balance into Court. But this was never asked, and they were quite good for the whole sum, and paid over the balance whenever it was decided that it was due.

On the whole matter I have come to the conclusion that the second and fourth pleas-in-law for the defender should be sustained.

LORD YOUNG—I agree that the judgment of the Lord Ordinary is right. I am of opinion that on the facts it is impossible for us to decide that the defenders were guilty of such a violation of the contract as to expose them under clause 5 to a notice to terminate the contract. I think no violation of the contract by withholding payment of the pursuer's annuity for six months has been established. I do not think that it is according to fact that the annuity was withheld by the defenders, and the fact that a portion of the annuity was not paid in the circumstances admitted here till it was decided by the Court that it was legally due is not in my opinion a ground of action under clause 5.

The pursuer has also accepted without reservation payment of annuities falling due after the occurrence founded on. Suppose ten years ago a dispute had arisen as to whether a portion of the annuity was due at a specified time, but that all subsequent annuities had been punctually paid and accepted without reservation, it would be ridiculous to contend that the pursuer, founding on the non-payment of the whole amount of the annuity on account of the dispute, could give notice ten years thereafter to terminate the contract. In the present case a part, amounting to £37, 10s., of the annuity payable at the term of Whitsunday 1898 was kept back until the Court had decided that it was due. With that exception the annuity has been punctually paid down to the present date, and has been accepted without reservation. That excludes any idea of the case falling under clause 5 of the contract.

I do not need to say more. My opinion is sufficiently expressed by rejecting as unsound the plea-in-law for the pursuer and sustaining as sound the second and fourth pleas-in-law of the defenders.

LORD TRAYNER — I am of the same opinion. Without repeating what your Lordships have said, I shall only say that in my opinion the pursuer has failed to show such failure on the part of the defenders in the fulfilment of their part of the contract as entitled him to resume possession of the business under the provision of the fifth article of the agreement. I am therefore for sustaining the defenders' second plea-in law.

I further agree with the Lord Ordinary that the defenders' fourth plea should be sustained. The pursuer received his annuity at the terms of November 1898 and May 1899 without protest or reservation. Now he was only entitled to claim or receive these sums on the footing that the defenders were still the owners of the business—that is, on the footing that the agreement founded on was still in force. By accepting these payments of the annuity after what he now alleges was the breach of contract on the part of the defenders entitling him to resume possession of the business, I think he must be regarded as having waived all objections competent to him in respect of the failure to pay the annuity due in May 1898.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Refuse the reclaiming-note: Sustain the second plea-in-law for the defender; and with this addition adhere to the said interlocutor reclaimed against, and decern."

Counsel for the Pursuer—Salvesen, Q.C.—M. P. Fraser. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defenders—Jameson, Q.C.—Orr. Agents—George Inglis & Orr, S.S.C.

Thursday, May 31.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

FOXWELL v. ROBERTSON.

Parent and Child—Aliment—Liability of Father for Aliment of Children after Divorce—Husband and Wife—Divorce.

Held (*rev.* judgment of Lord Kincairney) that a husband who has been divorced by his wife continues thereafter to be primarily liable for the whole aliment of the children of the marriage.

On 31st May 1899 Mrs Maggie Davidson Angus, formerly Robertson, now Foxwell, wife of John Burford Foxwell, engineer, Southport, with his consent and concurrence as her curator and administrator-in-law, and Mr Foxwell for his own interest, raised an action against John Robertson, shepherd and horsebreaker, Sallochan, Ardgour, Argyleshire, for payment to the female pursuer of the sum of £15 yearly as aliment for John Hector M'Lean Robertson, the only child of the now dissolved marriage between the said pursuer and the defender, payable quarterly and in advance, beginning the first term's payment of the aliment as at 1st November 1890, for the three months following, and so forth quarterly thereafter so long as said child should be unable to earn his livelihood and should remain in the custody of the female pursuer, with interest at 5 per cent. on each quarterly payment of aliment from the time the same became due till payment.

The facts as averred by the pursuers, and in substance admitted by the defender, were as follows:—Mr and Mrs Foxwell were married on 29th April 1896. Prior to her marriage with Mr Foxwell, Mrs Foxwell was on 27th November 1888 married to the defender, and one child, namely,

John Hector M'Lean Robertson, was born of the marriage on 1st October 1889.

On 1st November 1890 the female pursuer obtained in the Divorce Division of the High Court of Justice in England a decree *nisi* dissolving her marriage with the defender on account of the defender's adultery and cruelty. This decree was made absolute on 12th May 1891. It, *inter alia*, ordered that the child should remain in the custody of the female pursuer till further order of the Court, but it was directed that the child should not be removed out of the jurisdiction of the Court without its sanction. Since the dissolution of the marriage the defender had contributed nothing towards the aliment and education of the child, who had ever since remained in the custody of the female pursuer, by whom he had been exclusively alimented until the date of her second marriage. Thereafter he had lived in family with the pursuers.

The pursuers pleaded—"(1) The defender being legally bound to aliment the said child of his marriage with the female pursuer, and having entirely failed to implement said obligation since 1st November 1890, is bound to relieve the female pursuer of the whole cost of alimenting the said child since said date, and so long as it remains in her custody."

The defender pleaded—"(6) The amount claimed is excessive, and in any case is due by the defender to the extent of one-half only."

On 25th January 1900 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the defender is bound to relieve the pursuer of one-half of the cost of alimenting their child since 1st November 1890, and so long as he is unable to earn his livelihood, and shall be in the custody of and supported by the pursuer: Repels the pleas-in-law for the defender except the sixth: Sustains said sixth plea to the effect of finding that the claim of the pursuer is only for one-half of the aliment of the said child: Finds that no other question has been raised as to the amount of the aliment: Therefore decerns against the defender for payment to the pursuer of the sum of seven pounds ten shillings (£7, 10s.) per annum from said 1st November 1890, and so long as the said child is unable to earn his livelihood, and shall be in the custody of and supported by the pursuer."

Note—"This is an action by the mother of a child born on 1st October 1889, against the father of the child, concluding for payment of aliment for the child at the rate of £15 per annum from 1st November 1890. The child is the legitimate child of the marriage between them; but the marriage was dissolved by decree pronounced in the High Court of England on 1st November 1890, by which judgment it was found that the present defender had been guilty of adultery coupled with cruelty towards the pursuer, and it was ordered that the child of the marriage (there was only one) should remain in the custody of the present pursuer until further order of the Court, and it was thereby directed that the child be not removed out of the jurisdiction of the Court without its sanction.

"It has not been explained how it happened that the divorce was pronounced in the English Court, while parties have joined issue in the present case in a Scottish Court, but that is not a matter with which I am at present concerned.

"The defender, *inter alia*, states that he is desirous of having access to and the society of his child, and he offers to provide a home for him. But it does not appear to me that he can possibly get the custody of the child without applying to the English Court, which he has not proposed to do. So that in this case there is no question about the custody of the child. . . .

"The only question to which much debate was directed is, whether the pursuer was entitled to be paid for the whole aliment of the child or only for the half of it, the pursuer as mother of the child being liable to supply the half of the aliment herself. What she claims is the whole aliment, as is expressed in her first plea.

"The law is clear about the obligation to aliment the child of a subsisting marriage, and also clear as to the obligation to support an illegitimate child. In the former case in a question between the father and mother, the burden lies, unless in exceptional circumstances, on the father; and in the latter case, unless in exceptional circumstances, it lies on the two parents equally, and the obligation of each parent in a question between them is an obligation of contribution.

"But there is very little authority as to the obligation to aliment the child of a marriage after divorce. No opinion of any institutional writer on the point was quoted. It is laid down in Ersk. Instit. i. 6, 56, that the obligation to aliment children lies first on the father as head of the family, and failing him on the ascendants of the father, and only failing them on the mother; but the better opinion seems to be that it falls in the second place on the mother—See Ersk. i. 6, 56, note e. But these passages relate to the obligations of the parents while the marriage subsists, or when it has been broken by death, not when the marriage is dissolved by divorce, by which the whole relations between husband and wife are destroyed, and by which the husband who is divorced loses all the benefit of the marriage, and there remain no contractual or obediential relations between them at all. This is explained very fully by Lord Ormidale in *Stewart* v. *Stewart*, February 14, 1872, 10 Macph. 472, in which the claim of a divorced wife for aliment was repelled.

"Our institutional writers describe the obligation of a parent to his child as obediential and arising simply from the relation of parent and child. As it is expressed by Erskine, 'Parents are thus bound to maintain their issue, though the relation should be merely natural.' That is to say, that the obligation results from the mere fact that the child is the issue of the parent, whether legitimate or illegitimate.

Now, if that be the origin of the obligation, it must, I apprehend, lie on them equally. They seem to be in *pari casu*. The divorce has dissolved all inequality between husband and wife, and has left untouched the relations between parent and child. I think that the obligations after divorce must be substantially the same as in the case of illegitimate children. Both parents are responsible on precisely the same natural ground, and I can find no reason for choosing between them.

"There seem to be no reported decisions on the point, except *Dunn* v. *Mathews*, January 22, 1842, 4 D. 454, and *Ketchen* v. *Ketchen*, 9 Macph. 690, to which the pursuer referred. In each of these cases the action was, as here, by a mother of a child against its father who had been divorced, and in each case decree was given. But the point now in question was not raised and no decision was given or opinion expressed in regard to it. I therefore cannot hold them as affecting the principle of decision, and I am of opinion that on principle it ought to be found that the defender is liable, but liable only to contribute equally with the pursuer in alimenting their child. In that view perhaps parties may agree that decree should be pronounced for aliment at the rate of £7, 10s. per annum."

The pursuer reclaimed, and argued—The defender was liable for the whole aliment of the child. It would be very strange if a husband by committing a wrong towards his wife could release himself from part of his natural obligations to his children. Such a result was supported by neither sense nor law.

Argued for defender—It was only during marriage that the father was liable for the whole aliment of the children of the marriage. The reason of this was that during the marriage he was manager of the family funds, but when the marriage was dissolved the family funds were distributed, and the wife got a share of the property. It was therefore fair that she, if she was able to afford it, should bear part of the expense of alimenting the children—Bankton, i., 6, 15; Erskine's Institutes, i., 6, 56.

LORD JUSTICE-CLERK—The question for our decision is this—If a man by reason of his fault is divorced from his wife, does his obligation to aliment the children of the marriage cease in part by reason of such divorce? I am unable to answer this question affirmatively as the Lord Ordinary has done. I think that in such a case the father's obligation to aliment his children continues after the divorce. I do not see why a wife obtaining decree of divorce from her husband for his fault should thereby relieve him of part of his burden of supporting the children of the marriage. I do not see any ground in law or common sense for coming to such a conclusion. I am therefore of opinion that the Lord Ordinary's judgment should be recalled, and decree granted in terms of the conclusions of the summons.

LORD YOUNG—Being of opinion that the decision of the Lord Ordinary is erroneous, I agree that it ought to be reversed. In my judgment if a husband is divorced by his wife, he still continues liable to maintain the children of the marriage. I therefore would sustain the action, and give decree in terms of the conclusions of the summons.

LORD TRAYNER—This is an action at the instance of a lady against her former husband for payment of aliment of the child of the marriage. There is no doubt that but for the divorce the husband would be primarily liable for the aliment of that child. But the Lord Ordinary has held that the divorce has altered this. He says in his note—"The divorce has dissolved all inequality between husband and wife, and has left untouched the relations between parent and child. I think that the obligations after divorce must be substantially the same as in the case of illegitimate children." I cannot agree with this view. I am of opinion that the relationship between parent and child, and their consequent rights and obligations *hinc inde*, are undisturbed by the decree of divorce, and that the father after as well as before divorce is primarily liable to support his child.

LORD MONCREIFF—I am of the same opinion. It is argued that the effect of the decree of divorce is to relieve the guilty husband of one-half of the expense of supporting the children of the marriage, and to make the injured wife liable to contribute to the support of the children just as if they had been illegitimate. On the face of it this appears to be an extraordinary argument, and I am not surprised that the question does not appear to have been raised in any previously recorded case. In my opinion a decree of divorce does not affect the obligations of the parents to support the issue of the marriage.

The Court pronounced this interlocutor:—

"Recal the said interlocutor reclaimed against: Ordain the defender to make payment to the pursuer Mrs Maggie Davidson Angus, formerly Robertson, now Foxwell, of the sum of £15 yearly as aliment for John Hector M'Lean Robertson, the only child of the now dissolved marriage between the said pursuer and defender, quarterly and in advance at 1st November, 1st February, 1st May, and 1st August in each year, by equal portions, beginning the first term's payment on the 1st November 1890 and so forth quarterly thereafter so long as said child shall be unable to earn his livelihood and remain in the custody of the said pursuer, with interest at 5 per cent. per annum on each quarterly payment of aliment till payment, and decern," &c.

Counsel for the Pursuers — Maclennan —C. D. Murray. Agents—Shiell & Smith, S.S.C.

Counsel for the Defender — M'Clure — R. Scott Brown. Agents — Cumming & Duff, S.S.C.