

JOHN RITCHIE (THE HUSBAND), . . . APPELLANT.
 LOUISA GEORGIANA RITCHIE (THE } RESPONDENT.
 WIFE), }

1861.
 April 16th.

Divorce à vinculo after Divorce à mensâ et thoro.—After a decree of divorce *à mensâ et thoro* against the husband for cruelty, the wife sues for dissolution of the marriage on the ground of adultery committed by him while separate. Held, by the House (affirming the sentence of the Court of Session), that the wife was entitled to a decree of divorce *à vinculo matrimonii*.

Questions of Adultery—Juries.—Remarks of the Lord Chancellor, recommending a resort to juries in cases of adultery.

The Judge to hear the Evidence.—Opinion of the Lord Chancellor that the practice of taking depositions before a Commissioner is objectionable, and that the Judge who is to decide the cause ought himself to hear the evidence.

THE Appellant was married to the Respondent at Edinburgh, on the 18th January 1853. The parties had both arrived at mature discretion; the wife being then 45, and the husband 58. After the marriage they resided together for two years at Broompark, near Denny, in the county of Stirling.

On the 20th January 1855 the Appellant went to London on business; returning to Broompark on the 25th January 1855, he found that his wife had departed. Not long thereafter she instituted a suit against him for divorce *à mensâ et thoro and alimony*, on the alleged ground of cruelty. On the 15th March 1856 she obtained a decree, in which the Appellant acquiesced. She further, on the ground of the Appellant's alleged

infidelities, commenced the present action of divorce *à vinculo matrimonii*, by a summons issued on the 15th January 1856, that is to say, nearly a year after she had left her husband.

The Appellant having put in a defence, the *Lord Ordinary*, on the 6th March 1856, closed the record, and made a remit to the Sheriff Commissary to examine witnesses by deposition.

This examination occupied forty-four days. Among others, the woman charged with the adultery was examined, and as a witness upon oath denied the accusation. The evidence having been reported, the *Lord Ordinary* (Lord Ardmillan), on the 27th May 1857, pronounced an Interlocutor in the following terms :—

Finds facts, circumstances, and qualifications proved relevant and sufficient to infer the Defender John Ritchie guilt of adultery with Elizabeth Kelly or Bennett mentioned in the libel, the record, and the proof. Finds him guilty of adultery accordingly, and therefore divorces and separates the said John Ritchie, Defender, from the said Louisa Georgiana Ricketts or Ritchie, Pursuer, her society, fellowship, and company in all time coming. Finds and declares that the said John Ritchie, Defender, has forfeited all the rights and privileges of a lawful husband, and that the said Louisa Georgiana Ricketts or Ritchie, Pursuer, is entitled to live singly or marry any free man, as if she had never been married to the said John Ritchie, Defender, or as if he were naturally dead, and decerns. Finds the Defender liable in expenses, allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

The Appellant reclaimed to the First Division of the Court of Session, who, on the 9th July 1857, adhered simpliciter to the *Lord Ordinary's* Interlocutor.

Against the Interlocutors of the *Lord Ordinary* and of the Inner House the husband appealed to the House.

Mr. *Macqueen*, Mr. *Boyd Kinnear*, and Mr. *Arthur*, for the Appellant, contended that the nuptial bond

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ought not to be dissolved without clear proof of adultery, whereas in this case, the evidence was scanty and contradictory, and most of the witnesses were disreputable. The delinquency, moreover, even if proved, was subsequent to the separation, so that the requirements of the case were amply satisfied by the decree of divorce *à mensâ et thoro*, without going the further and extreme length of rescinding the marriage contract.

The *Lord Advocate* (a) and Mr. *Charles Scott* appeared for the Respondent, but were not called upon.

At the close of the argument on behalf of the Appellant the following opinions were delivered :

*Lord Chancellor's
opinion.*

The LORD CHANCELLOR (b) :

My Lords, this case has been very ingeniously and ably argued on the part of the Appellant, and nothing has been omitted that could be brought forward in his favour. Mr. *Macqueen* stated the principles by which, as he contended, the decision should be governed, but as was to be expected of Mr. *Macqueen*, he did not press his points against what he perceived to be the sense of the House. Mr. *Kinnear* has also very ably and with great lucidity analysed the evidence, in a manner which I think does him very great credit. But after paying the utmost attention to all that has been urged, I must say that I think it is unnecessary to call upon the other side for an answer. The question is entirely one of fact. There is no question of law in the slightest degree in contest between the parties. It is a question of the credibility of witnesses, and if the witnesses who were called on the part of the Pursuer are to be believed, there is no doubt that the fact of adultery is established.

(a) Mr. Moncrieff.

(b) Lord Campbell.

It is said that they are disreputable. But we are to look at all the circumstances. Nobody would expect in such a case that Bishops and Judges should be called to prove the facts which are to be established.

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Now instead of coming to a conclusion that the *Lord Ordinary* is wrong, I think he came to a right conclusion. What these witnesses state is not upon the face of it at all improbable. I do not wish to say anything to injure the character of Mr. Ritchie, but it appears that after a decree of separation *à mensâ et thoro*, in which he acquiesced, this proceeding for a divorce was instituted by Mrs. Ritchie, which he resisted, evidently without any reasonable thought of continuing the relation of husband and wife, but only from the motive that is imputed to him, that he might have the control over the lady's property, which was very considerable.

And here I must observe that the procedure in cases of this description in Scotland is lamentably defective, and that I should be glad to see a remedy applied. It appears there is no right to a trial by jury (a). Now we know that in Scotland trials by jury in criminal cases have been admirably conducted, and there is no country in the world where the criminal law is more admirably administered. I should therefore have thought that trial by jury was peculiarly applicable to such a case as this, where there is a charge of adultery to be made out by evidence. But at all events surely the Judge who is to decide the case ought to hear the witnesses, and to proceed upon *vivâ voce* evidence. My Lords, I may be pardoned for saying this extrajudicially; but now, speaking judicially, I must advise your Lordships that this Interlocutor be affirmed, and the Appeal dismissed.

(a) That is to say, neither party has a right to *demand* a jury.

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*Lord Cranworth's
opinion.*

Lord CRANWORTH :

My Lords, I concur with my noble and learned friend. I think that there is distinct proof of adultery. It appears to me that the case is entirely free from all possible doubt.

*Lord Chelmsford's
opinion.*

Lord CHELMSFORD :

My Lords, I am entirely of the same opinion.

*Interlocutors appealed against affirmed, and
Appeal dismissed.*