COURT OF SESSION.

Tuesday, January 30.

SECOND DIVISION.

[Sheriff of Aberdeen and Kincardine.

FERGUSON *v.* THOMSON AND OTHERS.

Husband and Wife — Divorce — Succession — Jus mariti*— Title to Sue.*

Held that a husband divorced in respect of his own adultery has a good title to sue for a share of intestate succession to which his wife became entitled before the divorce.

This was an appeal from the Sheriff Court of Aberdeen and Kincardine in an action of count and reckoning at the instance of the appellant Robert Ferguson, flesher, New Deer, against Alexander Thomson, farmer, and Hugh Walker, merchant, as the executors acting under a settlement of the deceased James Jack, and also against Margaret Jack, formerly wife of the pursuer (appellant), who was sisted as defender on 2d February 1876. The summons asked for count and reckoning that the share of the moveable estate of James Jack (who died on 16th July 1872) falling to Margaret Jack or Ferguson, as one of his lawful children and next-of-kin, to which the pursuer acquired right *jure mariti*, might be truly ascertained. There was an alternative conclusion for payment of £29, 14s. 5d., with interest from 20th December 1872. From the minute sisting Margaret Jack as a defender it appeared that the pursuer was divorced from her in respect of his adultery, on 19th December 1874. The defenders pleaded, no title to sue in respect of the divorce, and it was also pleaded that, as a condition of obtaining decree the pursuer was bound to make a reasonable provision for Margaret Jack, under the Conjugal Rights (Scotland) Amendment Act 1861 (24th and 25th Vict. c. 86, sec. 16).

The Sheriff-Substitute (COMBIE THOMSON), on 22d February 1876, sustained the plea of no title, and dismissed the action, adding the following note :—

"*Note.*—The pursuer Robert Ferguson was for several years prior to 19th December 1874 the husband of Margaret Jack. At that date he was divorced from her on the ground of his adultery. Her father James Jack had made a settlement in October 1868, and he died in July 1872. The object of the present action is to enable the pursuer to obtain from the executors of the father of the woman who was his wife her share of the succession. I am of opinion that he is not entitled to get it. It may be true that the sum sued for vested in the wife prior to the dissolution of the marriage, and that it might have been then claimed by the husband, as his marital rights were not excluded; but, in point of fact, he did not get possession of it, and I put my judgment on this broad ground, that having been divorced, and being the guilty party, he can take no benefit through the marriage or through the dissolution of the marriage.

"The words used by Stair seem to me to set forth the existing law of Scotland on the subject—'When marriage is dissolved by divorce, the party injuring loseth all benefit accruing through the marriage, but the party injured hath the same benefit as by the other's natural death.'

"I accordingly deal with the wife here as if she were a spouse surviving the death of her husband. The question of the rights of the husband's creditors is not raised.

"The defenders have stated a plea founded upon the provisions of the 16th section of the Conjugal Rights Amendment Act 1861, which declares that "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 shall not be entitled to claim the same as falling within his marital rights, except on the condition of making a reasonable provision therefrom for the support and maintenance of his wife."

"The wife's claim is barred if before she makes it the husband shall have obtained 'complete and lawful' possession of the property. In the present instance the husband had obtained no sort of possession of the wife's interest in her father's succession. But since the property sued for vested in the wife, the pursuer was sequestrated, and the trustee for his creditors became assignee to all his assets, including what he got through his wife; but I am of opinion that the 'complete and lawful' possession mentioned in the statute was not obtained by the creditors, unless the property had been attached either by a decree of forthcoming or by poinding and sale.

"In the view, however, that I take of the case, it is unnecessary to go into this matter further, as I base my decision on the broader ground indicated above."

On appeal, the Sheriff (GUTHRIE SMITH) adhered, adding in a note—"The pursuer maintains that the decree had no retroactive effect, as it simply terminated his rights under the marriage. It, however, does more; it operated a complete forfeiture of them—'the guilty spouse is thereby cut off from all right or privilege that he or she may have as a spouse'—*Ritchie* v. *Ritchie's Trustees*, 5th June 1874. It follows that, as regards this legacy, the wife herself is the only party now *in titulo* to uplift and discharge it, because although it may have vested prior to the decree, he never obtained possession of it, and the effect of the decree was to deprive him not only of the *status* of a husband, but of all the rights and privileges coming to him in that character."

The pursuer appealed to the Court of Session, and argued—The forfeiture operated by divorce is confined to legal and conventional provisions, *Harvey* v. *Farquhar*, 22 Feb. 1872, 10 Macph. (H. of L.) 26; *Ritchie* v. *Ritchie's Trustees*, 5th June 1874, 1 Ret. 987. The party injured is to have the same benefit as by the other's death—Act 1573, cap. 55; Erskine i. 6, 46; Stair i. 4, 20–1, and Brodie's note, p. 41. The wife could not take at death the whole sum falling under *jus mariti*. If the sum fell due before divorce, the *jus mariti* could not now be required as a title to recover. It was further argued that as the pursuer had been under sequestration, but had now by an onerous transaction been reinvested in his estate, the wife's claim to a reasonable provision was excluded. Sequestration is by the Bankruptcy Act declared to be equivalent to an arrestment in execution and decree of forthcoming, and to a completed poinding—Bankruptcy Act 1856, secs. 102, 108. Under section 16 of the Conjugal Rights Act the wife's claim may be defeated by

the creditor of the husband who has used adjudication or arrestment and has obtained decree of forthcoming or has poinded and reported a sale.

The respondent argued—The cases—such as *Justice* v. *Murray* (Mor. 334)—excepting tocher paid in cash from the general rule of forfeiture, were decided on the principle of immixtion. Here there was a mere right to claim, which was cut off by divorce. As regards the second point, the decision of Lord Mackenzie in *Miller* v. *Learmonth*, 21st Nov. 1871, 10 Macph. (H. of L.) 107, was wrong, being inconsistent with the doctrine of *tantum et tale* affirmed in *Fleming* v. *Howden*, L. R., 1 Sc. Ap. 327, and 6 Macph. (H. of L.) 113; Fraser on Husband and Wife, 2d ed., 833. The trustee had not reduced into possession.

At advising—

Lord Ormidale—The Sheriff-Principal, as well as his Substitute, has held that by his divorce on the ground of adultery the pursuer forfeited all rights, including his *jus mariti* as now attempted to be put in operation by him, which had accrued to him through his marriage with Margaret Jack, and consequently that he has no title to sue the present action. The question for the Court is, whether the Sheriff's judgment is well or ill founded.

It is indisputable that the pursuer's marriage with Margaret Jack was equivalent to a legal assignation in his favour of all her moveable rights and estate, and required no intimation beyond that afforded by the marriage itself. If, therefore, no divorce had interposed, the pursuer's right and title to insist in the present action would have been clear, for his wife's share of her father's moveable succession had indisputably vested in him on the father's death fully two years before the divorce, and payment of it might have been enforced by him, or it might have been attached by his creditors.

But, then, it is said that the divorce in 1874, before the present action was raised, destroys any title the pursuer might otherwise have had to sue for recovery of the fund in question, in respect the same must be held to belong to Margaret Jack. I do not very well see how this can be, unless upon the assumption that by the divorce her husband was divested of the right which he previously had, and that she thereby came to be vested in what she had not previously any right to. But can it be held that the divorce has had any such effect? It is true that a divorce operates as a dissolution of the marriage as effectually as the death of one of the spouses; but a dissolution of the marriage by death, although it puts an end as at its date to the *jus mariti*, does not operate *retro* so as to effect a restoration of previously vested interests. Accordingly, as observed by Mr Erskine (i. 6, 13), "Any moveable subject which after the wife's death shall be discovered to have belonged to her falls to the surviving husband," or, it may be added, to his representatives in the event of his death before the existence of the moveable subject was discovered, as was held in the case of *Egerton* v. *Forbes*, 27th November 1812, F.C.

The question, then, in the present case comes to be narrowed to this—Does the dissolution of the pursuer's marriage in consequence of his adultery do more than what would have been effected by its dissolution through the death of either of the spouses? If the divorce had been for desertion, its effect might in some respects have been different from what they are when the divorce has proceeded on adultery, for by the Act 1873, cap. 55, it is declared that "the offending party shall lose the tocher and the *donationes propter nuptias.*" But it has been decided in more than one case that such is not the effect of a divorce on the head of adultery—*Anderson* v. *Welsh*, 8th Feb. 1734, Mor. 333, and *Justice* v. *Murray*, 13th Jan. 1768, Mor. 333. It is unnecessary, however, to go into that distinction, for here the dispute does not relate to the tocher or the *donationes propter nuptias*. The very circumstance, indeed, of its requiring statutory enactment to effect a loss to the offending party of the tocher and *donationes propter nuptiam* goes far to show that beyond these particulars no divorce on any ground, unless on the head of absolute nullity, implying that there never had been any valid marriage, can be held to operate *retro* in its effects.

I am therefore unable to satisfy myself, either on authority or principle, that the pursuer's vested right to the fund here in dispute has been cut down by his divorce. It might very well have been that he had not previously obtained actual payment of it in consequence of his having from indulgence to the debtor refrained from exacting payment; or it might have been owing to the inability of the debtor to make payment; or a variety of other accidental causes not attributable to the pursuer, and which he could not help, may have prevented him obtaining actual possession; but I am unable to see how his right could be converted into no right by such circumstances as those now suggested. I am equally unable to think that his right has been destroyed in the circumstances in which the present action has been brought. Nor am I much impressed with the hardship that may be supposed to result from holding that a divorce does not destroy rights which had previously vested *jure mariti*, for it must be borne in mind that by his marriage a husband becomes liable for the debts and obligations of his wife, and after divorce, as well as before, is bound to bring up and maintain the children of the marriage. As regards the plea stated for the wife on the Conjugal Rights Act, we cannot possibly decide that, as the record contains no averment whatever on the subject.

Lord Gifford—I concur. There is no doubt that the wife's moveable estate accruing before marriage or *stante matrimonio* vests *eo ipso* in the husband. Now here we have a claim to moveable estate which emerged during marriage, which is therefore carried by the implied assignation of marriage, and this assignation cannot be cut down by the subsequent divorce of the husband for adultery, even though the assigned right should not have been reduced into possession.

Lord Justice-Clerk—As regards the defenders' preliminary plea, I entirely concur with your Lordships. The law laid down by Stair is that the guilty husband loses all benefit accruing through the marriage. I cannot hold that to apply to past benefits which have accrued, nor can I think that the divorce operates a retrocession to the wife of rights previously assigned to the husband. The implied assignation of marriage is absolute, not in trust, and therefore whatever equity there might be in the defenders'

view, there is certainly no legal principle for it. It is possible that the decisions in regard to divorce for adultery and the forfeitures provided by statute in the case of divorce for wilful non-adherence, may have left the law in some obscurity, but I am of opinion that they do not support the defenders' plea here.

The Court recalled the Sheriff's judgment, repelled the preliminary plea for the defenders, and remitted the cause to the Sheriff to proceed, and with power to deal with expenses.

Counsel for Appellant—M'Kechnie. Agent—W. G. Roy, S.S.C.

Counsel for Respondents—Rankine. Agents—Auld & Macdonald, W.S.

Tuesday, January 30.

FIRST DIVISION.

SPECIAL CASE—SCHOOL BOARD OF LOCHGILPHEAD *v.* SCHOOL BOARD OF SOUTH KNAPDALE.

School Board—Board of Education—Statute 35 *and* 36 *Vict. cap.* 62, *sec.* 9—*Jurisdiction.*

Held that the words "any question or dispute regarding the area of any parish or burgh" in the 9th sec. of the Education Act, are not restricted to cases where a burgh is contained in a parish, but are universally applicable, and that the determination of the Board of Education is final.

Where a question as to the extent of a decreet of disjunction and erection of certain lands into a new parish *quoad sacra* had been submitted to the Board of Education by the School Board of the *quoad sacra* parish before there was a School Board in existence in the other parish having an interest, and a determination issued by the Board of Education on the question submitted, without reference to the terms of the decreet—*held* that there was no finality in such a determination.

By a decreet of disjunction and erection, of date 9th December 1846, the Teind Court erected certain lands attached to a Parliamentary church which had been built at Lochgilphead under the authority of the statutes 4 Geo. IV. cap. 79, and 5 Geo. IV. cap. 90, into a parish *quoad sacra*, to be called the parish of Lochgilphead. It was matter of doubt from the terms of the decree whether two farms, Daill and Craiglass, were included in the new parish or still belonged to the parish of South Knapdale, one of two parishes which contributed part of their area to form the new parish of Lochgilphead. A School Board was elected for the parish of Lochgilphead on 11th March, and one for South Knapdale on 24th April 1873. By a minute, dated 10th April 1873, the Board of Lochgilphead, under the 9th clause of the Education Act, resolved to submit an extract of the decreet of the Teind Court to the Board of Education, and ask their opinion as to whether these two farms were to be held to be part of the parish of Lochgilphead for the purposes of the Education Act. On 18th April the Board issued the following determination:—The Board of Education "having considered the application made on behalf of the School Board of the *quoad sacra* parish of Lochgilphead, and having examined and considered the decreet of disjunction and erection of the districts attached to said parish, with reference to the question submitted regarding the farms of Daill and Craiglass, which question the School Board crave may be settled by virtue and in exercise of the powers in them vested under the Education (Scotland) Act 1872, have settled and determined, and do hereby settle and determine, that for the purposes of the said Act the farms of Daill and Craiglass above mentioned shall be included and comprehended within the area of the said *quoad sacra* parish of Lochgilphead." Both submission and determination, it will be observed, were prior to the election of the School Board of South Knapdale.

The Parochial Board of South Knapdale, when required by the School Board of Lochgilphead to levy the necessary assessment "from those parts of the parish of South Knapdale attached to the parish of Lochgilphead, including the said farms of Daill and Craiglass," refused to do so "until it should be judicially decided to which parish, for the purposes of the said Education Act, they belonged," in respect that the School Board of South Knapdale were dissatisfied with the determination of the Board of Education.

The 9th section of the Education Act 1872 provided—"The area of a parish shall, for the purposes of this Act, be exclusive of the area of any burgh or part of a burgh situated therein for which a School Board is required to be elected, and the area of every such burgh shall, for the purposes of this Act, be taken to be the limits within which the municipal, or where there are no municipal, then within which the police, assessments thereof are levied. And any question or dispute regarding the area of any parish or burgh for the purposes of this Act shall be settled by the Board of Education, or by the Sheriff of the county . . . on an application by the School Board authorised by the Board of Education, and the determination of the Board of Education or of the Sheriff, as the case may be, shall be final."

This Special Case was accordingly submitted to the Court, the first parties (the School Board of Lochgilphead) maintaining that the determination of the Board of Education was final; and, on the merits, that by decreet these farms made part of the parish of Lochgilphead.

The parties of the second part, (the School Board of South Knapdale) on the other hand maintained (1) that section 9 of the Education (Scotland) Act 1872, does not apply to such a question as the present, being limited to the case of a parish containing a burgh or part of a burgh, or at all events to questions of mere boundaries between parishes; (2) that in any case the Board of Education had no power to dispose of any such question on an *ex parte* application, and without giving other parties interested an opportunity of being heard; and, on the merits, that these farms still belonged to South Knapdale.

The following were the questions submitted to the Court:—"(1) Whether the determination of the Board of Education for Scotland, . . . is final, and conclusive of the question whether, for the purposes of the Education (Scotland) Act 1872, the farms of Daill and Craiglass form part of the parish of Lochgilphead, or of the parish of South Knapdale? (2) Whether the farms of Daill and Craiglass, for the purposes of the Education (Scotland) Act 1872, form part of the parish of Lochgilphead? Or (3) Whether the said farms, for the purposes