"In the opinion of the Lord Ordinary the defenders are in the right. He cannot construe the letters as amounting to a waiver or discharge of any preferable claims competent to Adamson. The defenders do not claim any preference by reason of the letters. They only contend that such preferable claims as then existed are to be satisfied *primo loco* out of the proceeds of the subjects which were sold. This is no more than an assertion of their legal rights, which, as the Lord Ordinary thinks, have been in no way impaired by the letters above mentioned."

The pursuer reclaimed, and argued that the defender was precluded by the terms of the letter from stating any preferable claim after the date of the inhibition, and that apart altogether from the agreement he could not claim a right of hypothec over title-deeds for law expenses incurred subsequently to the date of the inhibition. He argued further that he was entitled to a proof in support of his contention that the agreement referred to the claim of Mr Adamson as it stood at the date of the inhibition.

At advising—

LORD PRESIDENT—There may be some important questions between the parties raised in the accounting in this action, but with these we have at present nothing to do.

An agreement was come to by the parties by two letters of date 29th June 1878. The pursuer's counsel represented that those letters were merely a memorandum of an agreement already made, but that is quite an inadmissible representation. In expression, as well as substance, they are in themselves a complete agreement, consisting, as in the ordinary case, of two missives—the one containing an offer, and the other an acceptance of that offer. Further, on the faith of these letters the parties have made a judicial transaction. In July 1878 a minute was lodged expressing the settlement of a case then proceeding.

It states that the case had been "settled extrajudicially in terms of letter from Mr John Adamson, solicitor, Banff, the pursuer's agent, to Messrs Allan & Soutar, solicitors, Banff, the defender's agents, and answers thereto, both dated 29th June 1878. They accordingly craved the Lord Ordinary to interpone authority to this minute, and to decern in terms of the conclusions of the summons, and to find neither party entitled to expenses."

Here, then, is a judicial transaction given effect to by a judgment of the Court, and to say that that is not a complete and concluded agreement is altogether impossible. If it is to be a concluded agreement, what is there to be proved? What is proposed to be investigated is what is stated in condescendence 4, viz., that there was a verbal proposal that the subjects should be sold on certain conditions. It being merely a verbal proposal, it naturally led to a misunderstanding, and therefore the sale which was to follow fell through, and until these letters were written both parties were absolutely free. In the case of an agreement as complete as this it is against all the rules of law to go back and investigate prior communings. What, then, is the meaning of these letters? The pursuer says that it is, that whatever preferable claims Mr Adamson had prior to the date of the inhibition were to remain good, but that if he had acquired any since they were not to be held good, but were by form of the agreement to be waived. I can see nothing in the letters suggesting such a construction. I quite agree with the Lord Ordinary that Mr Adamson gave up no preferable claims that were possessed by him as at 29th June 1878. The Lord Ordinary has not decided that he possessed any at all, even before, and still less after, the inhibition. The nature and amount of the claims remain for settlement in the accounting which is to follow.

LORD DEAS—As your Lordship has said, the interlocutor reclaimed against has decided nothing except that preference of Mr Adamson's claims is to be considered as at the date of these letters. He has not decided that Mr Adamson has any such, but if he has, he does not restrict them to those before the date of the inhibition. All the details are just as open as before the Lord Ordinary's interlocutor. The parties have erred in coming here before their time.

LORD MURE concurred.

The Court adhered.

Counsel for Pursuer—Guthrie Smith—Keir. Agent—Alex. Morison, S.S.C.

Counsel for Defenders—Trayner—Jameson. Agents—Scott Moncreiff & Traill, W.S.

Friday, May 13.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MULLEN *v.* WHITE.

Husband and Wife—Wife's Præpositura—*Husband's Liability for Malicious Act of his Wife—Reparation—Wrongous Apprehension and Incarceration.*

In an action of damages for wrongous apprehension and incarceration the pursuer averred that the complaint on which she was charged proceeded on information given by the wife of the defender, "acting for him and with his authority," and "in the course of the management of his business, and within the scope and in accordance with the mandate or authority under which she was appointed to act as his representative;" further, that though he had been absent when the information was given and the apprehension was made, he entirely approved of and adopted the statements, and approved of the accusation being persisted in. *Held* that these statements were irrelevant.

This was an action for £500 in name of damages and *solatium.* The pursuer Mary Mullen had been a saleswoman in the service of the defender John White, a pawnbroker and salesman in Edinburgh. On 9th October 1880 she was apprehended on a charge of theft, in so far as it having been her duty to enter in a sale-book belonging to the defender a correct note of the price of the goods she sold, she had on the 4th October entered in that book a sum of 18s. as the price of certain goods sold by her instead of the sum of £1, which in reality she had received as the price

thereof, and had appropriated the sum of 2s. There were various other charges of the same nature. On the 9th October, the day following her apprehension, she was tried before the Judge of Police, who found her not guilty of the charge. She then brought this action against the defender, alleging that she had been apprehended "at the instance of the defender," and that the information supplied by him was given "falsely, calumniously, and maliciously, and without just or probable cause." The defender denied that the information supplied to the police was supplied by him. He averred that he was not in Edinburgh either on the 8th or 9th of October, and did not know or hear of the proceedings complained of till 26th October, between two and three weeks after the trial. The pursuer did not dispute that the defender was from home when she was accused and apprehended, but averred "the said complaint against the pursuer was founded on and proceeded with owing to information given by the defender's wife, who manages his business, and who in giving the said information was acting for the defender and with his authority. . . . The defender entirely approved of and adopted his wife's proceedings against the pursuer, and the said proceedings were taken in the course of the management of the defender's business, and were within the scope of and in accordance with the mandate or authority under which she was appointed to act as his representative." She also "explained and averred that the defender's wife and daughter had a general authority from him to manage his business and to do all that he did, and that his wife informed him of what she had done, and that he approved of the accusation being persisted in."

The pursuer's pleas-in-law were—"(1) The defender having maliciously, and without just or probable cause, caused the pursuer to be apprehended and incarcerated on a charge of theft, to her loss, injury, and damage, is liable to make reparation. (2) The defender is responsible for the actings of his wife and daughter, in respect that he authorised them to do what they did, and has since homologated it."

The defender pleaded—"(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (2) The defender should be assoilzied, in respect the information on which the pursuer was apprehended and tried was not given by him nor by his authority."

The Lord Ordinary (Rutherfurd Clark) assoilzied the defender. He added the following note:—"The pursuer, who was a servant in the employment of the defender, in substance alleges that the defender's wife lodged with the public authorities a charge of being guilty of theft, and that this charge was made maliciously and without probable cause.

"The main question argued before the Lord Ordinary was, Whether the defender is responsible for the act of his wife, on the ground that he had devolved on her the general management of his business? The Lord Ordinary thinks that the defender is not responsible. He would not be liable for his wife's slander, nor, it is thought, can he be made responsible for any malicious act on the part of his wife. The pursuer has, of course, no case unless she alleges malice.

"But the pursuer also maintained that the defender had specially authorised the act of his wife. It is admitted by her that when the charge was made on 8th October, and when the trial took place on 9th October, the defender was absent from home, but while this admission is made, it is said 'that he approved of the accusation being persisted in.' The Lord Ordinary was at pains to ascertain from the counsel for the pursuer what he meant to aver, and stated that if a distinct averment were made that the defender knew of the charge being made, and approved of the trial being proceeded with, he would grant an issue. But the counsel declined to make any alteration on the record, and considering that it is admitted that the defender was absent from home when the proceedings took place, the Lord Ordinary is of opinion the statements of the pursuer are too vague to go to trial. The pursuer is bound to make her case clear on record, and her declinature to amend shows that her real case is that which alone was maintained in argument, viz., that the defender is responsible for the act of his wife.

"The defender further contended that enough was admitted on record to show that the charge was made with probable cause. There is a good deal to be said in support of this view. But the Lord Ordinary thinks he could not withdraw the question from the jury."

The pursuer reclaimed, and argued—No doubt it had been decided that by the law of Scotland, unlike the law of England (Odgers on Libel, p. 350), a husband is not answerable for slander by his wife—*Chalmers* v. *Baillie*, Feb. 19, 1790, M. 6083, and April 6, 1791, 3 Pat. App. 213. But that case applied to a slander altogether unconnected with the husband's business, whereas the present was not properly a case of slander, but a case of false accusation of a crime, made in the course of conducting the husband's business. The principle of the case of *Ludquhairn* v. *Ear Marischal*, 1590, M. 13,982, and of *Scott* v. *Yates*, Feb. 20, 1800, Hume 207, is applicable; in that case a married woman who carried on business as a lodging-house keeper with her husband's knowledge, granted an obligation to pay the value of certain articles stolen from a lodger in the house, and the Court found the husband liable on the obligation, as being nearly connected with the object of the wife's *præpositura*. The pursuer was entitled to an issue on the general mandate the wife had to conduct the business, and had averred enough in the direction of special mandate to entitle her to an issue on that ground, also leaving the exact communings between the husband and wife for proof in the cause.

Counsel for the respondent was not called on.

At advising—

Lord Young—This is an action of damages for what is popularly called malicious prosecution, although it would be more correct to call it malicious giving into custody on a false charge, for the prosecution following the charge is with us at the instance of the public prosecutor, and is conducted by him. It is an action of damages for maliciously making a false accusation of a crime. The false accusation alleged to have been maliciously made, is said to have been made, not

by the defender, but by the defender's wife, and the question is, whether the defender is liable for the making of it by his wife, assuming the facts to be as set out on record? The Lord Ordinary is of opinion that he is not, and I think rightly so. It has been decided, that according to the law of Scotland a husband is not liable for slanderous statements made by his wife. The law may be different in England, as we are told it is, but it is settled in Scotland that against a husband such an action will not lie. This is not properly a case of slander, though it partakes of that character, for a false accusation of a crime made maliciously involves slander of the grossest kind, and not less so because it is made to the police, who act upon it and take the accused person into custody. There is no authority for the proposition that a husband is liable for his wife's misconduct in a matter such as this. I therefore agree with the Lord Ordinary on that point.

I suggested during the argument that the pursuer might bring the case within the rule that a man is responsible for what is done in the course of the conduct of his business, even if what is done is prompted by the malignity of the person who has been entrusted with the duty of representing him. The suggestion was not very warmly followed up, and I am not surprised at that, because I do not see how the rule that a man is responsible for what is done in the course of his business could be applicable to malicious accusation of a crime. That is not a matter of business at all, like the granting of an obligation in the course of business. The only case cited bearing on the point was in that category. A man who carried on the business of a distiller in the country, kept a lodging house in Edinburgh which his wife managed for him, and she granted an obligation for the value of some goods which had been stolen, and for which she was answerable, in consequence of the responsibility the law attaches to persons in that business. On that strictly business obligation the husband was held responsible. So if a business be conducted fraudulently, and a customer be injured thereby, I do not doubt that the principal would be liable for the fraud of his representative. But making a false accusation of a crime is not a matter of business. It may be made in the course of business, but is in no other way connected with the business than that it is made in the shop, and therefore is not within the rule to which I have referred.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

The Lords adhered.

Counsel for Pursuer — J. Campbell Smith. Agents—T. & W. A. Maclaren, W.S.

Counsel for Defender—Hon. H. J. Moncreiff. Agent—J. W. Moncreiff, W.S.

Friday, May 13.

FIRST DIVISION.

SCLATER *v.* ODDIE.

Mora—*Acquiescence—Silence for Thirty Years.*

Where the proprietor of two adjoining plots of ground sold one in 1850, and himself assisted the purchaser in 1851 to erect a building thereon without making any objection at the time or for thirty years after—*held* barred by *mora* and acquiescence from proving that the building so erected encroached upon his property.

This action was brought in the Sheriff Court of Orkney by Mrs Wilson or Sclater, the liferentrix of a dwelling-house in School Place, Kirkwall, against Peter Oddie, the proprietor of an area of ground immediately to the north of her property. The prayer of the petition was to ordain the defender "to remove the front and back walls of a dwelling-house presently in course of erection by him in School Place, Kirkwall, northwards, so as to leave a clear space between the same and the northern gable of the petitioner's dwelling-house, also situated in School Place, Kirkwall, aforesaid, and adjoining the defender's said house in course of erection."

The averment made directly to support this prayer was contained in Condescendence 3, which as it originally stood was in the following terms:—"The defender is presently in course of erecting a dwelling-house, &c., on said space or plot of ground immediately to the north of the pursuer's said dwelling-house, but without building a gable of his own he has so built the side walls of his house as to cause them to abut close upon the northern gable of the pursuer's house and has founded the end portion of said walls upon the scarcement or foundation of the pursuer's gable, which is her exclusive property, and thereby wrongfully; but has not only failed to erect a wall or end gable for his said dwelling-house, but has made, and persists in making, the northern end or wall of the pursuer's dwelling-house the southern end or wall of his said dwelling-house, and so encroaching on the rights and property of the pursuer."

The Sheriff-Substitute (MELLIS) granted the prayer of the petition, but on appeal the Sheriff (THOMS), in respect that there were no relevant averments in the petition to support its prayer, dismissed the petition with expenses against the pursuer.

The pursuer appealed to the First Division. The case was heard on Thursday, 17th Feb., when the Court allowed both parties to amend their record. The pursuer accordingly altered Cond. 3, so that it read as follows:—"The defender is presently in course of erecting a dwelling-house, &c., on said space or plot of ground immediately to the north of the pursuer's said dwelling-house; but without building a gable of his own, he has so built the side walls of his house as to cause them to abut close upon the northern gable of the pursuer's house, and has founded the end portion of said walls upon the scarcement or foundation of the pursuer's gable, which is her exclusive property, thereby wrongfully encroaching on the rights and property of the pursuer."