

tory of his conduct; therefore find that he committed a breach of the said promise; sustain the appeal; recal the interlocutor of the Sheriff of 23d June 1874; find the appellant entitled to £20 of damages, and decern in favour of the appellant and John Lockhart, her husband, therefor; find the appellant entitled to expenses, both in this and in the Inferior Court, and remit to the Auditor to tax the same and to report."

Counsel for Appellant—Scott. Agents—D. Crawford and J. Y. Guthrie, S.S.C.

Counsel for Respondent—M. Kechnie. Agent—Thomas Carmichael, S.S.C.

Wednesday, November 18.

### FIRST DIVISION.

[Lord Mackenzie, Ordinary.

WATSON v. WATSON.

*Process—Separation and Aliment—Adultery—Cruelty—Condonation—Competency.*

In an action of separation and aliment at the instance of a wife against a husband on the ground of adultery and cruelty, the defender pleaded that the pursuer after having left him as she alleged on account of his cruelty and adultery had condoned the alleged acts by returning to his society, although in the full belief of his guilt. The pursuer admitted her return, but averred that she did so on representations which led her to the conclusion that the defender was innocent of the adultery. The Court ordered proof of the alleged condonation, reserving all questions of the competency of the plea in the bar of action.

*Observations—(per Lord President) on the competency of the plea of condonation in bar of an action of separation and aliment on the ground of adultery and cruelty.*

This was an action of separation and aliment at the instance of Mrs Elizabeth Ponton or Watson, against her husband, on the grounds of adultery and cruelty.

The pursuer had at one time left her husband on account, as she alleged, of his cruelty, but she subsequently returned to live with him. In reference to this return the pursuer made the following averment—"After various communing outwith the knowledge of the pursuer's agents, the defender, of this date, (December 27, 1873), by his repeated promises of desisting from his cruel treatment of the pursuer, and in future leading a steady life, and shewing kindness to the pursuer and their children, induced her, on these representations, made to herself and others, to return to his house and live with him."

The defender stated the following answer:—"The pursuer thereafter, in the perfect, though erroneous, belief that the defender had committed adultery, cohabited with the defender as his wife, and fully condoned the alleged acts of adultery, and also the alleged acts of cruelty."

The Lord Ordinary (MACKENZIE) pronounced this interlocutor—"Finds that the pursuer having, as she admits, returned to the defender's house on

27th December 1873, and cohabited with him after that date, in the knowledge of the acts of adultery averred by her to have been committed by him prior to that date, cannot found upon these alleged prior acts of adultery in support of the present action."

The pursuer reclaimed, and obtained leave from the First Division to amend the record to the effect of adding the following statement—"Previous to the service of the summons, the defender was in the habit of following the pursuer about upon the street, using abusive language towards her, but after that, and before his defences were due, he wholly changed his behaviour, and seized every opportunity of visiting and speaking to her in her father's house (where she was residing), when her father was out, and also of speaking to her on the street and elsewhere, on which occasions he solemnly declared to her that there was no truth whatever in the charge of adultery made against him, and that the said Catherine Mitchell was an impostor, and implored the pursuer to come home and take charge of the shop for the sake of the children. On Friday, 26th December 1873, he followed the pursuer to the house of Mrs Robbie, 31 Regent Place, Edinburgh, where the pursuer had gone to call. He there again solemnly declared to her, and by his persistency induced her to believe, that he was innocent of the charge of adultery made against him, and insisted upon the pursuer going back to live with him. This she then declined to do, from her still being afraid of cruel treatment. He would not, however, allow her to leave the house until she would at all events sign a letter which he had written to her agents, requesting them to suspend all proceedings, and to release his account at the bank, which she did, and he posted it that same evening. The pursuer remained that night with her father. On the evening of the following day, viz., Saturday 27th December 1873, he sent over a note, addressed to her to her father's house, stating that he wished to speak to her after the shop was shut, and she was induced to go over. He did not shut the shop till it was going to twelve o'clock, and he thereafter detained her on various pretences till far on on Sunday morning, when he said it was too late for her to go home, as the lights in her father's windows were out, and he bolted the door. He then again and again solemnly protested that the charge of adultery was wholly false,—in consequence of which, and of his previous protestations of innocence, and his promises of desisting from his cruel treatment to her, she was induced to believe his said declarations, and to remain all night and sleep in the same bed with him. Next night, being Sunday, the defender having, as he thought, accomplished his purpose, commenced to taunt the pursuer, and told her to go and see what her lawyers could do now; and the pursuer at once perceived that the defender had intended merely to entrap her into an apparent condonation, and she thereafter, so long as she remained in the defender's house, refused to sleep with him, and occupied a bed with her children in a different room from the defender. After that date, the defender treated her with even more than his previous cruelty, and it is believed and averred, continued, outwith the pursuer's knowledge, to carry on his adulterous intercourse with the said Catherine Mitchell. The pursuer never condoned the defender's guilt."

At advising—

LORD PRESIDENT—This is a case requiring very cautious handling, for it involves questions of importance and novelty. It is an action of separation and aliment brought by the wife on the ground of adultery and cruelty. The Lord Ordinary has found “that the pursuer having, as she admits, returned to the defender’s house on 27th December 1873, and cohabited with him after that date, in the knowledge of the acts of adultery averred by her to have been committed by him prior to that date, cannot found upon these alleged prior acts of adultery in support of the present action.”

There are two rules of consistorial law which are firmly fixed, and which, although not directly applicable, have a bearing upon this case. First, In an action of divorce on the ground of adultery, the pursuer cannot found upon acts of adultery which have been condoned; and second, in actions of separation for cruelty, it is competent for the pursuer to prove acts of cruelty preceding a reconciliation, if there are other acts of cruelty following the reconciliation.

Here we have a mixed case. The action of separation rests on the combined ground of adultery and cruelty, and the speciality of the case is this, that the only adultery alleged is prior to a reconciliation. There are acts of cruelty alleged both before and after the reconciliation, and there is no doubt that the acts of cruelty before may be proved. But it is a most difficult question whether the pursuer is entitled to prove the prior adultery. An action of separation on the ground of adultery is of recent introduction, and so it is not surprising that a question of the kind should not have occurred before. If the action was only founded on the ground of adultery there would be a great deal to be said for applying to it the same rule as to a divorce. On the other hand, it is said with force that in an action of separation on the ground of cruelty, the whole lives of the parties may be brought under review. I do not think, however, that it is necessary to determine these questions at present.

I am not inclined to adhere to the judgment of the Lord Ordinary, whatever may be the ultimate result of the action. In the first place, I think his Lordship has assumed that there was proper condonation. In the present state of the record (which has been amended since it came from the Lord Ordinary) I am not prepared, without evidence, to hold that there has been such condonation as would be a bar even in an action of divorce. For the averment on the part of the pursuer is this,—she says she was all along willing to return to her husband, but she also says that her ultimate return was brought about by false representations, which led her to believe that her husband was actually innocent. If that is true, the serious question would arise, whether condonation by mistake would bar a divorce or separation. So I do not assume that there has been such condonation here as would be a bar even in a case of divorce.

In the second place, I think it clear that the pursuer is entitled to prove acts of cruelty prior to the reconciliation. The question is, how far it is possible, looking to the averments, to separate the proof of cruelty from proof of adultery, the two are so closely mixed up together. The cruelty alleged arises out of the wife’s detection of the adultery. I therefore think that we should recal the interlocutor of the Lord Ordinary, and allow a proof of the

whole averments on the record, under strict reservation of the relevancy of allegations both of cruelty and adultery before reconciliation.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“Recal the Lord Ordinary’s interlocutor, and remit to his Lordship to allow the parties a proof of their whole averments on record, reserving all questions as to the relevancy of the averments of adultery and cruelty prior to the alleged reconciliation of the spouses as substantive grounds of action, and reserving also the question of expenses.”

Counsel for the Pursuer—Scott. Agents—Rhind & Lindsay, W.S.

Counsel for the Defenders—Asher and Thorburn. Agents—Wallace & Foster, S.S.C.

## VALUATION APPEAL COURT.

1874.

(*Ante*, vol. ix, pp. 443–6, 497; vol. x, p. 661–4.)

(Before Lords Mure and Gifford.)

No. 105.—(PERTSHIRE)

DUNCAN M’GREGOR AND OTHERS.

*Preliminary Plea*—*Locus Standi of Objectors.*

*Held* that the fact of an objection being taken by persons whose names were not on the roll was not a good objection to the competency of their complaint.

*Lease—Over-value.*

A lease having been granted at what was proved to be an over-value, for the purpose of giving the lessee a vote, *held* that the lease was not such as to be conclusive of value, and that the Commissioners were right in reducing the valuation to what they deemed a correct amount, according to evidence adduced.

Certain villagers in Aberfeldy, whose names were not on the roll, appealed against the entry in the roll of Joseph Ewing, Sir Robert Menzies’ gardener, as tenant of a house at a rent of £14.

On behalf of Joseph Ewing and Sir Robert Menzies, Bart., the proprietor, a preliminary objection was taken that the complaint was incompetent in respect the complainers had no *locus standi*, because their names did not appear in the Valuation Roll, and, in point of fact, they paid no poor-rates or any other local rates.

On behalf of the complainers it was answered that although their names did not appear in the Valuation Roll, they were three of the parties entered in the Valuation Roll (being number 19 of the parish of Weem of the Valuation Roll for the year 1872–73, and number 37 of the Roll of 1873–74 for the parish of Weem) as “Easter Aberfeldy Villagers,” and that the payment of poor-rates had no bearing on their right to complain against the entry in question. This they offered to prove.

The Commissioners by a majority resolved to proceed with the case, reserving consideration of the preliminary objection.