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was good against the debts of the creditors of his father and of Lord Primrose. The appellant having brought an action (ranking and sale) for the sale of part of the estate for the purpose of paying off these debts, and praying the Court to “authorise a sale of as much of the said lands and estate as will pay the said debts, and to find and declare that by such sale the appellant shall not incur any irritancy of the entail.” The respondent contended that the entail gave no power to sell part of the estate for the said debts.

The Court, after full memorials, “found, and hereby find, That by the conception of the entail of the estate of Primrose (Carrington) neither the pursuer (appellant) nor any of the heirs of entail, are empowered to sell any part of the estate for payment of the debts, and therefore refuse to interfere or authorise any sale for that purpose.” Mar. 6, 1770.

Against this interlocutor the present appeal was brought to the House of Lords.

After counsel were heard, it was

Ordered and adjudged that the interlocutor be affirmed, because the debts in this case have arisen since the death of the maker of the entail, contrary to his intention, and from a cause which he could not foresee; without prejudice to the question, if the debts had been contracted by the maker of the entail, or any of his predecessors.

For the Appellant, *Jas. Montgomery.*

Ex parte.

Mrs. MARGARET HOUSTON STEWART NICOLSON,

Appellant;

HOUSTON STEWART NICOLSON, ESQ.,

Respondent.

House of Lords, 18th Feb. 1771.

DIVORCE—PROOF—ADMISSIBILITY OF PARTICEPS CRIMINIS—ALSO OF A SLAVE.—In the course of a proof, in an action of divorce against the wife, the party with whom she had adultery was adduced as a witness against her: Held him admissible as a witness. This judgment affirmed in the House of Lords. It was also objected to a slave, that he was incapable of bearing testimony, he not being a Christian, or able to take the usual oath. The Court of Session ordered him to be examined as to his belief or creed. This affirmed on appeal.

This was an action of divorce brought by the respondent against his wife, on the ground of adultery, committed by her with William Graham, a servant man to Sir William Maxwell of Springkell, while on a visit at Springkell.

A proof being allowed by the Commissaries, in the course thereof the appellant stated certain objections to the witnesses offered as incompetent in law.

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In the first place, she objected to William Graham as a witness, on the ground that he was a *particeps criminis*, the alleged adulterer, and therefore a party who could not be examined to prove the adultery. 2nd. She next objected to Lady Maxwell and Sir William Maxwell adduced against her as witnesses, on the ground of relationship to the pursuer who adduced them, Lady Maxwell being his sister. 3d. She next objected to the admissibility of a negro named Latchemo, in the service of the respondent's sister Lady Maxwell; on the ground that a slave was inadmissible, as not being a Christian, and therefore incapable of feeling and understanding the proper sanctions of an oath. 4th. She next objected to the admissibility of John Busbie, on the ground of his having acted as agent in the cause, and therefore objectionable on the ground of agency.

July 4, 1776. The Commissioners pronounced this interlocutor:—"Having considered the depositions of the witnesses already adduced, with the objections stated to those offered, allow Sir William Maxwell to be examined *cum nota*; as also allow Lady Maxwell to be adduced, reserving to the defender to put such interrogations to her *in initialibus* as may further tend to support the objections to her testimony. And reserving to the Commissaries to judge of the import of the witnesses answers to these interrogatories, and likewise to judge what credit is due to her testimony, in case she shall be admitted: Find the objections stated against the evidence of the said William Graham not competent at the defender's instance; and therefore repel the said objections, and allow the witness to be adduced; reserving to him, in case he thinks fit, to object to his own examination, or to the interrogatories to be put to him, and to the Court to judge of the import of his objections, if any such are offered, as accords: As to Latchemo the negro, before answer, appoint him to appear in Court, in order to be examined upon the articles of his faith: And find, That the said John Busbie cannot be examined as a witness upon any facts that have come to his knowledge since the time that he was employed as an agent in this cause; and so far sustain the objections stated against him."

Dec. 6, 1776. Lords, pronounced this interlocutor: "Refuses the bill with respect to William Graham, and Latchemo the negro, being examined as witnesses in this cause, and in so far remits the cause to the Commissaries simpliciter; and farther remits the cause to the Commissaries with this instruction, that they first determine the question with respect to their allowing Lady Maxwell to be examined as a witness in this cause, and then, before determining the question, Whether Sir Wm. Maxwell is to be examined? that they ordain the pursuer to give in a special condescendence of the questions in which he proposes to interrogate the said Sir William Maxwell."

The appellant brought the present appeal against the interlocutors of the Commissaries and of the Court of Session, in so far as they

permit the examination of William Graham and Latchemo the negro slave.

Pleaded for the Appellant.—As to the admissibility of William Graham, the particeps criminis, with whom the adultery is said to have been committed. 1st. By the civil law, which, when not opposed by statute or feudal law, takes place universally in Scotland, the person accused as adulterer could not be examined to prove the adultery, neither could a person convicted of adultery be a witness at all; and the same is the law of Scotland, in conformity with the civil law. There are various decisions in Scotland upon these principles, and the following very late one, in the case of Carruthers against his wife, when the Court of Session added this instruction to the order allowing a proof, viz. “That he, Bell, (the person with whom the wife was charged to have committed adultery,) be not admitted a witness either for or against the defender, as to the facts charged against him by the other witnesses.” The present case falls under both these rules; for, 1. The pursuer accuses Graham as the adulterer; and, 2. The purport of asking his oath, is to make him confess it, which is equivalent to a conviction. 2. The appellant has reason to believe that some precedents, alleged to have been brought from the ecclesiastical courts in England, greatly influenced the Court of Session in making the last judgment complained of. The appellant is a stranger to these cases, as well as the grounds on which they proceeded. She apprehends the circumstances attending them must have been totally different from those attending the present case. But whether they were or not, these ought not to have had any more effect *here* than as exhibiting the course of practice in any other foreign jurisdiction; and it is humbly submitted that it is the law of Scotland which must govern the case. By the law of Scotland, the evidence of ultroneous witnesses (that is, persons offering themselves as such,) cannot be received; and the Court here has departed from the Scotch practice, by authorising the examination of Graham, and in the same breath allowing him to object to such examination, thereby giving him an option of being or not being examined, which, in case the former should be his choice, must fix the character of ultroneous witness on him. Further, he was objectionable on another ground. It has been seen that he was servant to Sir William and Lady Maxwell, and it has all but been proved, that this action was first instigated by Lady Maxwell, and carried on by the direction of Sir William. Graham is the son of one of Sir William’s tenants, was brought up in his family, and rose gradually to the station of upper servant, and was a favourite with Sir William and his Lady, from all which he is under such influence as disqualifies him. 3. As to the admissibility of Latchemo, Sir William’s negro slave, the appellant humbly apprehends, that till Sir William himself is admitted as a witness in this cause, his slave ought not nor can be received, and that no slave, by the law of Scotland, can be received as a witness.

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Vide Pan: De Ritu. Nupt. L. 43. Mathews de Testib. Par. 4. Stat. Wm. the Lyon, c. 2, Sir George Mackenzie, tit. Witness 10.

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Pleaded for the Respondent.—There are two points to be determined here; first, Whether William Graham, the person accused of the adultery with the appellant, is an admissible witness against her, and, 2. Whether the negro slave shall be admitted?

There is nothing in the law of Scotland which puts a negative upon the evidence of the *particeps criminis*. On the contrary, from the authorities, both in the civil and Scotch law above quoted, it is clear that such evidence is not only admissible, but requisite and necessary, in proving adultery and all other crimes. These authorities are corroborated and strengthened by the uniform practice not only of the spiritual court in Scotland, where the adulterer has generally been permitted to give evidence, but also by the practice of the civil or criminal courts, where, in trials for murder, robbery, forgery, and other crimes, the *socii* have always been admitted as witnesses. This rule is not peculiar to the spiritual court of Scotland, but is also the rule in the spiritual courts in England, where the paramour is admitted as a competent witness. The objections therefore, *Quod nemo tenetur jurare in turpitudinem suam*, and that the witness, by swearing to the fact, renders himself infamous and intestible, are both of them admissions of the matter the respondent has undertaken to prove, and might perhaps supersede the necessity of his calling any witnesses. The objection, if good at all, is personal to the witness alone, and not competent to the appellant. As to the case of Carruthers founded on, Bell was adduced for the defender and not for the pursuer of the divorce, and so does not apply to this case. And as to the objection from the influence which Lady and Sir William Maxwell (who are alleged to have instigated the action) have over the witness, both the one and the other are groundless. But where, as in this case, the judges have reserved to themselves to judge what degree of credibility shall be given to his evidence, all these objections become frivolous. 2. All that the Court has determined respecting Latchemo the negro, is, That he is to be examined on the article of his faith; which is a proceeding so unexceptionable that it is amazing it should have been complained of in this appeal. If, from the examination, the Court shall judge it improper to take his evidence in the cause, he will be rejected. If otherwise, his being in a state of slavery to Sir Wm. Maxwell, can afford no legal objection to his admissibility, when he is to give evidence under the protection of the law.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Al. Wedderburn, J. Dunning, J Dalrymple.*

For Respondent, *Jas. Montgomery, Thos. Lockhart.*