

terdict. It must have arisen either from defective apparatus or negligence in management. His Lordship thought that Mr Scott was entitled to credit for the attempts which he had made, at considerable expense, to remove the cause of complaint. He was satisfied that Mr Scott was not actuated by any wish to annoy his neighbours, but he had subjected himself to a second complaint for breach of interdict; and but for his conduct since July this would be a very aggravated case. It was therefore necessary to mark the opinion of the Court by the imposition of a small fine.

Lord DEAS was of a different opinion. He thought that in order to constitute the offence charged it was necessary that there should be a wilful contempt of Court. It was impossible to say that if the smell in July arose from inattention or accident there was a contempt of Court. His Lordship thought that the difficulty of the case arose from the terms of the interdict, which were much too vague. It did not prohibit the works; on the contrary, it implied a permission to carry them on. In regard to the smell on the 31st July, it was clearly proved that it had been caused by the temporary emptying of a digester, which was thought necessary by Professor Penny, who had been employed by the respondent to devise means for removing the offensive smell. It was a strong thing to say that a man was committing a contempt of Court when in the very act of taking measures to obey it; and these measures seem to have been successful, for it is not proposed to hold that any of the breaches alleged after 31st July have been proved.

Lord ARDMILLAN concurred with Lord CURRIEHILL. The LORD PRESIDENT declined, being a brother of the complainer.

#### PATERSON v. KILGOUR AND MACQUEEN.

*Reparation—Cheating at Cards.* An action of damages founded on allegations that a person had been cheated when playing cards with others who had conspired for the purpose, but not alleging that the person said to have been cheated was *incapax*, dismissed as irrelevant.

Counsel for Pursuer—Mr G. H. Pattison. Agent—Mr John Leishman, W.S.

Counsel for Defender Macqueen—Mr Patton and Mr W. N. M'Laren. Agent—Party.

Counsel for Defender Kilgour—Mr Grant. Agent—Mr James Barton, S.S.C.

This action is raised by the mother and executrix of the late Andrew Murray Paterson, C.A., in Edinburgh, against J. M. Macqueen, S.S.C., and Henry Kilgour, writer in Edinburgh. The ground of action alleged is that the deceased had been cheated and defrauded by the contrivances and devices of the defenders, and of another person named Galbraith, now dead, in pursuance of a conspiracy previously concocted among them for that purpose. The sum sued for is £396, which is the amount of the damage alleged to have been sustained. The material averments made by the pursuer, but denied by the defenders, are as follows:—

Cond. I. The deceased Andrew Murray Paterson, chartered accountant in Edinburgh, after suffering from disorderment of the stomach and nervous system for several years, took, in the year 1855, by advice of Professor Christison, a voyage to the West Indies for the benefit of his health. The voyage unfortunately did not effect any permanent improvement in Mr Paterson's health, and after his return he continued to suffer from the same complaint. He had been recommended by his medical attendants, for the alleviation of his sufferings, to take small quantities of morphia or opium and brandy after meals; and after doing so for some time, he found it necessary, in order to obtain relief from pain, to take these medicines in considerable and gradually-increasing quantities. This had a most unfortunate result, and gradually led him to the excessive use of stimulants, to the great injury of his constitution, health, and habits,

Cond. II. Shortly after Mr Paterson's return to this country, which was in July 1855, Mr Paterson was introduced to, and became acquainted with, the defenders, John Moir Macqueen and Henry Kilgour, and the deceased James Shaw Galbraith, writer in Denny, in the county of Stirling; and he was, in the year 1856, elected and induced by them to accept, *inter alia*, the office of trustee on the sequestered estate of John Ritchie, residing at Denny, in whose affairs they were interested for themselves and for a client, by which means he was brought much into communication and contact with all of them.

Cond. III. At this time, partly in consequence of the disease under which he suffered, and partly in consequence of the frequent and habitual use of opium and stimulants, Mr Paterson was in an extremely bad state of health. Not only were his bodily powers prostrated, but his mental faculties were much impaired. From June 1856 until after the month of June 1857 he continued in the state above described. He was habitually and almost constantly, during said space of time under the influence of opium and stimulants, so as not to know what he was doing; and he had not, even in the intervals of comparative sobriety and abstinence, the full possession or command of his mental faculties. He was at all times during said period easily imposed upon and deceived, and had no strength of mind or power to detect or resist the desires of others who wished to deceive or cheat him, or to lead him into error for their own purposes.

Cond. IV. The defenders and the said James Shaw Galbraith, seeing the condition of body and mind in which Mr Paterson was, and knowing that he, under his father's trust-settlements, was entitled to property, both heritable and moveable, of a considerable amount, and being all of them needy and in want of money, resolved to enrich themselves at his expense. For that purpose they, in or about the month of June, July, or August 1856, or at some other time prior to May 1857, the precise period being to the pursuer unknown, entered into a scheme or conspiracy to engage Mr Paterson in play with them at cards for money—they arranging among themselves that, without his discovering it, they should so act and deal with the cards, and so manage by preconcerted signals to one another, and by other devices known to them and to those who practise in that way, as that they should always win, and Mr Paterson lose, on the result.

Cond. V. This conspiracy and scheme the defenders and Mr Galbraith jointly practised and carried out successfully. During the months of August, September, October, November, and December 1856, and January and February 1857, they induced Mr Paterson, under pretence, *inter alia*, of diverting his mind from his disease, and of otherwise amusing him, to engage in card-playing with them. They so played sometimes in Edinburgh in various houses, hotels, and other places there, and sometimes in Mr Galbraith's house at Denny. What games they played the pursuer does not know; but while one of their number, in order to deceive Mr Paterson, sometimes so played as to appear to lose money to him, care was taken that the other two who were in company should win from him to a greater extent, and this pretence of losing by one of the three was a mere lure to induce Mr Paterson to play, and to prevent his detecting the fraud that was being practised upon him. In playing the games in which the defenders and Mr Galbraith induced Mr Paterson to engage with them, the defenders and Mr Galbraith did not play fairly, but by signals known to one another, and by other contrivances and devices, they jointly and systematically, and in pursuance of their said scheme and device, played false so as always to make sure of winning in the end, and of Mr Paterson becoming the loser.

Cond. VI. When ready money was not at hand, the defenders and Galbraith took bills from Mr

Paterson for the amount of what they represented to be his losses to them. The defender Macqueen carried bill-stamps with him, and upon these stamps, which he had ready for the purpose, the bills or promissory-notes which Mr Paterson was got to subscribe were written.

These averments are followed by an enumeration of eleven bills and promissory-notes which were alleged to have been granted by Paterson to Galbraith, and of three others granted by Kilgour to Paterson, and by him endorsed to Galbraith; and it was stated—

Cond. VIII. No value was given to Mr Paterson for any of the promissory-notes and bills granted by him, above set forth, or for the endorsement of promissory-notes and bill by Kilgour, payable to him, above set forth. There was no consideration therefor, other than the pretence of the money said to have been won from him at cards by the defenders, but which was not won by fair play, but was made, by foul play, to appear to have been won from him, in pursuance of the conspiracy and scheme above set forth. Farther, the bills and promissory-notes were in most, if not in all, instances signed by Mr Paterson when, through intoxication and otherwise, incapable of knowing, and when in fact he did not understand what he was doing, or know the amount of the bills, the date at which they were payable, or any other particulars. The endorsement was written in the same circumstances.

Cond. XIX. Farther, the defenders were equally with Mr Galbraith concerned and participators in the conspiracy and scheme by which Mr Paterson was defrauded out of said sums, and by which the said bills were fraudulently impetrated and obtained. They were partakers in the carrying out of that scheme, and aided and abetted one another in the devices and contrivances by which it was effected, and by which they succeeded, first, in appearing to win money from Mr Paterson at cards, by unfair and false play carried on by them in concert; secondly in procuring bills from him under the false representation that the money for which said bills were granted or endorsed was fairly lost, and when he was in such a state as not to be capable of knowing whether their statement was true or false, or of understanding or transacting business; and, thirdly, in counselling him into payment of the foresaid sums, in the manner above explained, while he was ignorant of the falsehood, cheating, and cozening that had been practised upon him by them.

An issue was allowed by the Lord Ordinary which was lodged and reported to the Court. The defenders argued that the action was irrelevant, and that no issue should be allowed. The Court to-day gave effect to this contention, and dismissed the action with expenses.

The LORD PRESIDENT said—This is a very unpleasant sort of action in every aspect of it. It sets forth a course of proceeding in reference to this gentleman (Mr Paterson) which, if it be at all true, cannot be noticed in terms of too strong reprobation. The question is whether the statement is relevant as a ground of action. It is alleged that there was a conspiracy to cheat Mr Paterson, and that the cheating was to be accomplished by getting him to play at cards, and that there was to be illegal and unfair communications betwixt those playing with him whereby he was sure to lose; and, further, that he was a person generally in a state of inebriety, and occasionally in a state of sobriety, but that his normal condition was that of a person not altogether sober. It is not said that he was a person of such incapacity as to be unable when sober to conduct business. It is not even said that if the play had been fair he was not a match for the others. But it is said that by artifices money was nominally won from him, for which he granted bills, which were afterwards settled. Now, the defenders could not have come here to enforce payment of the bills even although the play had been fair. We do not take cognisance of such transactions;

but in this case it is said that there was cheating. Now, if this Court does not take cognisance of fair play at cards, can we be asked to determine whether there has been unfair play? In order to ascertain this we would in like manner require to make an inquiry into what are the rules of the game. There may be tribunals to settle these points—courts of honour with skill in these matters. But we do not pretend to possess such skill ourselves, nor are we in the habit of remitting to persons of skill in order to obtain information on such a subject. I would not have been surprised if the defenders against whom the charges have been made had demanded the fullest inquiry into them; but our judgment having been asked on the relevancy, I think the action should be dismissed.

Lord CURRIEHILL concurred. The only thing which moved him was the statement made in argument as to Mr Paterson's incapacity, but the action was not laid on that; there was no plea in law founded upon it, nor was it in the issue which was proposed by the pursuer.

Lord DEAS—This action is raised to recover money lost at cards. There can be no action for money so lost and paid in the ordinary case. I do not think that the allegation of cheating makes any difference. I think the object of the law was to discourage persons from playing for money. But it was argued that this is not an action of repetition, but one of damages. If, however, we entertained such an action, we would just be sanctioning in another way a *condictio indebiti*. The only thing which would have made the action relevant is an allegation of incapacity, which there is not. Nor is there any allegation of incapacity when the bills were paid.

Lord ARDMILLAN also concurred.

## OUTER HOUSE.

(Before Lord Ormisdale.)

WILSON v. WILSON.

*Husband and Wife—Adultery—Separation and Alimnt.* Held (per Lord Ormisdale) that adultery by a husband is a good ground for his wife insisting in an action either of separation and aliment or of divorce against him.

Counsel for the Pursuer—Mr A. Asher. Agents—Messrs Menzies & Coventry, W.S.  
Counsel for the Defender—Mr Fraser. Agents—Messrs White-Millar & Robson, S.S.C.

This is an action of separation and aliment, at the instance of a wife against her husband, on the ground of the defender's adultery and cruelty. The parties have been living apart for the last nine years, the pursuer alleging that in consequence of her husband's ill-treatment of her she was compelled to absent herself from his society. In 1864, shortly after the date of the defender's adultery, an action of divorce was raised by him against his wife on the ground of her desertion of him. This action was reported to the Inner House on an objection to the competency, and does not appear to have since been moved in. Thereafter the present action was instituted by the wife, and a proof was allowed her as to her husband's adultery. This having been led, the Lord Ordinary has now pronounced an interlocutor granting decree of separation and aliment, to which is appended the following note:—

"It is clear on the proof that the defender has been guilty of adultery; but the defender's counsel maintained in argument, that although adultery was a good ground for the fuller remedy of divorce *a vinculo*, it did not warrant the lesser remedy of separation and aliment. It was, however, at the same time conceded on the part of the defender, that if the defender had committed adultery with a domestic servant or other inmate of the house in which he and the pursuer resided, that would not only have been a sufficient ground for a divorce, but