THE CONFLICT OF LAWS IN CASES OF DIVORCE

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PATRICK FRASER

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IN

CASES OF DIVORCE.

BY PATRICK FRASER,
ADVOCATE.

"For Courts to quarrel and contend about Jurisdiction, is a piece of human frailty; and the more, because of a childish opinion, that 'tis the duty of a good and able Judge to enlarge the Jurisdiction of his Court; whence this disorder is increased, and the spur made use of instead of the bridle. But that Courts, thro' this heat of contention, should, on all sides, uncontrollably reverse each other's decrees, which belong not to Jurisdiction, is an intolerable evil, and by all means to be suppress'd by kings, the senate, or government. For 'tis a most pernicious example that Courts, which make peace among the subjects, should quarrel among themselves."—Bacon.

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CONFLICT OF LAWS IN CASES OF DIVORCE.

THE conflict of laws in reference to cases of divorce has been the matter of controversy in this kingdom for more than half a century. For a considerable period the controversy has flagged, being trampled out of sight by subjects of a more pressing and imperial character. Yet it is one which possesses all the largeness of national, and all the individuality of private, interest. New life has been thrown into the discussion by the recent proceedings of the House of Lords in reference to the Conjugal Rights (Scotland) Bill. Not merely has the old controversy been revived, but doctrines which had been considered settled have been called in question, and strong language has been employed in stigmatising the opinions which have guided the decisions of Scottish and American Courts, — opinions which have their source in the Roman Jurisprudence, and which, in the balance of good and evil, are more consistent with justice than the opposite.

The assailant in the present instance is a Scotsman. It is not the first time that he has signalised himself in attacks on the consistorial law of his native country; but, in the present instance, his views have had a practical effect, which, fortunately for Scotland, they never before attained. Lord Chancellor Campbell has contrived to deprive us of a measure that would have remedied many evils. He has kept many unfortunate persons in trouble whom the Conjugal Rights Bill would have relieved; and he has not advanced a step in establishing a theory alike condemned by expediency and by principle. In all this he is no doubt acting with all the confidence of conviction and all the earnestness of a patriot. No one will question his sincerity, but some may see in his

proceedings, how impatience of present inconveniencies, eagerness to bring order out of chaos, and reduce things to harmony with preconceived theory, often lead to illogical conclusions sagacious and unimaginative minds. In examining his opinions, we cannot be charged with any want of respect to a man who has so nobly earned it. It is the greatest tribute to his opinions that they have in Scotland excited so much attention. We are all the more proud of our country because she has sent forth one who has so worthily sustained the reputation of her sons, and who, upon a trying field, has exhibited the splendid spectacle of great talents long exercised with difficulties and ultimately crowned with triumph.

The Lord Advocate of Scotland introduced into the House of Commons, during the session of 1860, a Bill for the amendment of the law of Scotland as to husband and wife. The pressure of business in that House prevented it from passing through its necessary stages, so as to allow of it being taken into consideration by the House of Lords before the day in July after which their Lordships will not consider any new measure unless it be of pressing importance. It thus became necessary to withdraw the measure from the Commons, and to introduce it into the Lords, where it appeared under the auspices of the Lord Chancellor (with a new clause, which has called forth these observations), under the name of "The Conjugal Rights (Scotland) Bill."

The object of the measure was to remove from the law of Scotland many of those oppressive rules that operate so harshly against married women, and to smooth the administration of justice in reference to conjugal quarrels. It referred to many very different matters, all of which have long required reformation. It is needless, however, to dwell upon them, as they constitute no subject of controversy. It is not intended here, to sing the encomium of the Bill, or to write its epitaph. It attained as great a unanimity of approval as has ever been awarded to any Bill affecting subjects so delicate and important. But, unfortunately, it was taken out of Scottish hands; and we have to deplore the loss of a measure which would have effected great and necessary reforms, in consequence of strong opinions entertained by the Lord Chancellor

as to jurisdiction in matters of divorce,—opinions which are not favoured on this side of the Border, and which it is proposed now to submit to examination.

The Bill contained two clauses, to which alone the Lord Chancellor appears to have directed his attention,—at least, they were the only clauses to which he devoted special remark. They were the be-all and end-all of the Bill. Without them it was a mere collection of dry stubble, fit only for the burning; and as they were not allowed to become law, the rest of the Bill was worthy only of oblivion.

The Faculty of Advocates took the liberty of differing in opinion from his Lordship in reference to the two clauses in question, and they expressed that opinion in a short Report, which they communicated to his Lordship. This Report he made the subject of comment, and in the place where he made it, he was safe from all reply. Now, when a great magistrate undertakes to alter ancient laws, to rebuke a College of Lawyers, and to inaugurate a new era, we expect that the lofty message will be conveyed in the language of moderation. We will all listen with respect to the enunciations of a calm and serene wisdom; but it is difficult to acquiesce in the conclusions of a Judge who states, as axiomatic truths, the opposite of what has guided juridical opinion for many ages. In the mode in which the subject has been treated there is rather too much anger in his energy, and gall in his argument. The matter is of such a nature that lawyers might agree to differ upon it; and the loftiest wisdom might be subdued by the remembrance of the fact, that there have been many phases in the controversy, and great names enrolled on both sides.

Clauses in the Husband and Wife Bill limiting the jurisdiction.

I. In the "Husband and Wife" Bill, when it was in the House of Commons, there was a clause in the following terms:—

"XIX. It shall not be competent to raise and prosecute an action of divorce, unless, first, the defender has his or her domicile in Scotland; *or, secondly, the action being one for divorce on the ground of adultery, the adultery was committed in Scotland, and the defender has been personally cited in Scotland;* or, thirdly, the action being one for divorce on the ground of desertion, the defender has deserted the pursuer at a time when the pursuer had a domicile in Scotland, the pursuer continuing to