

CHARLES GREENHILL, Trustee on the Sequestrated Estate of
 JAMES FORD, Appellant.—*Moncreiff—Buchanan.* No. 51.

MRS CATHERINE AITKEN, Respondent.—*Cranstoun—Greenshields.*

Husband and Wife—Divorce.—A wife having brought an action of divorce, on the ground of adultery, against her husband, which was opposed by the trustee for his creditors, so far as related to the pecuniary consequences; and the wife having emitted an oath de calumnia, and denied collusion; and the trustee having offered a proof of collusion; and the guilt of the husband having been established;—Held, (affirming the judgment of the Commissaries and the Court of Session), 1. That the proof offered by the trustee, after the oath of calumny, was incompetent; and, 2. That the wife was entitled to decree of divorce in the usual terms, without any qualification as to the right of the creditors of the husband.

IN 1804 Mr Ford, merchant in Montrose, was married to the respondent, Miss Catherine Aitken, daughter of Mr Charles Aitken, merchant in Santa Cruz. She was possessed of a considerable fortune, and had the prospect of acquiring a large addition to it on the death of her two uncles, John and George Aitken. An antenuptial contract of marriage was therefore executed, by which, in consideration of a tocher of L.10,000, Mr Ford became bound to secure to her certain money provisions; and, on the other hand, she assigned 'to and in favour of herself and the said James Ford, in conjunct fee and liferent, for the said James Ford's liferent use allenary, and the children to be procreated of the said intended marriage in fee; whom failing, to the said Miss Catherine Aitken, her own nearest heirs and assignees, all and sundry whatsoever means and estate, heritable or moveable, personal or real, which she may happen to acquire by succession, gift, legacy, donation, or otherwise, during the subsistence of the said intended marriage.' The parties lived for many years together in perfect harmony, and had a numerous family. In 1814 and 1815 George and John Aitken, Mrs Ford's uncles, died unmarried, and the former intestate. John left a settlement, bequeathing his whole property to Mrs Ford; and although this deed was reduced quoad the heritage, yet she was entitled to a large personal succession; and as one of the next of kin of her uncle George, she had right to about L.5000. In 1817 Mr Ford became bankrupt; and his estates having been sequestrated on the 27th of February, the appellant, Mr Greenhill, was appointed trustee. A short time prior to this event, a young woman of the name of Charlotte L. Sutherland had been received into the family as governess of

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the children. In the course of the same month the respondent proceeded to London by herself, on business (as she alleged) connected with the construction of a will before Doctors' Commons, in which she and her children had important interests. During her absence the lease and furniture of the house in which the family resided were sold by the appellant.² In consequence of this, she stated, that she was obliged to look out for a new place of residence; and accordingly she took a house at Durham, to which the children were brought from Montrose by Miss Sutherland, who was thereupon dismissed, as, under existing pecuniary circumstances, her services required to be dispensed with. In the meanwhile it appeared that an adulterous intercourse had been carried on between Mr Ford and Miss Sutherland in the house in Scotland and its neighbourhood. After the family had been ejected, he went to Paris, and was there joined by Miss Sutherland. They there represented themselves as uncle and niece,¹⁰ occupied contiguous sleeping apartments, separated only by a partition, but which had a door of communication. Some time thereafter Mr Ford returned from France, and came to Durham, where he was received by the respondent, who stated that she was entirely ignorant of the criminal connexion, and supposed that he had been induced to go abroad to avoid the diligence of his Scottish creditors. Her suspicions were, however, excited from having accidentally discovered that he called for letters at the post-office under the name of Cunningham, and represented himself as residing in a street different from that in which the house of the family was situated. About the same time she found an open letter in his bed-room, addressed to him as Mr Cunningham, which was evidently in the handwriting of Miss Sutherland, but which was subscribed by a feigned name, and was dated from Fahan in Ireland, to which place it appeared she had gone in consequence of having contrived to be introduced into the Bishop of Derry's house as governess. At this time the family consisted of ten children, one of whom was dangerously ill; and as the respondent was desirous to disconnect herself from her husband without his knowledge, and to take her children along with her, she alleged that she was obliged to have recourse to a stratagem; that with this view she sent part of the family to the country; and having ascertained that he was to dine from home on a certain day, she made arrangements for carrying off the children who were in the house, and those who were in the country meeting her on the road. She accordingly, upon the afternoon of the day when he dined

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abroad, departed from Durham, met her children on the road, and having travelled all night, arrived next morning in Edinburgh. No communication afterwards took place between her and him; and about three months thereafter she raised a summons of divorce before the Commissaries, in which she set forth, that for a considerable time past, and at least for the two last years, the said James Ford had totally alienated his affection from the private complainer, and not only treated her with great disrespect, harshness, and severity, but at many different times and places during the said period, he, the said James Ford, had given himself up to adulterous practices, fellowship, and correspondence with wicked women, one or more, known not to be the pursuer, his wife; and to the having adulterous intercourse and dealing with the said women, one or more, in the house of the pursuer and the said James Ford, at Bromley, near Montrose, and in the woods and fields, or other places, in the neighbourhood thereof, in Paris, and in Ireland, or elsewhere abroad, and other places to the pursuer as yet unknown: And more particularly, the said James Ford having formed an intimacy with a young woman of the name of Charlotte L. Sutherland, who for some time lived in family with the pursuer and her said husband as governess to their children at Bromley aforesaid, he committed adultery with her in that house, and in the woods and fields and other places in the neighbourhood thereof, on many different occasions, during one or more of the days or nights in the months of March, April, May, June, and July 1817, and more particularly in the two last mentioned months, during which the private pursuer had occasion to be absent: Also in Paris, to which place or elsewhere abroad, the said woman, known not to be the private pursuer, accompanied or followed the said James Ford; and there the said James Ford and the said Charlotte L. Sutherland, or other woman known not to be the pursuer, lived and cohabited together as husband and wife, under the name of Mr and Mrs Cunningham, or other feigned name, for several months, and particularly during the months of February, March, and April 1818, when, or about which time, from want of funds to continue their residence longer there, or other cause, they separated. She then concluded for decree of divorce against Mr Ford, and to have it found and declared, 'That the said defender has forfeited all his rights by contract of marriage, jure mariti, or otherwise, the same as if he were naturally dead; and that the private pursuer has right to all her provisions, both legal and

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‘conventional.’ No appearance was made by Ford; but the appellant, as trustee for his creditors, lodged defences, in which he stated,—

1. That there was no evidence of the charges of adultery.

2. That the process was a collusive scheme concerted between the respondent and her husband to defeat the vested rights of the creditors under the contract of marriage. And,

3. Lastly, That there were sufficient grounds for the plea of remissio injuriæ.

She was thereupon appointed to emit an oath of calumny, which she accordingly did, and denied the allegation of collusion. The appellant attended on this occasion by his counsel, and put special questions, which were answered by her. She was then judicially examined, and was particularly interrogated in regard to her knowledge of her husband's guilt; but she pointedly denied that she had any suspicion of it until the discovery at Durham. Thereafter she was ordered to lodge a condescendence in support of her libel, which she accordingly did, and in which she stated,—

1. That the parties in this cause were regularly married in 1804, and afterwards cohabited together as husband and wife, and had several children.

2. That, in the beginning of the year 1817, when the parties resided at Bromley, near Montrose, the defender formed a criminal attachment to Charlotte L. Sutherland, who lived at Bromley as governess to the children, and he committed adultery with her in the house of Bromley, and in the woods and fields in the neighbourhood thereof, on many different occasions, in the months of March, April, May, June, and July, in the year 1817; and particularly during the two last-mentioned months, in which the pursuer was necessarily absent from home. The defender and the said Charlotte L. Sutherland were repeatedly shut up in her bed-room together for a considerable time, with the door thereof locked or bolted on them. They were overheard, while in the said bed-room, whispering to each other; and at times came out of it with their dress in a disordered state, the defender buttoning up his clothes. The bed, after they had left the said room, was likewise in a disordered state. During the pursuer's absence from Bromley, the defender and the said Charlotte L. Sutherland were frequently together in the school-room, and were there seen sitting on the same chair, he with his arm round her waist, and kissing her. He was sometimes seen or heard leaving her bed-room during the

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' night, and going to his own apartment; and the said Char-
 ' lotte L. Sutherland's bed had repeatedly, in the mornings, the
 ' appearance of two persons having lain in it. The said Char-
 ' lotte L. Sutherland was sometimes seen in her bed-room, which
 ' is a small apartment off the school-room, undressed, and going
 ' to bed, while the defender was in the school-room, undressed,
 ' or undressing for bed. At other times, the defender's candle-
 ' stick and slippers were seen in the said Charlotte L. Suther-
 ' land's bed-room, at her bed-side. On many occasions, during
 ' the same period, the defender and the said Charlotte L. Suther-
 ' land were seen walking together in the shrubbery and plan-
 ' tations at Bromley, arm-in-arm, and he sometimes with his
 ' arm round her waist and neck, and kissing her; and they occa-
 ' sionally remained in retired parts of the said plantation for a
 ' considerable time together. Other acts of indecency or gross
 ' impropriety between the defender and the said Charlotte L.
 ' Sutherland will also be proved, for instructing that an adul-
 ' terous intercourse subsisted between the defender and the said
 ' Charlotte L. Sutherland.

' 3. That afterwards the defender and the said Charlotte L.
 ' Sutherland, at least a female and not the pursuer, went to
 ' Paris, and resided there during the months of October, No-
 ' vember, and December 1817, and of January, February,
 ' March, and April in the year 1818, lodging and sleeping at
 ' different hotels, and particularly in the Hotel Valois, Rue de
 ' Richelieu, No. 17. kept by Madame Marcel; in the Hotel des
 ' Hautes Alpes, Rue de Richelieu, No. 12. kept by Madame
 ' Deribois; and in the Hotel d'Arbois, Rue Traversiere, No.
 ' 32. kept by M. Barbriere. In these hotels they represented
 ' themselves as uncle and niece, but occupied contiguous sleep-
 ' ing apartments—the only entry to the bed-room of the said
 ' Charlotte L. Sutherland, or other female, being through the
 ' bed-room of the defender, to which her bed-room was imme-
 ' diately adjoining, the two apartments being separated only by
 ' a partition, with a door of communication in it to the two
 ' rooms; and in the said hotels they repeatedly were guilty of
 ' adultery together.

' 4. That subsequent to the period last mentioned, the defen-
 ' der and the said Charlotte L. Sutherland, or other female as
 ' sforesaid, separated in France, and she obtained the situation
 ' of governess in a family residing at Fahan, near Londonderry,
 ' in Ireland. While she resided at the said place, a written
 ' correspondence was carried on between her and the defender

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under fictitious names; and, in particular, she wrote to him under the address of "Mr. Cunningham, care of the Post-Office, Durham, England;" and the said letters contained various passages instructing that an adulterous intercourse subsisted between the defender and the said Charlotte L. Sutherland, or other female, as aforesaid.

5. That in October or November last, the defender visited her at Fahan, and resided several days in the house in which she lived, and repeated his adulterous intercourse with her.

Of this condescendence she was allowed a proof, which was taken, and by which the criminal intercourse, and the pregnancy of Miss Sutherland, were clearly established. A condescendence was thereupon ordered to be lodged by the appellant as to the plea of remissio injuriæ, (this having been superseded by consent of parties till after the proof of the adultery had been concluded); and in that condescendence he offered to prove,—

First, That the pursuer, Mrs Ford, deserted her husband's house at Bromley, near Montrose, in the month of February or March 1817, soon after his bankruptcy, and went to London, leaving her family of ten children under the charge of her husband and Miss Sutherland; and notwithstanding that she had expressed previously her knowledge and suspicion of an adulterous intercourse being carried on betwixt her husband and Miss Sutherland.

Secondly, That the pursuer thereafter corresponded with Miss Sutherland, and afterwards invited her to join the pursuer at Durham, where she had subsequently taken up her residence.

Third, That afterwards, and about the month of July or August 1818, and subsequent to the acts of adultery charged, the pursuer formed the resolution of again living with her husband, Mr Ford; and accordingly received him into her house at Durham, and she exerted herself, by every means within her power, to obtain him introduced into the best society of that city. That they lived together as man and wife for the period of six weeks and upwards, and visited many respectable families; and the pursuer expressed her displeasure when any thing occurred to induce her to believe that her husband had been treated with neglect in consequence of unfavourable reports against him, on occasion of such visits, or at public places.

Fourth, That the pursuer and Mr Ford, after living together as man and wife at Durham for the period of more than six weeks after the acts of adultery charged, again formed the

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‘ resolution of separating; and, as the pursuer is possessed of a
 ‘ large fortune, unattachable by the creditors of her husband,
 ‘ but the liferent of which belongs to Mr Ford’s creditors, in
 ‘ terms of the contract of marriage with the pursuer, the parties
 ‘ concerted a collusive plan, for the purpose of defeating the just
 ‘ rights of the creditors in the said liferent rights; and accord-
 ‘ ingly the pursuer became bound to pay an yearly annuity of
 ‘ L.200, less or more, to Mr Ford, upon which he agreed to
 ‘ live separate from the pursuer, and afterwards the present
 ‘ action was brought.

‘ *Fifth*, That notwithstanding the alleged detection, by means
 ‘ of the anonymous letters addressed to Mr Cunningham, and
 ‘ produced in process, of an adulterous intercourse carried on
 ‘ between Mr Ford and Miss Sutherland, the pursuer and Mr
 ‘ Ford continued to live together as man and wife in their house
 ‘ at Durham, for the period of at least one or two weeks after
 ‘ the said letters had come to the knowledge of the pursuer.

‘ *Sixth*, That Mr Ford continued to reside in the pursuer’s
 ‘ house at Durham for some time after she, the pursuer, had
 ‘ quitted it; and he remained till part of the annuity was paid
 ‘ to him by the pursuer or her agents, by her authority and
 ‘ out of her proper funds, and which said advance was subse-
 ‘ quently repaid by the pursuer to the person by whom it had
 ‘ been advanced.’

The Commissaries, on advising the proof with this conde-
 scendence, found, that Ford had been guilty of adultery with
 Charlotte Sutherland; that the allegations stated in the conde-
 scendence were not relevant to infer remissio injuriæ; and there-
 fore repelled the defence founded thereon, and divorced and
 separated, and found and declared in terms of the conclusions
 of the libel.

Against this judgment the appellant presented two petitions,
 in which he stated, that he ‘ did not oppose decree of divorce
 ‘ being pronounced in favour of the pursuer, provided the rights
 ‘ of the creditors were preserved entire;’ but contended, that as
 the acts of adultery which had been established had taken place
 subsequent to the sequestration, their rights could not be affect-
 ed by these illegal acts of Mr Ford; and therefore that there
 ought to be some qualification of the decerniture in terms of the
 libel, whereby it was found that he had ‘ forfeited all his rights
 ‘ by contract of marriage, jure mariti, or otherwise, the same as
 ‘ if he were naturally dead.’ The Commissaries having adhered,
 he presented a bill of advocacy, which was refused by Lord

June 16, 1824. Meadowbank on the grounds which were explained by his Lordship in the following note—

1st, The pleas of remission or collusion can only competently be urged in bar of the dissolution of the marriage of the parties litigant. But in this bill, as well as in the proceedings before the Commissaries, the complainer has renounced all intention of objecting to the marriage of Mr Ford and the pursuer being dissolved. In that situation, the Lord Ordinary apprehends neither the one plea nor the other is competent to the complainer, who actually concurred in the judgment of the Consistorial Court divorcing the parties.

2^d, Parole proof of collusion can only competently be offered before the oath of calumny has been emitted, as was decided in a late case, (M^r Lean is believed to be the name of the party). But here, without objection, the oath of calumny was administered, and the deposition of the pursuer upon the point of collusion is complete, and exhausts that part of the cause. The condescendence, therefore, of the circumstances offered to be established in proof of collusion, is hoc statu inadmissible; and, were it otherwise, they do not appear to the Lord Ordinary to infer, if made out, the conclusion contended for, but the very reverse.

3^d, The plea of remission may be urged at any period of the suit, and indeed can only be brought forward after the adultery is proved. But the circumstances alleged in the condescendence to substantiate the plea, took place before Mr Ford is proved to have gone to France with the individual with whom the crime is charged to have been committed, and continued there to reside with her in a state of adulterous intercourse. So far, therefore, there is no room for inferring remission from the circumstances stated to have taken place on the part of the pursuer. But, in order to infer remission, the previous knowledge of the adultery must be clearly made out, and the circumstances from which it is to be inferred pregnant, and of indisputable import. In the case of the plea being urged against the wife in particular, the law, it is thought, will make great allowance for the situation in which she is placed: Often without the means of leaving her husband,—generally of habits of indecision,—in most instances unwilling to drive matters to an extremity betwixt them,—in all, where there is a family, having before her eyes the prospect of a separation from her children, and of leaving them under the guardianship of one from whom they are not likely to derive much attention or

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‘ beneficial instruction. These considerations, it can hardly be
 ‘ doubted, must be allowed weight in all such instances; and
 ‘ therefore the Lord Ordinary inclines to think that many cir-
 ‘ cumstances will, where remission is pleaded against an action
 ‘ of divorce where the wife is pursuer, be often disallowed to
 ‘ infer that conclusion which would have borne an opposite con-
 ‘ struction if pleaded against a husband, to whom most of them
 ‘ cannot apply, and who is degraded even by exercising that for-
 ‘ bearing towards the vices of his wife; which, on her part, to-
 ‘ wards her husband, is often the result of the most amiable feel-
 ‘ ings, and which, instead of lowering, not unfrequently exalts
 ‘ her character in the world.

‘ The Lord Ordinary is, therefore, in this case, more than
 ‘ doubtful whether the circumstances alleged to have taken
 ‘ place before the defender’s having withdrawn to France, can
 ‘ be held as relevant to infer the plea of remission. On the con-
 ‘ trary, there is no proof offered of Mrs Ford’s absolute know-
 ‘ ledge of the adultery before this occurred. They no doubt
 ‘ exhibit a suspicion of her husband’s conduct, but no more;
 ‘ and it would be highly dangerous to infer such knowledge from
 ‘ loose conversations, which may have been held under circum-
 ‘ stances of irritation, or when, in truth, the pursuer meant only
 ‘ to state her suspicions. But, as before stated, there is nothing
 ‘ condescended on as inferring remission, after the withdrawing
 ‘ of Mr Ford to France.’

Against this judgment the appellant presented a petition to
 the Court; but their Lordships, on advising it with answers,
 adhered, and refused a petition on the 13th November 1821.*

Against these judgments he appealed, and maintained,—

1. That the plea of collusion was not incompetent, or exclud-
 ed by the respondent’s oath; and that it appeared from the whole
 circumstances of the case that there was collusion; and, at all
 events, the appellant was entitled to prove, by additional circum-
 stances, that there was such a collusion.

2. That the facts stated in the condescendence were perfectly
 relevant to infer the defence of remissio injuriæ. With regard
 to the peculiarities of a wife’s situation, and the allowance that
 ought to be made for her in this matter, he contended, that any
 such question must be one of circumstances; and therefore an
 opportunity should have been allowed for ascertaining these by
 proof, whereas all evidence had been rejected. And,

* See I. Shaw and Ballantine, No. 336.

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3. That, at all events, the judgment of divorce ought to have been qualified by a reservation, to shew that the legal effect of the divorce upon the civil rights of the parties was a point not thereby decided, but was open to be tried by the Court of Session, which was the only competent authority in the first instance.

On the other hand, the respondent maintained,

1. That it was settled law, that after a party in her situation had emitted an oath de calumnia, and had been examined in regard to collusion, it was not competent to allow the defender a proof of such an allegation; and therefore, that as this was the situation in which the present case stood, the appellant was not entitled to redargue her oath by other evidence.

2. That the allegations in the condescendence relative to the plea of remissio or forgiveness may be a good defence as to past wrongs, but it is not a license to commit in future the like offences with impunity, and the privilege of using it may be lost by a repetition of the offence. In order to found this plea in any case, it must be averred and instructed, that the injured party not merely harboured suspicions, but had sufficient knowledge of the wrong done; and that, nevertheless, such party forgave the offence, either in express terms, or by acting in such a manner as necessarily to imply a remission. A distinction, however, must, in this respect, be made between the two sexes, and that distinction is well and eloquently expressed in the note of the Lord Ordinary. A husband would be degraded to infamy by exercising such forbearance towards the vices of his wife, which on her part, when he is the offender, may be not only excused, but applauded, as dictated by amiable and virtuous feelings. But, in the present case, there was no allegation of such knowledge on the part of the respondent as could found the plea. The most anxious concealment from her had taken place. The criminal intercourse between the parties in Scotland did not take place openly till after she had gone to England. She had no means of discovering that which had been carried on in France, where the parties, for the purpose of concealment, held forth that they were uncle and niece; and with the same view, and in order to conceal their adulterous connexion from her, they had corresponded under false names. And,

3. That the decerniture was precisely in the established and proper form, and was the legal consequence of the finding that her husband had been guilty of adultery.

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The House of Lords ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed. June 16. 1824.

Respondent's Authorities.—Homphray v. Nate, Feb. 18. 1814, (Ferguson's Rep.); St Aubine v. O'Brian, March 3. 1814, (Ferguson's Rep.); 1. Stair, 4. 20.; 1. Ersk. 6. 48.

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(Ap. Ca. No. 67.)

JAMES BUCHANAN and Others, Appellants.—Bosanquet—Greenshields.

No. 52.

Mrs CRAWFORD or MOLLISON, Respondent.—Moncreiff—Cunningham—Gillies.

Donation, or Anticipated Payment of Legacy.—Circumstances under which it was held, (affirming the judgment of the Court of Session); That a sum of money paid by a testator to persons to whom he had bequeathed one-half of his effects, was an anticipated payment of their provision, and not a donation.

STEPHEN ROWAN, who had been the master of a merchant vessel, and afterwards a partner in a mercantile house in Port-Glasgow, married Mrs Margaret Crawford about 1764. Partly by his own exertions, and partly by the most penurious habits, he realized upwards of L. 28,000. No contract of marriage had been executed, and he had no children. His nearest relations were the family of his niece, Jean Miller, wife of George Buchanan, merchant in Glasgow. In August 1805 he executed a trust-deed of settlement, with the consent of his wife, by which he conveyed to her and certain other persons, chiefly her relations, (among whom was Mr James Crawford), as trustees, his whole estates, real and personal. By this deed, after appointing certain specific legacies to be paid, he directed the trustees to dispose of the remainder and reversion of my said estates, real and personal, by paying one-half thereof to my said wife; whom failing, to her disponees or assignees; whom failing, to her nearest heirs whatsoever: And, of the other half, to pay L. 1000 to the said Jean Miller, wife of George Buchanan, at the expiry of one year after my death, for her liferent thereof, and to be at her disposal to and among her lawful children; but the rest of said half shall be liferented by my said wife, if she survive me, during all the days of her life, and thereafter by the said Jean

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