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in his management of the personal funds; and in allowing him to state the contents of this heritable debt as part of this account, it went no further than to determine, that as a debt chargeable against the personal estate, he was entitled to take credit for it in accounting for that estate. The action brought against the administrator in the Prerogative Court, related solely to the personal funds; and according to the terms of the record, the accounts exhibited were of his management as administrator only, and from the limited nature of its own jurisdiction, and the proper *forum* for determining the question of ultimate relief, being the law of the place where the landed property lay, not the law of the place where the deceased died domiciled, the Court could not have intended to preclude the after discussion of the matter, neither could its judgment have that effect.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *W. Adam, John Bell.*
For Respondents, *W. Grant, F. Lawrence.*

(M. 16787.)

MRS ROSE ANDERSON, Wife of THOMAS HAY MARSHALL, Merchant in Perth, - } *Appellant;*

THOMAS HAY MARSHALL, - - - *Respondent.*

House of Lords, 8th April 1799.

DIVORCE—PROOF—ADMISSIBILITY OF THE *SOCII CRIMINIS* AS WITNESSES.—In an action of divorce for adultery, brought by the husband against his wife, she was charged in the libel with having committed adultery with two persons therein named. In the proof led, meetings with these parties at night, in suspicious circumstances, were proved, but no direct proof of adultery. The defender, on her part, sought to adduce the alleged paramours as witnesses in her favour. The Commissaries having considered the nature of the proof led, held them inadmissible; and this, in an advocation, was adhered to by the Court of Session. On appeal, reversed; and held, that the *socii criminis* were equally competent as witnesses for the defender, as when adduced as witnesses for the pursuer, in an action of divorce for adultery.

The respondent raised an action of divorce against his

wife, the appellant, for acts of adultery said to have been committed with the Earl of Elgin and Dr. Harrison. A proof was allowed; but no direct or positive act of adultery was proved, although meetings at night, in suspicious circumstances, were proved. The parties were seen at night leaning against a gate, with their bodies close together, and when they separated in alarm, her dress was a little disturbed. They were also seen together in a stair case; and letters addressed by her to the parties, vowing love, and appointing meetings, were also proved. The appellant, after the conclusion of the respondent's proof, offered to adduce the Earl of Elgin and Dr. Harrison as witnesses in her favour. To this it was objected before the Commissaries, that these witnesses, being *socii criminis*, were materially interested in the cause, and consequently inadmissible.

The Commissaries held, "In respect of the proof adduced, sustain the objection, and find the Earl of Elgin and Dr. Harrison inadmissible as witnesses for the defendant in this cause." The Commissaries having refused a petition against this interlocutor, the case was brought before the Court of Session by advocation, which being reported to the whole Lords, the Lord Ordinary thereafter pronounced this interlocutor: "Having advised with the Lords, refuses the bill, and remits to the Commissaries, with this instruction, that they sustain the objection to the admissibility of the Earl of Elgin and Dr. Harrison.

Mar. 23, 1797.

Feb. 6, 1798.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The objection stated by the respondent to the admissibility of these witnesses on behalf of the appellant is, that they are *socii criminis*. But this assumes what has not been proved,—namely, that they are actually guilty as such. In other words, that they have been guilty of adultery with her. Nothing of this has been directly proved; and the whole objection therefore rests upon the bare averment of the pursuer in his libel, that the appellant (defender) has been guilty of adultery with these parties. If this were sufficient to debar her from their testimony as *socii criminis*, a pursuer might deprive a defender of the evidence of every man who could bear testimony to any circumstance in her favour, by placing him in the list of her alleged paramours. But even if the bare averment of the respondent (pursuer) could have the effect of placing these witnesses in the eye of law in the light of *socii crimi-*

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nis, yet the objection would not stand good; because there is nothing in the law and practice of Scotland to show that the alleged *socius criminis* is an incompetent witness. The charge of guilt against a witness lays him under no restraint, because he cannot be compelled to swear. And though, with this power of declining, he should choose (being really guilty) to come forward and criminate himself, his evidence could not affect him in any action of damages that might be brought against him at the husband's instance. He is therefore under less temptation to swear falsely than a witness who is liable to be compelled to swear. It is a settled point, not now, after the decisions, to be doubted, that the alleged *socius criminis* is a competent witness when adduced by the pursuer, and there ought therefore to be no difference whether he is adduced by the pursuer or the defender. But even supposing, in the general case, that the *socius criminis* was an incompetent witness for the defender in an action of divorce, on the head of adultery, the principle would not apply to a case like the present. Here the fortune, fame, and happiness of the defender, are involved in this criminal charge. Law and justice require that she should be entitled to prove every fact tending to clear and exculpate her from her guilt; and when this can only be effected by the testimony of a witness, or witnesses, to whom legal objection otherwise applies, law allows them to be examined, leaving it to the judge to attach such credibility as may be due to the evidence.

Pleaded for the Respondent.—There is no necessity to resort to the evidence of the alleged *particeps criminis*, in order to exculpate the appellant from the charge, even if competent, as, before she can enter on her exculpatory evidence, the pursuer's proof must first be completed. And the object of now examining these witnesses can only be to get them to swear in her favour, and thus contradict the pursuer's proof so far as led—a proof which, without that contradiction, is of the strongest possible nature, and goes to criminate the parties she wishes to adduce. The respondent maintains that the witnesses adduced in these circumstances are incompetent; and if adduced, that no possible credit could be given to their evidence. If they were to confess her guilt, they would publish their own infamy, and involve them in damages. Every bias of interest—every regard for their own reputation, necessarily inclines them to clear themselves of the charge imputed to them, and, in doing so, to clear the cha-

racter of the appellant. If they confessed, their evidence would be sufficient to convict them of damages. They might, it is true, refuse to swear; but, it is presumed, that as they are called, so they intend to depone; and where there is so strong a bias existing to perjure themselves, to save their own character as well as patrimonial interests, the witnesses ought to be rejected for the appellant, on the ground that they are *socii criminis*.

After hearing counsel,

THE LORD CHANCELLOR (LOUGHBOROUGH) said,

"MY LORDS,

"The question at issue by the present appeal is a very short one; and its merits lie in a narrow compass.

"The respondent brought an action of divorce against the appellant, his wife, for adultery, before the Commissaries, the proper ecclesiastical Court in Scotland: and he charged her as having been guilty with certain persons, whom he specially mentioned. The practice in this Court in former times, and till it was corrected by your Lordships, was of a singular nature. The mode was, in similar cases, that the husband charged his wife in general terms "with adul-" tery committed with divers persons, at divers times, and in divers " places." In a case which came before the House by appeal, in which I was concerned as one of the counsel, a defender claimed as her right, that the crime should be stated more particularly, before she entered upon her defence, which was accordingly ordered by your Lordships.* The pursuer in the present action, agreeably to modern practice, charged the acts of adultery as committed with the Earl of Elgin, and a Mr. Harrison.

"In the course of the action the parties proceeded to a proof; and the depositions of the witnesses, on the part of the pursuer, were taken and published before the defender was enabled to bring her exculpatory evidence. In that stage of the process, the appellant, in her defence, offered to call the two persons with whom she was accused, to disprove the evidence given for the husband. If they had been examined, questions might have been put to them which they might have declined to answer; but to others they would not have had a right to demur. The Commissaries, however, held them to be incompetent witnesses; and the cause having come before the Court of Session by review, they sustained the objections to the admissibility of these witnesses.

"It is true that the proof which was taken and published, entered much into the consideration of the Court of Session, in judging of the point of admissibility. Some of the judges go the length to

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* The case here referred to the Compiler has not been able to find.

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hold the opinion, that the pursuer had made out his case. But such a conclusion seems to be too large, and by no means warranted by the premises, and, in my opinion, would be of dangerous consequence, because it would go to establish this, that the circumstances of suspicion sworn to were not to be redargued, or answered by the persons most capable of clearing them up.

" The case, on the part of the respondent, was well argued as to the strictness of the ancient law of Scotland in matters of evidence. I confess that I feel some degree of difficulty and hesitation in giving an opinion upon this question. In any proceedings that could be held in the courts of this country, there is no doubt but that Lord Elgin and Mr. Harrison would be admissible as witnesses. I have therefore to fear my being liable to a bias, in adopting those rules of law which have the greatest hold of my affections, and of my understanding.

" But I am the less alarmed on the present occasion, as the history of the laws of every country shows us that the rules of evidence have gradually relaxed in strictness. Anciently, in this country, they were much more narrow than they are at present, and, in my time, I have seen many relaxations; and objections formerly sustained to the admissibility of witnesses would now be disallowed. In England a more liberal practice in the admissibility of witnesses obtains than in any other part of the world, because here witnesses are examined in public.

" In Scotland, they have also got rid of many objections to the admissibility of witnesses which are to be found in their text writers; but some of them still exist.—It is totally unnecessary for me to enter into a detail of those objections; I shall confine myself to the point at issue in the present case, and inquire whether the law of that country be not consistent with itself in collateral points.

" In a case, determined some years ago by the Court of Session, and which came before your Lordships by appeal, the case of Nicholson Stewart against his wife, it was decided, that the husband might adduce the alleged adulterer as a witness against the wife. And surely, on every ground of analogy, of reason, and of substantial justice, this rule must hold *e converso;* and the party accused be allowed to repel the alleged criminality by similar evidence.

Feb. 18, 1771. Vide ante App. to vol. iii.

" I think the practice of the Court of Session, in the present case, exceedingly inaccurate, where it is held, that the proof already adduced was of such a nature as not to admit them to listen to other evidence to redargue it. Finding that the Court had entered at large into a consideration of this proof, I have read it with attention, and I must take the opportunity here of observing, that I think it would be extremely becoming in the Court of Session to correct the present mode of taking proof. Such a heap of trumpery and trash, as appears in the present case, I have never met with on any occasion.

" Nor does it, taken either collectively or otherwise, in my opin-

ion, lead to any conclusion that should raise a doubt as to the propriety of examining the persons proposed by the appellant in her exculpation. If such a proof were offered at your Lordships' bar on a divorce bill, an act certainly could not be obtained in consequence of it. Nor do I think that a case so slightly supported was ever sent to the consideration of a jury in an action of damages.

"I have little difficulty, therefore, though against the judgment given by the Court of Session, which I conceive to be contrary to the general principles of law and of reason, to move that your Lordships should reverse the judgment appealed from, and declare that the Earl of Elgin and Mr. Harrison are admissible witnesses on the part of the appellant."

Accordingly, it was

Ordered and adjudged that the several interlocutors of the Commissaries of Edinburgh, and of the Lords of Session, complained of in the amended appeal, be, and the same are hereby reversed;—and it is further ordered, That the cause be remitted back to the said Commissaries, with instructions to repel the objection to the admissibility of the Earl of Elgin and Dr. Harrison, as witnesses on the part of the defender in the said cause.

For Appellant, *T. Erskine, W. Grant, Henry Erskine.*
For Respondent, *Sir John Scott, Wm. Adam.*

GEORGE HERIOT, calling himself the lawful Son of GEORGE HERIOT, deceased, who was the second Son of ROBERT HERIOT of Ramornie, Esq., . . . } *Appellant;*

HON. MARGARET MAITLAND MAKGILL, Widow, and JAMES MAITLAND MAKGILL her second Son, otherwise JAMES HERIOT of Ramornie, Esq., . . . } *Respondents.*

House of Lords, 29th April 1799.

REDUCTION OF SERVICE ON THE HEAD OF ILLEGITIMACY—MARRIAGE—CONSTITUTION.—A party alleging himself to be the lawful son of George Heriot, second son of Robert Heriot of Ramornie, served himself heir to his deceased father before the bailies of Canongate. In the reduction of this service on the head of illegitimacy: Held, that the appellant had failed to adduce sufficient proof that his mother was lawfully married to his reputed father,