensâ et thoro* pronounced by itself, and if the question is one of past practice, experience seems to point to the finality of such decrees.

"The chief authority on which the pursuer relies is a passage in Lord Fraser's Personal and Domestic Relations, in which it is said that the Court may, on proof of the husband's penitence and reformation, restore him to his marital rights. If the passage is to be read in connection with the authorities quoted it might perhaps be understood as a statement of the Canon Law on this subject. But as the sentence has been allowed to stand unaltered in the second edition of Lord Fraser's valuable and learned work, it may be taken to be the expression of his matured opinion that decrees of separation are revocable according to the law of Scotland. Giving to this opinion the weight which is justly due to it, I do not think that a new development of jurisdiction or practice can be founded on opinion however weighty. Moreover, if reference is made to the practice of the Ecclesiastical Courts in which the Canon Law was administered, it will be found that these courts were in the habit of pronouncing decrees of separation either for a limited time or in perpetuity; and the case quoted by Lord Fraser from the registry of the official of St Andrews is evidently a case where the original decree of separation was a conditional decree. The decree in the present case is for separation in perpetuity.

"If the question were open to consideration much might be said in favour of the course proposed by the pursuer. It is certainly hard that a husband, for it may be a single act of violence, should be not only

separated forever from the society of his spouse, but condemned to a state of celibacy for the rest of his life. It appears to me that a remedy for this hardship might perhaps be found in a return to the ancient practice of the Ecclesiastical Courts of granting only a conditional separation in cases of a less serious character. Or, if there be a difficulty in varying the form of the decree of separation, it might at least be in the power of the Court to grant an interim award of aliment, and to supersede consideration of the conclusions for separation for a time in the view that by doing so the parties might become reconciled, or the defender might be able to offer evidence of good behaviour which would be taken into consideration in the final decision of the case. I make these suggestions because in the Outer House, where these cases are often finally decided, the question of permanent separation has been felt to be one of great difficulty. I think that in the present case the Judges meant the decree to be in substance as well as in form an unqualified decree of separation, and that the decree is not revocable except by the joint consent of the spouses."

The pursuer reclaimed, and argued—Though the decree of separation was absolute in its terms there ought to be read in a time qualification in the event of any material change of circumstances occurring—*Fraser's Husb. and Wife*, 907. Here the cause for which decree of separation was pronounced no longer existed. There was an analogy in decrees for aliment which though equally absolute in their terms could yet be opened up on any change of circumstances emerging. The theory of a decree of separation for cruelty was protection to the injured spouse from the danger of cruelty, but here the danger of cruelty was past. The ground of the decree of separation no longer existed—*Macdonald v. Macdonald*, July 19, 1881, 8 R. 985.

Argued for respondent—The decree was separation "in all time coming," and the defender having secured this protection could not be compelled to give it up. This was a decree *in foro* unlimited in its terms, and the Court could not recal its own decree. Such a proceeding would be at variance both with law and practice, and would be equivalent to reading into the decree a time qualification. No authority for such a construction of the decree had been or could be cited—*Hume*, 1734, M. 6159; *Lang v. Lang*, June 31, 1851, 13 D. 1106; *A B v. C D*, December 3, 1853, 16 D. 111; *Ross v. Mackenzie*, May 27, 1836, 14 Sh. 845.

At advising—

LORD PRESIDENT—The decree in favour of the defender which it is sought by this action to have recalled was pronounced by Lord Trayner on 20th March 1885. By it the Lord Ordinary found that the present pursuer had been guilty of grossly abusing and maltreating the present defender, and we found that she was entitled to live separate from the pursuer, and ordained the pursuer to separate himself from the

defender *a mensa et thoro* in all time coming.

Now, I do not understand it to be contended that this is in any way an incompetent decree, but the ground of the present application is, that it is recallable, and that, as the circumstances in which it was pronounced have now materially altered, it ought to be recalled.

If it was competent for the Court to pronounce a decree ordaining the husband to separate himself from his wife *a mensa et thoro* in all time coming, then it is clear that the Court must give effect to this decree *in terminis*.

The competency of such a decree is not, and could not well be disputed, for for the last three hundred years—indeed since the Reformation—it has been the recognised form of decree in this class of actions.

No doubt Lord Fraser, at page 907 of his work, expresses the opinion that separation is in the law a temporary remedy, and that the Court granting the decree may recal it upon sufficient cause shown. But I think that the context makes it clear that his Lordship is not in this passage really dealing with the existing practice of the Court of Session, but rather with the regulations which prevailed in the commissary or the ecclesiastical courts. This is further made clear by the authorities to which reference is made.

The only Scottish authority cited is a decree of separation pronounced by the Official Principal of St Andrews, in which this exception was made, which I take the liberty of rendering as follows—"Saving and reserving also a renewal of the relations of husband and wife if the cruelty of the husband ceases and he finds caution against the repetition of his cruelty."

It is clear that we cannot follow this authority, not only because it is inconsistent with the practice of this Court, and of the Commissary Court since the Reformation, but also in consequence of the principle upon which it is founded. This Court cannot recal its own findings pronounced in a decree *in foro*.

LORD SHAND—I desire to treat with much respect the authority of one so learned in the law of marriage as the late Lord Fraser. But though his late Lordship expressed the opinion that decrees of separation give a temporary remedy, and may be recalled by the Court at a subsequent date on being satisfied that the cause of granting the decree no longer exists, the single authority in our law on which he relies is more than three and a-half centuries old, and that authority, so very remote, refers, not to the practice of this Court, but of ecclesiastical courts before the Reformation.

I do not doubt, further, that every decree which Lord Fraser pronounced while he was a Judge in this Court—and no one had a more extensive experience in such cases than he had—was in the form, that it was to have effect in all time coming. Although his Lordship's work has been before the profession for many years no defender in such an action has ever asked that a decree of

separation should be so limited, or has suggested that such a decree has the limited effect contended for.

I cannot, therefore, give any serious weight to this statement of opinion, for it appears to me that not only does immemorial practice establish that such decrees are expressed to be "for all time coming," but that in fact they are so, and I have no hesitation in holding that the judgment of the Lord Ordinary should be affirmed.

The Court does not lightly grant decrees of separation on the ground of cruelty. The cruelty must be such as to endanger life, or the spouse must be put in reasonable fear of danger to health and life, or of grievous bodily injury, or life must have been made intolerable by conduct producing that effect. Anything less is insufficient to warrant a decree, and that is because when a spouse has once so suffered the decree granted will properly give to the pursuer the right to refuse again to adhere. This degree of cruelty being proved, an absolute right is given to the spouse to refuse to adhere in all time coming, and it is no longer possible for the Court to require adherence. That is the result of immemorial practice and of the terms of the decree itself. Any other view leading to the result that a decree might be given for separation to have effect for a time only, probably on proof of a much less amount of cruelty than is now required for a decree of judicial separation, it would follow that there would be endless and often most unsatisfactory inquiries as to the alleged reformation of the habits of the spouse against whom the decree had been pronounced. A spouse who had suffered seriously once might be required to submit to risks of future injury, such as the law has hitherto protected an injured spouse against, unless consent be given again to adhere. And if the principle were sound it might well be urged that the same rule should also apply even to divorce for adultery, that the remedy should be temporary, and adherence should again be ordered where the divorced spouse had permanently reformed.

But further, the decree is in express terms "for all time coming," and with your Lordship I hold this would of itself be a sufficient ground of judgment. The claimer has attempted by the analogy of another part of the decree to read this part as if it truly meant something short of what it bears. It was argued with some plausibility that the Court should hold the decree of separation to be temporary only in effect because the decree for aliment, which is as absolute as the other in its terms, is according to use a decree which can in altered circumstances be modified in its effect. A decree of aliment in its language deals with termly payments over a future tract of time, and the rule and principle applicable to such decrees, according to a long-settled practice, is thus stated by Lord Fraser (p. 864):—"An award of aliment is not absolute and unchangeable. It is always, though not so expressed, *in hoc statu*." The reason for this is that the

circumstances of the parties, and particularly the pecuniary circumstances of the defender, may become materially changed. But while a limitation has been engrafted on the decree for alimony by long practice, the proposal made so to qualify the decree of separation is negatived by immemorial practice to an opposite effect. That being so, I can see no reason for refusing to give effect to the absolute terms which the decree bears.

LORD ADAM—I am of the same opinion. The decree which the defender has obtained, entitles her to live separate from the pursuer in all time coming. In spite of this and of the decree which she holds for alimony if it could have been shown that within the last three hundred years a decree of this kind had ever been treated as temporary in its character. I should have been disposed to have viewed favourably the contention of the pursuer, but any authority which there is is entirely the other way, and that being so I am for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN—It is clear that this Court can competently pronounce a decree of separation against the spouses which is irrevocable and will be "for all time coming."

The jurisdiction which the Court exercises in this matter is not statutory, but it is founded on the Canon Law, which was adopted in matters consistorial in this country when the Ecclesiastical Courts were abolished at the Reformation.

The law thereafter was administered by the lay courts, but it was the same Canon Law. Such decrees as the one now before us were only pronounced in the most aggravated cases, and after full investigation. Attention has been called to a passage in Lord Fraser's work in which he observes that in less aggravated cases something short of a decree of separation might be pronounced, and it has been sought in the circumstances of this case, on the authority of this *dictum*, to read the present decree with some qualification as to time.

It must, however, be kept in mind that Lord Fraser when compiling his valuable work did not mean merely to confine it to a text-book of the practice of the Court of Session, but rather to build it up on the lines of a philosophical treatise on the relation of husband and wife. He accordingly drew his materials from a variety of foreign sources, and it is of the utmost importance in studying the work carefully to distinguish between these cases when the writer is dealing with the existing law and practice of Scotland, and those when he is treating his subject historically, and giving a statement of the law as it existed in earlier times. These laws are now obsolete and cannot aid us in determining a question arising out of the law and practice of the present day.

What we are asked to do is, in consequence of an alleged change of circumstances, to recal a decree unconditional in its terms, and this I agree with your Lordship cannot be done.

The Court adhered.

Counsel for the Pursuers—J. Comrie Thomson—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—C. S. Dickson—A. S. D. Thomson. Agents—W. Officer, S.S.C.

Wednesday, October 30, 1889.

## OUTER HOUSE.

[Lord Wellwood.]

### LAMB v. FIELD.

*Heritable Security—Bond and Disposition in Security—Transmission of Personal Obligation against Person taking Estate by Succession—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), secs. 12 and 47—Intromission with Rents.*

The Conveyancing (Scotland) Act 1874 provides, sec. 12—"Where an heir has before renunciation intromitted with his ancestor's estate he shall be liable for the ancestor's debts to the extent of such intromission, but no further." Section 47—"Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land, shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession . . . without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against such person by summary diligence or otherwise in the same manner as against the original debtor."

The heir-at-law of the debtor in a bond and disposition in security for some time after his ancestor's death uplifted the rents of the estate over which the bond was granted, and paid the necessary outgoings, including the interest on the bond. He did not complete a title to the estate, and he renounced the succession. In a suspension of a charge against him at the instance of the bondholder, for the principal sum in the bond, *held* that he had not taken the estate by succession, and that accordingly the personal obligation in the bond had not transmitted against him.

Thomas Lamb, who died in the year 1885, granted a bond and disposition in security in favour of William Field, partner of and trustee for the firm of Field & Allan, slate merchants, Edinburgh, dated and recorded in the Division of the General Register of Sasines for the county of Edinburgh 17th June 1879, for the principal sum of £300 sterling over a dwelling-house situated at No. 11 Melville Terrace, Edinburgh, which