

Friday, January 21.

FIRST DIVISION.

[Lord Adam, Ordinary,

MONTGOMERY v. MONTGOMERY.

(*Ante*, p. 6).

*Process—Expenses—Divorce—Expenses of Wife's Reclaiming-Note.*

A wife who unsuccessfully reclaims against a decree of divorce will not be allowed the expenses of her reclaiming-note unless the Court is of opinion that she has a probable case.

In an action of divorce for adultery at the instance of James Montgomery against his wife, the Lord Ordinary (ADAM) granted decree, allowing the defender her expenses. In giving judgment his Lordship remarked that he did not believe the evidence of the witnesses for the defence.

Mrs Montgomery reclaimed, and the Court, after hearing a full argument and taking the case to *avizandum*, adhered.

Counsel for the defender then moved that she should be found entitled to the expenses of her reclaiming-note. He argued—She was justified in reclaiming, because the case involved the status of her child. She had also a probable case for success, as was shown by the fact that the Court had heard the argument fully out and made *avizandum*. In all the cases where such a motion had been refused the Court had been satisfied without calling on the respondent's counsel that the claimer's case was bad. But where a probable case for success was shown a wife was entitled to defend herself to the end at her husband's expense.

Replied for respondent—The wife had not shown a probable case. On the contrary, the Lord Ordinary was of opinion that her story was trumped up, and the Court after full consideration had affirmed that view. To allow the expenses in such a case would simply be to encourage vexatious litigation.

Authorities—2 Fraser, Husband and Wife, 1235; *Kirk v. Kirk*, Nov. 12, 1875, 3 R. 128; *Dalgleish v. Dalgleish*, Feb. 1, 1878, 5 R. 679.

At advising—

LORD PRESIDENT—The only special ground for Mr Asher's motion that his client should get her expenses for this reclaiming-note is that the case was fully heard out by the Court, and he says that the only cases in which a wife who has defended such an action and reclaimed has been found not entitled to her expenses have been where the Court adhered to the interlocutor under review without calling on the respondent's counsel. I should be sorry to lay it down as a rule that expenses are never to be refused except in that case, for I can conceive cases where the Court, though quite clearly of opinion against the claimer, might yet think fit to call on the respondent's counsel. Nay, I will go a step further, and say that that description applies to the present case. It was less in the interest of the parties than in that of the law that we heard the argument to the end; and I concur in a remark made by Lord Shand in giving judgment, to the

effect that he was clear against the claimer at the conclusion of her counsel's opening speech. That shows how inexpedient it would be to adopt such a rule as was suggested; it may be a consideration, but it is certainly not a conclusive one. I think no expenses should be awarded to the defender for this reclaiming-note; the case was a very bad one as regards her, and we were all of opinion that the whole story of the defence was trumped up and false.

LORD MURE—I am of the same opinion. I wished to hear the case out just to satisfy myself that the Lord Ordinary was right in his view that the defender's evidence was a trumped-up story. And I have come distinctly to that conclusion, and think we should award no expenses to this defender for her reclaiming-note.

LORD SHAND—It appears to me that the principle enunciated by the Second Division that a wife who reclaims in such an action as this is only entitled to her expenses if she had a probable case for overturning the judgment of the Court of first instance is a sound one to apply, and if we apply it to this case it appears to me that the claimer's motion must fail. The Lord Ordinary has said that he did not believe the evidence adduced for her, and our examination of it has certainly confirmed that view. I think she has shown no probable cause for disturbing the judgment, and that we should refuse her the expenses of this reclaiming-note.

LORD DEAS was absent.

The Court refused the claimer's motion for expenses from the date of the Lord Ordinary's interlocutor.

Counsel for Pursuer (Respondent)—Trayner—Young. Agent—Alexander Morison, S.S.C.

Counsel for Defender (Reclaimer)—Asher—Ure. Agent—Thomas Carmichael, S.S.C.

Friday, January 21.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

GALBRAITH AND OTHERS (WALKER'S TRUSTEES) v. CALEDONIAN RAILWAY COMPANY.

(Sequel to case of *Playfair and Others (Walker's Trustees) v. Caledonian Railway*, Dec. 2, 1879, reported *ante*, vol. xvii, p. 192).

*Property—Railway Compensation—Lands Clauses Consolidation (Scotland) Act 1845—Railway Clauses Consolidation Act 1845, sec. 6—Railway Works "Injurious Affecting Lands."*

A railway company under powers contained in a private Act executed alterations on certain public streets. The effect of these operations was to cut off level accesses to a great thoroughfare which a property situated not in immediate proximity to, but at a short distance from, the place where the operations were executed had enjoyed, and to substitute