LORD JUSTICE-CLERK—I think that we ought not to grant the diligence asked for.

LORD YOUNG—I concur.

LORD TRAYNER—I think that in this case there is no necessity for the diligence which the pursuer craves, for the parties are practically at one with regard to the defender's financial position. I wish, however, in consequence of some observations made in the course of the discussion, to guard myself from being supposed to hold any principle or general rule which would exclude the pursuer of an action of damages for breach of promise from obtaining such a diligence, if the extent of the defender's business or the state of his financial position were important to the proper determination of the case.

LORD YOUNG—Perhaps it is right that I should state my opinion on the general question without going into details. I am of opinion that the pursuer of an action of damages for breach of promise of marriage is not entitled to a diligence to disclose the defender's financial position.

LORD RUTHERFURD CLARK was absent.

The Court refused the motion for a diligence.

Counsel for the Pursuer—A. M. Anderson. Agent—John Veitch, Solicitor.

Counsel for the Defender—Maclennan. Agent—Alex. Ross, S.S.C.

Thursday, March 12.

FIRST DIVISION.

[Lord Low, Ordinary.

A *v.* B.

Husband and Wife—Adherence—Cruelty—Conduct showing Animus—Relevancy.

In an action of separation and aliment brought by a wife against her husband on the ground of cruelty, the pursuer proposed after the closing of the record to add an averment that the defender had, on an occasion prior to her leaving him, made an attempt to ravish her niece who was then living with them. This she stated had only come to her knowledge after the closing of the record. *Held* that the averment was relevant as showing the *animus* of the defender towards his wife, although the alleged act of misconduct, being unknown to her at the time, could not be founded on as an act of cruelty justifying her non-adherence. *Held*, for the same reason, that the averment was relevant by way of defence to an action of divorce for desertion brought by the husband.

An action of divorce for desertion was brought by a husband against his wife. A second action was brought by the wife against her husband for separation and aliment on the ground of her husband's cruelty. The averment of the defender in the first action was that she left the pursuer "upon the ground of his continued cruelty and maltreatment, which were endangering her health and life."

In the action of separation the pursuer enumerated various specific acts of cruelty which she alleged to have been committed by her husband in the course of their married life, and averred generally that "the cruel, harsh, and violent conduct of the defender caused the pursuer to suffer in health, and made it impossible for her to live with him and dangerous to do so." After the record in both actions had been closed, the wife presented a minute of amendment applying *mutatis mutandis* to both records, containing averments of facts which she alleged had only come to her knowledge subsequently to the date of closing the records. The minute stated that in the month of April 1890, M, a niece of the pursuer (the wife), was living with herself and the defender. It proceeded— . . . "The pursuer had occasion to go out early that morning, but before going she came and wakened M, telling her to get up in a quarter of an hour to make the defender's breakfast. M fell asleep, but was shortly afterwards awakened by someone catching hold of her, and discovered that the defender was in her bed. He was dressed only in his sleeping garments, and attempted to have connection with her. She resisted him violently, and succeeded in getting out of bed into the middle of the room, and upraising a chair ordered him out. At first he would not go, and offered her money or anything else if she would say nothing about it, but upon her threatening to open the window and call for help, he left the room. As this occurred so soon after the marriage of the spouses, and she was not afraid of any repetition of the occurrence, M abstained from communicating it to the pursuer."

The Lord Ordinary (Low) on 22nd February 1896 issued an interlocutor allowing the proposed amendment.

The husband reclaimed, and argued—The amendment was irrelevant. (1) The averments did not relevantly support an action of separation, inasmuch as the act averred did not amount to legal cruelty—*Beauclerk* v. *Beauclerk*, L.R., 1891, Prob. 189. It was admittedly unknown to the respondent, and could not therefore constitute an act of "cruel maltreatment." (2) Nor, for the same reason, could it form a valid cause for the desertion, and as such constitute a defence in an action of divorce.

Argued for respondent—The averments made by the respondent in both actions put the character of the reclaimer at issue, and the proposed amendment contained an attack upon that, and was accordingly relevant in both actions. Postnuptial incontinence was a good answer to a demand for adherence, and any answer relevant to that was relevant in an action of divorce—Fraser's Husband and Wife, p. 1211. The

rights of the parties were to be fixed as at the date when the action for divorce was raised—*Auld* v. *Auld*, October 31, 1884, 12 R. 36.

LORD PRESIDENT—I take the action of separation first, and the question is not whether the conduct averred in the new article constitutes a case of cruel maltreatment falling under the terms of this summons. If that were the question, I confess that my opinion would be that it should be decided in the reclaimer's favour, because I cannot see how a case of suffering from the misconduct of the defender, which is the essential quality of cruelty, can be made out when the pursuer was unconscious of the misconduct in question. But that is not the question. The question is whether this alleged conduct on the defender's part cannot have any bearing on the case of cruel maltreatment alleged on record. The suggestion is that the *animus* of the defender is necessarily in controversy, and in the question of how he treated his wife it may be material to know that he really was diverting his affection from his wife and had been tampering with this other woman. Accordingly, I do not think that the averment in question is so manifestly irrelevant that we should interfere with the manner in which the Lord Ordinary has exercised his discretion.

As regards the divorce case, it is clear that the same reasoning applies. The allegation against the husband is in that case made by way of defence, but its relevancy rests on substantially the same grounds, as the cruelty of the husband is the subject of investigation. Accordingly, I think we should refuse the reclaiming note.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Reclaimer — Dundas. Agents—Smith & Watt, W.S.

Counsel for the Respondent—A. Jameson —Cook. Agents — Kinmont & Maxwell, W.S.

Thursday, March 12.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

SIMPSON AND OTHERS *v.* BURRELL & SON AND PATON.

Reparation—Master and Servant—Defect in Plant—Whether Stevedore Liable for Shipowner's Plant.

A workman brought an action to recover compensation against his employer, a stevedore, for personal injuries caused by the defective condition of the hatchway of a ship upon which the stevedore's men were engaged. The pursuer averred that it was usual and necessary in a ship of the class in question for the stevedore to see that the ways and plant were sufficient before setting his men to work. *Held* (following *Nelson* v. *Scott Croall & Sons*, January 30, 1892, 19 R. 425, and *Robinson* v. *John Watson, Limited*, November 30, 1892, 20 R. 144) that the action was irrelevant.

This was an action raised in the Sheriff Court of Lanarkshire at the instance of the representatives of the deceased William Simpson against Messrs Burrell & Son, shipowners, Glasgow, and John Paton, stevedore, Glasgow, for damages in respect of the death of William Simpson. The summons concluded for payment by the defenders "jointly and severally, or severally, of the sum of £1000."

The pursuer averred that William Simpson while in the employment of John Paton was engaged in working on board the s.s. "Strathavon," which was the property of the other defenders, who had employed John Paton to do certain work thereon; that he was ordered by Paton to remove the hatch-covers from the hold, and that while doing so the supports gave way and he fell to the bottom of the hold, receiving injuries which caused his death. She averred that the accident was caused by the weakness and insufficiency of one of the beams supporting the hatch in question. She averred further—"(Cond 5) The said accident was also caused through the fault of the other defender Paton, in culpably failing to see (as was his duty before setting his men to work) that the ways and plant used by the deceased in the course of his employment were sufficient and in good order, in so far as the said thwart-ship beam was weak and bent, the said hatch-covers were off the square and had not sufficient hold, and there was only one defective 'fore and after,' in place of four strong 'fore and afters.' It is usual, necessary, and safe in ships of the class in question for the stevedore to see that the ways and plant are in sufficient order before setting his men to work, to have the thwart-ship beam straight and of sufficient strength and length to support the 'fore and afters,' and the covers in their places, to have the hatch-covers fitted evenly and with sufficient hold of the supports, and to have four strong 'fore and afters' supporting the covers. The said accident was also caused through defender Paton culpably ordering the deceased to remove the hatch-covers. It was his duty as stevedore to remove said hatch covers, as is usual, necessary, and safe in vessels of this description at the Queen's Dock, Glasgow."

The pursuers pleaded—"(1) The said William Simpson, while a workman in the service of the defender Paton, having been killed through the fault of the said defender, the pursuers are entitled to reparation from the said defender, with interest and expenses, as craved."

The defender Paton pleaded—"The action is irrelevant."

The Sheriff-Substitute on 7th February 1896 allowed parties a proof before answer.