

Thursday, November 15.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BEGG v. BEGG.

*Husband and Wife—Decree of Divorce—Reduction—Relevancy.*

A wife who had been divorced for adultery raised an action for reduction of the decree, on the grounds (1) that the material evidence against her was perjured, and (2) that it had been obtained by subornation of perjury committed by an agent of the husband. The Court, *reserving* opinions on the first ground, *allowed* proof before answer of the averments with regard to the subornation of certain witnesses.

In 1886 Charles Begg, M.B., residing at Hankow, China, brought an action of divorce for adultery against his wife Rachael Isabella Lockhart or Menzies or Begg. Upon 25th February 1887 decree of divorce was pronounced by the Second Division of the Court of Session.

Upon 15th December 1887 the defender raised an action for reduction of the said decree, on the ground that it was obtained by an agent of the husband having suborned the witnesses to depone falsely.

The pursuer in the reduction produced the following affidavits of two of the husband's witnesses in the action of divorce:—

“At Edinburgh, the 14th day of June 1887 years,—In presence of John Walcot, Esquire, one of Her Majesty's Justices of the Peace for the county of Edinburgh; appeared Elizabeth Fairbairn, servant, No. 9 Rankeillor Street, Edinburgh, who, being solemnly sworn, depones—I was a witness at the trial of *Begg* against *Begg*, in which Mrs Begg was divorced from her husband, and I have now to state, with reference to the evidence which I then gave, that the greater part of it was untrue. In particular, I never heard Mr Phelps call Mrs Begg ‘Tui,’ always Mrs Begg, nor have I ever seen Mr Phelps in Mrs Begg's bedroom, either dressed or without his coat or boots, as I said in the Court. I never heard Mrs Begg call Mr Phelps ‘Sam dear’ or ‘Sam darling,’ and I never lay awake to listen if he went downstairs after he had come up to bed. After he went into his room he closed his door, and I have never heard him go downstairs until the following morning at breakfast time. I have never seen Mrs Begg iron Mr Phelps' cuffs or collars or shirt. I have never seen Mr Phelps in Mrs Begg's room while she was doing her hair or washing her hands, nor have I ever seen him in Mrs Begg's room after I came in with the children. The statements I made to the above effect at the trial were untrue. All which is true as the deponent shall answer to God.”

“At Edinburgh, the 17th day of June 1887 years,—In presence of John Walcot, Esquire, one of the Magistrates and a Justice of the Peace for the city of Edinburgh; appeared Christina Ramsay Fairbairn, presently working in the brickworks at Portobello, and formerly a domestic-servant, who being solemnly sworn, depones—I gave evidence at the proof in the action of divorce by Mr Charles Begg against his wife on 15th July last. I have been very miserable ever since, see-

ing that a number of the statements which I made then were untrue, and I have since been, and now am, anxious to make what amends I can for the harm I then did. The whole of the statements which I made as to the alleged intimacy between Mr Phelps and Mrs Begg are not true. In particular, I have never seen Mrs Begg and Mr Phelps kissing one another, and I never heard either of them call the other ‘darling.’ What I stated about Mr Phelps taking off his boots in Mrs Begg's house when there was supper was untrue. I have never known them to be in the bedroom together alone with the door shut, and it is not the case that I found the bed disarranged. I never shut the kitchen-door because of anything I saw pass between Mrs Begg and Mr Phelps. Mrs Begg never stated to me that Phelps was her step-brother, nor did she ever say to me that if ever a divorce was brought against her she would be able to work for herself. I never saw Mrs Begg arm-in-arm with Phelps at Portobello Railway Station. I am very sorry for the harm I have done, but I was led into saying the untruths at the trial, and am prepared now to state in any court the true facts of the case. All which is truth, as I shall answer to God.”

The averments on which the pursuer in the action of reduction relied appear from the following opinion of the Lord Ordinary, who found the averments irrelevant and dismissed the action.

“*Opinion.*—The object of the present action is to reduce a decree *in foro* pronounced in the Court of Session, on the ground that the witnesses were perjured and were suborned.

“To aver that the witnesses in a cause were perjured is not sufficient in an action of reduction. In almost every case that is tried there is conflicting evidence. Much of it is undoubtedly false, and it is for the judge or the jury to find out on which side the truth lies. Therefore, an allegation that the successful party obtained a verdict or decree in consequence of perjured evidence is irrelevant as a ground of reduction. But the pursuer goes further than an allegation of perjury, and states that the evidence given against her was suborned by a person acting on the defender's behalf, and she maintains that her averments on this head ought to be allowed to be proved. There can be no doubt that subornation of perjury is a ground of reduction, even of a decree *in foro* of the Court of Session. In the case of *Lockyer v. Ferryman*, June 28, 1876, 3 R. 896, the Lord Justice-Clerk stated the law as follows—‘I entertain no doubt that an allegation relevantly made, that a decree was obtained by the successful party having induced or bribed the witnesses to depone falsely, is, like any other fraud, sufficient to rescind or subvert a decree so obtained. If a man obtains a decree by bribing the judge or by personating the creditor in a debt, the judgment so obtained must yield to a proof of the facts.’ And in the case of *Forster v. Grigor or Forster*. January 21, 1871, 9 Macph. 448, Lord Cowan expressed himself as follows—‘There is an essential distinction between an allegation of subornation of perjury and one merely of perjury. If subornation of perjury by the party successful in the action were here alleged, the conduct of the party would be fraudulent; and inasmuch as a party cannot benefit by his own fault or fraud,

that would form a relevant ground of reduction of a decree alleged to have been obtained by such means.' In both of these cases the allegations upon which the decrees were sought to be set aside were found to be irrelevant or insufficient, and the question now comes to be, whether there is to be found in the present record any relevant statement, such as is necessary to support a charge of the commission of a crime—Hume, i. 381.

"The pursuer's allegations consist of an attack upon the credibility of five witnesses who were examined against her. In the first place, she avers that Christina Ramsay Fairbairn gave false evidence when she said that she had seen the pursuer kiss the man with whom she is said to have committed adultery, and that she had seen other familiarities between the parties; and it is averred that such evidence 'formed a material part of the evidence adduced by her in said action.' The advising by the Judges in the Inner House has not been reported, and the Lord Ordinary has no means of knowing what view they took of this girl's evidence; but, in so far as regards his own opinion, it was so little material that he discarded it altogether, not because he did not think the girl a credible witness, but because it was a point in the case which was capable of corroboration, and was not corroborated, and also because the witness and the pursuer parted upon unfriendly terms. The pursuer next attacks the witness Elizabeth Fairbairn, and avers that she spoke falsely when she said that she had been a witness of familiarities between the pursuer and the man. The truth or falsehood of her evidence was a matter for the Court to judge of, and the pursuer, knowing this, makes the averment that the two girls gave this false evidence 'on the suggestion, or at the instigation of a private detective named Alexander Macdonald, who was employed by the defender to concoct and procure evidence against the pursuer;' and it is said that he enforced these suggestions by 'various threats against them, alleging that he would "jail" them if they did not say that the particulars he mentioned were true, and urged them at all events to say that they heard those particulars stated.' Now, the precise meaning of this threat is not very obvious, and if the threat was issued, it seems to have been very senseless. How persons could have been induced to swear falsely by a threat to 'jail' them (meaning, it is supposed, to put them in prison) if they did not swear falsely, is really very difficult to comprehend when an appeal to the parents, the neighbours, and the police was quite open. There is here a want, as there was in the case of *Lockyer v. Ferryman*, and in the case of *Forster v. Grigor or Forster*, of any specification of the suggestions which the private detective made, or the time or place when he made them, and without such specification the averments are irrelevant.

"Lastly, in regard to this matter of subornation, the pursuer charges Frederick Reid and his wife Mrs Reid as giving false evidence, which is just a reiteration of what was formerly maintained by her after her proof was led; and then comes this general averment—'The pursuer further believes and avers that the said detective also visited these witnesses, and profiting by

their animosity to the pursuer, induced them to give the said evidence against her.' This vague and general averment is plainly irrelevant.

"But not contented with the allegations of subornation the pursuer in this record goes over points of law which were decided by the Court. She complains that a motion made by her in the course of the proof to be allowed to lead additional evidence for the purpose of proving that Christina Ramsay Fairbairn had made a statement inconsistent with her evidence after that evidence had been given was refused. The judgment of the Court upon this point is reported (*Begg v. Begg*, February 25, 1887, 14 R. 497), where it was held 'that it is incompetent to recal a witness to be examined as to statements alleged to have been made by him since he was examined as a witness in contradiction of the evidence he then gave.' The pursuer's point simply comes to this (if there be anything in it), that the Court gave an erroneous judgment on a point of law.

"Then it is complained that the witness Miss Martha Somerville gave evidence which 'was disregarded by the Lord Ordinary and the Court, on the ground that a lady friend of the pursuer and the said witness had written a letter to Miss Somerville prior to her examination as a witness which, it is believed, affected her evidence.' The Lord Ordinary and the Court had a perfect right to disregard her evidence if they thought it was affected by the circumstance stated, but it is not correct to say that it was entirely disregarded by the Lord Ordinary and the Court, for the Lord Ordinary, at all events, founded upon Martha Somerville's evidence as a ground for disregarding that of Christina Ramsay Fairbairn.

"It is also further averred that 'the Lord Ordinary and the Court, in pronouncing the decrees sought to be reduced, proceeded upon the evidence of Donald Fraser, now an innkeeper, and formerly a sergeant of police at Portobello, who deponed that in the summer of 1883, *i. e.*, from April till August, he often saw the pursuer and Mr Phelps together and alone and in suspicious circumstances and at untimely hours at and in the neighbourhood of Portobello. The fact is that the pursuer had never met or seen Mr Phelps prior to the month of October 1883, and that Mr Phelps had not been in Portobello until September of that year.' Be it so. The Court had the right to give what weight they thought was justly due to the evidence of this witness. The Lord Ordinary who saw him, and heard him deliver his evidence, believed him to be an honest man, and in every way a credible witness, only he made a mistake as to the time, and this mistake the Lord Ordinary pointed out in his opinion. The pursuer has reproduced the circumstance once again. It was only a very small matter to which Fraser's evidence applied, and cannot in any way be said to have been material.

"This case is therefore one that ought to be stopped at the outset. Instead of a final decree of the Court putting an end to strife it would, if such an action as this were entertained, be not the ending but the beginning of strife."

The pursuer reclaimed.

The case was continued to allow her to amend her averments of subornation of perjury with the view of making them more specific.

The pursuer lodged proposed amendments, stating in full the evidence summarised in the affidavits above mentioned. She stated the particulars in which she alleged this evidence to be false and perjured, and averred that in each particular it, along with the evidence of a Mr and Mrs Reid, was procured by subornation of perjury on the part of the defender, or of his agent Alexander Macdonald, a private detective acting on his instructions, and who, she averred, was employed by the defender to get up the case against her, and was supplied by the defender with funds for that purpose.

When the case was again called, the pursuer argued—The averments were now relevant. They gave sufficient notice to the other side of what the pursuer intended to prove, and that was all she was called upon to do. The allegations need not be as specific as in a criminal indictment. The pursuer by these averments had gone further than merely making allegations that the evidence of certain witnesses was false; she had alleged that Macdonald, as an agent for the pursuer, had gone to certain persons and obtained false evidence by subornation of perjury. That was the element wanting in the case of *Forster v. Grigor or Forster*, January 21, 1871, 9 Macph. 448. The case of *Lockyer v. Ferryman*, quoted by the Lord Ordinary, could not be an authority, as that was an extreme case, brought thirty years after the alleged hints on which the reduction was sought.

The respondent argued—The averments were not relevant. The evidence of the witness Christina Fairbairn was not material, the Lord Ordinary and the Inner House having both disregarded it, and besides, at the previous trial an unsuccessful attempt had been made to show that her evidence was false. The evidence of Elizabeth Fairbairn was certainly not disregarded by the Judges, but there was sufficient evidence to warrant decree apart from it. It was not averred that the pursuer was personally cognisant of the actings of Macdonald, even if the averments as to the latter were sufficient—*Lockyer v. Ferryman*, June 28, 1876, 3 R. 882.

At advising—

LORD YOUNG—I was not one of the Judges who heard the previous action of divorce. I am therefore not intimate with the facts of it, but I have regarded this action, which has been raised for the purpose of reducing the decree in that action of divorce, as raising questions of the highest importance. The original action of divorce was begun in 1886, and decree was finally pronounced in 1887. In the latter part of the same year this action was brought, and it is founded substantially upon the ground that the evidence upon which that decree proceeded was false and perjured evidence, and not merely that the decree proceeded upon an erroneous view of that evidence. It is not merely said that there was an exaggerated view of the facts given, but further, that this false evidence had been of service in the cause, and had been material in the view of the Court in granting the decree they did, and that it had been procured by an agent for the husband by crime of subornation of perjury. I am not prepared just now to give any opinion on the question whether a decree in an action of divorce or any other decree of this Court may be

set aside in an action of reduction upon the ground that the evidence upon which the Court proceeded in giving judgment was false and perjured. I do not need to express an opinion upon that point. We are told that there is no judgment upon the point, although there are *obiter dicta* to the effect that a reduction would not be entertained, and I desire to reserve my opinion. But it is in some respects a different question, and a more extensive one, whether it is not a relevant ground of reduction that a party should aver that a decree against him was obtained by means of evidence procured by subornation of perjury. It does not seem doubtful to me that if it was established that a man had procured decree of divorce against his wife by means of perjured evidence, procured either through his agent or by himself, that that decree could not stand whatever might be the means necessary for getting rid of it. I do not think it necessary to give any opinion upon the relevancy of the action, or whether the decree could be reduced even if it were proved that certain evidence was false, but the averments are such that I think it would be expedient for the parties and justifiable for the Court to see how the facts really stand before deciding the legal questions, or saying anything as to the materiality of the evidence given by the witnesses, except that the Court proceeded to a certain extent upon the evidence of one of them. It is averred that the pursuer's case had been handed over to Macdonald, that he went about procuring false evidence, and that he got these girls, partly by means of bribes and partly by threats, to give false evidence. The general result of it has been stated in the affidavits produced by the pursuer, and a fuller and more particular account has been given in the proposed amendments. It comes to this, that the defender and the co-respondent in the action of divorce acted in an unbecoming manner which indicated some immoral connection between them, and all the evidence of the Fairbairns is confined to matter tending to prove exhibitions, of a character favouring the idea, that they were significant of adultery. Now, the averment in this case is, that all this evidence was false in the knowledge of the witnesses, but that they were urged to give it by Macdonald's threats and bribes. If the evidence on this matter were taken by a short inquiry, a much easier issue would be left for us to decide than the very difficult questions of law which might arise on the case as it stands at present. The question then would be whether or not the evidence of these girls was false, and was induced by Macdonald's machinations. If the pursuer failed to establish her contention that the evidence at the former trial was false, then there is an end of the matter. If, however, the pursuer should succeed in proving that their evidence was perjured, then serious questions of law would emerge, but we should have all the circumstances before us. I think that we should allow a proof before answer with respect to the averments that the pursuer makes in regard to the evidence of the Fairbairns.

LORD RUTHERFURD CLARK—I also agree that we should allow a proof before answer, but nothing more at present. I would in the meantime rather refrain from making any observations on the matter.

LORD LEE and the LORD JUSTICE-CLERK concurred.

The Court allowed a proof before answer as to the averments of the witnesses Fairbairn.

Counsel for the Appellant—Gloag—G. W. Burnet. Agent—Robert Stewart, S.S.C.

Counsel for the Reclaimer—J. B. Balfour, Q.C.—Jameson. Agents—Stewart & Stewart, W.S.

Thursday, November 15.

## SECOND DIVISION.

[Sheriff Court of Ayrshire.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY v. BOYD, GILMOUR, & COMPANY AND OTHERS.

*Process—Appeal—Competency—Court of Session Act 1868, sec. 71—A.S., March 10, 1870—Omission to Lodge Prints in Time.*

In an appeal from the Sheriff Court the appellant failed to lodge prints within fourteen days after the Clerk of Court had received the process, in terms of A.S., March 10, 1870, sec. 3 (3), the appeal having been taken by mistake to the First Division instead of the Second Division. The Court, in the circumstances, and in view of the fact that no prejudice had been suffered by the respondents, *repelled* an objection to the competency.

The Act of Sederunt of March 10, 1870, which regulates the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 71, provides, in regard to appeals from inferior courts—“3 (2) The appellant shall, during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof, if any, . . . and the appellant shall upon the box-day or sederunt-day next following the deposit of such prints with the clerk, box copies of the same to the Court. And if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court, as aforesaid, a print of the papers required, or to box the same as aforesaid on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed as hereinafter provided. Section 3 provides for reponing on cause shown within eight days after the appeal has been held to be abandoned—“(5) On the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same, and the Clerk of Court shall further re-transmit the process to the Clerk of the Inferior Court.”

Upon 29th June 1887 the Sheriff-Substitute of Ayrshire at Kilmarnock (HALL) decerned in favour of the pursuers in this action.

The defenders appealed to the First Division of the Court of Session, and upon 8th March 1888 the Second Division, to which the case had been transferred, allowed the record to be amended in terms of a minute lodged for the defenders.

Upon 15th March 1888 the Court recalled *in hoc statu* the said interlocutor of the Sheriff-Substitute, and remitted the case to the Sheriff with instructions to allow the parties a proof of their respective averments under the record as amended. The Sheriff-Substitute accordingly again allowed the parties a proof, and upon 29th June 1888 he issued an interlocutor by which he “repelled the defences, and decerned against the defenders in terms of the prayer of the petition.”

The defenders appealed to the First Division of the Court of Session upon 25th July 1888, and the appeal was noted as received by the acting Depute Clerk of Session on 26th July 1888. The amended record, proof, and interlocutors were not boxed to the Court until 4th September 1888. When the case was put out for hearing upon 15th November the pursuers objected to the competency of the appeal on the ground that the defenders had failed to comply with the Act of Sederunt 10th March 1870 in not boxing the prints in the appeal within fourteen days from the 26th of July.

The pursuers argued—The prints ought to have been boxed to the Court on the first box day in vacation, which fell on 17th August, and if not boxed by that time, then the defenders could have applied within the next eight days to be reponed. But they did neither of those things. When the days for reponing had elapsed, the Clerk of Court ought to have marked upon the proceedings the intimation given in the Act of Sederunt, and re-transmitted the process to the Sheriff Court. But the defenders in this case borrowed the process, and so prevented the clerk from re-transmitting the process according to his duty. The appellants must be held to have abandoned their appeal, and the judgment of the Sheriff-Substitute had become final. In the cases quoted by the defender the parties had printed and boxed some part of the necessary prints, and were consequently allowed to print others, but in no case had the parties omitted to print all the papers, and yet had been allowed to prosecute their appeal—*Park v. Weir*, October 15, 1874, 12 S.L.R. 11.

The defenders argued—The delay had arisen through a mistake of the country agent, who had appealed the case to the First Division when he ought to have appealed it to the Second Division, and the agents in town did not become aware of the facts in time. But the Court had a discretion in the matter, and where no delay had been occasioned the appeal would be regarded as competent, although the terms of the Act of Sederunt had not been strictly complied with. Here the prints had been boxed by 4th September, and no prejudice had resulted—*Walker v. Reid*, May 12, 1877, 4 R. 714; *Young v. Brown*, February 19, 1875, 2 R. 457; *Lattimer v. Anderson*, December 20, 1881, 9 R. 371; *Robertson v. Barclay*, November 27, 1877, 5 R. 257; *Greig v. Sutherland*, November 3, 1880, 8 R. 41.

At advising—