

that being the case, I entirely concur with your Lordships that the interlocutor should be reversed.

The House reversed the interlocutor of the Second Division and declared that the second plea-in-law of the defenders and respondents [viz., "the provisions contained in the marriage-contract of Helen Campbell or Mackie and John Gloag in favour of the children of the said Helen Campbell or Mackie by her first marriage were not onerous or irrevocable, and the pursuer had and has no *jus crediti* therein, and the said provisions being testamentary and revocable, the present action cannot be maintained"] ought to be repelled; Ordered that the "respondents pay the costs following on the reclaiming-note in the Court below, and such costs in this House as have been incurred by the appellant in appearing *in forma pauperis*, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments with the usual provisions for diligence in the case of non-payment, as in the case of *Mackenzie v. The British Linen Company* [11 Feb. 1881, 8 R. (H. of L.) 9]; the costs prior to the reclaiming-note to be dealt with by the Court below as costs in the cause;" and remitted the cause to the Court of Session to do therein as shall be just.

Counsel for Appellant (Pursuer)—Shiress Will, Q.C.—M'Clymont—C. M. Le Breton. Agents—A. Beveridge—W. Officer, S.S.C.

Counsel for Respondent (Defender)—Lord Adv. Balfour, Q.C.—Webster, Q.C. Agents—Martin & Leslie—J. & J. Ross, W.S.

COURT OF SESSION.

Friday, March 7.

FIRST DIVISION.

[Lord Lee, Ordinary.]

WHYTE v. WHYTE.

Proof—Divorce for Adultery—Evidence of Single Witness—Corroboration.

In an action for divorce at the instance of a wife against her husband on the ground of adultery alleged to have been committed with a female servant in his house—held that evidence of improper familiarities by the defender towards other servants with whom adultery was not libelled was competent as corroborative of the oath of the *particeps criminis*.

This was an action of divorce on the ground of adultery at the instance of Mrs Robina Cameron Harkness or Whyte against the Rev. John Whyte, minister of the parish of South Queensferry. The acts of adultery libelled were alleged to have been committed in the manse with two of the defender's servants, named Janet Marshall and Margaret Young. The former denied ever having committed adultery. The latter swore to several acts, the last of which was on 26th

April 1882. She had a child on 17th February 1883, 297 days after the last act of connection to which she deponed. In corroboration of her oath proof was led of indecent conduct by the defender towards other servants in his employment with whom adultery was not libelled. The evidence is sufficiently indicated in the opinion of Lord Mure.

The Lord Ordinary (LEE) found adultery proved with both Marshall and Young, and in his Opinion made the following remarks upon the question whether the evidence of Margaret Young was supported by corroboration where corroboration might have been reasonably expected. "But the evidence of one witness alone may be sufficient to establish adultery in a case where several acts of adultery are libelled; and I hold that this rule applies not only to the case of several acts of adultery with the same person, but to cases, like the present, of adultery with several persons, particularly where these persons stand in the same relation of servant to the alleged adulterer. It appears to me that the reason upon which one witness may be sufficient proof in the one case is equally applicable to the other; and I think the conduct of the alleged adulterer, upon other the like occasions, is relevant as affording corroboration. It has been so held in England, where one witness uncorroborated is not sufficient—(see *Soilleux v. Soilleux*, 1 Hagg. C. R. 373; *Foster v. Foster*, 1 Hagg. C. R. 144; *Taylor v. Taylor*, 1849, Thornton's Notes of Ecclesiastical Cases, vol. vi. p. 558). The evidence disallowed in the case of *King* (4 D. 590) was very different. For what was proposed there was to lead proof as to the conduct of the alleged paramour towards other women. In considering whether Margaret Young's story is credible in itself, I therefore think it competent and necessary to have regard to the defender's conduct towards his female servants on other occasions."

The defender reclaimed, and argued—There was no reported case in Scotland in which evidence of improper familiarities with persons other than the alleged *particeps criminis* had been admitted. The case of *King v. King*, 4 D. 590, had carried the law as far as it had gone in allowing evidence of facts not specially averred on record to show personal intimacy between the defender and the *particeps criminis*.—Fraser on Husband and Wife, 1154, 1161. In *Forster v. Forster*, 1 Hagg. C. R. 144, 152, the evidence was offered to support a plea of recrimination in bar, not an original accusation of adultery. In *Taylor v. Taylor*, 6 Thornton's Notes of Cases, 558, adultery was alleged to have been committed with the persons towards whom the defender had used improper familiarities.

At advising—

LORD MURE—In this action of divorce decree is sought to be pronounced against the defender for adultery with two young women, named Janet Marshall and Margaret Young, in the manse occupied by the defender in South Queensferry, and in the house in South Queensferry where the former of these women lived after her marriage. The adultery with the girl Marshall, now Mrs Walters, is charged as having been committed in 1878–79–80, and that with Margaret Young during the years 1881–82. The Lord Ordinary has pro-

nounced an interlocutor in which he finds both charges proved; but as regards the charge of adultery with Marshall his judgment is limited to the adultery alleged to have been committed in the manse at South Queensferry before her marriage, which took place in January 1880. The adultery charged as having been committed with her after her marriage was added to the record after the case came into Court, as condescendences 5 and 6. The Lord Ordinary holds that these charges have not been proved.

As regards these last charges, I have had no difficulty in coming to the same conclusion as the Lord Ordinary, for reasons which I will immediately explain. The other charges are attended with more difficulty, and I will now deal with them in their order.

The case as regards Janet Marshall is set out in the fourth article of the condescendence. The Lord Ordinary has disposed of it under different divisions, and I propose to adopt pretty much the same course. The condescendence sets forth—“The said Janet Marshall, on an occasion in the end of May or beginning of June 1878, which the pursuer is unable more particularly to specify, visited the defender, and she was received by him in his study. The study has two doors, and upon the said Janet Marshall being received therein, the defender locked both doors, and he and Janet Marshall remained alone together for more than an hour. The pursuer, after Janet Marshall left, asked the defender what he had been doing with her, and he replied that she had been helping him to make up the communion-roll, and explained that Janet Marshall knew more of the religious condition of the parish than the whole session. The pursuer believes and avers that on the said occasion the defender committed adultery with the said Janet Marshall.”

The charge here made is thus very specifically stated to have occurred in the end of May or beginning of June, and the first question to be considered is, whether that charge has been proved. It is one of a very exceptional character, and in substance amounts to this, that the defender, who is a man about sixty years of age, and who had been married in the beginning of May, and only returned home in the middle of that month, within about a fortnight of his return home, sent for this girl, who was about nineteen, to come to the manse, where his wife and his daughter by a former marriage were living, and that when she came there he committed adultery with her in his study, or in other words, that the defender, on that occasion, seduced the girl. Upon the face of this allegation, the story is a most improbable one, as the girl is proved up to that date to have been a modest, well-behaved girl, and it involves a degree of depravity on the part of the defender which could scarcely be exceeded. It is a charge therefore which requires to be proved by evidence of the clearest and most unimpeachable description. The evidence in support of it consists of that of the pursuer and a girl of the name of Dick, who was then a servant in the manse. But before advertising further to this evidence it is desirable to attend to that of Mrs Findlay, with whom the girl worked, as to how she happened to go to the manse on that occasion. Mrs Findlay says—“I remember when she was with me of her going to the manse to give some information to Mr

Whyte. I think she did so both in 1877 and 1878. I remember of a message coming from the manse for her to go there. The message was brought by Miss Whyte. I saw Miss Whyte when she called. She said Mr Whyte would be obliged if Janet would go and give him a few addresses. I allowed her to go in consequence of Mr Whyte's request. She went to the manse between five and half-past six. Her tea hour was five o'clock, and it was at that time that she went. She left my house at five o'clock, and she came back at six. On this occasion she was rather longer in coming. I have known Janet Marshall since she was a child. I always considered her a modest girl. I never saw any improper conduct on her part. I do not think Mr Whyte could have got any better person to give him information with regard to the addresses of the people of the parish.”

This is important as fixing the time, viz., about the beginning of June, and also as to the character of Marshall. The girl Dick says as to this incident—“I remember a short time after I entered Mr Whyte's service of a girl named Marshall coming to the house. I think it would be about the second week after I went that she came. It was I who opened the door to her and let her in. She asked for the Rev. John Whyte. I had never seen her before. She appeared to me to be a girl of about nineteen years of age. I showed her up to the study, and told Mr Whyte she was there, and he went up after her. I saw her go out, but I cannot say how long she was in the house. Before she went away Mr Whyte asked his wife to give her a bit of the bride's-cake, and Mrs Whyte went to the sideboard and took out the cake-basket and gave her a piece. I did not try the study door when the girl was there with Mr Whyte. Mr Whyte did not say what the girl was wanting.” She speaks also to three other visits, one of them in July, when she says she and Mrs Whyte tried the study doors and found them locked, but she does not say they were locked on the occasion now in question. Then as to this first visit the pursuer says—“I remember of a girl Janet Marshall coming to the manse after we returned from our marriage trip. I had met her in Mr Whyte's house before our marriage, on the 3d January, and knew her again when I saw her at the manse. She was a girl of about nineteen or twenty. I do not know anything about where she was before she came to the manse. I do not know whether she had delivered milk before that time; I never heard. It was exactly a week after we returned from our wedding trip when she first came to the manse. It was Maggie Dick who opened the door to her. She was shown upstairs to the study. I did not see her before she went. I cannot say how long she was in the study at that time. I did not know that she was there until Mr Whyte came downstairs with her, and came into the dining-room where I was sitting, and asked me to give her a piece of my bride's-cake. I said ‘Certainly.’ She left after she got a bit of the bride's-cake.” That is the whole of the evidence for the pursuer bearing directly on this particular charge, and it is in my opinion altogether insufficient to lead to the inference that adultery was committed on that occasion. It is not proved that any door was locked, or that any kind of impropriety took place.

In the course of the discussion it was said that

the reason given for sending for the girl was absurd, and showed that it was a mere pretence on the part of the defender, as the information about the parish might be got elsewhere, and showed that the defender had invented that pretence as an excuse for sending for the girl. Now, that is a matter of opinion. It did not strike Mrs Findlay as absurd or a pretence. It seems, on the contrary, to have appeared to her that the girl had very good sources of information on the subject. Nor did it so strike Mrs Stewart, the defender's daughter, who went to Mrs Findlay's to ask the girl to come to the manse, and whose credibility was not challenged. She says—"I knew a girl Janet Marshall. I knew her a long time, off and on. She was a very respectable girl, and came of respectable people. She came first of all temporarily to service at the manse for three months between December 1877 and March 1878. During that time she helped my father by giving him addresses. She was qualified to do that, because she had been all her life in the place, and knew where the people lived. She had been in the habit of carrying milk from door to door, and knew where everyone stayed. There are no numbers in Queensferry, and it is very difficult to know where people stay. There are many families also living in one close or lane. I remember of Janet Marshall coming to see my father after he was married to his present wife. She came to give him addresses, and tell him where the people had changed to. I went for her by my father's direction. I asked if she could come, and told her what it was for. She came and saw my father in the study. While she was in the study I had occasion to pass through it to my bedroom. My bedroom opened into the study, and I got in and out of it that way, or through the dressing-room and drawing-room. I usually went through the study, because it was the nearest way; that was the principal reason. There was also frequently furniture up against the door between the drawing-room and the dressing-room, and it would have had to be put out of the way if I had wished to go that way. As a matter of habit I used the study continually as a means of access to my bedroom. If there had been any impropriety on the occasion when Janet Marshall was with my father in the study I must have heard it. There was no impropriety so far as I know. Janet Marshall came to the house twice to see my father when Mrs Whyte was there. I was in the study on both of these occasions; I passed out and in several times. I never found the study door locked so that I could not get in. On the door between the study and my bedroom there is a lock. The key was on the bedroom side. It could be put in on the other side, but it was habitually on the bedroom side. At the time when Janet Marshall called, the furniture in the study consisted of a writing-table and chairs. There was a sofa put in afterwards by Mrs Whyte. It was not there before. She had it put there because she wished her own furniture in the drawing-room." On this state of the evidence I have no difficulty in coming to the conclusion that this charge as laid has not been proved. It is a most improbable one in itself as I have already remarked, and in all the circumstances almost incredible; and it is, in my opinion, not only not proved, but disproved by Mrs Stewart as well as Marshall who both say

the doors were not locked, and the former of whom passed through the study to her bed-room and back on the occasion.

The charges of adultery set out in condescence 5 and 6, which the Lord Ordinary has held have not been established, depend mainly on the evidence of Mrs Allan and her husband, and that evidence is in my opinion not to be relied on. Mrs Allan says she remembers the girl's marriage, and of her coming with her husband to Mrs Mulholland's house. She cannot say if Walters left with his ship in April or May, but that in May, before the old term, she went out one night and had to pass Mrs Walter's door. "It would be past ten o'clock at night when I went out; ten o'clock struck on my clock before I rose to go out. It was clear daylight at the time. There could be no mistaking any person on the street. When I was passing the house where Mrs Walters was staying, I saw Mr Whyte and spoke to him. He said 'Good night, Mrs Allan.' He rapped at the door of Mrs Walter's house, and turned the handle and went in. It was the outside door of the house that he knocked at. The door opens by means of a handle, and he opened it and went in. I did not see him any more that night. I did not wait to see him come out; I might have waited long enough." I think the last sentence shows a pretty decided *animus* against the defender, for the witness evidently meant to infer that she believed the defender remained all night. Then she says it was before the 25th May, and clear daylight at half-past 10 o'clock at night, while such a thing at that season is unknown, as the sun sets at about half-past eight o'clock. In the third place it is proved that the husband's ship left about the 8th of May, and Mrs Walters went to her mother's house to live there a few days after the ship went away. That is distinctly proved by Mrs Walter's mother and sister and Mrs Mulholland, so that the evidence of Mrs Allan and her husband as to the time cannot be true. I think, therefore, that the charges of adultery made against Mrs Walters after her marriage are also disproved.

In this view of the evidence as to the first adultery charged in condescence 4, and also as to that charged as committed after the marriage, the question comes to be, whether, in regard to the other occasions spoken to by the pursuer and Margaret Dick, we are to believe them or to believe Janet Marshall and Mrs Stewart, the former of whom says she was only at the manse on two occasions during the period libelled, while the latter says she saw her on two occasions only, but never heard of her being there oftener. Condescence 4 sets forth—"After that occasion (that is after the charge with which I have already dealt), and before the said Janet Marshall entered the defender's service on 15th August 1878, the said Janet Marshall repeatedly visited the defender, who received her in his study, and was there repeatedly alone with her, the doors being always locked. From the time the said Janet Marshall came to the defender's house he never slept with the pursuer, but he paid visits almost every night to Janet Marshall, who was alone in bed in the closet off the kitchen. The pursuer believes and avers that the defender carried on a continuous course of adulterous conduct and intercourse with the said Janet Mar-

shall, in the said manse at Queensferry, from the month of May 1878 till she left his service about the beginning of the year 1880, and the defender was also in the habit of using indecent familiarities with the said Janet Marshall." It is remarkable that there is here no specific statement as to the time when the other visits of Janet Marshall took place, or as to there having been any adultery committed on the occasions when the door is alleged to have been locked. The pursuer and her advisers must have been quite aware of how the case stood in these respects in their view of the evidence, because this action was not the first occasion on which these charges had been made matter of judicial averment with a view to judicial investigation. The averments in condescendence 4 are admittedly the same as those set out in the action of separation and aliment brought by the pursuer in 1879, and afterwards withdrawn on a compromise; and they should, according to the ordinary rules applicable in such cases, have been more specific and distinct as to the time the meetings occurred, which must have been well known to the pursuer, and more particularly as to the date of the adultery now said (but not alleged on record), to have been committed in October 1878 in the bed-closet off the kitchen of the house. But although the pursuer applied for and obtained leave to amend the record and made important additions, no more distinct averments were made as to the adultery alleged in the fourth article of the condescendence. No objection, however, seems to have been taken to this want of specification at the proof which we have now to dispose of, but it is a circumstance not to be lost sight of in dealing with the case.

In regard to the alleged visits to the manse other than the one with which I have already dealt, there is, as the Lord Ordinary has pointed out, considerable conflict of testimony as to the number of those visits. In the view I take of this part of the case it is not necessary to examine the evidence in detail in order to ascertain whether Janet Marshall was at the manse on four occasions as deposed to by the pursuer, or on two as deposed to by Marshall herself and Mrs Stewart—a point on which there may very well be a difference of opinion—because on the question of credibility, viz., whether adultery was committed on any of these occasions, I see no reason to doubt the credibility of the girl. Her evidence, in my opinion, is on the whole clear and distinct, not contradictory in itself, and substantially confirmed by Mrs Stewart in so far as it admits of corroboration by her, and in the face of the distinct and unequivocal denial the girl has given of all the charges, I am unable to come to the conclusion that adultery took place, in a case where it is not even specifically alleged on the record to have been committed, merely because the girl came to the manse to see this clergyman about matters as to which it is said that others could have informed him, and was in the room alone with him, with the door locked on one or two of these occasions. To come to that conclusion one must hold that besides being an adulteress she deliberately perjured herself throughout her whole evidence, and that is what I am not prepared to do in the case of a person who is proved to have been a modest well-behaved girl by those who had good means of knowing her character up to the day when she was sent for to come to the manse,

and who is now a respectable married woman. The charge against her as to the first act set out in condescendence 4 is, in my opinion, disproved. The charges made against her of adultery after her marriage have also been disproved. She has, therefore, been found to have spoken the truth in denying those charges, and I see nothing in the evidence to warrant me in holding that she perjured herself when she denied the other charges.

It appears to me, moreover, that the conduct of the pursuer as to those charges is not to be thrown out of view, for we find that after she says she was aware of the adultery, which she alleges took place with Janet Marshall in June and July, she went to visit her relatives in Paisley, and when there wrote to her husband the letter which was laid before us, and which is in answer to one in which he had informed her that Janet Marshall had been engaged as a servant in the house. That is a very peculiar letter, to say the least of it, to be written by a woman who believed that the girl had four times visited the defender in the manse for an improper purpose, and had committed adultery with him there.

Again, these charges were all made in the previous action of separation and aliment, and that action was withdrawn. We have it stated on record in the present action that the pursuer craved leave to withdraw the action "of separation and aliment, and all statements therein impugning the defender's character." These same allegations, which were then withdrawn, have been made matter of proof in this case, and it appears to me that if this action had been laid on these averments alone it might have been made matter of serious question whether statements which had been so withdrawn in a previous action ought to have been sent to proof in a new action of a similar nature. That, however, is a question which does not here arise, but the withdrawal of them is not in favour of the pursuer's belief in their veracity. That is the evidence which relates to Janet Marshall, and in dealing with these charges I have not referred to the evidence of the pursuer's sister Mrs Hatrick, to whom the defender appears to have behaved with much rudeness, but who is only able to say with regard to Janet Marshall that on her calling at the manse she saw the defender standing in the kitchen talking to the servant-girl, whom she was afterwards told was Janet Marshall. Nor have I alluded to the evidence of a witness—a Mrs M'Arthur—who says that on a Sunday she saw the defender, who was smoking in his back-yard, a place which was overlooked by a number of windows besides that of the witness's house, use an indecent liberty with Janet Marshall. It does not seem to me probable that in such circumstances such an act would have been committed.

In dealing with this evidence as to the charges of adultery with Janet Marshall, I have not in any degree, as will have been observed, relied on the denials given by the defender. I rest my opinion on the other evidence in the case, and on the opinion I have expressed as to the credibility of Marshall herself. I see very much in the extraordinary conduct of the defender, in going down to the maidservants' room, as well as to the kitchen, at the times and in the manner in which he did, which is open to serious observation and reflection, and what his intentions to-

wards Janet Marshall may have been I have no means of knowing. I put my opinion, therefore, as I have said, on the credibility of the other evidence in the case.

II. On the charge of adultery with Margaret Young, the other servant with whom the defender is said to have committed adultery, I am constrained to come to the same conclusion as the Lord Ordinary. I think that the grounds on which his opinion proceeds are well founded, and that his views on the questions raised as to the admissibility of the evidence and its sufficiency to convict the defender are sound. Adopting his opinion on the evidence, it is unnecessary for me to go into it at any length, and I shall only say a few words on this part of the case as to the rules understood to be applicable to evidence in any action of filiation or of divorce.

In the first place, there was ample opportunity for carrying on the adultery on those occasions when the defender's daughter Miss Whyte, now Mrs Stewart, was away from home; and it is on these occasions, when there was no other person in the house than the defender and Margaret Young that the latter says the intercourse between them took place. Then Margaret Young's character previous to this alleged course of misconduct seems to have been good. There is no evidence of any light conduct on her part, or of her having been seen to be on an improper footing with other men. She fixes on the defender as the father of her child from the first, and is consistent in her story throughout. That is proved by her mother and by Mrs Thomson, to whose service she went after leaving the defender. Mrs Thomson says she spoke to her on the subject of her condition, and though at first she would not tell who was the father of the child, she ultimately stated in the presence of her mother that the defender was the father of the child.

The period of gestation was referred to as being for a period inconsistent with the theory that the defender could be the father of the child of which the girl was delivered. The child was born on 17th February 1883, and connection is said to have taken place for the last time on 26th April 1882. That is said to be too long a period to be relied upon in an action of divorce as proof of the guilt of the defender; but I find that it is a period of 297 days, and that is a period which both medical and legal books of authority on the subject consider to be quite a possible period of gestation.

Certain discrepancies in the account which this girl gave when she went to the poor-house to be confined, and when she went to the defender's agent Mr Baxter and made a statement to him, as compared with her story in the witness-box, are also relied on. I think these discrepancies arise from a confusion she makes as to the time when the defender went to Liverpool. It is a confusion as to the exact year viz., 1880 or 1881, arising I think from the fact that Miss Whyte went to Liverpool at the end of each of these years. But the statement of the fact that the intercourse took place for the first time on the night of the defender's return from his visit to Liverpool is quite consistently adhered to; and so also is the statement that the connection was repeated when Miss Whyte was absent in Cupar

and in Glasgow. It is said that there is a discrepancy also as to the Glasgow visit, but that is merely a confusion as to whether Miss Whyte was away for one night or for two.

Now, that is the case which the Lord Ordinary had to deal with, with the exception of two important points, the first of which relates to the conduct of the defender with regard to the examination of the girl by Dr Jardine. I think that conduct is a circumstance which is not in the defender's favour. It may not be precisely a corroboration of the girl as to who it was that had connection with her, but it goes at all events to prove that when this medical man examined her in February 1881 he was satisfied that she was not a virgin. That corroborates her statement that she had had connection with some one before, and she says it was with the defender. If that examination had proved her to be a virgin, it would have at least disproved the statement she makes against the defender as to his having had intercourse with her shortly before that examination, and it has thus a not unimportant bearing on the result. As to the time of her visits to the doctor, it is proved that she went first to see him in September 1880 as to some slight stomachic complaint, and that, before her second visit, the defender goes to Dr Jardine to ask him to examine her, and see if she is with child, because, if so, she was to be dismissed. Thereafter she is examined by the doctor, with the result to which I have already referred. I think this visit of the defender to Dr Jardine a remarkable circumstance, and a corroboration to some extent of the girl's story.

The Lord Ordinary has held that there is corroboration of the girl's evidence in that of Christina Haldane, a witness into whose bedroom the defender admits that he went at half-past two in the morning to ask her to make his bed. Her account of what took place there is that she was so disgusted with his conduct in coming into her room and into her bed that she left the house at five the same morning, and went home to her mother. It was maintained that this was not competent evidence in law to corroborate Margaret Young. I cannot adopt that view, especially in a case where the defender's position as a clergyman, and the improbability of his so acting towards Margaret Young, are founded on in defence. I think evidence of indecent conduct to other women is competent corroborative evidence of the charge with regard to a particular woman; and I find that in England, where there is more strictness than with us as to two witnesses being necessary to prove an act of adultery, such is the state of the law. We find, for example, in Lord Stowell's opinion, in one of the cases cited, that he held that proof of indecent liberties with other persons will afford corroborative evidence of one witness with regard to a particular act of adultery, and that in a subsequent case Dr Lushington adopted the same view. Thus in *Foster v. Foster*, 1 Haggard 144 (at p. 150) Lord Stowell says that the evidence of a witness brought for a purpose similar to that for which Christine Haldane was adduced "is a decisive proof of corrupt inclinations and endeavours on the part of" the defendant; and again (at page 151) his Lordship says that evidence of adultery "derives confirmation strong from proofs furnished by other females on whom similar attempts

have been made in a course of conduct familiar and habitual to this person;" and (p. 153), that certain instances of failure of defendants' endeavours to induce certain women to commit adultery with him "furnish a strong corroboration to the conclusion to be drawn from the other cases where it is evident that no such resistance was to be apprehended." Dr Lushington's opinion to the same effect will be found in the case of *Taylor* in the 6th volume of Thornton's Notes.

I think, therefore, that both according to the general rules of evidence, and according to authority, the Lord Ordinary is right in his view on this part of the case.

On these grounds I have come to the conclusion that adultery with Margaret Young is established.

The LORD PRESIDENT and LORD SHAND concurred.

LORD DEAS was absent.

The Court recalled the interlocutor of the Lord Ordinary in so far as it found the charge of adultery with Janet Marshall proved, but adhered with regard to the charge of adultery with Margaret Young.

Counsel for Pursuer and Respondent—Scott—Strachan. Agents—Miller & Murray, S.S.C.

Counsel for Defender and Reclaimer—Graham Murray—C. K. Mackenzie. Agents—Mitchell & Baxter, W.S.

Friday, March 7.

FIRST DIVISION.

ORR EWING AND OTHERS v. ORR EWING'S TRUSTEES (NOTE FOR GEORGE AULDJO JAMIESON, JUDICIAL FACTOR).

(*Ante*, p. 423).

Judicial Factor—Trust-Estate—Sequestration—Powers.

A trust-estate having been sequestrated, a judicial factor was appointed thereon "with power to him to take full and complete possession" of the estate. The Court thereafter, on a note being presented for the factor stating that the trustees would not deliver over the trust-estate, granted to him warrant to "take full and complete possession of all sums belonging to the trust-estate . . . and of the whole writs, titles, and securities, books, papers, and documents of and concerning the same," and granted warrant to and ordained the bank in which sums were at the credit of the estate, to pay to him as factor the sums lying at the credit of the trust-estate on deposit or on account-current, and also on various companies to transfer to his name, as factor, the amounts of their stocks, shares, or debentures belonging to the trust-estate, but on its being stated for the defenders that the granting of such an order would, if it were obeyed by them, render them liable to be proceeded against for contempt of the Court of Chancery, which had ordained them to lodge accounts in Chancery, refused *hoc statu* to ordain the defenders to deliver up the estate and the titles thereof.

Ante, p. 423. George Auldjo Jamieson, C.A., the judicial factor on the trust-estate of the deceased John Orr Ewing, appointed by interlocutor of 29th February 1884, as previously reported, presented this note, in which he stated that having called upon the defenders, the trustees, to put him in full possession of the trust-estate, he was satisfied that they would not, without a direct compulsor, deliver over to him the trust-estate and effects. The prayer of the note was as follows:—"To grant warrant to, authorise, and empower the said George Auldjo Jamieson, as judicial factor foresaid, to take full and complete possession of all sums of money belonging to the trust-estate of the said deceased John Orr Ewing, and of the whole writs, titles, and securities, books, papers, and documents of and concerning the same, wheresoever or in whose hand soever the same may be found; and to grant warrant to, authorise and ordain the said defenders, and the said M'Grigor, Donald, & Company, their agents, and all other persons acting for them or on their behalf, and all bankers and others in whose hands there are sums of money belonging to the said trust-estate, forthwith to deliver up to the said George Auldjo Jamieson, as judicial factor foresaid, all such sums of money, and all writs, titles, and securities, books, papers, and documents of and concerning the said trust-estate and effects; and without prejudice to the generality of the prayer of this note, to grant warrant to and ordain the Royal Bank of Scotland to pay to the said George Auldjo Jamieson, as judicial factor foresaid, the following sums of money belonging to the said trust-estate, viz.:—[*here followed a list of certain sums*], and to grant warrant to and ordain the following companies to transfer to the name of the said George Auldjo Jamieson, as judicial factor foresaid, the following amounts of their stocks, shares, or debentures now belonging to said trust-estate, and for which the certificates or other vouchers bear to be in name of 'William Ewing, Archibald Orr Ewing, James Ewing, William Ewing Gil-mour, Henry Brock, and Alexander Bennet M'Grigor, and the survivors and survivor of them, as trustees of the late John Orr Ewing,' or are otherwise expressed in favour of the defenders, or one or more of them as trustees foresaid, and are of the several dates and registered numbers after mentioned, viz.:—[*here followed a list thereof*], and to decern; to allow interim extract of the deliverance to be pronounced hereon, and to dispense with the reading in the minute-book, and allow extract to be issued forthwith."

The trustees, respondents in this application, asked for delay until further proceedings in the Chancery Division, in view of a letter from the solicitors for the plaintiff in the English suit, intimating that if the trustees did any act to divest themselves of their trust-estate, without previously obtaining the authority of the Chancery Division, they would be committing a contempt of that Court.

Authorities—*Young v. Collins*, Feb. 24, 1852, 14 D. 540, 746, 811—*rev.* March 14, 1853, 1 Macq. 385.

At advising—

LORD PRESIDENT—On the 29th of last month, in the action of declarator at the instance of the parties entitled to the residue of Mr John Orr