J., at 417; (1873) 8 C.P. 148, *per* Kelly, C.B., at 153; *Smith* v. *North Metropolitan Tramways Company*, (1891) 7 T.L.R. 459; *Seymour* v. *Greenwood*, (1861) 30 L.J., Ex. 189, *per* Pollock, C.B., at 191; *Dyer* v. *Munday*, [1895] 1 Q.B. 742, *per* Lord Esher, M.R., at 746; *Hanlon* v. *Glasgow and South-Western Railway Company*, (1899) 1 F. 559, 36 S.L.R. 412, *per* Lord Young at 1 F. 562, 36 S.L.R. 414; *Wood* v. *North British Railway Company*, (1899) 1 F. 562, 14 S.L.R. 407; *Mackenzie* v. *Cluny Hill Hydropathic Company, Limited*, 1908 S.C. 200, 45 S.L.R. 139, *per* Lord Low at 1908 S.C. 206, 45 S.L.R. 142. (2) The injuries averred were sufficiently serious to warrant a trial by jury—*Taylor* v. *Dumbarton Tramways Company*, 1918 S.C. (H.L.) 96, 55 S.L.R. 443, *per* Lord Shaw at 1918 S.C. (H.L.) 108, 55 S.L.R. 452.

LORD JUSTICE-CLERK—This case has been fought by the Corporation on relevancy. But Mr Garson has satisfied me on the authorities cited, which included certain English and one Irish decision, that we could not dispose of this case on the ground that it was irrelevant. Amongst those to which he referred, two of the most cogent cases, to my mind, were the Scottish cases of *Hanlon* v. *Glasgow and South-Western Railway Company*, (1899) 1 F. 559, and *Wood* v. *North British Railway Company*, (1899) 1 F. 562. I am of opinion that we cannot dispose of this case as the defenders desire, on the ground that the statements are irrelevant and that there must be inquiry.

A further point, however, was debated whether the inquiry should be by jury trial or a remit to the Sheriff—that depending mainly upon the averments that have been made as to the injuries suffered by the pursuer and the probable amount of the award that a jury might give. There is no doubt that the averments as to the injuries might have been made more pointed, but I am not prepared to say that they are not sufficiently specific to justify an award that could not be objected to as trivial. Having regard to the grounds upon which it is urged, I do not feel that I would be justified in saying that this was a case that was not suited for jury trial, and that it must go for proof before the Sheriff.

I am therefore for approving of the issue proposed.

LORD SALVESEN—I do not differ from your Lordship, although I should have preferred that this case should have been tried in the Sheriff Court. I say so for this reason, that I think there is nothing more difficult to determine than the responsibility of a master for violent acts in the nature of an assault committed by a servant, even though the servant in committing it was acting primarily in the supposed interests of his master. That by itself does not infer responsibility in all cases, and the large citation of authorities that we have had from England, Ireland, and Scotland shows how fine the distinctions are upon which the Courts have proceeded. It was upon that ground that I thought that we must have inquiry here, because everything depends upon the precise facts which are elicited in the course of the evidence as to whether there is legal responsibility or not. I thought that a question of that kind was more suited for determination by a judge accustomed to deal with legal distinctions than by a jury whose minds are necessarily affected by sympathies that obscure the true issue which they have to dispose of. On the other hand I recognise that it has been the practice to send such cases to a jury unless they were cases, on the face of them, of so small a character that they ought to be relegated on that account to the Sheriff Court. I think this case is on the border line, but I do not feel sufficiently strongly on the subject to differ from the opinion which your Lordship has expressed.

LORD ORMIDALE — I agree with your Lordship on both points.

The Court repelled the objection to the relevancy of the action, approved of the proposed issue, and remitted the cause to Lord Blackburn, Ordinary, to proceed therein as accords.

Counsel for Appellant (Pursuer)—D. P. Fleming, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for Respondents (Defenders)—Macmillan, K.C.—Keith. Agent—Campbell Smith, S.S.C.

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*Wednesday, March* 1.

## SECOND DIVISION.

[Lord Hunter, Ordinary.

## AULD *v.* AULD.

*Process — Res noviter — Divorce — Recall of Witnesses after Proof Closed — Signed Statements by Witnesses that Evidence Given by Them Untrue.*

In an action of divorce for adultery at the instance of a husband against his wife the defender adduced the evidence of three witnesses to prove an alibi on the date libelled, and she was subsequently assoilzied. The pursuer reclaimed and lodged a minute of *res noviter*, founding on signed statements by the witnesses that the evidence given by them was untrue, and asked to be allowed to recall the witnesses with a view to their being re-examined. The Court *allowed* the minute to be received as a condescendence of *res noviter* and answered.

David Allan Carlyle Auld, Glasgow, *pursuer*, brought an action of divorce for adultery with a man to the pursuer unknown against his wife Mrs Christina Pow Crawford or Auld, *defender*.

The pursuer averred that the alleged adultery took place on Friday 24th December 1920.

On 25th November 1921, after proof, the Lord Ordinary (HUNTER) assoilzied the defender.

*Opinion.*—" . . . The defenders' case is not merely a denial that she committed adultery on 24th December 1920 but an allegation that she spent that evening in a house at 35 Dover Street, Sandyford, Glasgow, being confined to her house with a sore ankle and leg. In support of this allegation she examined three witnesses, Mrs Grier with whom she boarded for several weeks, and Thomas Byrne and John Grimm. According to Mrs Grier the defender came to her house on Tuesday 21st December. She says—'The defender was in very bad health and very poorly. When she came to stay with me her leg was so bad she could not walk across the floor.' She is quite positive that the defender never left the house until the following Monday, when she went to get a payment of aliment from the pursuer's lawyer. This evidence is corroborated by Mrs Grier's two lodgers, Byrne and Grimm, who are in the habit of spending the principal part of their evenings in Mrs Grier's kitchen. In cross-examination Grimm explained that 24th December was his daughter's birthday, that he went out to buy her a present, and when he came home he saw the defender.

" If the evidence for the defender is to be believed it is impossible that the M'Glynns could have seen the defender as they allege at 492 Gallowgate on 24th December 1920. What they speak to is not a brief visit of the defender to that place but to her having been there for a prolonged period of time. They say that the defender spent the night of 23rd December with Mrs Wright in her kitchen. Mrs M'Glynn adds that she saw her on Friday morning about ten o'clock before she left Mrs Wright's, and afterwards about three, and again about six o'clock, on both occasions in Mrs Wright's kitchen.

" In support of the M'Glynns' evidence that the defender was at 492 Gallowgate on 24th December a number of witness were adduced. . . .

" For the pursuer it was suggested that even if I accepted the evidence of the witnesses for the defence I might hold that adultery was committed by the defender on the Friday of the week preceding the 24th December. The defender admits that on the Thursday of that week she spent the night with Mrs Wright, and also admits that she saw Mrs M'Glynn the following day and requested the loan of money. She, however, denies being in the yard on the Friday evening. In certain cases it might be legitimate to take the course suggested by the pursuer's counsel, but I do not think that I am entitled to do so in the present case. If I thought that the defender's alibi was fictitious there would in this circumstance be some corroboration of the story told by M'Glynn, but if M'Glynn is speaking to something that occurred on a different day I think that there is an absence of sufficient corroboration to justify me in holding the pursuer's case proved. On the 24th December the means available to the M'Glynns for identifying the people they saw on their landing appear to have been of an imperfect character, and it seems to me that they are as likely to have made error in identification as in date. The defender is proved to have been addicted to drink, but there is nothing to suggest that she was in the habit of making friends of men other than her husband. Except the M'Glynns no one speaks to having seen her in the company of any man on the occasion of the alleged adultery. On the whole I do not think that the evidence of the pursuer's witnesses is of a sufficiently clear or convincing character to justify me in holding that adultery has been proved. I shall therefore assoilzie the defender."

The pursuer reclaimed and lodged a minute craving leave to recall and re-examine certain witnesses on the ground of *res noviter*.

The minute stated, *inter alia*—"2. That the defender denied the pursuer's said averment of adultery and averred that upon the date mentioned she was at 35 Dover Street, Glasgow, which is two miles or thereby from 492 Gallowgate. 3. That in support of the said alibi the defender led the evidence of three witnesses, viz., (1) Mrs Margaret Wallis or Grier, (2) Thomas Byrne, and (3) John Grimm, all residing at 35 Dover Street, who deponed that upon the said date and for several days before and after it the defender was unable to leave and in point of fact never left the house at 35 Dover Street aforesaid in which she was lodging with the said Mrs Grier. 4. That the Lord Ordinary accepted the evidence of the said three witnesses and came to the conclusion that it was therefore impossible that the witnesses for the pursuer could have seen the defender at 492 Gallowgate on said 24th December 1920, and that they must be mistaken either as to identification of the defender or as to the date on which they saw her. He therefore assoilzied the defender. 5. That since the date of the Lord Ordinary's interlocutor the pursuer has discovered that the evidence led for the defender in support of the said alibi is false. . . . The said Mrs Grier now admits that the said statements made by her in evidence were untrue, and that the defender did not leave her house on the evening of 21st December, but that she cannot swear as to the defender's movements or how often she was out after that day. A tested statement by the said Mrs Margaret Wallis or Grier is produced herewith. . . . 6. In an attested statement dated 21st February 1922 the said Thomas Byrne corroborates the statement made by the said Mrs Grier, and he states that he cannot swear as to the movements of Mrs Auld after the date she came to lodge with Mrs Grier. Said attested statement is produced. . . . 7. The said John Grimm has now given a tested statement dated 19th February 1922, in which he corroborates the truth of the statement now made by the said Mrs Grier. His statement is produced. . . . 9. The facts above condescended on were unknown to the pursuer, and could not by reasonable diligence have been discovered by him prior to the proof. The pursuer accordingly craves, in respect that these facts are *res noviter veniens ad notitiam*, to be allowed to add this minute

to his pleadings, to open up the proof in order (first) that the said Mrs Margaret Wallis or Grier and John Grimm and Thomas Byrne may be recalled and re-examined."

Argued for the pursuer—The averments made in the minute amounted to a new fact, and in an action involving a question of status the Court would be more ready to admit evidence of this character—*Elder* v. *M'Lean*, 1829, 8 S. 56; *Gairdner* v. *Macarthur*, 1915 S.C. 589, and *per* Lord Salvesen at p. 594, 52 S.L.R. 427; *Balfour Kinnear* v. *Balfour Kinnear*, 1919 S.C. 391, 56 S.L.R. 282; *Johnston* v. *Johnston*, 1903, 5 F. 659, and *per* Lord Kinnear at p. 662, 40 S.L.R. 499.

Argued for the defender—The discretion of the Court in opening up a proof on the grounds alleged would be very sparingly used. The statements in question amounted to no more than signed precognitions made to an interested party, and the pursuer could have examined the witnesses before the proof as to whether the statements were true or not. It was in the interests of justice that there should be an end to litigations—*Lockyer* v. *Ferryman*, 1877, 4 R. (H.L.) 32; *Brown* v. *Gordon*, 1870, 8 Macph. 432, 7 S.L.R. 257; *Snodgrass* v. *Hunter*, 1899, 2 F. 76, 37 S.L.R. 60; *Gilmour* v. *Hansen*, 1920 S.C. 598, 57 S.L.R. 518; *Longworth* v. *Yelverton*, 3 Macph. 645, and *per* Lord President Inglis at p. 649.

LORD JUSTICE-CLERK—This is a very exceptional case. The circumstances in which the pursuer asks to be allowed to lodge a condescendence of *res noviter* are as follows:—He says that in his action of divorce, in which he alleged that his wife had been guilty of adultery, the defender ultimately (though the proposal was not warranted by any interlocutor) put on record an alibi. The parties are agreed that the statement was added on record before the proof. In support of that statement evidence was led, which was to the effect that the defender had been confined to the house in Dover Street, at a distance of some two or three miles from where the alleged adultery took place, and had not left that house for several days, including amongst others the only day on which a specific act of adultery had been alleged, viz., 24th December 1920. Three witnesses were examined in support of the alibi which they spoke to, and the Lord Ordinary was satisfied that their evidence that the defender was at Dover Street at the time in question was material to the issue.

The pursuer now says he has got statements signed by these three witnesses that the evidence they gave was untrue, and that whereas they had stated before the Lord Ordinary that on certain days, including the day in question, 24th December 1920, she was not out of the house at Dover Street, they now say they do not know whether she was out of the house or not on that day. All they can say is that she was not out of the house on the first day she came to Dover Street, viz., 21st December 1920. As to her movements after that date they cannot speak.

It seems to me that in the circumstances it would be most unsatisfactory, this being a consistorial question involving the status of the parties, that we should proceed further to consider the case without having further proof. I therefore move your Lordships that we should allow the pursuer to add these averments of *res noviter* to the record.

LORD SALVESEN—As regards the point here in question the circumstances are really unique. The three witnesses who spoke most positively in the evidence to an alibi have now signed statements before witnesses in which they say that the evidence that they gave on oath was untrue. I do not think it necessarily follows that that involves a charge of perjury, although it indicates a great inaccuracy on their part. But the peculiarity of the case is that the Lord Ordinary really decided the case upon the evidence of these three witnesses, from whom the pursuer has now secured attested written statements that their evidence was untrue.

I think it would be a denial of justice if we did not allow these witnesses to be recalled and give them an opportunity of explaining how they came to sign these depositions. One need not anticipate the result, but it seems to me that if we come to the conclusion that their evidence as a whole is worthless, then the alibi fails, as it undoubtedly would fail if the statements that they made in their depositions last taken were sworn to and believed.

I think this is entirely an exceptional case, and that there is no authority which precludes us from acceding to the motion of Mr Wark that we should allow these witnesses to be recalled.

LORD ORMIDALE—I am of the same opinion. I agree with both of your Lordships that the circumstances here are unique. It seems that the three witnesses in question misled the Lord Ordinary into accepting their testimony as reliable, whereas now they have signed statements to the effect that what they said at the trial was not true.

I confess that as I read these statements I view them in a graver light perhaps than your Lordships are prepared to do, because I look upon them as practically amounting to an admission of perjury. It appears to me to be the same as if the parties making them had gone through the Justiciary Court and been convicted of the crime to which they are prepared to plead guilty. And if they had been convicted I cannot believe that this Court would not have given the relief that is sought, to wit, to wipe out their perjured testimony as it was given at the trial which would probably have resulted in a different judgment being pronounced by the Lord Ordinary. In the absence of an actual conviction we have here the strongest possible *prima facie* evidence that false testimony has been given in a consistorial case in which the status of parties was involved.

The Court allowed the minute to be received as a condescendence of *res noviter*

on the point above reported, and allowed the defender, if so advised, to answer within eight days.

Counsel for the Pursuer and Reclaimer— Wark, K.C. — Burns. Agents — Cowan & Stewart, W.S.

Counsel for the Defender and Respondent — Jameson — Gibson. Agent — R. D. C. M'Kechnie, Solicitor.

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*Saturday, January 7.*

## FIRST DIVISION.

[Lord Hunter, Ordinary.

## THE PERFORMING RIGHT SOCIETY, LIMITED *v.* MAGISTRATES OF EDINBURGH.

*Trade Union—Restraint of Trade—Title to Sue — Company — Combination to Exercise and Enforce Rights under Copyright Act* 1911—*Trade Union Act* 1913 (2 *and* 3 *Geo. V, cap.* 30), *sec.* 2 (1).

The objects of an association of composers of musical works, and authors of literary or dramatic works, and of owners, publishers, and persons interested in the copyrights in such works, which was incorporated under the Companies Acts 1908 to 1913, were, *inter alia*, to exercise and enforce on behalf of the members of the company all rights and remedies under the Copyright Act 1911, or otherwise in respect of the public performance of the works. The memorandum of association contained a provision that the objects of the company should not extend to any of the purposes mentioned in section 16 of the Trade Union Act Amendment Act 1876. Under the articles of association every member undertook during the period of his membership to assign to the company his interest, whether present or future, in the right to perform any work which had been published or should thereafter be published by him, and invested the association with the sole right, so far as it was or should be invested in him, to authorise or forbid the public performance of the works published or to be published by him. In an action by the association to interdict the performance in public of certain musical compositions, the defenders objected to the pursuers' title to sue on the ground that the association was a trade union, and that therefore its registration under the Companies Acts was null and void. *Held* that the association was not a trade union within the meaning of the Trade Union Act 1913, section 2 (1), and objection *repelled.*

The Trade Union Act 1913 (2 and 3 Geo. V, cap. 30) enacts—Section 2 (1)—"The expression 'trade union' for the purpose of the Trade Union Acts 1871 to 1906 and this Act means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects. . . ." Section 1 (2)—"For the purposes of this Act the expression 'statutory objects' means the objects mentioned in section 16 of the Trade Union Act Amendment Act 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members."

Upon 6th March 1914 The Performing Right Society, Limited, the membership of which consisted of composers of musical works, authors of literary and dramatic works, and of owners and publishers and persons interested in the copyrights of such works, was incorporated under the Companies Acts 1908 and 1913, with its registered office at Chatham House, 13 George Street, Hanover Square, London.

The memorandum of association stated—"3. The objects for which the company is established are (*a*) To exercise and enforce on behalf of members of the company, being the composers of any musical works or the authors of any literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (hereinafter called 'the proprietors') all rights and remedies of the proprietors under the Copyright Act 1911, or otherwise in respect of the public performance of their works. . . . (*y*) Provided nevertheless that the objects of the company shall not extend to any of the purposes mentioned in section 16 of the Trade Union Act Amendment Act 1876."

The articles of association provided, *inter alia*—"4. Every member who is a publisher by virtue of his election undertakes . . . during the period of his membership to assign to the company in accordance with the rules for the time being in force his interest, whether present or future, in the right to perform any musical or dramatic work which has been or shall hereinafter [hereafter?] be published by him. . . . 5. Every member who is a publisher by virtue of his election also invests the company for and during the period of his membership with the sole right so far as it is or shall be or become vested in him (*a*) to authorise or forbid the public performance of all or any of the works published or to be published by him. . . . (*d*) To protect generally his interests in the said works."

In 1921 the Society brought an action against the Provost, Magistrates, and Councillors of the City of Edinburgh, *defenders*, concluding for interdict against the infringement of the rights of performance in public, vested in the pursuers, of certain musical compositions, and for damages in respect of infringement.

The parties averred, *inter alia*—"(Cond. 1) The pursuers The Performing Right Society, Limited (hereinafter referred to as 'the Society'), were incorporated under the Companies Acts 1908 and 1913 upon 6th March 1914 with the object, *inter alia*, of