

fore that the teinds of Lady Willoughby de Eresby's lands of Kirklands of Cargill and Nether Campsie are valued. There was a question behind as to whether even if the only valuation of the teinds of this parish must be taken to be the sub-valuation of 1629, whether the teinds were not still valued. I do not understand upon what that argument was founded, but it is needless to consider it, because Lady Willoughby succeeds upon the other ground, which is much more distinct and satisfactory.

LORD MURE—There are various questions raised in this case, but the only one which was distinctly brought before us for decision was whether the decree of 1647 was calculated to operate to the prejudice of the bishops so as to be struck at by the Acts of Parliament referred to. It was very clearly and distinctly put by the Solicitor-General, and after fully considering the whole matter I have come to be of the same opinion as that which your Lordship has now so very fully and clearly expressed.

LORD SHAND and **LORD ADAM** concurred.

The Court adhered.

Counsel for Crown—Sol.-Gen. Robertson—Keir. Agent—Donald Beith, W.S.

Counsel for Lady D'Eresby—Mackintosh—Dundas. Agents—Dundas & Wilson, C.S.

Thursday July, 17.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

MACDONALD v. MACDONALD.

Husband and Wife—Divorce for Adultery—Condonation—Action of Damages by Husband against Wife's Seducer.

Held (rev. judgment of Lord Fraser) that a husband is not barred by having condoned his wife's adultery from an action of damages against her seducer.

In April 1884 Murdo Macdonald raised an action of divorce against his wife, Mary H. Macdonald, founding on an act of adultery which she had confessed to him to have committed with Kenneth Macdonald. The action was defended by Mrs Macdonald, but Murdo Macdonald failed to proceed with it, and decree of absolver by default was pronounced. He subsequently resumed cohabitation with his wife.

In January 1885 Murdo Macdonald raised the present action against Kenneth Macdonald for £1500 in name of damages and *solatium* for the seduction of his wife. The defender denied the adultery, alleging that the pursuer's wife was of immoral character, that the confession was false, and that the action was the result of a conspiracy to injure him and gratify the pursuer's ill-will against him and extort money.

He pleaded—“(3) The pursuer having resumed cohabitation with his wife after having raised an action of divorce against her, on the ground of her alleged adultery with the defender, and being

still living and cohabiting with her, he is barred from claiming damages from the defender.”

The Lord Ordinary sustained this plea and assolized the defender, holding in law “that an action for damages against the seducer of a married woman cannot be maintained where the husband has condoned the offence and taken back his wife to cohabitation and is living with her when the action is brought.”

The pursuer reclaimed, and argued—In deciding this case the Lord Ordinary had considered himself bound by the case of *Aitken v. M'Cree*, February 6, 1810, F.C., while in the previous case of *Collins v. Collins* (December 1, 1882, 10 R. 250) he had expressed an opinion (p. 257) “that it is quite compatible with forgiving a repentant wife to demand reparation from the man who has brought dishonour both upon her and her husband, and has diminished the happiness of both.” The report in *Aitken v. M'Cree* was too short and unsatisfactory to be regarded as a fixed precedent on so important a point. Though noted by institutional writers since (*e.g.* Bell's Prin. 2033), it was not approved as an authority settling the point, but was merely cited as a decision which had occurred. There was no ground in principle for holding that forgiveness of the wife involved the waiving of the husband's claim for compensation for the wrong done him by the seducer; for there might be reasons inducing the husband to take back his wife, applying only to her, and which might make the wrong done him by the seducer all the greater. It was extravagant to say that a wronged husband was to have no recourse against the author of that wrong except on condition of divorcing or trying to divorce the wife. The policy of the Roman law in excluding such actions was its fear of *lenocinium* on grounds of public policy. But the argument from public policy was at least as strong on the other side. The prospect of immunity to the seducer by forbidding recourse against him would be productive of as much evil as the possible encouragement to collusion between an immoral couple to extort money by way of damages from victims. It was the office of the Court on public grounds as much to encourage reconciliation between a husband and an erring wife as to discourage collusion and *lenocinium*.

Other authorities cited—*Maxwell v. Montgomery*, 1787, M. 13,919; *Paterson v. Bane*, 1803, M. 13,920; *Glover v. Samson*, Feb. 15, 1856, 18 D. 609; *Wilton v. Webster*, 7 Carington and Payne, 198; Fraser, H. and W. 1205; Sedgwick on Damages, ii. 517.

Replied for pursuer—No doubt the Lord Ordinary had held differently in the case of *Collins*; but in the present case he was following a precedent, viz., *Aitken v. M'Cree*, which decided the point. The report was full enough to state the point, and that was enough, and it was uniformly cited by institutional writers since, and certainly never disapproved, while it was approved by two of Erskine's editors—Ivory's Ersk. note to i. 3, 13, and Macallan's Ersk. *ib.*; also by More, Lect. p. 65. The only intelligible doctrine of condonation on grounds of principle was that it wiped out the act of adultery as if it had never been committed, so that no legal proceedings of any kind could ever afterwards be founded on it against any person. [LORD RUTHERFURD CLARK—Could

the wife interdict the husband from raising this action?—Yes, she could, because she was entitled to prohibit him, after he had taken her back and buried her misconduct, from publishing her shame in a court of law. He had disintitiled himself from ever bringing up the subject to her again in judicial form. He could not be said to forgive her if he made her misconduct the subject of judicial inquiry. That would be as much an injury to her as if the action were against herself. [LORD RUTHERFURD CLARK—Suppose the husband had recovered damages and thereafter cohabited with his wife, would the seducer be entitled to get the damages back?—No, because the matter had been finally adjudged upon, and could not be reopened. The argument from public policy, which was that of the Roman Law (Dig. 48, 5, 11, and 48, 5, 16), was against such an action as this, because it would lead to connivance between a bad man and a vicious woman to extort damages from the wife's paramour. It had been decided in England that condonation was a bar to recovery of costs against a co-respondent, and the judicial opinion expressed in that case was general—*Norris v. Norris and Others* 1861, 30 L.J., Prob. and Div. 111.

Other authorities cited—*Graham v. Graham*, July 19, 1878, 5 R. 1093, p. Lord President 1095; *Collins v. Collins*, Feb. 18, 1884, 11 R. (H. L.) 19.

At advising—

LORD JUSTICE-CLERK—In this case the Lord Ordinary has found that the action cannot be allowed to go on, and that an action of damages is incompetent against the seducer of a married woman where the husband has condoned the offence and taken back his wife to cohabitation and is living with her. No authority is given for that finding, and I have been able to find no authority for that result. It is certainly not an ordinary case—probably one of rare occurrence—but it does not, in my view, in the least follow that because a husband has condoned the wife's offence the paramour is entitled to found on that as barring an action of damages against him. I did find in Selwyn's "Nisi Prius" an excerpt from an opinion by one of the oldest judges leading to that conclusion (see Chief-Justice De Gray in *Howard v. Burtonwood*, as quoted in Selwyn's "Nisi Prius," 13th edition, p. 9, note K), which is exactly on the lines I have mentioned. I am for altering the judgment of the Lord Ordinary and remitting to him to proceed.

LORD YOUNG—I am of the same opinion. I think we may with safety repel the plea-in-law which the Lord Ordinary has sustained. That plea is that the resumption of cohabitation bars the pursuer from claiming damages from the defender. Although I think with your Lordship that it is not a bar, it may be a very important fact in the case; it may, for instance, bear on the question whether any injury was done to him at all; it certainly will bear on the question as to the extent of the injury, assuming that there was any. When I use the expression "whether any injury was done to him at all," I mean that that might be a fact more or less depending on circumstances—if the facts countenanced a suggestion of that kind. But apart from that altogether, and regarding that in the meantime as an impossible feature in the case,

I say the condonation of the wife's offence may have an important bearing on the question of damages due to the husband. But I cannot on any consideration which commends itself to my mind assent to the proposition that in all cases where a man forgives his wife—condones to her the offence that has been committed—a state of matters which may in certain circumstances be common enough if the woman has really been the victim of a seducer—I cannot assent to the proposition that he must also pardon the seducer. I do not, in saying that, suggest circumstances which would make one sympathise with the adoption of such a course by the husband, forgiving the wife for the injury she had done. I am merely saying that such a thing is quite possible. I repeat I cannot assent to the proposition that in so doing the husband condones the offence to the seducer. There may be no comparison between the guilt of the two parties implicated. Now, to sustain this plea and hold the action is barred against the seducer, would be to uphold that view which I entirely repudiate. I think it would not be a sound, and it would be a very curious result to announce that an action of damages against the seducer, if it is to be brought at all, must precede the forgiveness, or ostensible forgiveness, of the wife, and her return to cohabitation. I know of no authority for such a doctrine, or for allowing cohabitation—which may be of an infinite variety or degrees of weight and importance in individual cases—any further effect than that which I have stated—possibly having more or less weight on the question of injury or the amount of injury.

LORD RUTHERFURD CLARK—I am of the same opinion. The Lord Ordinary has had this question before him in two different cases, and he has decided in opposite ways. Therefore it is quite certain that in one case he must be right. I prefer the judgment which he pronounced in the case of *Collins*, 10 R. 250, where he found that the authority of the case of *Aitken*, on which he founds the present judgment, was not an authority for the proposition in law which the defender has pleaded. I cannot think that the report of that case warrants us in holding in law that condonation of the wife is condonation of the offending paramour.

LORD CRAIGHILL was absent.

The Court recalled the Lord Ordinary's interlocutor and repelled the third plea-in-law for the defender.

Counsel for Pursuer (Reclaimer)—A. J. Young—Salvesen. Agent—J. A. Trevelyan Sturrock, S.S.C.

Counsel for Defender (Respondent)—Rhind—Strachan. Agent—William Officer, S.S.C.