LORD GUTHRIE—I concur.

LORD JUSTICE-CLERK—I concur.

The Court sustained the appeal and found that on the facts stated the Sheriff-Substitute should have convicted the respondent.

Counsel for the Appellants—Clyde, K.C.—Pringle. Agent—Robert Pringle, W.S.

Counsel for Respondent—Watson. Agent—John Stewart, S.S.C.

## COURT OF SESSION.

*Thursday, March* 14.

### FIRST DIVISION.

[Lord Guthrie, Ordinary.

### A *v.* B AND ANOTHER.

*Husband and Wife—Divorce for Adultery—Collusion.*

*Observed* (*per* the Lord President) that a reference to English decisions as to the meaning of collusion was, looking to the difference between the two systems of law in regard to these matters, misleading, and that to prove collusion according to the law of Scotland it must be shown that the oath of calumny has been falsely sworn. The mere fact that a woman, who may have repented of misconduct, gives information to her husband afterwards is not collusion.

*Expenses—Divorce—Expenses against Co-Defender — Taxation — Conjugal Rights (Scotland) Act* 1861 (24 *and* 25 *Vict. cap.* 86), *sec* 7.

In an action of divorce for adultery at the instance of a husband, the Court *granted* decree, and found the co-defender liable in damages and also in expenses.

*Held* that the expenses fell to be taxed as between agent and client.

*Held*, further, that it was not necessary to insert a direction to that effect in the interlocutor, the practice of the Auditor being in accordance with the rule.

The Conjugal Rights (Scotland) Act 1861 (24 and 25 Vict. cap. 86), sec. 7, enacts—"In every action of divorce for adultery at the instance of the husband it shall be competent to cite, either at the commencement or during the dependence thereof, as a co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the Court in such action to decern against the person with whom the wife is proved to have committed adultery for the payment of whole or any part of the expenses of process, provided he has been cited as aforesaid, and the same shall be taxed as between agent and client. . . ."

In an action of divorce for adultery at the instance of a husband against his wife the Lord Ordinary (GUTHRIE) assoilzied both the defender and the co-defender.

The pursuer reclaimed.

In the course of his argument counsel for the co-defender (who alone had lodged defences) submitted that the action, if in England, would have been dismissed on the ground of collusion, in respect of the assistance given by the defender to the pursuer's agent in preparing the case. He cited Dixon on Divorce (4th ed.), 63; *Midgley* v. *Wood*, (1860) 30 L.J. (P.) 57, and *Lloyd* v. *Lloyd and Another*, (1859) 30 L.J. (P.) 97.

The Court (the LORD PRESIDENT, LORD JOHNSTON, and LORD MACKENZIE) recalled the Lord Ordinary's interlocutor, granted decree of divorce, and found the co-defender liable to the pursuer in £250 damages. In the course of his opinion the LORD PRESIDENT observed—"There was an argument by the counsel for the co-defender in which he confidently asserted that this case in England would have been at once dismissed, because, he said, the English decisions led to this, that if the defender had given any assistance in the getting up of the case the case was one of collusion and would have been dismissed.

"I had already occasion in the case of *Walker* (1911 S.C. 163, 48 S.L.R. 70), to call attention to the differences between the English law and our own in these matters; and I must emphatically again say that I think a reference to English decisions in these matters is very misleading and quite uncalled for. Our divorce law is centuries older, and their law depends entirely upon statute. Our law as to collusion is as I defined it in the case of *Walker*, and the definition was approved by the rest of your Lordships. To put it in other words, I can only say that there never can be collusion unless you can show facts which, if proved, would show that the oath of calumny had been falsely sworn. The mere fact that a woman, who may have repented of misconduct, gives information to her husband afterwards would never be collusion."

Counsel for the pursuer moved for expenses against the co-defender as between agent and client, and cited the Conjugal Rights (Scotland) Act 1861 (24 and 25 Vict. cap. 86), sec. 7; *Andrews* v. *Andrews*, February 7, 1873, 11 Macph. 401, 10 S.L.R. 251; *Munro* v. *Munro*, January 25, 1877, 14 S.L.R. 287; *Grant* v. *Grant and Another*, June 8, 1905, 43 S.L.R. 109. He also craved the Court to insert a direction to the Auditor to that effect in the interlocutor.

Counsel for the co-defender submitted that expenses should be taxed in the ordinary way, on the ground that section 7 of the Conjugal Rights Act only applied to cases where there was no conclusion for damages as there was here. In any event it was unnecessary to insert in the interlocutor the direction craved. He cited *Hoey* v. *Hoey*, June 6, 1884, 11 R. 905, 21 S.L.R. 620.

At advising, the opinion of the Court was delivered by

LORD PRESIDENT—We have looked into this matter and we have consulted the Auditor, and the Auditor has informed us that the practice of the office has been to treat the phrase in the Act of Parliament as imperative. In the older practice it was not thought necessary in view of the imperative phrase in the Act of Parliament to put anything into the interlocutor. It seems that in some more modern cases that practice has been departed from, and an instruction in the interlocutor has been inserted that expenses were to be taxed as between agent and client; but we think that is unnecessary, that the older practice is the right one, and that the Auditor will continue as before to treat the phrase in the Act of Parliament as imperative on him. We shall therefore make no express finding on the point, but as a matter of fact expenses will be taxed as between agent and client.

The Court found the co-defender liable to the pursuer in expenses, and remitted the account thereof to the Auditor to tax and to report.

Counsel for Pursuer—Crabb Watt, K.C. —R. S. Brown. Agent—John Robertson, Solicitor.

Counsel for Co-defender — Blackburn, K.C.—Wilton. Agent—J. Ogilvie Grey, S.S.C.

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*Friday, March* 15.

## FIRST DIVISION.

## GOVERNORS OF GEORGE HERIOT'S TRUST *v.* FALCONER AND OTHERS (LAWRIE'S TRUSTEES).

*Superior and Vassal—Feu-Contract—Construction—Composition—"A Double" of the Feu-Duty.*

The reddendo clause in a feu-contract entered into in 1889 was for certain sums of feu-duty for each of three lots of ground, to be payable "at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment" at certain dates respectively. There followed a clause providing for liquidate penalty in case of failure and for interest, and then came these words—"As also paying to" the superiors "a double of the said respective feu-duties before mentioned in name of composition at the expiration of every twenty-two years from the following terms," which were in each case a term of Whitsunday only.

*Held* (*dub.* Lord Johnston) that the sums payable to the superior in name of composition in addition to the annual feu-duties were twice the amounts of the respective feu-duties.

*Alexander's Trustees* v. *Muir*, January 28, 1903, 5 F. 406, 40 S.L.R. 316, *distinguished.*

A Special Case was presented for the opinion and judgment of the Court by (1) the Governors of George Heriot's Trust, incorporated by scheme made in terms of the Educational Endowments (Scotland) Act 1882, and approved of by her late Majesty Queen Victoria by Order in Council dated 12th August 1885, as amended by the Court of Session in terms of interlocutors dated 2nd December 1897 and 27th October 1908 (*first parties*), and (2) William Falconer and others, the surviving trustees of Charles Lawrie, builder, acting under his trust-disposition and settlement (*second parties*).

By contract of feu dated 9th and 11th February and recorded in the General Register of Sasines 9th April 1889, entered into between the Governors of George Heriot's Trust, on the one part, and Messrs Lawrie & Scott, builders and joiners, Edinburgh, and Charles Lawrie and Thomas Scott, the individual partners of the said firm, as trustees for the firm, on the other part, the said Governors, under the burdens therein mentioned, disponed to Charles Lawrie and Thomas Scott and the survivor of them, as trustees or trustee for behoof of the firm of Lawrie & Scott, all and whole that area of ground in Hillside Crescent, Edinburgh, marked Nos. 1, 2, and 3 on the feuing plan for building purposes, and that on the conditions contained in the said contract of feu. Thomas Scott was survived by Charles Lawrie, and the second parties were infeft as vassals in the said subjects as trustees of Charles Lawrie.

The clauses of tenandas and reddendo in the said contract of feu were in the following terms, viz.—"To be holden the said subjects before disponed of the said the Governors of George Heriot's Trust and their successors as immediate lawful superiors thereof, in feu farm, fee, and heritage for ever: Paying therefor, yearly, the said Charles Lawrie and Thomas Scott, trustees foresaid and their foresaids, to the said the Governors of George Heriot's Trust and their foresaids, in name of feu-duty as follows, *videlicet*—For the said lot number one on the plan prepared by said John Chesser the sum of thirty-six pounds; for the said lot number two on said plan the sum of thirty-six pounds; and for the said lot number three on said plan the sum of thirty-four pounds sixteen shillings; and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said sum of thirty-six pounds for said lot number one at the term of Martinmas Eighteen hundred and eighty-nine, and the next term's payment at the term of Whitsunday following (said feu-duty commencing to run at the term of Whitsunday Eighteen hundred and eighty-nine), and so forth, half-yearly thereafter in all time coming, beginning the first term's payment of the said sum of thirty-six pounds of feu-duty payable for said lot number two at the term of Martinmas Eighteen hundred and ninety, and the next term's payment at the term of Whitsunday following (said