COURT OF SESSION.

Friday, November 22.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

THOMSON *v.* THOMSON AND ANOTHER.

Husband and Wife—Divorce—Lenocinium—Bar.

In an action by a husband against his wife for divorce on the ground of adultery the defender pleaded *lenocinium*. From the evidence it appeared that the pursuer knew that his wife, of whose conduct he had suspicions, was corresponding with another man, and that she had received an invitation from him to visit him in England; that on her asking for money to go away for the week-end to Stirling he supplied her with it and arranged to have her watched; that on her saying, "Should I go?" he replied, "Yes, certainly go;" that she then went to England and committed adultery.

Held that the husband's behaviour was not such as to bar him on the ground of *lenocinium* from obtaining divorce.

Expenses—Husband and Wife—Consistorial Action—Wife's Expenses of Reclaiming Note.

In consistorial actions the question whether a wife will be allowed the expenses of an unsuccessful reclaiming note will depend on whether the case was a fair one to try, and the onus of showing that is upon the reclaimer.

Circumstances in which the Court allowed to a wife the expenses of an unsuccessful reclaiming note.

On 18th June 1906 David Jugurtha Thomson, Portobello, raised an action of divorce on the ground of adultery against his wife Mrs Matilda Lawson Stewart or Thomson, residing at 59 South Bridge, Edinburgh, defender, and Arthur Bright, vocalist, Perth, co-defender. The fact of adultery was admitted on record, but the defender pleaded that the pursuer having been guilty of *lenocinium* with regard to the misconduct founded on was barred from suing for divorce.

The facts on which the plea of *lenocinium* was based are stated in the opinion (*infra*) of the Lord Ordinary (SALVESEN), who on 10th January 1907 granted decree of divorce as craved.

Opinion.—"The parties to this action were married on 5th August 1898, after having cohabited for more than a year before marriage. The defender even at that time was addicted to drink, and although she verbally promised to give it up on her marriage she failed to keep her promise except for a few months. The pursuer on the other hand was a man of loose morality, and it is not surprising that a union thus inauspiciously contracted did not prove a happy one. The only child of the marriage was born in November 1902 but died at birth. Since that time the pursuer and defender have been entirely estranged, owing partly to the defender's habits of intemperance, and partly to the pursuer's open preference for the society of other women. Since May 1902 the marriage home has been in Portobello, where during most of the period they resided in a house consisting of three rooms and a kitchen. For at least a year before the events founded on in the present action they occupied separate apartments, the pursuer occupying the chief bedroom, having as his companion a bull-dog that his wife disliked and feared, and the defender sleeping in the other bedroom with the general servant.

"Although the parties lived in the same house they saw little of each other. The pursuer generally remained in bed till about two o'clock in the afternoon and was generally out the rest of the day. He often left Portobello on short trips which sometimes occupied a good many weeks. He never took his wife with him on these trips, nor did he ask her to be his companion at any of the places of amusement which he frequented when at home. Except that he provided her with board and lodging, and even received her mother and sister as his guests, he did not discharge any of the duties of a husband towards her. His excuse is that she was constantly the worse of liquor; but although there is no doubt that the defender was much addicted to intemperance, I am satisfied that the pursuer has greatly exaggerated her conduct. At all events he took no means to try to cure her of the liquor habit, but on the contrary allowed her to order from the grocer at his expense as much whisky as she pleased. The truth seems to be that the pursuer had absolutely ceased to care for his wife, and would have been glad to be rid of her; and I have no doubt he so expressed himself on many occasions during their matrimonial squabbles. The pursuer himself took full liberty to indulge in disreputable intrigues with other women, and was quite indifferent as to his wife's happiness or moral welfare.

"In July 1905 the defender was on a visit in Perth for some time along with her mother, and she there became acquainted with the co-defender, who is by profession a variety artist. They were frequently together, and in the course of conversation confided to each other their domestic troubles. The result was that an attachment sprang up between these two persons, both of whom were married; and during the winter and spring of 1905-6 they kept up a continuous correspondence. The defender collected picture post cards, and the co-defender sent her during that period no less than eighty-seven such cards. They all bore a greeting or affectionate message in his handwriting, and were signed 'Annie' (in one instance 'Alice'), or with the initials 'A. B.' The defender says that the pursuer must have known from these post cards that she was on

friendly terms with the co-defender, but I think there is no evidence to support this. In ordinary course the pursuer would only have the opportunity of seeing a very few of the post cards, and as they bore a female signature they were not calculated to excite suspicion. The co-defender says he assumed the name 'Annie' because that was a nickname that had been given him owing to the success of a song called 'Annie More,' which was part of his repertoire. But the co-defender's reputation was not so well known that this fact must be presumed to have been within the knowledge of the pursuer, who had never seen him until the date of the proof.

"The letters which passed between the defender and the co-defender have been destroyed on both sides, but from the parole evidence it appears that the correspondence culminated with the co-defender sending an invitation to the defender to visit him at Gateshead where he was to perform as one of the members of a troupe that had been engaged for the Easter season. There is no doubt that he intended if she accepted the invitation to commit adultery with her. When he engaged his rooms at Gateshead he told the landlady he expected his wife would visit him at the end of the week, and it may be conjectured that the character of the correspondence which had passed between the two convinced the co-defender that she would be willing to pass herself off as such. At any rate events proved that he was not mistaken. The defender travelled from Edinburgh to Gateshead by the 2·20 train, she was met at the station by the co-defender, who after they had had some refreshment in a public-house, immediately conducted her to his apartments, which they occupied together till the Monday morning. The adultery was capable of such clear proof that it was ultimately admitted upon record by both the defender and co-defender, and it is upon this admitted misconduct that the present action of divorce is based.

"It is not averred that there was any condonation, and accordingly the only defence available was that of *lenocinium*. The onus of instructing this very special defence admittedly rests on the defender, but the facts upon which she founds are to a large extent not in dispute. About the end of March the pursuer had heard a rumour that his wife had been too intimate with some 'actor fellow' in Perth, who on one occasion was said to have assisted her to bed when in a state of intoxication. He seems to have connected this with the frequent post cards she was receiving, and shortly after, at all events prior to the 9th of April, he learned from the defender's youngest sister that a man called Arthur Bright had invited her to go to Gateshead to see him. On the 9th of April, accordingly, he instructed his law agent, with whom he had had two previous meetings, to engage detectives to watch her movements. In the course of the same week he learned from the same source the train by which she proposed to travel on the Saturday. The defender had informed her husband that she wished to spend the week end at Cambusbarron near Stirling, where she was in the habit of visiting a female friend. On the morning of Saturday the 14th of April she asked for £1 to pay her railway expenses and he at once handed her £2. She also asked him whether she should go, and he answered 'Certainly go,' or words to that effect. The defender had previously had a hint from her brother-in-law that she was being watched, and her mother had endeavoured to dissuade her from going on the projected visit to Gateshead, but she did not take the statement seriously, or else imagined that she was able to elude detection. After the interview at which the money passed the pursuer went to Edinburgh along with his brother-in-law, and despatched a telegram to the detectives informing them of the train by which he expected his wife to go. He expected and hoped that the defender would go to Gateshead, and that the detectives would procure evidence which would result in his being able to establish grounds for a divorce. His expectation was based partly upon what his sister-in-law had told him and partly on a suspicion that the defender had on a previous occasion gone to Dumfries when she professed to be going to Stirling, and had done so for the purpose of meeting the co-defender.

"On these facts the defender's counsel argued that the pursuer had contributed to his wife's misconduct by supplying her with funds to visit the co-defender in the knowledge that she contemplated such a visit and that no more was required to support the plea of *lenocinium*.

"After carefully considering the evidence I think it is not sufficient to establish this special defence. The pursuer was not in any way responsible for the intimacy which had sprung up between the defender and co-defender; and so far as his wife knew it had been carefully concealed from his knowledge. Moreover, she did not believe that he was aware of her intended visit to Gateshead, a visit which she fully intended should not come to his knowledge. With this object she took the train from Gateshead to Stirling on the Monday and remained there two or three days, and she despatched post cards to the pursuer and her own relatives from Bridge of Allan in order that the pursuer might suppose that she had actually gone on the week-end visit for which she had asked her travelling expenses. She does not pretend that if she had informed the pursuer that she was going to visit Bright he would have allowed her to do so. Moreover, it lay entirely with herself whether or not the visit was to result in her committing adultery with Bright; and she says that she had not made up her mind to do so when she left, although she was apparently easily persuaded when he met her at the station. The defender therefore had no ground for supposing that she was acting with the consent or even the acquiescence of her husband in yielding to Bright's persuasions, and as he had not connived at the original intimacy, or done

anything to throw them together, I do not think that it can be said that he was in any sense a party to her guilt. I do not commend his conduct; but I think it is substantially the conduct referred to by Lord Young in his opinion in the case of *Mackintosh*, 20 S.L.R. 117, which that learned Judge said would not amount to *lenocinium*. The pursuer believed that his wife had already been unfaithful to him; and in these circumstances I think he was within his legal rights in endeavouring to procure evidence which would establish her guilt.

"I was referred to various reported cases the facts in which bear very little, if any, resemblance to those which we have here. In only one of them, *Marshall*, 8 R. 702, was the plea of *lenocinium* sustained, and that upon grounds which are totally inapplicable to the present case. The pursuer here was alimenting his wife in his own house, in a suitable, and indeed liberal, manner, and there was no reason except her infatuation for the co-defender why she should have made the visit to Gateshead at all. His neglect, and indeed unkindness to her, and his own immorality, may excuse but they do not justify her lapse from virtue, or bar him from the remedy which he seeks.

"On the question of expenses the defender is admittedly entitled to have her expenses paid by her husband. The pursuer, however, maintained that the co-defender should be found liable in the whole expenses. These would have been comparatively trifling but for the plea of *lenocinium* stated by the defender, and which could only be stated by her with any prospect of success; and having regard to this and the pursuer's own conduct I am not disposed to subject the co-defender in these expenses. Prior to the Conjugal Rights Act of 1861 the co-defender could be rendered liable in such expenses only in a subsequent action, and as part of the damages that the injured pursuer had sustained through the seduction of his wife. There can be no question here of the pursuer having suffered damage in the ordinary sense through the co-defender's adultery with the defender, for he was anxious to get rid of his wife, and scarcely sought to disguise his indebtedness to the co-defender for giving him the opportunity of putting an end to the matrimonial relation. It is true that the co-defender's conduct cannot be excused, but I think he is sufficiently punished by the exposure that it has entailed, and the expense to which he has himself been put in the present action. As between the pursuer and the co-defender I shall accordingly find no expenses due to or by either party."

The defender reclaimed, and argued—The pursuer had been guilty of *lenocinium* as that had been defined in the following authorities—Mackenzie's Criminal Law, ii, 120-1; Bell's Prin., sec. 1532; *Donald* v. *Donald*, March 30, 1863, 1 Macph. 741, *per* Lord Ardmillan at p. 748; *Wemyss* v. *Wemyss*, March 20, 1866, 4 Macph. 660, 1 S.L.R. 151; *Munro* v. *Munro*, January 25, 1877, 4 R. 332, 14 S.L.R. 287; *Marshall* v. *Marshall*, May 20, 1881, 8 R. 702, 18 S.L.R. 500. These authorities showed that there must be more than "quiescence" on the husband's part, there must be "acquiescence"—Fraser, H. & W. ii, 1184-7. Such acquiescence had been proved here. *Esto* that it was not enough for a husband to desire his wife to commit adultery, to watch her, and to take steps to catch her, more than that had been proved, viz., that he knew of her intimacy with Bright; of her having received an invitation from him to visit him at Gateshead in circumstances which could have only one result; that on her asking whether she should go, he replied "Yes, certainly go;" and that he supplied her with the means which enabled her to go, and without which she could not possibly have gone. In these circumstances he was accessory to and responsible for the act of adultery libelled, and barred from suing for divorce. The cases of *Hunter* v. *Hunter* (*cit. infra*), and *M'Intosh* v. *M'Intosh* (*cit. infra*), relied on by the respondent, were distinguishable. In the former, the expressions used by the husband were used *in rixa*, and not seriously meant. In *M'Intosh* the facts were entirely different, and the case therefore was not in point.

Argued for respondent—The Lord Ordinary was right. The defender in order to succeed had to prove that her husband was both accessory to and responsible for the act of adultery. Neither had been proved here. The pursuer did not know that his wife would go to Gateshead, for he instructed detectives to watch both the north and south going trains. She had said she was going to Stirling, and he was under the belief that she would go there. The defender had failed to prove that when she went to Gateshead she went in reliance on her husband's distinct permission to go there. She had therefore failed to show that direct connection and association between his conduct and the act of adultery which was essential to her success—*Hunter* v. *Hunter*, December 21, 1883, 11 R. 359, 21 S.L.R. 255; *M'Intosh* v. *M'Intosh and Blair*, November 14, 1882, 20 S.L.R. 117. The onus of proving *lenocinium* was a heavy one, and in this case had not been discharged. It was not enough merely to prove suspicions on the husband's part—Fraser, H. & W. ii, 1193-4. There must be proof of direct inducement or inciting to the act.

At advising—

LORD PRESIDENT—This is an action of divorce at the instance of the husband on the ground of adultery. The fact of adultery is admitted, and the only ground on which the wife argues that decree should not be pronounced is her plea of *lenocinium*. The facts on which the plea is founded are these—The parties were married in 1898, and after a short time the marriage was not a very happy one. Both parties seem to have been in fault. The husband seems to have been unfaithful,

and the wife was addicted to drink. It is quite clear that for some time previous to the events to which I am going to refer the two had lost all affection for each other, and so far as the pursuer was concerned he would have been pleased if the marriage relationship between them came to an end.

The defender had formed an intimacy with another person whom she had met at Perth originally, and with whom for some time she had carried on a correspondence. This correspondence does not seem to have been of a very intimate character. It was carried on for the most part on postcards. A large number of these have been recovered and are produced in the case, but they contain nothing which is not of the most innocent description. I do not think that any impression could be drawn from the postcards adversely to the parties. I also think it is the case that for some time at least the pursuer did not know that this postcard correspondence was going on, although at the end he did know that his wife was receiving communications from a man whom he did not know but about whom he had heard.

The defender had been in the habit of leaving the family home at Portobello and going away for week-end visits, and prior to the events I am coming to the defender had gone away for a week-end visit, and it had come to the pursuer's knowledge that she had deceived him as to the place where she had been. It is only human experience to suppose that if a man's wife says that she is going for a visit to one place and goes to another there is some motive for her doing so, and that the motive is likely to be not a very good one. Accordingly the pursuer's suspicions were aroused. They were still further aroused by a communication which he received from his sister-in-law to the effect that his wife had received an invitation to visit or at least to go and see this acquaintance whom he did not know, and who was staying at a considerable distance. There again it is human nature to suppose that a man would have suspicions if his wife concealing the fact from him went to visit a man in a far distant town, and he would think she went there for no good purpose. That his suspicions were aroused by this communication is certain, for he went to consult his agents and made arrangements for having his wife watched. In these circumstances the defender came to the pursuer and said that she wanted to go to Stirling for the week-end and asked for money. The pursuer gave her £2. The defender had had a sort of warning from her mother, who had got an inkling of what the pursuer was about in setting people to watch his wife, and had advised her daughter not to go away because she was being watched. This had caused an uncomfortable feeling in the defender's mind, and she asked her husband "Should I go," and he said "Yes, certainly go."

The defender was watched. She went to Gateshead, and there the adultery admittedly took place. She did not come straight back from Gateshead to Portobello, but went first to Cambusbarron, near Stirling, from which place she returned home.

It was argued for the defender that these facts disclosed a case of *lenocinium*, and it was maintained that what was proof of *lenocinium* was in each case a matter of circumstances. In this case the defender relied in particular on two facts—(1) that the pursuer gave the defender a sum of money to enable her to carry out her purpose, and (2) that he encouraged her by the expression "Yes, certainly go."

I think I should here leave the facts and consider the law in regard to *lenocinium*. I do not think that the difficulties of the question can be put in more appropriate language than is done by Lord Fraser in his treatise on the Law of Husband and Wife (p. 1186). The title under which it is dealt with is connivance or *lenocinium*, and the heading of the passage is—"Not connivance if the husband watch his wife whom he suspects." Lord Fraser says—"The difficulty is to determine when a husband's conduct ceases to be suspicious and justifiable watchfulness and becomes acquiescence. The husband's suspicions may be aroused, but it is no connivance on his part though he did not disclose his suspicions to his wife. He is entitled to observe her, and to track her proceedings, and it is not concurrence in her guilt because he does not tell her what he is doing and favour her with admonitions. It is possible that a hint from him as to his suspicions might have saved her, but it is not connivance though he did not utter it. It is only where the husband goes beyond this, and gives facilities for the commission of the offence, and creates opportunities, that he is held to connive and to concur. His connivance then involves criminality, because that connivance occasioned or allowed the adultery to take place." I think these words are a very accurate statement of our law, and that the difficulty arises in the application of the law to each particular state of facts. The same view is supported by the opinion of one who, though not a jurist, is considered an authority on this matter. I refer to the opinion of Sanchez, which is quoted by Lord Fraser on p. 1187 of his work, and is as follows:—"Sed an liceat eo fine offerre occasionem uxori ut adulteratur?" Which question he answers in the negative—"Quia id non solum est permittere, sed co-operari et positivé concurrere."

Now, it seems to me that two things are clear. The one is that no judge will do well by trying to frame a definition of what amounts to *lenocinium*, because each case really depends on its own facts, and it would be impossible to frame a definition which comprehended all cases. The other is, that there must be something on the husband's part of an active character. "Co-operari et positivé concurrere," says Sanchez, and I think that is an accurate description of our law.

I am aware that in another portion of Lord Fraser's work he says that "passive acquiescence will be sufficient to bar the husband, provided it appears to be done with the intention and in the expectation that the wife would commit the crime" (p. 1186); and he quotes a passage from Lord Stowell's opinion in the case of *Walker* to the same effect.

It has been pointed out by Lord President Inglis in *Wemyss* that the English doctrine on this matter has not the same historical origin as the Scots doctrine, and one cannot therefore say that an English authority is to be cited as a Scots authority might be, although the two doctrines come very near one another in practical application. After all, the distinction comes to be nearly a question of words. If I may use an expression which seems like a contradiction in terms, I would say that there is a sort of passive acquiescence which is equivalent to active acquiescence. To explain, I may take an analogy from another branch of law which is very familiar to us. There are certain cases where, for instance, in the negotiations for a contract there is a relation between two parties which puts on one of them a duty of disclosure to the other, and if he fails to discharge this duty the contract will be set aside because of the silence of the party. There are other cases where there is no duty of disclosure. In these the contract cannot be set aside on the ground that the party did not speak. But in the colloquies between the parties there may be occasions when silence amounts to assertion or representation, and in such a case the contract may be set aside on account of this silent acquiescence. I cannot help thinking that the distinct acquiescence of which Lord Fraser speaks would have to be of that character. It is not mere passive acquiescence, but acquiescence in such circumstances as to give it an active character. That there must be something done by the husband I cannot doubt.

Applying that exposition of *lenocinium* to the present case I think the facts fall short of what is necessary to make out the defence. Here was a husband who did not know the facts, but strongly suspected that his wife had gone wrong. He hears of a project on her part in circumstances in which it is probable that she would commit adultery. I do not think he was bound to disclose his suspicions; I do not think he was barred from taking steps to observe the proceedings of his wife; I do not think so much stress can be laid on his use of the words "Yes, certainly go." We know what was in the wife's mind at the time. She put the question because she thought his answer would show whether he knew what she intended to do. She took him to mean "Yes, certainly go to the place you say you are going to, viz., Stirling." That seems to me to fall far short of contriving the infidelity or the occasion for it. On the contrary, I believe that the matter was *in dubio* so far as the defender was concerned almost to the last moment.

On the whole matter I am of opinion that the Lord Ordinary has come to the right conclusion, and that decree must be granted.

LORD KINNEAR—I agree that the plea of *lenocinium* cannot be supported, and therefore that the Lord Ordinary was right in giving decree of divorce.

LORD DUNDAS—I agree. I think the proof falls distinctly short of what is necessary in law to support the plea of *lenocinium*.

LORD M'LAREN and LORD PEARSON were absent.

The Court adhered.

Counsel for defender moved for expenses on the ground that in the circumstances the wife was entitled to reclaim at her husband's expense. He referred to *Hoey* v. *Hoey*, June 6, 1884, 11 R. 905, 21 S.L.R. 620.

Counsel for pursuer opposed the motion. The defender had already received £80 towards her expenses, viz., £30 in the Outer House and £50 when the reclaiming note was presented, and she had been awarded her expenses in the Outer House, which would be paid her. He cited *Montgomery* v. *Montgomery*, January 21, 1881, 8 R. 403, 18 S.L.R. 253.

LORD PRESIDENT—We have consulted with the Judges of the other Division in this matter in order to lay down a general rule in such cases,

Where a wife has been unsuccessful in the Outer House, and then presents a reclaiming note, the question whether she is entitled to her expenses, being again unsuccessful, must depend on whether the case was a fair one to try. What I may call the *prima facie* view of the case is that the Lord Ordinary is right. And therefore it is for the wife to show that the case is a fair one to try.

In this particular case we think that the question was one which it was fair to bring before this Court, and we therefore allow the reclaimer her expenses.

The Court found the defender entitled to additional expenses since the date of the interlocutor reclaimed against.

Counsel for the Pursuer (Respondent)—Orr Deas.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Defender (Reclaimer)—Constable—Pringle. Agents—Cowan & Stewart, W.S.

Counsel for the Co-Defender - Lyall Grant. Agent—Joseph Chalmers, S.S.C.