reason why he should not continue in the future as in the past to receive that sum in consequence of total incapacity.

LORD ANDERSON—On the point of competency, the main argument advanced by the appellants' counsel was that there was no subsisting dispute between the parties for the settlement of which arbitration is appropriate or indeed competent. The only question that was said to be between them is the question of the meaning of the recorded agreement. Now, if the facts had supported that contention the appellants would have been entitled to succeed in this appeal, because I think it is quite plain that an arbitrator has no jurisdiction to construe what in effect is his own decree, that is—the recorded agreement. But then, it seems to me that the facts do not fit the contention of the appellants to which I have alluded, because it appears to be plain on the facts that the dispute has arisen under and because of the passing of the Act of 1923. The question between the parties is not what is the meaning and effect of a recorded memorandum of agreement, but what is the meaning and effect of the Act of 1923 in so far as regards the weekly payment which the workman was receiving at the time when that Act was passed.

Now, this is a new question as to which there has been no agreement, and as to which there could have been no agreement. And it seems to me that arbitration is necessary and competent and appropriate for the purpose of solving this question. The procedure, which the appellants' counsel say should have been taken, and which the arbitrator suggests might have been taken, obviously will not do, because if a charge had been given as suggested upon the recorded memorandum, the answer at once would have been made that the Acts of Parliament which purport to give the 15s. charged for had been repealed and no longer applied, and that, it seems to me, would have sealed the fate of the suggested charge at the outset.

Accordingly I am of opinion that a minute such as was lodged by the workman in this case, inviting arbitration, was quite competent and, indeed, the best procedure for solving the dispute which subsists between the two parties.

As to the merits, I content myself with agreeing *in omnibus* with the admirable way in which the arbitrator has disposed of that part of the case.

The Court answered the first question in the negative, and the second and third questions in the affirmative.

Counsel for the Appellants—Wark, K.C. —Macdonald. Agents — Alex. Morison & Company, W.S.

Counsel for the Respondent — Keith. Agents—Douglas & Miller, W.S.

Friday, May 30.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

BLACK *v.* DUNCAN.

Reparation—Rape—Action of Damages by Husband—Title to Sue—Relevancy.

In an action of damages brought by a husband against the alleged ravisher of his (the pursuer's) wife, the pursuer averred that the defender had, "notwithstanding her struggles . . . succeeded in overcoming her resistance and then obtained carnal connection with her." The defender pleaded that the pursuer had no title to sue. *Held* that the pursuer had a good title to sue, and that his averments were relevant.

Process—Jury Trial—Action of Damages for Rape—Form of Issue.

In an action of damages by a husband against the alleged ravisher of his (the pursuer's) wife, the Lord Ordinary approved of an issue in the following terms:—"Whether . . . the defender obtained carnal connection with the pursuer's wife, to the loss, injury, and damage of the pursuer?" The defender reclaimed and along with his reclaiming note lodged a notice of motion to vary the issue by "deleting the words 'obtained carnal connection with' and substituting therefor the word 'ravished,' or alternatively by inserting between the word 'defender' and the word 'obtained' the words 'seized hold of the pursuer's wife and endeavoured to embrace her, and in spite of her resistance to the utmost of her strength and her struggles and efforts to get free, succeeded in overcoming her resistance and thus.'" *Held* that the issue must conform to the case made on record, and that it should therefore be varied as proposed in the second of the alternatives suggested by the defender.

William Black, plater, 19 Allison Place, Port-Glasgow, brought an action against Alan Duncan, motor engineer, Port-Glasgow, for £500 in name of damages for ravishing his (the pursuer's) wife.

The pursuer averred—"(Cond. 2) The pursuer was married on 9th November 1914 to his present wife, Mrs Mary Black or Black. There are two children of the marriage. After their marriage the pursuer and his wife resided together in family with the parents of the latter at 19 Allison Place aforesaid, and the pursuer's wife assisted her mother in a fruit, confection, and tobacco shop carried on by her at 17 Allison Place. The said shop is immediately across the street from the West Renfrew Motors garage. . . . (Cond. 3) In the evening of Saturday, 24th February 1923, the pursuer's wife, the said Mrs Mary Black, was assisting her mother in the said shop. In connection with her business the latter had occasion to require change for a £1 note, and she sent her daughter, the said Mrs Mary Black, to the said garage in order to obtain the

necessary change. Mrs Black and her mother had on previous occasions obtained change at the garage when it was required. . . . (Cond. 4) On entering the garage, sometime between 9 and 9·30 or thereby, the pursuer's wife, the said Mrs Mary Black, was met by the defender who took her upstairs to the office and gave her the necessary change. The defender then suggested to the pursuer's wife that she should come with him in order to see over the premises, and he led her along the passage leading to another part of the said premises. Before they reached the end of the passage the defender suddenly seized hold of the pursuer's wife and endeavoured to embrace her. The pursuer's wife resisted the defender to the utmost of her strength, and did all she could to free herself from his hold. Ultimately, however, her strength became exhausted, and notwithstanding her struggles and her efforts to get free the defender succeeded in overcoming her resistance, and he then obtained carnal connection with her. . . . (Cond. 6) The pursuer has been greatly injured in his feelings and reputation in consequence of the defender's wrongful conduct to his wife, and he has suffered great pain, annoyance, and mental distress. The defender, however, refuses to make reparation to him for the said wrong, and the present action has been rendered necessary. The sum sued for is only reasonable reparation to the pursuer in the circumstances. . . ."

The pursuer pleaded—"1. The defender having obtained carnal connection with the pursuer's wife in the manner condescended on is liable to the pursuer in reparation therefor."

The defender pleaded—"2. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. 3. The pursuer's averments, so far as material, being unfounded in fact, the defender should be assoilzied."

On 5th March 1924 the Lord Ordinary (ASHMORE) repelled the first and second pleas-in-law for the defender, and approved of an issue in the following terms, viz. :—"Whether on or about Saturday, 24th February 1923, and in or about the premises of the West Renfrew Motors, Limited, Port-Glasgow, the defender obtained carnal connection with the pursuer's wife to the loss, injury, and damage of the pursuer. Damages laid at £500 sterling."

Opinion.—"In this case the pursuer is suing for damages for the wrong which he alleges has been done to him in consequence of the defender having had immoral relations with the pursuer's wife, and having thereby injured the pursuer in his feelings and reputation and caused him great pain and annoyance and mental distress.

"The defender absolutely denies the alleged immoral relations, and further pleads as preliminary objections that the pursuer has no title to sue for the damages claimed, and has set forth no grounds relevant or sufficient to support the action.

"Counsel for the pursuer submitted that the case ought to be remitted for trial by jury, and the following issue was proposed as appropriate in the circumstances:—'Whether on or about Saturday, 24th February 1923, and in or about the premises of the West Renfrew Motors, Limited, Port-Glasgow, the defender obtained carnal connection with the pursuer's wife, to the loss, injury, and damage of the pursuer. Damages laid at £500 sterling.'

"Counsel for the defender in support of the preliminary pleas founded specially on the following facts:—(*a*) That the pursuer is suing in his own name without the concurrence and, so far as it appears, without the consent of his wife, and does not even aver that he has lost either the affection or the society of his wife; (*b*) that the wrong alleged is not the seduction of the pursuer's wife by wiles or otherwise; (*c*) that what is averred is in effect that the defender forcibly ravished the pursuer's wife by overcoming her utmost resistance, and that accordingly the pursuer has not in fact sought to divorce his wife, and has not in law any right to obtain a divorce.

"In these circumstances it was maintained for the defender that the claim made by the pursuer is contrary both to authority and principle, that the issue ought to be disallowed, and that the action ought to be dismissed as irrelevant and untenable.

"So far as appears no case of the kind has come up for judicial determination in Scotland under similar circumstances, and an issue in the form proposed for the pursuer is absolutely unprecedented.

"In my opinion, however, having regard to the principles which have been given effect to and which clearly underlie the reported decisions, the following propositions may be regarded as well founded—(1) A husband may insist in an action of damages in respect of the seduction of his wife against the seducer either (*a*) without having raised an action of divorce against his wife—Fraser on Husband and Wife, 2nd ed., vol. ii, p. 1206; *Maxwell* v. *Montgomery*, 1787, M. 13,919; *Paterson* v. *Bone*, 1803, M. 13,920; or (*b*) after having obtained a decree of divorce—*Steedman* v. *Coupar*, 1743, M. 7337; *Baillie* v. *Bryson*, 1818, 1 Murray 317; *Glover* v. *Samson*, 1856, 18 D. 609. (2) The fact that the husband has condoned his wife's offence does not bar his claim of damages against the seducer—*Macdonald* v. *Macdonald*, 1885, 12 R. 1327. (3) It is the wrongful carnal intercourse which gives rise to the husband's claim of damages—Opinion of Lord Chief Commissioner Adam in *Baillie* v. *Bryson* (*cit. sup.*) at p. 334; Fraser on Husband and Wife, vol. ii, p. 1204. So one who commits a rape on the wife is liable in an action at the husband's instance—Bishop's Commentaries on Marriage, Divorce, and Separation, 1891, vol. i, sections 1365-6; *Egbert* v. *Greenwalt*, 1880, 38 Am. R. 260. (4) As regards damages, however, considerations with special reference to the acts of illicit connection complained of may be taken into account in the way of increasing or diminishing the husband's claim, *e.g.*, on the one hand the fact that the wife resisted and was overcome by violence, and on the other hand that she

importuned the defender or gave a willing consent—Fraser on Husband and Wife, vol. ii, pp. 1204-5; *Ferguson* v. *Smethers*, 1880, 36 Am. R. 186.

"The law being as above set forth it follows, in my opinion, that the pursuer's averments in this case are relevant, and that the action cannot be disposed of without inquiry into the facts.

"As regards the further procedure there are these outstanding considerations. On the one hand there must be kept in view the unusual, and indeed unprecedented, terms of the proposed issue, inasmuch as it puts to the jury the general question whether at the time and place specified the defender 'obtained carnal intercourse' with the pursuer's wife without stating whether by artful wiles, or by force, or by the consent of the pursuer's wife.

"In the previous cases in Scotland what was put in issue was whether defender 'did seduce and commit adultery with' the pursuer's wife—*Glover* v. *Samson* and *Baillie* v. *Bryson, cit. sup.*

"On the other hand I have come to the conclusion that there is no sufficient justification for regarding the case as unsuitable for trial by jury, the case being one for damages for an alleged wrongful act on the part of the defender, and its determination depending on facts which are *prima facie* appropriate for the consideration of a jury. Then as regards the form of the issue, I think that in view of the averments made by the pursuer the question as put raises sufficiently what is the true issue, viz., the simple question whether on the occasion referred to the defender had carnal intercourse with the pursuer's wife.

For the reasons which I have given I will repel the defender's pleas of no title to sue and irrelevancy, and will approve of the issue proposed by the pursuer."

The defender reclaimed, and along with his reclaiming note lodged a notice of motion to vary the issue.

[The variation proposed is quoted *supra in rubric.*]

Argued for reclaimer — The action was irrelevant, because the husband's right to sue was restricted to cases of seduction; it had never been extended so as to comprise cases of rape. The principle upon which the action was allowed was clearly stated in Fraser, Husband and Wife, vol. ii, pp. 1203, 1204. The reason why the husband was entitled to sue in the case of seduction was that there the wrong was done to him. But in rape the wrong was done to the wife, and accordingly she alone had the right to sue—*Kirk* v. *Guthrie*, 1817, 1 Murray 271; *Baillie* v. *Bryson*, 1818, 1 Murray 317; *Glover* v. *Samson*, 1856, 18 D. 609; Bishop's Commentaries on Marriage, Divorce, and Separation, vol. i, sections 1365, 1366. *Esto* that the pursuer had a claim here, it was a derivative claim, and should therefore be strictly scrutinised by the Court. A pursuer was not entitled to make a claim of this nature unless he could show patrimonial or pecuniary loss—*Greenhorn*, 17 D. 860; *Eisten*, 1870, 7 S.L.R. 638, 8 Macph. 980, at p. 984; *Darling*, 1891, 18 R. 1164, 28 S.L.R. 872. Further, where the injured party, the wife, did not bring an action on account of the rape, it was against public policy that the husband should be allowed to do so. In cases of adultery and seduction the element of consent was present, so that obviously the wife could not sue, though the law allowed the husband an action for loss of services. But the present case, which proceeded upon rape, was entirely different, and it should therefore be dismissed as irrelevant. Secondly, the terms of the proposed issue were defective, because they did not square with the statements made in the condescendence. The case on record was one of rape, but the proposed issue was much more general than that. Its terms should accordingly be altered so as to bring them into line with the averments in the record. Reference was also made to *Black* v. *North British Railway Company*, 1908 S.C. 444, *per* Lord President Dunedin at p. 453, 45 S.L.R. 340.

Argued for the pursuer and respondent—The right to sue depended upon the sexual act averred. So far as relevancy was concerned, the act complained of was the act of intercourse, which was a civil wrong. Force was merely an aggravating circumstance—Bishop (*cit.*), section 1366, p. 571 of vol. i. The ground of action was the dishonour of the marriage bed, and it did not matter whether the act of violation was committed with consent or without it. As regards the form of the issue, it was sufficient if it did not contradict the record—*Fletcher* v. *Lord Advocate*, 1923 S.C. 27, 60 S.L.R. 27. Whether the act complained of was rape or seduction, that was merely a question of *modus*. The legal wrong was the same, and therefore the appropriate course was to allow the case to go to the jury on the general issue.

LORD JUSTICE-CLERK (ALNESS)—The pursuer in this case seeks to recover damages from the defender on the averment that the defender ravished his (the pursuer's) wife. The relevancy of the claim was challenged by the defender in the Outer House, but the Lord Ordinary repelled the challenge and allowed an issue. Against that decision this reclaiming note is taken. The defender maintained (1) that the pursuer has no title to sue, and that his claim is irrelevant; (2) that, if inquiry were allowed, it should be by way of proof before a Judge, not by way of jury trial; and (3) that if the case must go to a jury, the issue which the Lord Ordinary has allowed should be varied in the manner to be afterwards detailed.

1. The defender *in limine* argued that in no reported case had the Court allowed an action of damages to proceed at the instance of a husband against the ravisher of his wife, and that the Court should not form what he regarded as a dangerous precedent. The defender's counsel was constrained to admit that, if the claim of the pursuer had been based on the averment that the defender had seduced his wife, or on the averment that the defender had committed adultery with his wife, the action would

lie. But he argued that different considerations come into play where the basis of the claim is rape, and that in such a case a different decision should be reached. Now, that differences in fact exist between claims based on seduction and adultery on the one hand and a claim based on rape on the other hand is no doubt obvious. In the first two cases, the wife is in a greater or less degree a guilty party, whereas in the last case she may be, and no doubt generally is free from blame. In other words, in the one class of case the infidelity of the wife is postulated; in the other her fidelity to her husband is unassailed, Again, in the former class of cases the husband can divorce his wife; in the last case he cannot, for she has not broken her marriage vow. In the one class of case the wife must play the role of a suppliant for forgivenses from her husband; in the last class of case she has no need to do so. But, while these differences in fact undoubtedly exist between the cases to which I have referred, I do not regard them as concluding the matter. I cannot help thinking that it would be highly anomalous if it were held that a husband is entitled to sue his wife's seducer or her paramour, but is denied the right to sue her ravisher. Indeed I think that it would be a blot on any system of civilized jurisprudence if it prescribed that result. I cannot think that our law is so impotent as to deny a remedy in the latter case. The fact that the remedy may be imperfect is, as indeed was pointed out in one of the cases cited in the course of the discussion, no reason for refusing any remedy at all. It appears to me that in all three cases a legal wrong has been done to the husband, for which he is entitled to seek redress. In each case the wrong is the same. In each case his right to the exclusive possession of his wife's body has been violated, and his marriage bed has thus been defiled. Whether the wife consents or whether she does not consent to the attack upon her virtue seems to me to be immaterial and irrelevant. Indeed the fact that force was used to overcome her chastity seems to me to be an aggravation of the wrong. I am not prepared to hold—as the defender in effect invites me to do—that, as the indignity done to the wife increases, the remedy open to the husband shrinks. In principle I think that the claim made by the pursuer is well founded.

But the claim does not lack authority to support it. I refer in particular to Fraser on Husband and Wife (2nd ed.), vol. ii, p. 1204; and to *Baillie* v. *Bryson*, 1 Mur. 317, at p. 334. The learned writer in the one instance, and the Lord Chief Commissioner in the other, lay it down distinctly that the foundation of the husband's claim, in a case of seduction or adultery, is the wrongful act of intercourse. No case was quoted to us in which the authority of these views was impared or even challenged. American legal opinion, as appears from the Lord Ordinary's note, is to the same effect. If the foundation of the claim is the wrongful act of connection, then the cases of seduction, adultery, and rape are indistinguishable in principle from one another.

From the point of view then of principle and authority I think that the pursuer's claim is well founded, and that the Lord Ordinary's judgment on this part of the case is sound.

2. On the second question, viz., the mode of inquiry, it is not necessary to say much. The plea that the case should be withheld from a jury and tried before a Judge was but faintly urged by the defender. Indeed, having regard to the views recently expressed in the House of Lords, it is difficult to see how it could have been otherwise. The case is a simple one, and is of a type appropriate to jury trial. No adequate reason was adduced, and I can think of none, for withholding the case from the appropriate tribunal, viz., a jury.

3. The last question argued was as to the form of the issue. The Lord Ordinary allowed an issue in these terms:—"Whether on or about Saturday, 24th February 1923, and in or about the premises of the West Renfrew Motors, Limited, Port-Glasgow, the defender obtained carnal connexion with the pursuer's wife to the loss, injury, and damage of the pursuer." *Prima facie* this form of issue seems to me inappropriate. For aught that appears from it the husband might have been a consenting party to his wife's shame. But apart from that, the issue does not conform, as an issue always must do, to the pursuer's record. The only case which the pursuer makes on record is that the defender ravished his wife. It is true that neither the word "ravish" nor the word "rape" is employed; but the description given of what occurred is consistent only with rape, and indeed might have been abstracted from a High Court indictment of that crime. Mr Aitchison for the pursuer frankly admitted that, if the evidence disclosed that the pursuer's wife consented to what happened, he would not be entitled to a verdict, because his averments postulate that she did not consent. He admitted that his interest to oppose the variation in the issue suggested by the defender is that, on the issue allowed by the Lord Ordinary, he would be entitled to a verdict if the jury took the view that intercourse was proved, even though they were doubtful whether it took place by force or with the consent of the pursuer's wife. The admission, in my judgment, destroys the argument. What does the admission imply? It implies that, whereas the averments of the pursuer exclude the theory of consent, he claims to be entitled to a verdict which does not exclude that theory, that, while he admits that he is not entitled to a verdict if consent be proved, he claims to be entitled to a verdict, even though it is possible that consent may have been given. In each case the verdict would contradict the record. This will not do. I quite recognise that it may be, and probably is, good strategy to make the record of a pursuer as comprehensive as possible, and then to seek an issue which undertakes to discharge an onus as light as

possible. But here the pursuer has pinned himself down by averment to one case and one case only, viz., that the defender ravished his wife. The issue must echo that averment, not evade it. The second alternative issue propounded by the defender in his motion to vary seems to me to reproduce the pursuer's case on record with accuracy and sufficiency, and I think that it should be substituted for the issue allowed by the Lord Ordinary.

I therefore suggest to your Lordships that we should hold (1) that the pursuer has a title to sue the action, and that his averments are relevant; (2) that the case should be remitted for jury trial; and (3) that the issue for the trial of the cause should run as follows:—"Whether on or about Saturday, 24th February 1923, and in or about the premises of the West Renfrew Motors, Limited, Port-Glasgow, the defender seized hold of the pursuer's wife and endeavoured to embrace her, and, in spite of her resistance to the utmost of her strength and her struggles and efforts to get free, succeeded in overcoming her resistance, and thus obtained carnal connection with the pursuer's wife, to the loss, injury, and damage of the pursuer."

LORD ORMIDALE—The defender pleads, *inter alia*, that the pursuer has no title to sue the present action, and that his claim for compensation is therefore irrelevant. It was maintained for him that in a case where a married woman has, against her will, been forced by a third party to have carnal connection with him, the sole right to insist on an action of damages for the outrage is vested in her. The Lord Ordinary has rejected this contention.

Incidents disclosing *res gestæ* similar to those averred here must be of the rarest possible occurrence, and it is not surprising, perhaps, that among the reported decisions of the civil Courts we do not find a precise precedent for an action like the present. On the other hand, there appears to be neither authority nor reason in principle for refusing to entertain such a plea as the husband here advances. In the case of his wife's adultery, however brought about, he is entitled to claim damages against her paramour, and the ultimate basis of his right is the fact of carnal intercourse. The Lord Chief Commissioner in *Baillie* v. *Bryson* (1 Mur. 317 at p. 334) says—"I take it to be a clear law, that it is the adultery, not the seduction, that is the criminal act on which the claim of damages is founded. The adultery is the fact founding the action. . . ." Again, it is not necessary that the husband should first divorce his wife before suing for damages—*Maxwell* v. *Montgomery*, M. 13,919; *Paterson* v. *Bone*, M. 13,920. In neither of these cases was the wife a party. Further, a husband may take his guilty wife back to cohabitation and continue to live with her and yet retain his right of redress—*Macdonald*, 12 R. 1327. This shows clearly enough that neither loss of society nor loss of services is necessary to instruct and found the husband's right to compensation. What constitutes the wrong is the violation, as Mr Aitchison put it, of the husband's right to the exclusive possession of his wife's person and the dishonour done to the marriage bed. Moreover, while it may be true, as I have said, that there is no precise decision in point, the case of *Charteris*, 1723, referred to in Hume on Crimes, vol. ii, 123, is dissimilar only in respect that the form and nature of the proceedings therein are not disclosed, the case not being reported; but, as the Lord Advocate had withdrawn his concourse, and the case involved no question of homicide, it must be regarded as analogous rather to an ordinary *actio injuriarum* than to an action of assythement. Looking to the context of his opinion in *Greenhorn* v. *Addie* (17 D. 860 at p. 861), Lord Deas apparently regarded it as a simple action of damages. The question under consideration was whether the right to sue for compensation when a relative had been fatally injured was open, as it was in a proper case of assythement, to collaterals. Lord Deas says—"Undoubtedly we are familiar with actions for *solatium* merely, not only at the instance of the individual directly aggrieved" (of which his Lordship then gives examples), "but likewise at the instance of certain relatives, as in the case of *Colonel Charteris* (mentioned in 2 Hume, 123), who, for attempting to ravish a married woman, was found liable to the husband in £300 of damages."

According to American law, as the Lord Ordinary points out, "one who commits a rape on the wife is liable to the husband's action"—Bishop's New Commentaries on Marriage, &c., vol. i, secs. 1365-6.

The law of England as indicated by the case of *Long* v. *Long and Johnson* (15 P. D. 218) points in the same direction. In that case, a petition for divorce, the jury found that the wife had been guilty of adultery with the co-respondent, and found the latter liable in £50 of damages. Holding that the issue of adultery was one for the Judge to determine, Mr Justice Butt, not being satisfied that the wife, who had not been called as a witness, had consented to the illicit intercourse which she had admitted to her husband had in fact taken place, directed her to be cited to attend. On being examined on oath, she stated that, on the only occasion libelled, she had been forced. Mr Justice Butt, being satisfied that this was the truth, refused to grant dissolution of the marriage, and following, as I read the report, a case in which the circumstances had been similar, dismissed the suit as against the wife, but gave judgment with costs against the co-respondent for the damages found by the jury. The case, in effect, was just the case presented by the pursuer here.

Pleas 1 and 2 for the defender, in my opinion, therefore fall to repelled. I further agree, for the reasons stated by your Lordship, that the action must go to trial by a jury and on the issue varied as your Lordship advises.

LORD HUNTER—I agree. It is well settled that a husband is entitled to maintain an

action against one who has committed adultery with his wife. That right of action is independent of the husband bringing an action of divorce against his wife or even of separating himself from his wife's company. In principle I see no reason why an action under those circumstances should lie at a husband's instance and not in a case where the wife's person has been taken possession of forcibly and against her will.

There does not appear to be any express decision upon the point, either in favour of the pursuer's contention or of the defender's contention; but I agree with your Lordship that such expression of opinion as is to be found in the books favours the pursuer's contention rather than the defender's contention.

As regards the form of the issue, I think, with your Lordship, that the form approved by the Lord Ordinary is not satisfactory. For my own part, I should have been satisfied with a simple issue as to whether the defender had ravished the pursuer's wife; but, as your Lordships think it better to have the issue expressed more nearly in exact consonance with the words employed by the pursuer relative to the incident of which he makes complaint, I do not differ.

LORD ANDERSON—The main contention of the reclaimer's counsel was that the pursuer had stated no relevant case, and that a husband had no title to bring an action of damages against the ravisher of his wife. It was maintained that, by the law of Scotland, a husband could bring an action for reparation only against the seducer of his wife. There is no authority which supports this contention. On the contrary, there is some Scottish authority against it. In the case of *Baillie* v. *Bryson* (1 Mur. 317) Lord Chief Commissioner Adam in charging the jury said (at p. 334)—"Before entering on the proof, I may state to you that I take it to be clear law, that it is the adultery, not the seduction, that is the criminal act on which the claim of damages is founded. The adultery is the fact founding the action, the seduction and gaining the affections of the wife may involve circumstances to be considered in aggravation of damages. In finding damages due, it is not necessary to find specially as to the seduction." Lord Fraser (Husband and Wife (2nd ed.), vol. ii, p. 1204), referring to this dictum, expresses an opinion to the same effect.

Considerations of principle also would seem to give the husband this remedy where his wife has been ravished. In most, if not in all, of the cases referred to by the Lord Ordinary, it is doubtless the fact that the circumstances disclose that the wife had been seduced. This simply means that she had not yielded at once, but that her virtue had been gradually undermined by seductive arts and wiles. It is plain that the real injury done to the husband was not that his wife had been subjected to seductive arts, but that the seducer had attained his purpose. The basis of the husband's claim seems to be that his bed has been dishonoured—that there has been violation of his right to the exclusive possession of his wife. The respondent's counsel maintained that a husband was entitled to sue for reparation in any case in which wrongful carnal intercourse had taken place with his wife. Thus, it was argued, he had this legal right of action where adultery had taken place by mutual consent or even where the woman had made all the advances. This contention, in my opinion, is well founded, and if that is so, it would seem to follow that this remedy is open to a husband in a case where his wife has been ravished. The wrong done to the husband is the same in this as in the other cases; his bed has been dishonoured. The wrong done to the husband would seem to be aggravated in the case of a rape. Hence, if the reclaimer's contention were well founded, this anomalous result would follow, that while the law gives a remedy for the lesser wrong it refuses it for the greater.

The reclaimer's counsel submitted two reasons which, they maintained, established their contention. (1) It was pointed out that, in a case of rape, a wife is entitled to sue for damages for the wrong which had been done. Where carnal intercourse had followed on her consent, she is obviously disentitled to sue for damages; in such a case the husband alone can sue for reparation. In the case of a rape, however, I am of opinion that the law gives a remedy to each spouse in respect of wrongs which are quite distinct. The ravished wife may sue in respect of the assault to which she has been subjected; the husband may sue for *solatium* for the wrong done to him in respect of the dishonour of his bed. In the case of rape, therefore, it seems to me that either spouse, or both, may sue the wrongdoer. (2) It was argued that it was against public policy to allow the husband to sue an action like the present. It was suggested that where the wife, the party most grievously injured, had taken no legal proceedings against the wrongdoer, it fell to be presumed that she refrained from suing in order to avoid publicity. These being her presumed wishes, it was maintained that, on the grounds of public policy, the husband ought not to be permitted to frustrate his wife's implied desires. I am unable to draw the suggested inference from the circumstance that the wife has not chosen to sue an action, and I cannot agree that any considerations of public policy compel a Court of law to deprive a husband of his right to obtain reparation from the ravisher of his wife.

I am therefore of opinion that the reclaiming note fails on the main argument which was submitted to us.

The action, in my opinion, must be tried by a jury, and I agree that, in the peculiar circumstances on which the action is based, the issue ought to take the form suggested by your Lordship.

The Court recalled the interlocutor reclaimed against; of new repelled the first and second pleas-in-law for the defender; varied the issue as proposed by the alternative of the notice of motion to vary and

approved of the issue as so varied, as the issue for the trial of the cause.

Counsel for the Defender and Reclaimer —Mackay, K.C.—Gilchrist. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Pursuer and Respondent —Aitchison, K.C.—King. Agents—Campbell & Smith, S.S.C.

Saturday, May 31.

FIRST DIVISION.

[Sheriff Court at Perth.

ROBBIE *v.* DAWES.

Expenses — Affiliation and Aliment—Constitution of Claim—Paternity Admitted and Aliment Paid Prior to Raising of Action.

The defender in an action of affiliation and aliment had admitted paternity before the action was raised, and had paid the inlying expenses and aliment as it became due at the rate concluded for, but had refused to bear the expense of a written agreement admitting paternity and undertaking to pay aliment. *Held* that the pursuer was entitled to decree of affiliation and aliment, but that as in the circumstances the action was merely one of constitution she was not entitled to expenses.

Rebecca Howe Laird Robbie, Perth, *pursuer*, brought an action in the Sheriff Court at Perth against Corporal F. C. Dawes, Army Pay Office, Perth, *defender*, in which she craved decree of affiliation and aliment in respect of a child which was born on 20th July 1923.

The averments of the parties were, *inter alia*—"(Cond. 4) Defender is the father of said child and has admitted paternity of said child, and has paid inlying expenses and aliment for one quarter at the rate sued for, to the extent of which sums so paid the pursuer restricts her claim. The defender has before and since the action was raised paid to the pursuer in all the sum of £9, 17s. in name of inlying expenses and aliment—(*Ans.* 4) Admitted that the defender admitted being the father of pursuer's child and paid the inlying expenses and first quarter's aliment previous to the action being raised. Explained that defender's agent wrote the pursuer's agent on 6th August 1923 enclosing £2, 18s. 6d., being the first quarter's aliment, the inlying expenses having been previously paid, and intimating that the future aliment would be paid through him. (Cond. 5) Pursuer desired defender to enter into a written extra-judicial agreement wherein he would admit paternity of said child and find and oblige himself to pay aliment at the rate claimed, and that he would bear the expense of said agreement, but defender refuses to enter into any such agreement—(*Ans.* 5) Admitted that the pursuer desired the defender to enter into a written extra-judicial agreement wherein he would admit paternity of said child and bind and oblige himself to pay aliment at the rate claimed, and that he would bear the expense of said agreement. *Quoad ultra* denied. Explained that on 6th September 1923 the defender's agent wrote the pursuer's agent that as the defender had 'admitted the paternity of pursuer's child, paid the inlying expenses, and will pay the future aliment through me, he does not see the necessity of incurring the expense of an agreement.' On 10th September 1923 the defender's agent wrote the pursuer's agent that if his client wished 'a written agreement or a decree of court she could have this at her own expense.' Again, on 27th September 1923 the defender's agent wrote the pursuer's agent that as his 'client had admitted the paternity he does not see the necessity of an agreement. If your client wishes same the expense must fall on her.' Pursuer is called upon to produce said letters. (Cond. 6) Defender is an Englishman at present on military service in Scotland, but amenable to the jurisdiction of the Scottish Courts. He may, however, at any time be removed on military service from Scotland, when pursuer would lose her remedy against him in the Scottish Courts. The pursuer believes and avers that defender in order to escape continued liability for and payment of the aliment due for said child contemplates leaving Scotland, and in consequence refused to enter into any extra-judicial agreement to aliment said child—(*Ans.* 6) Admitted that defender is an Englishman at present on military service in Scotland and subject to jurisdiction of the Scottish Courts. Explained there is no immediate prospect of defender being removed from Scotland. Pursuer's additional averments are denied."

The defender pleaded, *inter alia*—"1. The pursuer in respect of defender's admissions of paternity and payment of the inlying expenses and first quarter's aliment before the action was raised is bound to constitute her claim at her own expense."

On 16th January 1924 the Sheriff-Substitute (BOSWELL) decerned against the defender in terms of the crave of the initial writ and found the pursuer entitled to the expenses of bringing the action into Court, and to one guinea sterling of modified expenses in respect of subsequent procedure.

The defender appealed to the Sheriff (SANDEMAN), who on 25th February 1924 recalled the interlocutor of the Sheriff-Substitute, sustained the first plea-in-law for the defender, and dismissed the action, and found the pursuer liable to the defender in the expenses of the cause and of the appeal.

The pursuer appealed.

Counsel for the pursuer referred to the case of *Doyle* v. *Reilly*, 1919, 35 S.L.R. 271.

LORD PRESIDENT (CLYDE)—This is an action of affiliation and aliment which was brought in the Sheriff Court. The initial writ includes the usual declarator of paternity, a crave for a sum in name of inlying expenses, and for aliment for the child, and a further crave for expenses against the defender. On record, however, the pursuer