

Wednesday, May 18.

SECOND DIVISION.

[Lord Adam, Ordinary.]

MURRAY v. BISHOP AND OTHERS.

Proof—Writ or Oath—Loan.

This was an action of multiplepounding raised at the instance of Mrs Mackay or Murray, as executrix-nominate of her husband the Rev. James Murray, minister of Reay, in Sutherland, under a mutual disposition and settlement executed by the spouses. The defenders who lodged claims were Mrs Bishop (who under the said deed was to succeed to the fee of their whole heritable and moveable estate on the wife's death) and the trustees of a marriage-contract executed by the spouses in 1860. In this marriage-contract the pursuer conveyed to the trustees, *inter alia*, her whole right to the proceeds of certain farms in which she had a joint right with her sister Miss Johanna Mackay. The estate so conveyed was to be held in trust for the sole use of the pursuer, and was to be exclusive of her husband's *jus mariti*. In 1865 Miss Mackay, the pursuer's sister, took a lease of the farms in her own name, and granted a bond for £1000 in favour of the marriage-contract trustees, in part payment of the value of the pursuer's share in the stock, &c., which had been valued at £1212, 17s. 7d. The Rev. Mr Murray being at that time in poor circumstances, applied to the trustees to be allowed to receive payment from Miss Mackay of the balance of the said sum payable by her. The trustees consented, and Miss Mackay accordingly paid over the sum of £210 to him in three sums of £180, £50, and £10, for which they received three acknowledgments, the first being signed by the two spouses, the second and third only by Mrs Murray.

The marriage-contract trustees in demanding repayment of the £210 pleaded that they had advanced the money to the Rev. James Murray on loan and on condition of repayment. Mrs Bishop claimed that the executry estate should suffer no such diminution.

The Lord Ordinary (ADAM) found that the trustees had failed to prove by competent evidence the alleged loan, and repelled their claim accordingly.

On their presenting a reclaiming-note the Lords adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimers—J. A. Reid. Agent—Alexander Morison, S.S.C.

Counsel for Respondents—Scott. Agent—John Walls, S.S.C.

Friday, May 20.

SECOND DIVISION.

[Sheriff Court of Lanarkshire.]

WOOD v. NELMES & COMPANY.

Lease—Sub-Lease—Rent.

In this action, which was raised in the Sheriff Court of Lanarkshire, the pursuer sought to obtain payment of a sum of money due as the rent

of certain premises belonging to him which had been occupied by the defenders under an assignation by a certain William Bowes of his right to the said premises, as constituted by a lease from the pursuer by which assignees and sub-tenants were excluded. It was admitted that neither rent nor sub-rent had been paid for the period sued for, but from the evidence it appeared that there had been a tacit recognition of the defenders as tenants by the pursuer. The defenders pleaded that they were not tenants under the pursuer, and therefore not liable.

The Sheriff (CLARK), affirming the Sheriff-Substitute (SPENS), decerned against the defenders for the sum sued for, and on appeal the Lords adhered.

Counsel for Appellant—Brand. Agent—W. Elliot Armstrong, S.S.C.

Counsel for Respondent—Hon. H. Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, May 20.

SECOND DIVISION.

[Lord Adam, Ordinary.]

MARSHALL v. MARSHALL.

Husband and Wife—Divorce—Lenocinium.

A man who married a prostitute, shortly afterwards, in the presence of witnesses, bade her obtain her living by returning to her old life and getting some one to make her his mistress, and then deserted her. The woman being left in poor circumstances, obtained an interim award of £50 from the Lord Ordinary, having previously refused as insufficient an alimentary allowance of £50 per annum from her husband's relatives. She subsequently committed adultery on various occasions in the house of an old associate who kept a brothel. *Held* (rev. Lord Ordinary), in an action of divorce raised by the husband, that his language, coupled with the fact of his having left her exposed to old temptations, was sufficient to bar him from divorce on the head of *lenocinium*.

This was an action of divorce raised by Harry Marshall, formerly coffee-planter, Ceylon, latterly residing in the Island of Skye, against his wife, residing in Edinburgh, on the ground of adultery. The pleas urged in defence were generally a denial of the pursuer's statements, and *separatim lenocinium*, in respect of the pursuer's conduct towards his wife.

In the proof, which was taken before the Lord Ordinary, the following facts appeared:—The parties were married on the 9th of October in London, the defender having been for some years previous a prostitute plying her trade in Edinburgh. They then sailed for Ceylon, where the pursuer had coffee estates, and remained there till March 1880, when he was ordered home with health impaired from the effects of drink. After a short stay in London they returned to Edinburgh, where they lived in lodgings. Their life was now a very unhappy one, as the pursuer began to tire of his wife, and said that he was

dependent financially on his relatives, who refused to give him money unless he consented to leave the defender. Left to herself and her own resources she renewed her former intimacy with her old associates before her marriage, and her husband made no objection. He abandoned himself now so persistently to drink, that for the benefit of his health he was ordered off to the island of Skye. Before he started she represented to him that she had no money, and he replied in the presence of witnesses,—“Do what you did before; get a gentleman to keep you.” She was now left alone, and being in want of money she applied to her husband’s relatives, who offered her £50 a-year as aliment. This she refused, and in an action of aliment raised against her husband the Lord Ordinary gave her an interim award of £50. In October, November, and December she was in the habit of frequenting a brothel in Leith Walk, Edinburgh, kept by a former associate, and it was proved on somewhat narrow evidence that she had there on repeated occasions committed adultery.

The Lord Ordinary (ADAM) found the facts, circumstances, and qualifications proved relevant to infer that the defender had committed adultery as libelled, and found her guilty of adultery accordingly.

The defender reclaimed, and argued—(1) In point of fact, there was no sufficient proof of the adultery. (2) In point of law, even if adultery had been committed, the plea of *lenocinium* was proved, the pursuer, both by the advice he gave to the defender prior to his leaving her, and by the reckless way in which he exposed her to old associates and temptations, having conduced to the adultery—*Wemyss v. Wemyss*, March 20, 1866, 4 Macph. 660.

Argued for pursuer—(1) In point of fact, the evidence though narrow was sufficient to establish the adultery. (2) In point of law, it was not competent to plead *lenocinium* here. To found such there must have been direct connivance or corrupt design on the part of the husband concurring to the adultery. Here though the husband had left his wife, he had offered her sufficient aliment, and this fact excluded all argument as to her having been compelled through poverty to return to her old mode of life—*Munro v. Munro*, Jan. 25, 1877, 4 R. 332; *Phillips v. Phillips*, Robertson’s Eccles. and Consist. Cases, 144.

At advising—

LORD JUSTICE-CLERK—In this case there are two questions raised—first, whether on the proof adultery has been proved against the wife? and second, whether if it is proved, or whether it is proved or not, the conduct of the husband has been such as to conduce to it? Something has been said about the contrariety of the two pleas, and the incompetency of pleading more than one of them. I do not, however, think there is much in that, for the woman can easily say—“I am innocent, but even if the proof of adultery is held to be sufficient, you, my husband, conduced to it.” There is no need to go strictly into this argument, and I shall deal with both pleas. On the first question, though the proof that is offered to us is certainly not of a high class, the witnesses not being of the best description, still if the case came here solely on the evidence, I should find it very difficult to come to a differ-

ent conclusion to that arrived at by the Lord Ordinary. If the Lord Ordinary had found the other way, I should not have differed from him, but, as I have said, as it is I am not inclined to do so. On the second question, however, I am very strongly of opinion that I have seldom seen a case in which *lenocinium* has been more strongly presented. This woman, whose former life had certainly been of a very bad description, owed a duty to her husband, and there is nothing in the evidence before us to show that she did not mean to do it. The husband, however, on his part, owed her a very special duty, considering the circumstances of her former life; as he had chosen a wife from that class, it was his special duty to protect her from outside influences and from herself. Now, it seems to me that in addition to leading a highly dissipated life, he thought fit when he was suffering from the pressure of poverty, over and over again to counsel her, in what I must characterise as the most brutal and heartless way, to return to her former life. This was not done before one witness only, but before several. If that was done before witnesses on several occasions, it is most probable that it was done several times when they were alone. After conduct of that kind I certainly am not prepared to give the husband the remedy he asks. It is perhaps true that the wife was not driven to do what she did by poverty, but her husband thought fit to withdraw from his wife his maintenance and protection, and that in such a way that she did not even know where he was. No wonder, then, that left to herself entirely she fell back into the society to which she had been accustomed before her marriage. On this ground I have no hesitation in proposing that we should alter this interlocutor. I must add that I do not differ in the least from the authorities cited to us, but when it comes to direct advice having been given to the wife to return to her former life, and that advice being given, not as a jest, but with serious intention that the woman should follow it, then I think there can be no doubt that the plea of *lenocinium* is applicable.

LORD YOUNG—I am of the same opinion, and I feel no difficulty whatever about the case. I think that a man who marries a common prostitute hurriedly should not easily obtain a divorce from her on the ground of her adultery and immorality. It is not impossible that he should obtain it, but I say it as emphatically as I can that he ought not easily to do so. A divorce is not granted because of the sin of the husband or wife as the case may be. No doubt the sin of the one or the other is a necessary condition of divorce, but it is not a punishment to the guilty party but a remedy to the injured. Now, can anyone say that the pursuer here is an injured party? He married a street-walker, and lived with her a dissolute and discreditable life. After marriage it seems to have broken on the wife that her husband was impecunious, entirely dependent on his mother, and utterly incapable of supporting himself and her. When she remonstrated with him he had no hesitation in telling her to return to her old way of living, if indeed she had ever left it. For some time she had been living with certain friends of hers before her marriage, and her husband did not seem to care whether she kept virtuous or not. At last he left her

because he was in poverty, and in such a condition from drink that he had been ordered away to some place in Skye for treatment. His wife then said to him, "What shall I do?" and he answered, "My mother will do something for you, but you had better return to your old ways." I think that a man who conducts himself in that way cannot be heard when he says, "I am an injured husband." I am very clearly of opinion that he is not entitled to appeal to a Court of Justice for a remedy. I agree with your Lordship in thinking that the evidence of adultery is the narrowest—there is absolutely no respectable evidence in the case, and such as it is, it is only the evidence of detectives set upon her by the husband's relatives. I am distinctly of opinion that such an action ought not to be sustained, and that it is not for the cause of morality that it should be. I do not like tying this man to this woman, but it is most important that men who marry prostitutes, as this man did, should not do so under the idea that they will obtain divorce as a matter of course on a proof of adultery on their part, or upon proof that in the ordinary case would suffice to obtain a divorce. I think that it is more wholesome that it should be announced that they shall not easily get divorce, and I think especially that when advice such as we have here is given, that the plea of *lenocinium* (though perhaps that is not a very good word) should constitute a bar to decree being granted.

LORD CRAIGHILL—I am quite of the same opinion. If the adultery was in any way conducted to by the husband he is not entitled to get his divorce; but I think that if adultery is proved against a wife, and if it is not proved that the husband is directly or indirectly answerable for it, then whether the wife was a prostitute or not, he is not to be deprived of that remedy which others enjoy. The wife is answerable for her own wrong, and if the husband has not conducted to her guilt, though she was a prostitute before her marriage, she has no right to relapse from virtue and bring forth the facts of her early life as an answer to an action of divorce.

The first question here is, whether this woman did commit adultery? Now, where a woman was of the character of this one, the circumstance that she was such has a material effect on the evidence brought forward to convict her of adultery, for that which would be conclusive proof against a person of hitherto unimpeachable character may not be conclusive against such a woman as this. It is notorious that when a woman, not a professional prostitute, goes to a brothel, it is ascribed to one purpose only, and in such a case adultery would be held to have been established. But here this woman was left by her husband with no friends in the town but those in the walk of life in which she had been before her marriage. When she went to see them there was not the same presumption against her. There is a great deal in this view certainly, but the question is, whether the evidence is all that is required. There is certainly not a strong case on the evidence, but I do not say that I feel warranted in differing from the conclusion arrived at by the Lord Ordinary, who saw and heard the witnesses give their testimony. I am far from thinking that there is a clear case of adultery made out, but I think there is suffi-

cient to warrant the verdict that has been given. That introduces the next question, Are the circumstances such as to disentitle the husband from obtaining redress? It is not necessary for me in answering this to state an exact definition of the plea of *lenocinium*, but this I may safely say, that if a husband must be held to have been in any way contributory to what ensued, the law will not interfere to give him a remedy. The circumstances here are certainly very peculiar. Take one case. In the course of a conversation between the husband and wife, in the presence of a man who had been intimate with the wife before her marriage, he advised her to go back to her former way of life. If it could be shown that this was not meant or taken seriously, of course all that could be said would be that it was a brutal and dangerous joke, but the pair came to Edinburgh, and again in the presence of the same man similar advice is given, and before the effect of the recommendation had passed away the husband left his wife without protection or means of subsistence. Might the wife not have had this advice in her mind when she returned to her former course of life? If what he said can in any way be held to have been contributory in bringing about the result, then all that is required to make me come to the same conclusion as your Lordship has been proved. I think that that is so, and therefore I agree in thinking that this divorce should not be granted.

The Court therefore recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Reclaimer—Millie—Rhind. Agent
—James Henderson, L.A.
Counsel for Respondent—J. P. B. Robertson
—Darling. Agent—George Dunlop, W.S.

Saturday, May 21.

SECOND DIVISION.

[Lord Lee, Ordinary.]

LOUDONS v. HUNTER.

Arbiter—Oversman—Devolution.

In this case the pursuers sued the defender, *inter alia*, for a sum of money as the balance of the alleged price of the white crop on the farm of Newlands, Peeblesshire, taken over by the defender as incoming tenant, and as fixed by the arbiters under a minute of submission between the parties. The defence was that there had been no award by the arbiters, who had differed, and that the reference therefore devolved on the oversman, who had fixed a sum as the price of the crop, which the defender had paid.

After proof the Lord Ordinary (LEE) found that there had been no devolution on the oversman, the arbiters having only failed to fix the price through a misunderstanding between themselves as to the principle of the valuation; the case was accordingly remitted to them to fix the price. The defender having reclaimed, the Lords recalled the Lord Ordinary's interlocutor, being of opinion on the evidence that there had been a difference of opinion and a devolution on the oversman.