curred in by your Lordships. But in considering the merits of the case we must keep in view that the pursuers are but a small number out of a very large body, and their right to insist in the conclusions of their action may be thereby affected. Be that as it may, once the parties have joined issue upon the merits of the case, I do not see my way to any other judgment than that of absolvitor. The grounds upon which we might have dismissed the action are contained in the first and second pleas for the defenders. These pleas were repelled by the Lord Ordinary's interlocutor of the 3d November. That interlocutor might have been brought under review, but it was acquiesced in. I am therefore of opinion that we must pronounce judgment on the merits, and that that judgment must be one of absolvitor.

On the merits themselves I so entirely concur with the Lord Ordinary that I think it would be mere waste of time for me to add anything. With regard, however, to the last head, like my brother Lord Ardmillan, I should have been very much inclined, if I saw my way to it, to adopt some measure for determining a fair rate of fees for interment. But I am afraid we could not do so except upon the assumption that the defenders are not entitled to charge any higher fees than would merely cover the bare working expenses of the cemetery. I am, on the contrary, of opinion that they are entitled to a fair margin of profit upon their outlay. But I cannot find room for such a judgment under the conclusions of the action. For the eighth conclusion is, "That except in the allocation and sale of such lairs in the said cemetery (if any) as remain yet undisposed of, the defenders are not entitled to derive or draw pecuniary profit from the regulation and management of the said cemetery, and of interments therein." That is the general proposition. But then it continues, "and in particular, that they are not entitled to charge higher or other rates or fees for interments in the said cemetery than such as are necessary to provide for the proper maintenance and annual working expenses thereof, or than such as may be fixed and determined by our said Lords." It is impossible to read that last sentence as inconsistent with what goes before, or with the general proposition by which it is introduced. It was argued that under these words a table of fees might be fixed by us upon any principle we thought proper; but I cannot so read them. I think they are only intended to ask that we fix a scale of fees upon the footing that they are to cover the working expenses and maintenance only.

On the other conclusions of the action I do not touch, the judgment of the Lord Ordinary is so entirely satisfactory to me.

Agent for the Pursuers—A. Kirk Mackie, S.S.C.
Agent for the Defenders—James Webster, S.S.C.

Friday, June 23.

WILLIAM WALKER *v.* JANE ANN FRASER OR WALKER, *et e contra.*

(*Ante*, p. 328.)

Husband and Wife—Divorce. In counter actions of divorce on the ground of adultery, decree of divorce pronounced against both parties.

Expenses. Wife *found* entitled to expenses in both Outer and Inner House in both actions.

In consequence of the interlocutor of the Court of 17th January 1871, procedure in the action at Mr Walker's instance was sisted till the action at Mrs Walker's instance was ripe for judgment. The latter action proceeded before Lord Ormidale, who on 7th March 1871 reported the case to the Court, intimating, as parties had requested him to state his impression of the evidence, that he considered a sufficient case had been established against the defender.

Both cases now came before the Court, Lord Ormidale having already pronounced decree of divorce in the action against Mrs Walker.

The general character of the evidence will sufficiently appear from the opinion of the Lord President.

FRASER, LANCASTER, and MACDONALD for Mr Walker.

The SOLICITOR-GENERAL, BALFOUR, and ROBERTSON for Mrs Walker.

At advising—

LORD PRESIDENT—We have before us counter actions of divorce—one at the instance of the husband against the wife, and the other at the instance of the wife against the husband. It is proper and necessary that judgment should be pronounced in these two cases at the same time, but it is not the less necessary that the two cases should be considered separately, because they depend upon independent and unconnected evidence. The wife's adultery is said to have been committed in the house occupied by the husband and wife in the neighbourhood of Edinburgh, and in other places in Edinburgh and in the neighbourhood of the home of the parties, and the time when this adultery was said to have been committed is in the year 1869-70. The husband's adultery is said to have been committed during his absence from home in places at a distance from Edinburgh, and at an entirely different and much earlier time than the time when the wife's adultery was committed —during a course of years ending with the year 1865. The case which came first into Court was the action at the instance of the husband, and I therefore proceed to consider the evidence led in that case to prove the adultery of the wife. There are certain articles of the condescendence which were not admitted to probation; but proof has been allowed, and has been led, in support of the sixth article, and also of the articles 9 to 17 inclusive. The sixth article of the condescendence is as follows:—"During the months of April, May, June, July, August, September, October, November, December, 1869, and the months of January and February 1870, the defender was constantly in the habit of meeting James Grant, novelist, No. 26 Danube Street, Edinburgh, clandestinely, or some other man or men, not the pursuer, unknown to the pursuer, with the exception of two periods, namely, from 1st to 28th June, and from 29th July to 16th August, 1869, during which two periods the defender was away from Edinburgh. The pursuer's occupation required that he should be often from home, and during the period above referred to, with the said two exceptions, the defender was daily alone with the said James Grant, or with some other man or men, not the pursuer, and unknown to the pursuer, in his house at Murrayfield. She was also frequently in company with the said James Grant, or such other man or men, unknown to the pursuer, at places in the near neighbourhood of pursuer's house at Murrayfield, and in Edinburgh, during said period, the

particular place or places, date or dates, being to the pursuer unknown. The defender during the said period, with the said two exceptions, carried on a continuous course of carnal and adulterous intercourse with the said James Grant, or with such other man or men, unknown to the pursuer, not the pursuer, in the pursuer's house at Murrayfield, and in the neighbourhood thereof, and in Edinburgh, the particular dates on which the acts of adultery were committed in the pursuer's house being to the pursuer unknown, and the particular places or dates on which the acts of adultery were committed in the neighbourhood of the pursuer's house at Murrayfield, and in Edinburgh, being to the pursuer unknown." The other articles of the condescendence, 9 to 17, condescend on particular acts of adultery committed in particular places and at particular times, but with regard to the time in each of these specific allegations a latitude is taken, and I think legitimately taken, so as to cover in each case a period of three months. But the sixth article of the condescendence is in my opinion relevant of itself; and I say this at the outset, because it appears to me that the great weight of the evidence in the case goes to support the sixth article. If it had been necessary to take each specific act of adultery alleged separately on the evidence applicable to it alone, there might have been difficulty in holding any one of these acts to be sufficiently proved; but this is not, in my opinion, the way to deal with acts of adultery. There may be no direct evidence of any one act. There may be no sufficient evidence, even circumstantial, applicable to one act alone, if it stood alone, and yet there may be quite enough in what is proved as to the conduct of defender and her alleged paramour, and their communications and meetings, to justify the inference that they were, during the period specified, in the habitual practice of adultery with one another. If such a case were submitted to a jury, they would be entitled, under the direction of the Court, to draw the inference of guilt, without any direct or complete evidence of the commission of any one act of adultery. In our practice, cases of divorce are, I think wisely, left to the determination of the Court, without the assistance of a jury (for there is no example, so far as I am aware, of the Court having exercised the power conferred on them by the 37th section of the Act of 1830, to send issues in fact in a case of divorce to be tried by a jury). But the Court, dealing with the matter of fact and the proof according to the laws of evidence, are in like manner at liberty, from a combination of many circumstances and minute particulars, to draw inferences in fact, and among others the general inferences of guilt. The time, then, to which the evidence applies is from April 1869 to January 1870 inclusive, but excepting the short periods above mentioned. The scene is the house at Murrayfield called Carlton Lodge, the matrimonial home of the pursuer and defender, and the neighbourhood of that house, and other places in and near Edinburgh. The central figures are the defender, the wife of a commercial gentleman, whose business frequently called him from home, and her alleged paramour Mr James Grant, who was resident in Edinburgh with his wife and family, and was known to the world as a literary man and author. But the witnesses by whom they are surrounded are so numerous, and the evidence is so various and circumstantial, that any attempt at a complete exposition by reference to the testimony of individual witnesses would occupy much time, without serving any useful purpose. I shall content myself with stating what I conceive to be the general import of the evidence, and the inferences in fact fairly deducible from it. The intimacy which undoubtedly subsisted between the defender and Mr Grant is represented by the defender's counsel as the result or concomitant of an innocent friendship, founded on the lady's part in admiration of the literary genius and reputation of the gentleman, and characterised by a somewhat romantic extravagance. But their original acquaintance was of the slightest possible kind, and was interrupted by some misunderstanding between the families, Mr and Mrs Grant on the one hand, and Mr and Mrs Walker on the other. It was not till after the cessation of that slight and commonplace intercourse between the families that the close intimacy between the defender and Mr Grant individually commenced; and that intimacy was, not only in its origin but throughout its whole endurance, without the sanction of the defender's husband, and till a very late period entirely without his knowledge. Nor was this in any degree matter of accident; for the frequent visits of Mr Grant to Carlton Lodge took place always and without exception during the absence of Mr Walker in prosecution of his business. Great precautions were used to prevent any inopportune appearance of Mr Grant while Mr Walker was at home. A system of signals was arranged by which Mr Grant, without any personal communication with anybody on the premises, might know whether he could safely enter the grounds or house. He was furnished by the defender with a whistle and a latch-key for a private door opening from the public road to the shrubbery, and by these means the numerous meetings in Carlton Lodge were so arranged that none ever took place while Mr Walker was at home. Frequent meetings also took place elsewhere in the neighbourhood, generally at night, and in the open air, obviously intended to be private and unwitnessed, though in that the parties did not succeed so well as in ensuring the absence of Mr Walker when they met at Carlton Lodge. The very occurence of such meetings between two persons of different sexes, each of whom is married, necessarily gives rise to grave suspicion; nor is the probability of a criminal purpose at all lessened by the fact that the lady and gentleman have attained the somewhat mature ages of thirty-seven and forty-seven respectively. Numerous meetings between such parties, intended to be entirely secret, and brought about not without great trouble and fatigue and risk of discovery, are not to be accounted for by any trivial motive, by anything short of a strong and serious interest or a passionate impulse. Still, if nothing more were proved than the frequent repetition of such clandestine meetings, it might not be safe to conclude that the case amounted to more than a case of grave suspicion. The letters which passed between the parties have been destroyed by the act of the defender, with the exception of one; and it is not very satisfactory, even in these circumstances, to rely on secondary evidence of the contents of such letters. But the one letter preserved, which is from Mr Grant to the defender, may very fairly (considering how the others have been lost as evidence) be taken as a specimen of the correspondence which passed between them. In this letter Mr Grant addresses the defender as "My darling Janie;" expresses the fondest regret at the impos-

sibility of their then meeting; most anxious concern about her health; and concludes, "With dearest and truest love, believe me, ever your own affectionate Pet," a name under which he generally passed during their intercourse. But there was another mode of correspondence to which these parties resorted, the evidence of which it was much more difficult to destroy. They made use of advertisements in a newspaper to convey to one another their intentions and wishes and even their feelings; and the contents of these advertisements throw a very strong and most unfavourable light on the character of the meetings which they were intended to bring about, and which were frequently taking place contemporaneously with the publication of the advertisements. When a married woman does not hesitate to address the husband of another wife through the columns of a newspaper, in words such as the following:—"My darling, gratitude, thanks, and everlasting love I offer. You have cheered a sinking heart. Do as you say, but let me feel my hand in yours once more." "I am indeed sad and lonely. Oh, that I could take you in my arms and clasp you to my heart." "Dost ever imagine our next meeting—our leap unto out-stretched arms, beloved one! I dream of it night and day." When such words are conveyed by any means from a married woman to a man who is not her husband, she has already committed adultery in her heart, and has gone far to justify the allegation of the old summons of divorce, that she "has cast off the fear of God, and, disregarding her matrimonial vows and engagements, has totally alienated her affection from her husband." But if it be found that a woman with her passions thus inflamed, and her sense of modesty and decency so dulled and impaired, has ample opportunity of clandestine meetings with the man whom she thus recklessly loves, it would be to throw away all the lessons of experience, and shut out our knowledge of human nature and human frailty, if we should refuse to admit the irresistible inference that the sensual gratification which has been desired and longed for, and for the sake of which the woman has already divested herself of the most precious attribute of our moral nature, would certainly be welcomed and enjoyed on the first convenient opportunity. To all this must be added the kissing and embracing which was seen by witnesses to occur in some of their out-of-door meetings, when they believed themselves to be unseen, the passionate and sensual manner in which the defender spoke of Mr Grant to female friends, who, she trusted, would not betray her, besides a variety of other isolated and minute particulars, each of which taken by itself is unimportant, but all of which taken in combination afford the strongest corroboration of the justice of the inference suggested by the more direct evidence of the conduct and feelings of the parties. The result of the whole evidence, in my opinion, is to leave no room for doubt in any reasonable mind that the defender was guilty of adultery with Mr Grant on various occasions between April 1869 and January 1870, though it may not be possible to fix on particular occasions within that period when acts of adultery were certainly committed. It is to a case so established by strong circumstantial evidence that our old and well settled style of a decree of divorce is peculiarly suitable. The Lord Ordinary, following this usual and recognised style, "Finds facts, circumstances, and qualifications proved relevant to infer that the defender Jane Ann Fraser or Walker committed adultery with James Grant mentioned in the record and proof: Finds her guilty of adultery accordingly: Therefore divorces and separates," &c.

In the action at the wife's instance against the husband, the evidence is of an entirely different character, and may be disposed of very shortly. The purpose is to prove that on certain specified and ascertained occasions the husband, Walker, defender of the second action, committed adultery with prostitutes in houses of bad fame in the towns of Aberdeen and Sheffield. It is proved by unimpeachable evidence that the defender had been in such houses in Aberdeen more than once. But the actual commission of any act of adultery rests on the testimony of the keepers of these houses and the prostitutes who frequent them. Such testimony requires to be very carefully and scrupulously weighed and examined; and, as might have been expected, a good deal of it will not bear the test of scrutiny. I am of opinion, however, that it is proved by evidence as satisfactory as could have been obtained in a case of this description that the defender (the husband) committed adultery on four different occasions in houses of ill-fame in Aberdeen. This is sufficient to lead to the conclusion that decree of divorce must be pronounced in this action also.

LORDS DEAS and KINLOCH concurred.

LORD ARDMILLAN—Being of opinion that the guilt of both parties—the husband and the wife—is established by the proof, and concurring, as I do entirely in the view which your Lordship has taken, and in the observations which your Lordship has made, on the merits of these conjoined actions, in so far as regards the evidence of the adultery of both, I should simply express my concurrence, and say nothing in addition to what has been so clearly and so ably explained, were it not that, according to the judgment proposed, the result of the adultery of both spouses is to be the divorce of each from the other. The dissolution of the marriage tie is to be declared to be the consequence of the guilt of both parties. Both parties are proved guilty of breaking the most sacred of contracts, and violating the solemn obligations of marriage, yet each party is to be declared by judicial decree to be free from the marriage tie, and from the marriage obligations. This is a result which I do not think accordant with sound principles, either of law or of morals. Divorce on the head of adultery is, in point of principle, and ought to be in point of fact, a remedy for a wrong done to an injured and innocent husband, or to an injured and innocent wife. The foundation of the action is the criminal breach of solemn contract, and the party who has himself, or herself, broken that contract, ought not to be permitted to allege the breach of that contract by the other party as a ground for dissolution of marriage. The tie of marriage is too sacred to be susceptible of dissolution by mutual guilt. This was the view of marriage taken by the Scottish Reformers at the Reformation, and this also was the old law of Scotland. "Adultery," says Lord Stair (b. i, t. 4, sect. 7), "does not annul the marriage, but is a just occasion on which the person injured may annul it, and be free." No one but the injured spouse can sue for divorce. Erskine's opinion is given to the same effect (Ersk. Prin. i, 6, 23, and Ersk. Inst. i, 6, 43). Divorce is the redress which law gives to the injured, not, as I

think, to the guilty. I am aware that it has been in recent times otherwise decided. To that decision I must bow, and in that decision I must, in this Court, respectfully acquiesce. It would be incandid in me to do less,—it would be presumptuous in me to do more—than express my regret that the old law has been departed from.

The following interlocutor was pronounced:—

"*Edinburgh*, 23*d June* 1871.—The Lords having resumed consideration of the reclaiming note for Mrs Jane Ann Fraser or Walker against Lord Ormidale's interlocutor of 28th July 1870, and heard counsel on the said reclaiming note, and also on the record and proof in the relative action of divorce reported by the Lord Ordinary, at the instance of the said Jane Ann Fraser or Walker against William Walker, her husband; recall the said interlocutor of 28th July 1870: Conjoin the said last mentioned action with this action, and in the conjoined actions, find facts, circumstances, and qualifications proved relevant to infer Jane Ann Fraser or Walker's guilt of adultery with James Grant, mentioned in the record and proof: Find her guilty of adultery accordingly: Therefore divorce and separate the said Jane Ann Fraser or Walker, defender, from the pursuer William Walker, his society, fellowship, and company in all time coming; Find also facts, circumstances, and qualifications proved relevant to infer William Walker guilty of adultery with Jeanie Kay, Mary M'Phail, Agnes Flood or Flann, and Jane Gordon Mackay or Worth, all mentioned in the record and proof; find him guilty of adultery accordingly: Therefore divorce and separate the said William Walker, defender, from the pursuer Jane Ann Fraser or Walker, her society, fellowship, and company in all time coming: Declare the said William Walker and Jane Ann Fraser or Walker respectively free of the marriage solemnized and completed between them, and that each of them may marry any free person in the same manner as he or she might have done had they never been married to each other, and decern; reserving in the meantime the effect of the above findings and decrees on the patrimonial rights of the parties respectively: Find the said Jane Ann Fraser entitled to the expenses hitherto incurred by her in each of the said actions now conjoined; allow an account of said expenses to be given in, and remit the same to the auditor to tax and report: Remit to the Lord Ordinary to dispose of the remaining conclusions of the summons at the instance of the said Jane Ann Fraser against the said William Walker."

Agents for Mr Walker—W. G. Roy, S.S.C., and Henry & Shiress, S.S.C.

Agents for Mrs Walker—J. B. Douglas & Smith, W.S.

Friday, June 23.

SECOND DIVISION.

TAYLOR *v.* TAYLOR AND SMITH.

Husband and Wife—Conjugal Rights Amendment Act 1861, § 16. *Held* that § 16 of the above Act had a retrospective effect.

This was an action at the instance of Mrs Taylor against the trustees under a trust-disposition, granted by her husband for behoof of his creditors, for declarator that the rents of certain lands which belonged to her in liferent and her children in fee did not exceed a reasonable provision for her support and maintenance, in terms of Section 16 of the Conjugal Rights (Scotland) Amendment Act 1861.

The property in question came into the possession of Mrs Taylor in 1842, under a deed in which neither the *jus mariti* nor right of administration of her husband were excluded.

She alleged (Conds. 7 and 9) that she continued therefrom, down till the time that her husband granted a trust-disposition in favour of his creditors, to uplift and receive the rents of the said subjects and to grant receipts therefor in her own name, and kept the funds distinct from those of her husband.

The defender pleaded—"2 The provisions of the Conjugal Rights Act have no application to the present case, in respect that—1st The pursuer succeeded to the liferent of the subjects in question before the statute came into operation. 2d The right to the rent of said subjects during their joint lives had vested *jure mariti* in the husband of the pursuer, and was in his lawful possession, within the meaning of the statute, before the present claim was made by the pursuer."

The section in question is as follows:—"When a married woman succeeds to property or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband, or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communis bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife. . . . . Provided always that no claim for such provision shall be competent to the wife if before it be made by her the husband, or his disponee or assignee, shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has, before such claim is made by the wife, attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of furthcoming, or has poinded or carried through and reported a sale thereof."

The Lord Ordinary (MURE) pronounced this interlocutor:—

"2*d March* 1871.—The Lord Ordinary having heard parties' procurators on the second plea in law for the defenders, and considered the closed record and productions—before answer, allows the pursuer a proof of her averments in articles 7 and 9 of the condescendence, and to the defenders a conjunct probation; and appoints the proof to be taken on a day to be afterwards fixed.

"*Note*—The claim made by the pursuer in this case appears to the Lord Ordinary to fall within the general policy and spirit of the provisions of the Conjugal Rights Amendment Act; and assuming the allegations relative to the manner in which the pursuer has been allowed to draw and administer the rents of the property in question, from 1842 to 1869, to be established, the Lord Ordinary, as at present advised, would entertain great doubts whether her claim to a reasonable provision under the 16th section of the Statute can be repelled simply because the deed under which the property was acquired came into operation before the passing of the Act.

"The main ground on which it appears to be laid down in Dwarris on Statutes, and other authorities relied on by the defenders, that Acts of Parliament are not to be construed as having any