sufficient in its own structure and terms to warrant the possession.

The defender, and those acting in his right, dealt with the sea-shore, so far as here in question, truly as a subject vested in him, and held by the tenants and others in the occupation of the lands under and through his right. This possession has been prescriptive, and, under the terms of the Statute 1617, must enure to the benefit and support of the right of the defender.

Is there then any law, as laid down by the institutional writers, or as established by decision, which strikes against the validity of the title and the sufficiency of the possession so had by the defender?

The Lord Ordinary has examined the cases and *dicta* of authors, as quoted both from the law of England and of this country. As respects the former he hesitates to apply them lest he should mistake their import and effect. But he has been unable to see anything in the principles of the law of England bearing on the question at issue which at all militates against the argument of the defender.

Again, as respects the law of Scotland, while it cannot be held to be as yet clear on this point—for had it been so the Lord Ordinary and the parties might have been saved this discussion—the Lord Ordinary thinks all the principles of that law tend against the contention of the pursuer here, and for the defender. And although it may be true that the course which the case of the Officers of State *v.* Smith, 8 D. 711, and the same case, Smith *v.* the Officers of State, as decided in the House of Lords, 6 Bell's App. p. 487, took, was such as to create doubt as to the law applicable to such questions as that now mooted, yet in truth and reality the judgment there as actually pronounced does not in any material respect affect the question here raised, and, indeed, having regard to the relative position of the parties in that case, as distinguished from that which those here occupy, could scarcely do so.

The modern authority which appears to bear most directly on the point at issue is to be found in the Opinion of the Second Division of the Court, as delivered by the Lord Justice-Clerk in the case of Nicol *v.* Blaikie, Dec. 23, 1859, to which the Lord Ordinary shall here simply refer.

The Lord Ordinary does not understand the defender to maintain his private right in the sea-shore as other than subject and subservient to the public right in the sea for purposes such as navigation and fishing.

At all events the Lord Ordinary has no idea that by assoilzieing the defender from the present action, he does more than to find that the right of property as claimed on the part of the Crown cannot be supported against that of the defender.

(Initd.) C. B.

A reclaiming-note was boxed for the Crown; but after the case had been sent to the roll a note was lodged by the pursuer craving the Court that the reclaiming-note should be refused. The interlocutor of the Lord Ordinary has accordingly become final.

Agent for Pursuer—D. Horne, W.S.
Agent for Defender—Wm. Peacock, S.S.C.

WILSON *v.* WILSON.

Husband and Wife — Adultery — Separation and Aliment. A wife whose husband commits adultery may sue him either for separation and aliment or for divorce.

This was an action of separation and aliment at the instance of a wife against her husband. It was founded upon maltreatment, and one act of adultery, committed in August 1864, which was admitted on record by the defender.

The defender averred that in October 1855 the pursuer had unjustifiably deserted him, returned to her father's house, and has ever since, notwithstanding repeated solicitations from the defender, refused to return and perform her conjugal duties. This was denied by the pursuer.

The defender pleaded that the pursuer having deserted him she was not entitled to aliment, and that she not having been treated with cruelty, as alleged, she was not entitled to decree of separation.

The Lord Ordinary (Ormidale), on 22d February 1866, found the action irrelevant, in so far as regards the allegation of cruelty, and *quoad ultra* allowed a proof. This interlocutor became final.

After a proof his Lordship pronounced an interlocutor, in which he "finds that it is proven that Hugh Wilson, the defender, has been guilty of adultery, committed by him with Jessie or Janet Megget, mentioned in the libel and proof, in or about the months of July and August 1864: Finds that the pursuer has not been living with, and has not been supported by the defender since the said adultery was committed: Therefore finds that Alison Pow or Wilson, the pursuer, has full liberty and freedom to live separate from the said Hugh Wilson, her husband: Decerns and ordains him the said Hugh Wilson to separate himself from the said Alison Pow or Wilson, pursuer, *a mensa et thoro*, in all time coming: Decerns and ordains the said Hugh Wilson, defender, to make payment to the said Alison Pow or Wilson, pursuer, of the sum of £12 yearly, for aliment to her, during their joint lives." His Lordship added the following

"*Note.*—In support of this action for separation and aliment, the pursuer stated two grounds—1st, That the defender had been guilty of adultery; and 2d, That he had otherwise ill-used her. In regard to the latter ground, the Lord Ordinary, by a former interlocutor, held that the pursuer's statements were irrelevant, and in regard to the former he allowed her a proof which she has accordingly adduced.

"It is clear on the proof that the defender has been guilty of adultery; but the defender's counsel maintained in argument, that although adultery was a good ground for the fuller remedy of the divorce *a vinculo*, it did not warrant the lesser remedy of separation and aliment. It was, however, at the same time conceded on the part of the defender that if the defender had committed adultery with a domestic servant or other inmate of the house in which he and the pursuer resided, that would not only have been a sufficient ground for a divorce, but also for a decree of separation and aliment. The distinction thus suggested is not one which recommends itself to the Lord Ordinary, and he is of opinion, on principle as well as authority, that the husband's adultery, whether committed within or without the dwelling-house of the spouse, is an equally good foundation for a decree of separation and aliment at the instance of the wife as for a divorce *a vinculo*. He can see no reason for holding that the offending husband is to be allowed to dictate to his wife the redress she is to demand, and to maintain that she must divorce him, the very object which he had in view, and was desirous to obtain, and so be allowed to derive the benefit of his own misconduct, of not only being made free to marry his paramour, but also to relieve

himself from all pecuniary obligation towards his innocent wife. Nor does the Lord Ordinary think that the circumstance of the pursuer in the present case having been living apart from her husband, the defender, at the time he committed adultery, is any such specialty as to take the case from within the scope of what he holds to be an established general principle of law—that adultery is a good ground for separation and aliment. The pursuer could not adhere to the defender, her husband, after his adultery had come to her knowledge, without forfeiting her right to the remedy not only of separation and aliment, but of divorce; and she only asks for aliment from a period subsequent to the adultery; or, to put it differently, the husband's adultery would be an unanswerable defence by her to an action of adherence at his instance; and if so, by a parity of reasoning, it appears to the Lord Ordinary to be an equally good ground of action at her instance for a separate aliment.

"The Lord Ordinary was referred to the authorities cited by Mr Fraser ('Domestic Relations,' vol. i. pp. 464, 465), and they appear to support the views he has expressed.

"The Lord Ordinary thinks that, looking at all the circumstances, and especially to the position of the defender as an ordinary workman of his class, an aliment at the rate of £12 a-year is a proper sum to award to the pursuer, and that sum he has accordingly awarded."

The defender reclaimed.

FRASER, for the defender, argued—This action was rested on allegations of cruelty, and of one act of adultery. The averments of cruelty were held irrelevant, and that judgment is final. The parties have been living separate for ten years. The wife deserted the husband, not on account of his misconduct. She thus violated her conjugal vow to adhere to her husband. At the end of these ten years, she complains of an act of adultery. In these circumstances, a wife is not entitled to aliment. Had she only asked separation, the action would not have been opposed. The Lord Ordinary has treated this case as involving a general question. The abstract proposition which he lays down is not sound. There is no remedy for adultery but divorce. But, besides, this case is a special one, in consequence of the wife's desertion for so long a time. He cited the following cases:—Duchess of Gordon *v.* The Duke, 8th June 1697, M. 5902; Cook *v.* Johnston, 23d February 1700, M. 5905; Seton *v.* Seton, 1705, Ferguson's Reports, p. 428; and Letham *v.* Letham, 8th March 1823, 2 S. 250 (284).

ASHER, for the pursuer, answered—The sole question is whether in law adultery is a ground for granting separation and aliment. It is laid down in Fraser, vol. i., p. 464, that it is. The injured party is entitled, if she pleases, to select the lesser remedy. Before the Reformation in 1560, when marriage was regarded as a sacrament, separation was the only remedy for adultery. There is no authority for saying that after 1560, when divorce *a vinculo matrimonii* was introduced for adultery, separation ceased to be a competent remedy. Divorce is generally the preferable remedy; but in some cases, such as the present, it is not. The wrong-doer is not entitled to compel the injured party to select the remedy most beneficial to himself, and least beneficial to his injured wife. In the cases of Seaton *v.* Seaton, and Letham *v.* Letham, separation was granted for adultery.

FRASER, in reply—This woman, if living in adultery, could not have sued this action. She has been guilty of malicious desertion, which is at least as great an offence against marriage. He also referred to Leslie *v* Nairn, 4 Br. Supp. 880.

The LORD PRESIDENT—I have very great doubts whether a wife living with her father and mother, and apart from her husband for ten years, is necessarily guilty of wilful and malicious desertion, such as would entitle the husband to divorce her. The circumstances of the desertion in this case have not been proved. I think that the allegations of cruelty in this case, apart from adultery, though irrelevant as the ground of an action of separation, may be relevant, to preclude the husband from insisting upon the wife's return. There is no proof here, on either side, of the circumstances of the wife's absence. We are, therefore, brought back to the general question, whether adultery on the part of a husband entitles his wife to separation and aliment, as well as divorce. On that point I am of opinion that separation and aliment is a competent remedy. I do not think that the remedy of separation, which existed at a very early period, has been abrogated. The adultery here is proved and admitted. It appears that after commission of the adultery, the husband raised an action of divorce against his wife, on the ground of desertion, but we know nothing about that action. The wife was living with her parents; and it may be, for anything we know, that she was doing so with her husband's concurrence. She is not now, after the adultery, bound to return and adhere. I think, therefore, that the Lord Ordinary's interlocutor should be adhered to.

LORD CURRIEHILL—I concur. Adultery has been a relevant ground for obtaining separation from the earliest period, and continues to be so. Is then, the wife in this case barred by her absence with her father and mother from seeking that remedy? I don't think she is. I think further, that the husband is not entitled in this case to say that his wife was guilty of wilful desertion. She put upon record allegations which she offered to prove, and, which, if true, showed that her desertion was not wilful. These averments were objected to by the husband as irrelevant, and she was thus prevented from proving them. I think, therefore, that we must deal with this case in ignorance of the cause of the absence, and on the footing that we do not know what it was.

LORD DEAS—I have no doubt that a wife may bring an action of separation on the ground of adultery, and that she is not confined to the remedy of divorce. I think, too, that she may bring such an action whether the adultery is committed in the house where she and her husband are living or elsewhere. Farther, I have no doubt that if the wife in this case is entitled to separation, she is also entitled to aliment. The difficulty which I have lies here. It is plausibly maintained to us that we must assume that the wife during her absence unjustifiably absented herself from her husband. Such desertion would not have barred a divorce, but it may be a bar to separation and aliment. I think it is unfortunate that this matter should have been made to turn on a mere presumption, or rather on a question of *onus*, namely, whether it was incumbent on the husband or on the wife to prove that the absence was wilful desertion. I doubt very much whether, ten years' absence being admitted by the wife, it did not lie upon her to explain it. It is quite true her allegations were found irrelevant; but although irrelevant in one sense, they may be quite relevant in regard to this matter. I do not see that the interlocutor finding the allegations irrelevant must be laid at the door of the husband. In consis-

torial cases it is the practice for the Lord Ordinary to deal with questions of relevancy irrespective of the pleadings of the parties. I think that seems to have been what was done here. I rather think there was a miscarriage in pronouncing that interlocutor, because proof of the maltreatment averred would have removed the only difficulty I have in this case. The only answer to my difficulty is that suggested by your Lordship in the chair, that to entitle a husband to get a divorce for desertion he must aver more than simple desertion—namely, that it is malicious. But I am not sure that that is a complete answer, and I would very much have preferred that your Lordships had still allowed an inquiry. I have therefore very great difficulty in concurring.

LORD ARDMILLAN—This is a case of very great interest in both its branches. On the point as to the competency of the remedy of separation, I do not understand there is any difference of opinion or doubt. I am satisfied that the injured wife has a choice of two remedies, and that the selection of the remedy does not rest with the wrongdoer. In the next place, I have no doubt that if separation is competent, it is appropriate that in this case we should award aliment also. The only remaining question, and the only one on which I understand there is any difference, is whether the wife's absence for ten years is of itself a sufficient reason for barring her from obtaining separation and aliment. I think it is not. I do not think that the fact of a wife living with her own parents should of itself, and without any evidence of the circumstances, raise a presumption that she has been guilty of wilful desertion. I cannot presume that a father will aid his daughter in deserting her husband; and I don't think that a wife wilfully deserting her husband will take refuge in her father's house. What does the defender allege? Simple desertion. He could not have got a divorce without alleging malicious desertion; and as he has neither made that allegation, nor led any proof of malicious desertion, I am not inclined to build any presumption on the absence. The pursuer made averments which, rightly or wrongly, the Lord Ordinary held to be irrelevant; but if one-half of these averments are true, the pursuer was entitled to remain absent from the defender.

Reclaiming note refused.

Agents for Pursuer—Menzies & Coventry, W.S.
Agents for Defender—White-Millar & Robson, S.S.C.

M'KIE *v* WHITE AND OTHERS.

Parochial and Burgh Schoolmasters (Scotland) Act, 1861. A sentence of the Sheriff under the 14th section of the 24th and 25th Vic., c. 107, is final, unless the Sheriff has exceeded his jurisdiction.

This was a note of suspension of a sentence pronounced by the Sheriff-Substitute of Dumfriesshire on 12th February 1866, whereby the complainer, who had been parochial schoolmaster of the united parishes of Applegarth and Sibbaldbie, was deprived of his office. That sentence was pronounced in a complaint to the Sheriff at the instance of the respondents, who were respectively clerk to the Presbytery of the bounds and heritors of the said parishes. It was also proposed to interdict the respondents from proceeding to elect another than the complainer to the office of schoolmaster.

The complaint to the Sheriff was founded upon the 14th section of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861 (24 and 25 Vict. cap. 107), whereby it is provided as follows:—"So much of the 21st section of the said recited Act" (the Act of 43 George III., cap. 54), "as provides that the Presbytery shall take cognisance of, and, if they see cause, proceed by libel against any schoolmaster in respect of any complaint charging him with immoral conduct, or cruel or improper treatment of the scholars under his charge, is hereby repealed, and in lieu thereof, it is hereby enacted, that it shall be lawful to the heritors and ministers, or the clerk of the Presbytery of the bounds, by the authority of the said Presbytery, given on the application of the heritors and minister, or of any six heads of families in the parish whose children are attending the school, to make a complaint in writing to the Sheriff of the county in which the school is situate, charging the schoolmaster with immoral conduct, or cruel and improper treatment of the scholars under his charge, and specifying in such complaint the particular acts in respect of which the complaint is made, and a copy of such complaint shall be served upon the schoolmaster, who shall be required, on an *inducia* of fourteen days, to appear before the Sheriff, by himself or his agent, to answer to the said complaint; and the schoolmaster accused shall, if he deny the charge, if he think fit, answer the particulars of the complaint, such answer to be in writing, and to be lodged within the said fourteen days, or may, when the cause comes to be tried, state his plea to be not guilty, and the Sheriff shall thereafter proceed to the trial of the complaint, and take the evidence in the same way as and under the same rules as those which are in force in the Sheriff Court in regard to process in civil causes, and in the event that he shall find such complaint, or any material or relevant part thereof, to be proved, the Sheriff shall give judgment accordingly, and shall pass such sentence of censure, suspension, or deprivation, as in his opinion the case requires, which sentence shall be final, and not subject to review, and shall have all the effects consequent before the passing of this Act, on any similar sentence of any Presbytery under the provisions of the last recited section of the said Act, and no sentence of censure, suspension, or deprivation, otherwise pronounced on such charges, shall be valid or effectual."

The complaint charged the complainer, the said Robert M'Kie, with immoral conduct, unbecoming his situation as parochial schoolmaster, in respect that he had committed antenuptial fornication with Isabella Wilson White, now M'Kie, his wife; and more particularly, that "The said Robert M'Kie, previous to his marriage with the said Isabella Wilson White, now M'Kie, which was celebrated according to the forms of the Church of Scotland, on or about the 21st day of March 1865, had illicit sexual intercourse with her, in consequence whereof the said Isabella Wilson White, now M'Kie, bore a child on or about the 30th day of May 1865, being only two months and nine days after their marriage, of which child the said Robert M'Kie is, and has admitted himself to be, the father."

The complaint having been served upon the complainer, he lodged written answers thereto, in which he stated various objections to the relevancy and competency of the proceedings, and denied the charge made against him. Along with his answers he produced the following documents, which he contended proved that he had been married prior to the date of the alleged offence charged against him; and he offered to instruct