

ANNO VICESIMO QUARTO & VICESIMO QUINTO

VICTORIÆ REGINÆ.

****

CAP. LXXXVI.

An Act to amend the Law regarding Conjugal Rights in *Scotland*. [6th *August* 1861.]

WHEREAS it is expedient to amend the Law of *Scotland* relating to Husband and Wife: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

A Wife deserted by her Husband may apply for an Order to protect Property which she has or may acquire by her own Industry, or which she may succeed to.

1. A Wife deserted by her Husband may, at any Time after such Desertion, apply by Petition to any Lord Ordinary of the Court of Session, or in the Time of Vacation to the Lord Ordinary on the Bills, for an Order to protect Property which she has acquired or may acquire by her own Industry after such Desertion, and Property which she has succeeded to or may succeed to or acquire Right to after such Desertion, against her Husband or his Creditors, or any Person claiming in or through his Right; and the Lord Ordinary shall appoint such Petition to be intimated in the Minute Book of the Court of Session, and to be served upon the Husband; and the Husband, or any Creditor of the Husband, or any other Person claiming in or through his Right, shall be entitled to lodge

Answers to the said Petition, and if the Husband be furth of *Scotland*, the Petition shall be executed edictally against him on an Induciæ of Twenty-one Days; and upon considering such Petition the Lord Ordinary shall require Evidence of such Desertion, and on being satisfied thereof pronounce an Interlocutor giving to the Wife Protection of her Property as aforesaid against the Husband and all Creditors or Persons claiming under or through him; and if Answers be lodged to the said Petition, the Lord Ordinary may, on considering the same, and, if he consider it necessary, after hearing Parties, allow a Proof to them of their respective Averments, which Proof he shall take himself, and either write the Evidence with his own Hand, in which Case it shall be read over to the Witness by the Judge, and signed by the Witness, if he can write, or the Lord Ordinary shall record the Evidence by dictating it to a Clerk, in which Case it shall, when taken down, be read over and signed as above; or the Lord Ordinary shall cause the Evidence to be taken down and recorded by a Writer, skilled in Shorthand Writing, in manner after mentioned, and it shall be competent to the Lord Ordinary, in special Cause shown, instead of taking such Proof, to grant a Commission to take said Proof elsewhere than in *Edinburgh*, in which Case he may pronounce an Interlocutor setting forth such special Cause, and granting Commission to take such Proof, and if satisfied after Proof of the Fact of such Desertion, and that the same was without reasonable Cause, he shall pronounce an Interlocutor giving to the Wife Protection as aforesaid, and he shall appoint Intimation of the said Interlocutor having been pronounced to be made in One or more Newspapers published within the County within which the Wife is resident, or in such other Newspapers as the Lord Ordinary may appoint.

Husband or Creditor may apply by Petition for Recal of Order.

2. It shall be lawful for the Husband, or any Creditor or other Person claiming in or through his Right, if such Creditor, Husband, or other Person have not lodged Answers as aforesaid, to apply by Petition to the Lord Ordinary by whom such Order was made for the Recal thereof; and the Lord Ordinary shall appoint such Petition to be answered by the Wife, and thereafter dispose of the Application as he shall think just; but such Recal shall not affect any Right or Interest onerously and *bonâ fide* acquired by any Third Party from the Wife before said Recal; and the Lord Ordinary shall direct that Publication of his Interlocutor be made in manner herein-before provided.

Interlocutors may be reviewed.

How long Order of

3. All Interlocutors of the said Lord Ordinary may be brought under Review of either Division of the Court of Session, by lodging and boxing within Twenty-one Days after the pronouncing of such Interlocutors, if in Session; and if the said Twenty-one Days shall expire

expire during Vacation, by lodging in the Bill Chamber a Reclaiming Note and boxing the same at the First Box Day after the Expiry of the said Twenty-one Days: Provided always, that, notwithstanding such Reclaiming Note, the Interlocutor of the Lord Ordinary granting Protection shall take effect when intimated as aforesaid, unless the Lord Ordinary, either at the Time of the pronouncing thereof or within Forty-eight Hours thereafter, order that his Interlocutor shall not take effect till the advising of the Reclaiming Note, or such other Period as he may think fit; and such Order of Protection shall, where there has been Appearance by the Husband, continue operative until such Time as the Wife shall again cohabit with her Husband, or until the Lord Ordinary, upon a Petition by the Husband, shall be satisfied that he has ceased from his Desertion, and cohabits with his Wife; and the Lord Ordinary may require him to find Security for such Period as may be appointed, that he shall continue to cohabit with her; and upon the Lord Ordinary being so satisfied, and Security found, if required, he shall recal the Order of Protection; but such Recal shall not affect any Right or Interest acquired by the Wife while the said Order subsisted, which Right and Interest shall remain vested in her, exclusive of her Husband's Jus mariti and Right of Administration; nor shall it affect any Right or Interest acquired by a Third Party during such Period, or any Third Party through or from her, while the said Order subsisted; and until such Order be recalled it shall not be competent for the Husband to institute an Action of Adherence against his Wife; and the Lord Ordinary shall direct that Publication of its Recal be made in manner herein-before provided.

Protection to continue operative.

No Action of Adherence competent while Order subsists.

4. After an Interlocutor of Protection is pronounced, and duly intimated, the Property of the Wife as aforesaid shall belong to her as if she were unmarried: Provided always, that such Protection shall not extend to Property acquired by the Wife of which the Husband or his Assignee or Disponee has before the Date of presenting said Petition obtained full and complete lawful Possession, nor shall such Protection affect the Right of any Creditor of the Husband over Property which he has before the Date thereof duly attached by Arrestment, followed by a Decree of Forthcoming, or which such Creditor has before the said Date duly poinded, and of which he has carried through and reported a Sale.

After Interlocutor of Protection is pronounced, Property of Wife to belong to her as if unmarried.

5. If any such Order of Protection be made and intimated, it shall have the Effect of a Decree of Separation *a mensâ et thoro* in regard to the Property, Rights, and Obligations of the Husband and of the Wife, and in regard to the Wife's Capacity to sue and be sued.

Order of Protection to have Effect of Decree of Separation.

6. After

In case of Separation the Property of the Wife to belong to her exclusively of the Jus mariti and Right of Administration;

6. After a Decree of Separation *a mensâ et thoro* obtained at the Instance of the Wife, all Property which she may acquire, or which may come to or devolve upon her, shall be held and considered as Property belonging to her, in reference to which the Jus mariti and Husband's Right of Administration are excluded, and such Property may be disposed of by her in all respects as if she were unmarried, and on her Decease the same shall, in case she shall die intestate, pass to her Heirs and Representatives, in like Manner as if her Husband had been then dead; provided that if any such Wife should again cohabit with her Husband all such Property as she may be entitled to when such Cohabitation shall take place shall be held to her separate Use, and the Jus mariti and Right of Administration of her Husband shall be excluded in reference thereto, subject, however, to any Agreement in Writing made between herself and her Husband; and the Wife shall, while so separate, be capable of entering into Obligations, and be liable for Wrongs and Injuries, and be capable of suing and being sued, as if she were not married; and her Husband shall not be liable in respect of any Obligation or Contract she may have entered into, or for any wrongful Act or Omission by her, or for any Costs she may incur as Pursuer or Defender of any Action, after the Date of such Decree of Separation and during the Subsistence thereof; provided that where upon any such Separation Aliment has been decreed or ordered to be paid to the Wife and the same shall not be duly paid by the Husband, he shall be liable for Necessaries supplied for her Use.

also for Purposes of Contract and suing.

In Action of Divorce Adulterer to be Co-Defender.

7. In every Action of Divorce for Adultery at the Instance of the Husband it shall be competent to cite, either at the Commencement or during the Dependence thereof, as a Co-Defender along with the Wife, the Person with whom she is alleged to have committed Adultery; and it shall be lawful for the Court in such Action to decern against the Person with whom the Wife is proved to have committed Adultery for the Payment of whole or any Part of the Expenses of Process, provided he has been cited as aforesaid, and the same shall be taxed as between Agent and Client: Provided always, that it shall be competent to examine the Person with whom the Wife is said to have committed Adultery as a Witness in the Cause, notwithstanding he is called as a Co-Defender in the Action, and in the Power of the Court, on Cause shown, to dismiss such Action as regards such Co-Defender, if in their Opinion such a Course is conducive to the Justice of the Case.

Lord Advocate may enter Appearanc in Actions

8. It shall be competent to the Lord Advocate to enter Appearance as a Party in any Action of Declarator of Nullity of Marriage or of Divorce; and it shall be competent to him to lead such Proof and maintain such Pleas as he may consider warranted by the Circumstances

of

of the Case; and the Court shall, whenever they consider it necessary for the proper Disposal of any Action of Declarator of Nullity of Marriage or of Divorce, direct that it be laid before the Lord Advocate, in order that he may determine whether he should enter Appearance therein; and Expenses shall not be claimable by or against the Lord Advocate with reference to such Cases. for Nullity of Marriage and Divorce.

9. In any Action for Separation *à mensâ et thoro* or for Divorce the Court may from Time to Time make such Interim Orders, and may, in the Final Decree, make such Provision as to it shall seem just and proper with respect to the Custody, Maintenance, and Education of any Pupil Children of the Marriage to which such Action relates. In Action for Separation, Court may make Interim Orders with respect to Children.

10. In every Consistorial Action the Summons shall be served upon the Defender personally, when he is not resident within *Scotland*: Provided always, that if it be shown to the Satisfaction of the Court that the Defender cannot be found, Edictal Citation shall be deemed sufficient; but in every Case where the Citation is edictal the Pursuer shall also serve the Summons on the Children of the Marriage, if any, and on One or more of the Next of Kin of the Defender, exclusive of the Children of the Marriage, when the said Children and Next of Kin are known, and resident within the United Kingdom, and such Children and Next of Kin, whether cited or so resident or not, may appear and state Defences to the Action. In every Consistorial Action the Summons to be served on Defender personally when not within Scotland.

11. It shall not be necessary, prior to any Action for Divorce, to institute against the Defender any Action of Adherence, nor to charge the Defender to adhere to the Pursuer, nor to denounce the Defender, nor to apply to the Presbytery of the Bounds, or any other Judicature, to admonish the Defender to adhere. Not necessary to institute an Action of Adherence against Defender prior to Action for Divorce.

12. The Widow of any Person who shall, after the passing of this Act, die infeft in Property held by Burgage Tenure shall be entitled to Terce therefrom; and the like Proceedings as to Service and Kenning before the Sheriff shall be competent in such a Case as are competent with reference to Property in respect of which Terce might have been claimed prior to the passing of this Act. Terce claimable from Burgage Property.

13. The Forty-first Section of the Act of the First Year of His late Majesty *William* the Fourth, Chapter Sixty-nine, in so far as it enacted that "it shall be lawful for His Majesty's Principal Secretary "of State for the Home Department to appoint from Time to Time "such Number of Persons, being Sheriffs-Depute of Counties, as he "shall think fit, to take Proofs in Consistorial Causes, which Duty "the Lord Ordinary to take Proofs in Consistorial Actions.

" the Persons so appointed shall perform;" and the Second Section of the Act of the Sixth and Seventh Years of His late Majesty *William* the Fourth, Chapter Forty-one, shall be and the same are hereby repealed; and in place thereof it is hereby enacted, That where Proof in Consistorial Actions shall be allowed, a Diet of Proof shall be appointed, at which the Evidence shall be led before the Lord Ordinary, and he shall take himself, and either write down with his own Hand the oral Evidence, in which Case it shall be read over to the Witness by the Judge in open Court, and shall be signed by the Witness, if he can write, or the Lord Ordinary shall record the Evidence by dictating it to a Clerk, in which Case it shall, in like Manner, be read over and signed; or the Lord Ordinary shall cause it to be taken down and recorded in Shorthand by a Writer skilled in Shorthand Writing, to whom the Oath De fideli administratione officii shall be administered, and the Lord Ordinary may, if he think fit, dictate to the Shorthand Writer the Evidence which he is to record; and the said Shorthand Writer shall afterwards write out in full the Evidence so taken by him; and the Notes of the Judge, or the extended Notes of such Writer, certified by the presiding Judge to be correct, shall be the Record of the oral Evidence in the Cause; and the Lord Ordinary shall take a Note of the Documents adduced, and any Evidence, whether oral or written, tendered and rejected, with the Ground of such Rejection; and any Ruling of the Lord Ordinary in reference to the Admission or Rejection of Evidence may be recalled or altered by the Inner House, under a Reclaiming Note against the final Interlocutor of the Lord Ordinary, disposing of the Merits of the Cause; and the Diet of Proof may be adjourned by the Lord Ordinary, if he shall consider it proper and reasonable so to do; but the Proofs shall be taken as far as may be continuously, and with as little Interval as the Circumstances or the Justice of the Case will admit of: Provided always, that it shall be competent to the Lord Ordinary, where any Witness or Haver is resident beyond the Jurisdiction of the Court, or by reason of Age, Infirmity, or Sickness is unable to attend the Diet of Proof, to grant Commission to any Person competent to take and report in Writing, according to the existing Practice, the Evidence of such Witness or Haver.

Payment to certain Sheriffs.

14. The Commissioners of Her Majesty's Treasury shall annually pay to each of *John Cay* Esquire, Sheriff of the County of *Linlithgow*, *John Tait* Esquire, Sheriff of the Counties of *Kinross* and *Clackmannan*, *Erskine Daniel Sandford* Esquire, Steward of the Stewartry of *Kirkcudbright*, and Sheriff of the County of *Wigton*, *Robert Hunter* Esquire, Sheriff of the Counties of *Dumbarton* and *Bute*, and *Benjamin Robert Bell* Esquire, Sheriff of the Counties of *Banff*, *Elgin*, and *Nairne*, out of Monies to be voted by Parliament for that Purpose,

Purpose, a Sum equal to One Fifth of the total Amount which shall be ascertained by the Queen and Lord Treasurer's Remembrancer in Exchequer to have been paid annually, on an average of the last Three Years, to the Sheriffs Commissary, in respect of Proofs taken by them in Consistorial Causes; but such Sum shall only be paid as long as the said Persons shall hold the Office of Sheriff in any County in *Scotland*, and no longer.

Actions of Aliment.

15. Actions of Aliment in the Court of Session between Husband and Wife shall not be considered Inner House Causes, but shall be considered and disposed of in like Manner as other Consistorial Causes, except as herein-after provided as to Decrees in Absence; and Actions of Aliment at the Instance of other Parties shall not be considered Inner House Causes, but shall be disposed of by the Lord Ordinary (subject in both Cases to Reclaiming Note in common Form against his Interlocutors) in the same Way as such Causes are at present disposed of by the Judges of the Inner House: Provided always, that all Actions for Aliment shall be deemed Summary Causes both in the Outer and in the Inner House, and that where no Appearance is entered for the Defender, Decreet shall be pronounced in Absence without Proof, as in other Cases before the Court of Session.

When a married Woman succeeds to Property, &c., Husband or Creditor not entitled to claim the same.

16. 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 Communio 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, if a Claim therefor be made on her Behalf; and in the event of Dispute as to the Amount of the Provision to be made, the Matter shall, in an ordinary Action, be determined by the Court of Session according to the Circumstances of each Case, and with reference to any Provisions previously secured in favour of the Wife, and any other Property belonging to her exempt from the Jus mariti: 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 Assignee or Disponee 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 and carried through and reported a Sale thereof.

17. The

Court of Session empowered to make Acts of Sederunt.

17. The Court of Session are hereby authorized and empowered to make from Time to Time such Orders and Regulations as to Forms of Process by Acts of Sederunt as they may consider necessary for carrying into execution the Purposes of this Act.

Repeal of Laws inconsistent with this Act.

18. All Laws, Statutes, and Usages are hereby repealed in so far as the same are inconsistent with the Provisions of this Act, but no further or otherwise.

Interpretation of Terms.

19. The following Words and Expressions, when used in this Act, shall, in the Construction thereof, be interpreted as follows, except where the Nature of the Provision or the Context of the Act shall exclude or be repugnant to such Construction; that is to say, the Expression "Lord Ordinary" shall include his Successor; the Word "Property" shall include and apply to all Property falling under the Jus mariti; the Expression "Consistorial Action" shall include Actions of Declarator of Marriage, of Declarator of Nullity of Marriage, of Declarator of Legitimacy and Bastardy, Actions of Separation *à mensâ et thoro*, of Divorce and of Adherence, and of putting to Silence, and Actions of Aliment between Husband and Wife instituted in the Court of Session.

Short Title.

20. This Act may in all Proceedings be cited as "The Conjugal Rights (*Scotland*) Amendment Act, 1861."

Commencement of Act.

21. This Act shall come into operation on the First Day of *November* now next ensuing, and not before.

LONDON:
Printed by GEORGE EDWARD EYRE and WILLIAM SPOTTISWOODE,
Printers to the Queen's most Excellent Majesty. 1861.