It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed. 1815.

FAIRLIE v. FAIRLIE.

For the Appellants, *Sir Saml. Romilly, John Cuninghame.*

For the Respondent, *Geo. Cranstoun, James Keay.*

SIR WILLIAM CUNINGHAM FAIRLIE, Bart., *Appellant;*

Dame MARIANNE CAMPBELL or CUNINGHAM FAIRLIE, . . . *Respondent.*

House of Lords, 3d July 1815.

DIVORCE FOR ADULTERY—REMISSIO INJURIÆ.—The plea of *remissio injuriæ* was sustained by the Court of Session, but in the House of Lords the case was remitted for reconsideration, with considerable doubts expressed as to the judgment below, in consequence of there being no evidence that the husband had probable knowledge of his wife's guilt at the time of the alleged condonation.

This was an action of divorce brought by the appellant against the respondent for adultery committed by the latter, in which the special defence of *remissio injuriæ* was stated by the respondent as a bar to the action.

The appellant, in regard to this defence, stated that, at the time alluded to, when he forgave the respondent, he knew nothing of any act of adultery having been committed. Certain rumours and hints led him to inquire, and he found that they all ended in certain familiarities with a young man of the name of Begbie, who resided in the house, but did not amount to guilt, such as could found a divorce. And having charged her with these, it led her to protestations of innocence, which reconciled him to her at the time. Afterwards, however, having received two letters from Major Brown, in regard to her conduct, which he opened in her presence, and on reading them, discovered his uneasiness, such as led her to be anxious to know their contents. Accordingly, that very night, or early next morning, he found that she had taken these two letters out of his pocket, and had gone to Begbie's bedroom, where he found her reading to him (Begbie) the two letters which he had received about her conduct with him. He left the house on this occasion, and on her entreaties again returned, and slept with her again. Afterwards, however, he received

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further information through a Major Woodgate, in the end of January 1809, which made him determine to institute a full inquiry. On the 12th of February he slept with her, but had then no actual knowledge of her guilt. Thereafter he separated himself from her, and raised his action of divorce for alleged acts of adultery committed with Begbie, in the years 1806, 1807, and 1808.

The commissaries were unanimous in holding that the defence of *remissio injuriæ* was not made out after his actual knowledge of her criminality. But this judgment having been brought under the review of the Court of Session, the

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Court finally, of this date, remitted to the commissaries "to "sustain the defence of *remissio injuriæ*, but supersede extract "till the first box-day in the ensuing vacation." *

From this interlocutor of the First Division of the Court the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, While the respondent set up the defence of *remissio injuriæ*, she contended that the facts condescended on by the appellant, were not founded on fact; but the defence of *remissio injuriæ* was not competent, except upon the ground that the appellant was cognizant of certain facts inferring the criminality of the respondent, and being so cognizant, renewed his marital intercourse with her. 2d, The greater part of the facts condescended on by the appellant, became known to him in consequence of the investigation which he set on foot, as to the conduct of the

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* Opinions of the judges:—

By previous interlocutors, the Lord Ordinary and the Court had come to an opposite conclusion; and at this advising,

LORD PRESIDENT HOPE said,—"I think the circumstances of *remissio injuriæ* as strong here as in the case of Hutchison, where the defence of remission was sustained."

Hutchison *v.* Hutchison, Mar. 11, 1808 (unreported). *Vide* Frazer's Domestic Relations, vol. i., p. 667.

LORD BALMUTO.—"The difference between the two cases is, that Hutchison knew and was thoroughly informed of the adulteries, and had actually commenced his process of divorce. But in this case, all was in a state of *suspicion* and *investigation* only. There were no doubt strong grounds of suspicion; but this did not just amount to certain conviction, at least in his mind; and my view was, that it would require something very strong to tie a man for life to such a woman as this."

A majority were for refusing on that ground.

But on another advising (March 1812), the Lords altered and sustained the defence.

Hume's Collection, Session Papers, vol. 114.

respondent, subsequent to his final separation from her. And the respondent has totally failed to prove that the appellant was acquainted with the circumstances, inferring the criminality of the respondent, on which to found an action of divorce, before he entirely separated himself from her society. Before that occurred, there was nothing but suspicion.

Pleaded for the Respondent.—The appellant's mind was made up in the month of January 1809 or in the beginning of February, for it was towards the end of January that the visit to Bath began, in the course of which, he determined to separate from his wife for ever. He had communicated this determination to Mr James Cuningham; had directed him to get separate lodgings for his wife. These directions had been complied with, and the lodgings actually seen and approved of by the appellant on the 11th of February. Now he admits in his judicial declaration, that he slept with the defender on his return from Tunbridge Castle on the night of Sunday the 12th of February. Yet so capricious and unfair was his conduct, that on the 13th, being the very day in which he had left her room, he wrote the letter which he gave to Mr James Cuningham, and which is misdated the 14th, and falsely dated from Stilton. The cohabitation between the night of the 12th and 13th, is conclusive against the appellant. These facts are proved by his judicial declaration and the testimony of Mr James Cuningham. The declaration acknowledges the cohabitation upon the 12th; the condescendence states, that on the 14th, the appellant wrote to the respondent that he never meant to see her more, and of course the resolution must have been adopted for sometime before he wrote. The appellant attempts to explain away all those circumstances by pretending they were resorted to merely for the purpose of facilitating *investigation*, and there is no doubt that this word was used. But it is a very equivocal expression; for in one sense, the separation which at this moment subsists between the parties, as well as the whole procedure under the action of divorce, may be said to have taken place for the same end. It is not necessary for the respondent's plea that she prove the appellant to have been so convinced, and his evidence so prepared, that he required to make no further inquiry, before he demanded a divorce. It is enough for her to show that he heard and believed the existence of the injury which he afterwards forgave. The appellant's conduct, therefore, amounted to that *remissio injuriæ*, which is sufficient, by the law of Scot-

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land, to bar an action of divorce at the instance of the party who has forgiven the injury he complains of.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,*

"There was a cause heard sometime ago, in which Sir William Cuningham Fairlie was appellant, and Dame Marianne Cuningham Fairlie, his wife, was the respondent. This arose from a divorce which the appellant, Sir William Cuningham Fairlie, endeavoured to enforce by an action in the Court of Commissaries of Edinburgh. It appears that these parties were married in November 1790, and, as the appellant states, in the years 1806, 1807, and 1808, the parties resided at different places in England. My Lords, in 1806, it will be in your Lordships' recollection that the intimacy and supposed criminality of James Begbie with Lady Cuningham have been the subject of a great deal of discussion in the papers and at your lordships' bar. It certainly appears that Sir William C. Fairlie entertained considerable suspicions as to the chastity and purity of his wife's conduct; an examination was instituted into the grounds of those suspicions upon more occasions than one, and at length Sir William Cuningham Fairlie was so well satisfied of the fact in his own mind, that Lady Cuningham Fairlie had committed an act of adultery, that he instituted this action of divorce.

The respondent gave in her defences, and in her defences she denied the truth of the charge.

My lords, on the 26th of January 1810, the Commissaries pronounced this interlocutor:—"The Commissaries having considered "the libel, execution, defences, answers, condescendence for the "pursuer, answers thereto and replies, and pursuer's oath of "calumny, before further procedure, ordain the pursuer to give "in a more articulate condescendence, and therein to state when "he was first informed of or had reason to believe the criminal in-"tercourse of the defender with James Begbie, mentioned in the "process." In consequence of this interlocutor, the appellant lodged another condescendence to which the respondent answered, and then the Commissaries, on the 16th of March 1810, pronounced a second interlocutor in which they "ordained the pursuer "to give in an additional condescendence, and therein to state "much more specifically the times when the different criminal "acts alluded to in the first, second, and third articles of the "condescendence, are alleged to have taken place, and to allow "the defender to see and answer the said additional condescen-

*. From Mr Gurney's Short-hand Notes.

"dence when given in." This was accordingly given in, and further answers, and then the Court pronounced another interlocutor on the 22d June 1810, allowing the pursuer a proof of the facts stated in his additional condescendence, and the defender a conjunct probation anent the premises, and granted diligence in the usual terms. This interlocutor was again brought under the review of the Court by the respondent, but the Commissaries refused her petition without answer. She then presented a second reclaiming petition, and she insisted that the action was cut off by a *remissio injuriæ*, in other words, that the offence complained of by the husband, had been cut off by *condonation*. Upon this the Commissaries, who are very much in the habit of considering these matters by the law which regulates these concerns in Scotland, on the 14th September 1810, "ordained the pursuer to "appear in Court and undergo a judicial examination with "regard to the facts stated in the petition." The appellant was, accordingly, judicially examined, and, on the 12th of October 1810, the Court pronounced this interlocutor:—"The Commis-"saries having resumed consideration of this cause, find that the "pursuer's declaration does not instruct the defence of *remissio* "*injuriæ* pleaded by the defender; therefore ordain her to give "in a special and articulate condescendence of the facts she will "undertake to prove in support thereof;" which condescendence having been given in, and the appellant having answered, the Commissaries pronounced a further interlocutor of the 23d of August 1811, by which they state that, "having considered the "proof adduced by the defender, and whole process, repel the "defence of *remissio injuriæ*, allow the pursuer a proof of the facts "stated in his libel and condescendence, and of all facts and cir-"cumstances tending to support the conclusions of his action; "allow the defender a conjunct probation anent the premises, and "grant diligence *hinc inde*." Against this interlocutor also, the respondent reclaimed, and the appellant having made answers, the Commissaries, on the 26th of November 1811, pronounced this interlocutor:—"The Commissaries having considered this "petition with the answers, refuse the desire of the petition, "and adhere to the interlocutor of the 23d of August last; appoint "the pursuer's proof to proceed on Friday three weeks after "the Court; but allow the defender, if so advised, to apply by "bill of advocation, in the meantime, complaining of the judgment "of the Commissaries, repelling the plea of *remissio*."

Your lordships, therefore, perceive that, upon three occasions, as I understand these proceedings, the judges in the Commissary Court were of opinion that there was nothing before them sustaining this defence of a *remissio injuriæ*, which should repel the right of the appellant to enter into proof of the facts of adultery, which he alleged, but at the same time the Commissaries seem

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to have thought this was a case of some peculiarity and some difficulty, and they therefore qualified the last interlocutor by allowing the defender "to apply by bill of advocation, in the "meantime, complaining of the judgment of the Commissaries "repelling the plea of *remissio*." The matter was accordingly in due form advocated to the Court of Session, to which the appellant made answers, and the Lord Ordinary, on the 26th of January 1812, having considered the answers and proceedings before the Commissaries refused the bill.

The respondent then presented a reclaiming petition, which the Court directed to be answered, and answers having been given in, the Court on the 29th of January 1812, by a majority of their number, pronounced this interlocutor:—"The "lords having heard this petition, they refuse the prayer of it, "and they adhere to the interlocutor of the Lord Ordinary re-"claimed against, and sist process for ten days, that the petitioner "may reclaim if she shall see cause." Here are, therefore, my lords, two judgments, one of the Lord Ordinary, and the other of the first division of the Court of Session, acceding to three judgments of the Commissary Court—so far the interlocutors all agree. The respondent then presented a second reclaiming petition which the Court directed to be answered, and answers having been given in, the Court, on the 5th of March, by a majority of their number (all of them, I think, stating themselves to have great difficulty, and if I may be permitted with infinite respect to say so, perhaps mistaking the case in some views that may be taken of it with respect more to other considerations than whether this defence of *remissio injuriæ* should be admitted), pronounced this

Mar. 5, 1812. interlocutor:—"The lords having resumed consideration of this "petition, and advised the same with the answers thereto, they "alter their former interlocutor, and remit to the Commissaries "with instructions to sustain the defence of *remissio injuriæ*," and from this last interlocutor of the Court of the 5th of March 1812, this appeal is brought.

My lords, the result seems to be this, that the Commissary Court were of opinion that this plea of *remissio injuriæ* was not a plea on which they should act, or at least on which they should act to the extent of holding Lady Cuningham Fairlie acquitted of the fact of adultery, the Lord Ordinary thought so, and the first division of the Court seem to have been almost all of the same opinion on the first occasion when this matter was brought before them, but on its being brought before them for further consideration, the majority were of opinion that this *remissio injuriæ* was a sufficient answer to the adultery, even supposing the adultery to have been committed. My lords, I have observed in such memoranda as we have of the judges' opinions (being very loose notes, and notes in general so loose that I am afraid on many

occasions they would not do justice to the grounds of opinion which are expressed), several passages intimating that it is a matter quite out of the question, that Sir W. Cuningham Fairlie should ever obtain a divorce, that his conduct has been so inattentive, so negligent, as that, perhaps, intending so to do, or at all events, if he did not intend so to do, yet from the operation of negligence and inattention, he has given so much encouragement to this conduct of his wife, that he could not be expected to sustain an action for considerable damages, if any damages, and that he could not be considered as entitled to sustain his demand for a divorce. Your lordships will permit me to say that we are going too far forward in this case, if we take upon ourselves to say whether Sir W. C. Fairlie will ever obtain damages; for the real point before the Court of the Commissaries as well as the Division of the Court of Session, is not what judgment should be pronounced under all the circumstances of this case, if Sir W. C. Fairlie shall make out that his wife has committed an act of adultery, and she, on the other hand, shall not establish that there has been a *remissio injuriæ*—admitting it to be a *remissio injuriæ*, —I conceive we are going too far forward if we are undertaking to say now, whether, in the result of the cause put upon that point, Sir W. C. Fairlie will be entitled to have the sentence of the Court in his favour; the question before us now appears to me to be this, and to have been this before the Commissaries and the Court of Session, whether, attending to the state of the pleadings, and attending to the conduct and declarations of Sir W. C. Fairlie, according to the form in the court of the Commissaries and the Court of Session, the wife having positively and solemnly denied, in her pleadings and in her correspondence, according to the evidence which is given, that she ever was guilty of adultery, it be competent for her to say, I never did inflict this injury upon my husband, and if I have, he has forgiven it. It is very difficult to make out that a person can forgive that injury which he has never sustained. I do not mean to deny, that in a case of this nature, if it could be made out clearly and decidedly, that the husband believed that the wife was guilty of the adultery, and afterwards acted towards her as he would have acted to her if she had been always innocent, that plea might not be maintained in our Ecclesiastical Courts, or in the Commissary Courts in Scotland and the Court of Session, that is to say, if the adultery being proved by clear and decisive evidence to have been committed, he chooses to say, 'Well, though I am satisfied you have been guilty of adultery, I will forgive it,' either by express words or by such conduct towards her as imports that he has forgiven it, but I think that your lordships will feel it as one of the most difficult questions that can occur, with respect to proof, for you to say, what evidence you will admit to be sufficient, that the husband did

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believe it. There are many cases where a husband would make but little way in an action of damages where you can prove there has been negligence, or in a bill of divorce here, where there was that negligence and that inattention, and yet it may be extremely difficult to say that, because a man has been negligent, and because a man has been inattentive, therefore he believed his wife was guilty of adultery; negligence and inattention may be circumstances to furnish such an inference, but it depends much upon the temper of men, upon the understandings of different persons, and their minds and passions. One man does what another does not on such a subject, so much so, that I apprehend before you can, on a plea of *remissio injuriæ*, permit the party to go on to prove there was adultery committed, you ought to have some evidence, pregnant with proof, tending to the conviction, that he actually did believe that she had been guilty of adultery, before you shall say that the subsequent declarations and subsequent conduct amounts to that defence.

"My lords, I do not mean to say there is not some evidence of that sort here. There is some evidence of that sort, contradicted, however, by other evidence applying to that which was said, to which the former evidence referred, and therefore bringing into evidence the declarations, if they were unquestionably true, but they do not appear to be declarations on which the Court of Session proceeded.

"My lords, it is laid down in all the books, and particularly by Burn, an author of great weight with respect to ecclesiastical doctrine, and with respect to divorce: "If the party accused "shall prove that the accuser, before the commencement of the "suit, had probable knowledge of the crime committed, and yet "afterwards had carnal intercourse with the accused, in such "case the accuser shall not obtain a sentence of divorce, for the "crime shall be supposed to have been remitted;" and this author states what he means by a probable knowledge of the crime committed, he says,—"probable knowledge in this case is, if the "husband suspecting his wife, shall charge her with the offence, "and she confess it, or if the witnesses whom he shall afterwards "produce, shall signify to him before the commencement of the "suit, that they can testify the offence from their own sight and "knowledge," that is, of course, that the witnesses have informed him what they have learned by their own sight and knowledge, whose testimony he is to use in procuring the divorce, in order to prove those facts which that very sight and knowledge would give him the means of proving, "or if the husband shall take her "in the act of adultery," and so on. Each instance which he states, is an instance, in which, it was quite impossible, but that the husband must know enough before he afterwards conducted himself to his wife, or so declared his opinions with respect to his wife,

as would amount to a condonation; but in those cases where the husband declares that he knows, or that he believes, his wife has been guilty of adultery, or where it is stated to him in an authentic way that she has been so guilty, and afterwards he thinks proper to pardon the offence by his conduct, there appears to be no necessity at all to inquire into the proof of the act of adultery, for, taking it that the act of adultery was committed, there has been a *remissio injuriæ;* but the case is widely different where you are acting upon your notion of what he believes, and impugning him, not from his own declaration, not from evidence tending to that, but you are taking upon yourself to say, that because in similar cases you would have believed it, (though, perhaps, the next man would not have believed it), you think better of your judgment than of another man's judgment, and you, therefore, infer that he believed that which you would have believed in the same circumstances.

"My lords, I am quite satisfied that this case has not been sufficiently considered upon these nice points, and there is one particularly which may require a little further consideration, and that is this, supposing it happens that a man has forgiven his wife the act of adultery committed at one time, it cannot be contended that *that* is to operate to all time thereafter that she pleases; and, therefore, the case is to be considered, not with reference to the conduct of the husband, as to one act of adultery alleged to have been committed in 1806, but the case, when put on the question of *remissio injuriæ* must be considered with reference to the years 1806, 1807, and 1808. If he did remit the injury committed in 1806, no man will argue that he thereby gave her a licence, as it were, to commit as many acts of adultery as she thought proper, in the years 1807 and 1808, and, therefore, when, in a case of this sort, judges jump to the conclusion that the husband has remitted, and do not at all establish that he was acquainted with the facts, and meant to forgive that which he knew had taken place, as contradistinguished from his being induced to believe that the fact of adultery had not taken place; and when, again, the point to which I have last adverted, is considered, that the *remissio injuriæ* cannot extend to a further period, I think it is fit the case should be further considered.

"My lords, I should be very unwilling to go more particularly into this. I think I have said sufficient for the purpose of founding upon it the proposition, which I intimated to your lordships the other day, that I intended to make. Feeling that we may possibly, in this part of the island, have different notions upon this subject in matters of pleading, from what the Commissary Court (who seem, however, rather more to agree with us than the Court of Session), and what the Court of Session may have, and that, therefore, this is that sort of case in which your lordships

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have been in the habit of recalling the attention of the Court of Session to the further consideration of the case, I would abstain for the present from either reversing or affirming the interlocutor, but would propose sending it back, by your authority, to the Court of Session, desiring them to review their several interlocutors, and upon that review to do what is just.

"I therefore move your lordships, in this very special case, to remit this to the Court of Session, and that they do review the several interlocutors complained of, and do, after such review, as to them shall seem meet and just."

It was ordered and adjudged that the cause be remitted back to the Court of Session to review the interlocutors complained of, and to do therein as to them shall seem just.

For the Appellant, *Sir Saml. Romilly, Thos. Thomson.*

For the Respondent, *Fra. Horner, Henry Cockburn.*

NOTE.—Unreported in the Court of Session. For further opinions of the judges, *vide* President Campbell's Session Papers, vol. 147, Nos. 11 and 12.

WM. KEIR, WM. CADELL, JAMES SCOTT, ALEXANDER ROBERTSON, and DONALD NICOLL, all occupying separate farms from, and Tenants of, the Duke of Atholl, . } *Appellants;*

JOHN, DUKE OF ATHOLL, . . . *Respondent.*

House of Lords, 15th July 1815.

LANDLORD AND TENANT—IMPROBATIVE LEASE—WRITING—POSSESSION—PAROLE—EXPENSE OF STAMPING—EXECUTION PENDING APPEAL.—Written offers were made by the tenants of the Duke of Atholl, through the suggestion of his factor, for fifteen years' leases of their farms, upon the footing of making and laying out money on improvements, and paying only a small increased rent. These leases were renewals of former ones. They entered on possession, made expensive improvements, and paid the landlord their rents for nine years, when they were warned to remove, although their leases had five years to run. No written acceptance had been returned to their offers, and no regular probative lease was gone into; and the landlord alleged that he had intimated to them that their offers were only accepted for nine years instead of fifteen. 1st, In an action of removing, held the lease good for fifteen years, and the tenants entitled to