this provision evidently is, to supply by a provision to the husband the means of supporting the spouses and their children, if they had any, in the home of their married life. This is in short an obligation *propter nuptias.*

Now, this marriage has been dissolved by decree of divorce, in respect of the adultery of the husband. It was admitted in argument that the defender, the father of the divorced husband, cannot resist this claim on any other footing than that he is still bound to pay the annuity to his son, or to those in right of his son as assignees. The question therefore is, whether, after the dissolution of marriage by decree of divorce for adultery, this annuity is to be paid to the innocent wife or to the guilty husband? I am of opinion that the claim of the wife is preferable.

I think it is quite settled in our law, both by institutional authority and by decision, that the effect of the dissolution of marriage by divorce for adultery is, that the guilty party loses all benefit accruing through the marriage, and that the innocent party has the benefit of all onerous marriage-contract provisions, just as if the offender were naturally dead. This is the opinion of Lord Stair (1. 4. 20), of Lord Baukton (1. 5. 34), of Mr Erskine (1. 6. 46), and of Mr Bell (Prin. Sec. 1622), and no contrary institutional authority has been referred to; while, in the case of Thom *v.* Thom, 11th June 1852, the law is so stated in the clearest terms by Lord Rutherfurd as Lord Ordinary, and concurred in by the Lord Justice-Clerk and Lord Medwyn. It must, I think, be conceded that the case of Justice *v.* Murray, 30th January 1761, founded on by the pursuer, is not a decision of the point now raised. But I am of opinion that the argument in that case assumes the point now raised—that the husband, who was acting under the advice of very eminent counsel, did not dispute the claim of the wife to that extent; and that, if the question now before us had been presented to the Judges who decided that case, they would have sustained the claim of the wife. There is, in my view, neither principle nor authority to support a claim by the husband for this provision. I put it to the counsel for Mr Hope Johnstone whether, if the father had been willing to pay to the wife, his son, the divorced husband, could have compelled payment to himself? The answer was that he could. Unless he could, the defender can have no case here. Now, I am humbly of opinion that the son could not have compelled payment. In order to do so, he must have founded on the marriage-contract, and pleaded the marriage relation, which, by his own act, he had violated. No party can be permitted to found on a contract which he has broken; and the legal effect of the decree of divorce was to pass the right in the onerous provisions, not to the offender, but to the innocent party, in the same manner as if the guilty party were naturally dead.

It was argued to us that, as the defender might, in the event of his son's falling into extreme poverty, be compelled to support him, he would be a loser if ordained to pay the annuity to the pursuer, whereas, if assoilzied from this action, he would be protected against such a demand. There are many answers to this somewhat singular argument. One of these is, that, under no circumstances, would the law allow a provision of £200 a year to the son on the footing of his being a pauper. Another is the answer so well explained by your Lordship in the chair, that the defender himself states on record that the annuity has been assigned by his son to creditors, so that the assignees and not the divorced husband would draw the annuity, if it were refused to the wife. But really this argument for the defender is inapplicable. It has not been contended that the defender is released from his obligation. It is certain that he cannot be compelled to pay twice. The assignees can be in no better position, and can plead no higher right, than the divorced husband himself, and both of these assignations were granted posterior to the acts of adultery, on which the decree of divorce proceeded. The whole question—the only question—is to which of the two parties shall this onerous antenuptial provision be paid? Shall it be paid to the divorced husband, in respect of whose judicially ascertained adultery the marriage has been dissolved? Or shall it be paid to the innocent wife, to whom the law has given the redress of divorce, which divorce has, in the words of Lord Rutherfurd, an effect equivalent to the dissolution of the marriage by the offender's death? On this question I have formed a clear opinion in concurrence with your Lordship in the chair, with Lord Deas and with the Lord Ordinary.

Adhere, with expenses.

Agents for Pursuer and Advocator—Jardine, Stodart, & Frasers, W.S.

Agents for Defender and Reclaimer—Hope & Mackay, W.S.

Wednesday, Feb. 6.

SECOND DIVISION.

MORAM *v.* FORD AND OTHERS

(*ante*, vol. i. p. 227).

Expenses — Validity of Testamentary Writings — Trust-Estate—Residuary Legatees. Held that claimants on a trust estate who had unsuccessfully maintained the validity of certain alleged testamentary writings, were not entitled to expenses out of the fund, as against the interest of residuary legatees, the fund divisible among whom would thereby be diminished.

On March 20, 1866, the Court found that three out of four writings left in addition to a trust-deed and settlement by the late Miss Jane or Jean Bell, daughter of the late Samuel Bell, architect in Dundee, were not of a testamentary nature, and the cause was remitted to the Lord Ordinary to give effect to this finding, and to proceed further in the cause. The unsuccessful claimants, who maintained the validity of the deeds, asked that expenses should be allowed them out of the fund, in respect the difficulty as to the validity of the writings had been induced by the testatrix herself. The successful claimants, who are also the residuary legatees, on the other hand, contended that those who were unsuccessful should be found liable in expenses.

The Lord Ordinary (Ormidale) took the medium course of neither finding the unsuccessful claimants entitled to expenses out of the fund nor subjecting them in expenses. His Lordship added the following note:—

"In regard to the matter of expenses, the only difficulty that was suggested by the parties related to the claimants who have been wholly unsuccessful—their claims having depended on papers which have been found by the Court not to be testamentary writings at all. It was maintained for these claimants not only that they ought not to be subjected in any expenses, but that they were entitled

to expenses out of the fund *in medio*, in respect they had reasonable grounds for making their claims, and that it was not their fault, but that of the testatrix, that litigation became necessary to have it determined which of the papers or writings left by her were to be held as forming her settlement. On the other hand, it was maintained not only that the claimants who were wholly unsuccessful should not get any expenses, but that they ought to be subjected in expenses. The Lord Ordinary has arrived at the conclusion, that, in the circumstances of this case—and there is no absolute or invariable rule as to expenses—the medium course, viz., of finding no expenses due to or by the claimants in question, is the correct one. The expenses of raising and bringing the process into Court have been, by a former interlocutor, awarded to the parties by whom these expenses were incurred out of the fund *in medio;* but the Lord Ordinary does not think that the present is a case for awarding out of the fund *in medio*, the expense of preferring and maintaining claims founded on writings which have been held by the Court not to be part of the testatrix's settlement at all. The fund not being very large in itself, and various parties having made separate claims, founded on the invalid writings referred to, the consequence would be, that, if all of them were to be found entitled to expenses out of the fund *in medio*, a very serious inroad would be thereby made upon what, according to the present standing judgment of the Court, belongs to others."

The unsuccessful claimants reclaimed.

WATSON (with him A. R. CLARK), for them, argued—The Court have recognised a distinction in disposing of such questions between the case where a party takes his risk of the construction of a clause in a deed admittedly valid, and where he seeks to establish the validity of deeds the operativeness of which is on all hands recognised as a question of doubt. Here the difficulty has been induced by the testatrix herself, and it is only reasonable that the parties who were thereby led to be claimants should have expenses allowed to them out of the fund. Hill *v.* Burns, 2 W. and S., 389; Cameron *v.* Mackie, 7 W. and S., 106; Morgan *v.* Magistrates of Dundee, 3 M'Qu., 176; Dunlop, 1 D., 912.

GLOAG (with him A. MONCRIEFF), answered—The Court have never, except in very exceptional circumstances, which are not present in this case, given effect to the plea of the reclaimers. But here the respondents are in the position of residuary legatees, and the effect of allowing the unsuccessful claimants whom they have defeated to get their expenses out of the fund, would be to diminish the fund to which, contrary to opposition, they have been preferred. Allan, 7 D. 908; Lady Baird's Trustees, 18 D. 1246; Wilson *v.* Crosbie, 3 M'P., 882.

At advising,

Lord JUSTICE-CLERK—The reclaimers maintain that when a question is raised as to the construction and meaning of a settlement, or as to what papers constitute the settlement of a person deceased, and the question is difficult and requires to be determined before the estate can be distributed, the expenses of the inquiry should all be paid out of the fund, no matter what is the state of interest in the fund. I confess that this is too broad and abstract a proposition. There have been cases in which expenses have all been paid out of the fund *in medio*, but these cases have all been based on considerations of equity. I don't think that the general rule, which has been approved of both in the Court of Session and in the House of Lords, should be extended. The rule is one of a very dangerous kind, and I am rather disposed to deal with each case upon its own circumstances. Here it is obvious that the right of the residuary legatees under the testatrix's deed is unchallenged and unchallengeable. There is no doubt as to their right. But the unsuccessful claimants, who maintain that they should not be found liable in expenses, endeavoured to set up and constitute special legacies, which, of course, would prove a burden on and must be provided out of the residue. And what would be the effect of allowing them expenses out of the fund?—that a winning party would be ordained to pay the expenses of the party unsuccessful. I don't say that that is conclusive, because there are cases in which such order has been given. But it would not be consistent with justice in the present case, but would be a direct violation of it, to order the party who was successful in defending his own fund to pay the expense of the party attempting to diminish it. I am disposed therefore to adhere. It was said that the question was one of unusual difficulty, and nothing can be said otherwise, for by our judgment we altered the interlocutor of the Lord Ordinary, and did so only by a majority. But though the question was a difficult one, that only carries us the length which the Lord Ordinary has gone, and that is far enough, that the unsuccessful claimants should pay their own expenses.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to, and the reclaimers were found liable in expenses since its date.

Agent for Reclaimers—Wm. Miller, S.S.C.

Agents for Respondents—Wilson, Burn, & Gloag, W.S.

GRAY *v.* GRAY.

Husband and Wife—Divorce—Identification of Wife—Conjugal Rights Act—Final Judgment—Additional Evidence. The pursuers of an action of divorce obtained decree of divorce from the Lord Ordinary. On hearing a reclaiming note for the defender, the Court intimated an opinion that the evidence as to identification of the defender was insufficient, whereupon the pursuer moved for leave to open up the proof, with the view of leading additional evidence upon this point. (1) Held (Lord Cowan dissenting) that the ground of action being really the charge of a crime against the defender, she could not be called a second time to answer for it; and motion accordingly refused as incompetent. (2) Circumstances in which allegations of adultery held not proven.

This is an action of divorce at the instance of Richard Gray, stationer, Edinburgh, against his wife, founded on the alleged adultery of his wife. The evidence was led before Lord Kinloch last session, and the proof was taken under the Conjugal Rights Act. The defender was cited as a haver by the pursuer, but she did not appear. The evidence as to the identification of the defender consisted of statements made by witnesses that a person called Mrs Gray was in the habit of coming to the house of the co-defender during the period libelled, and of the following statements in the deposition of the co-defender:—"She told me that she was a married woman, and that her husband resided in Edinburgh. She said his name was Richard Gray, and that he was a com-