weeks after the regiment removed from Kingsale, which was in June 1724, and thereupon in July *Helen* must have been born.

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The appellant, in her libel, says, that she was married by Mr Martin Archer, afterwards by a doctor of the surname of Martin. If the appellant could have proved her marriage, she might have done so under the commission allowed for that purpose.

After hearing counsel,

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

For the Appellants, *Alex. Lockhart, Al. Forrester.*

For the Respondent, *Wm. Hamilton, Wm. Murray.*

[Fraser's Domestic Relations, Vol. i., p. 666.]

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STEDMAN *v.* STEDMAN.

JANET STEDMAN, wife of James Stedman of Kinross, ... *Appellant;*

JAMES STEDMAN of Kinross, . . . *Respondent.*

House of Lords, 6th May 1742.

DIVORCE—REMISSIO INJURIÆ.—Though a husband, who raises an action of divorce against his wife, on the ground of adultery, does not withdraw himself from his house, where his wife chooses to remain, after the summons is served on her, but eats and sleeps separately, under the same roof, he is not held to cohabit with, or to be reconciled to her, so as to raise the plea of *remissio injuriæ* as a bar to the action; and, therefore, that plea was, in this case, repelled.

An action of divorce on the ground of adultery, was raised by the respondent against the appellant, his wife, setting forth that he had been recently informed, and had the greatest reason to believe, that his wife had for several years been guilty of, and had committed acts of adultery with Charles Coupar, sheriff-clerk of Kinross, who had regularly every Sunday morning, after he had gone to church, come to his house and had connection with his wife. It was also mentioned, that criminal familiarities with Mr Coupar were said to have taken place in the most public places.

Upon hearing this, the respondent stated that he thought

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it proper to withdraw from her bed; and soon after he instituted his action of divorce before the Commissaries of Edinburgh. The libel set forth the acts of adultery, at particular times and places. The appellant was served with the summons on 14th July 1741.

In defence the appellant appeared (on 2d August), and pleaded, That since she had been summoned, at least since the respondent had received the information that moved him to institute the suit, he had cohabited with the appellant, and entertained her in his house, which she insisted was a sufficient bar in law to the action, as it implied a reconciliation, or *remissio injuriæ*. It was answered for the respondent, That, though she still lived with him under the same roof, yet, they had separate beds, and that cohabitation only, or sleeping under the same roof, could not imply remission of the offence.

The respondent was allowed a proof of his libel, and the appellant liberty to prove her defence.

Aug. 19, 1741. On the representation against this interlocutor, she insisted, that the cohabitation itself, that is, living together in the same house, after the suit commenced, was a passing from the action; and that this was sufficient, without carnal conversation, and, therefore, desiring leave to bring proof of their cohabitation since citation; but the Commissaries adhered to their former interlocutor, and repelled the defence proponed.

Sept. 7, 1741. Afterwards the appellant presented a petition, offering to prove, That after the false information received by the respondent, of her alleged guilt, he was perfectly reconciled to her, owned and treated her in every respect as a wife, intrusted her with the management of his family; that they were frequently in private by themselves, both night and day; that he was in the room with her in private by themselves, while she was in naked bed, with the door shut upon them, and that after the summons was executed he was in naked bed with the appellant. Answers having been given to this petition, the Com-

Sept. 16, 1741. missaries pronounced this interlocutor: "In regard the defence "of reconciliation was laid so strong in the petition, as to ex- "clude the libel, they, before answer, allow the appellant to "prove her defence as laid; and allow the respondent a con- "junct probation; and supersede taking proof of the libel till "the proof of the defence was concluded."

The proof was accordingly taken. It seemed to amount to this, 1st, That the appellant and respondent lived in the

same house, and slept under the same roof, for sometime after the summons of divorce was served, though they did not eat together, but separately, and lay in different beds. 2d, That the respondent was sometimes seen to go into the appellant's room; and they were sometimes seen talking together in the shop and bedchamber, sometimes in friendly manner—sometimes not. 3d, That the appellant sold in the shop, which the respondent kept, sugar, for which she received the money. And one witness said, that going in once to the respondent's house, she saw the respondent sitting on the side of his bed, while she was in it. Two witnesses (servants) stated in evidence, facts and circumstances that led to the conclusion, that carnal connection had taken place. One had seen the "respondent lying above the appellant."

On the other hand it was alleged, that this testimony could not be relied on, and was contradicted by every other article of evidence, and the whole tenor of the proof as led. It was proved, in particular, at that very time, that the respondent and appellant were both in a very different frame of mind towards each other.

The commissaries thereafter found, "that the defence of "reconciliation was *not proved*, and therefore repelled the Dec. 4, 1741.
"said defence, and allowed the respondent to prove his libel,
"and allowed the appellant a conjunct probation, as to all
"facts and circumstances that may exculpate, and granted
"diligence."

The appellant brought an advocation to the Court of Jan. 5, 1742.
Session. The Lords, on the report of the Lord Ordinary, refused the bill. And on reclaiming petition the Court Jan. 22, 1742.
adhered, and remitted the cause to the commissaries.

The Commissaries ordered a proof of the libel, whereupon the appellant brought a second advocation; the Lords remitted again to the Commissaries to proceed with the proof in the action of divorce, and with instructions to supersede the appellant's proof of alleged subornation, till that proof was completed.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—1st, As the charge upon the appellant was laid in so very general and uncertain a manner, that it was morally impossible any person could bring proof of facts, that inferred a negative of the charge; and as the appellant had full proof of some practices used to suborn witnesses against her, she could, without any admission of guilt, rely upon the legal defence of reconciliation or *remissio*

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injuriæ; and from her relying on that defence, it was not to be inferred that her innocence did not afford a sufficient defence, but that the contrivance of her enemies had rendered a defence, founded on her innocence, almost impracticable.

2d, The Commissaries and the Lords of Session ought to have found the *remissio injuriæ* sufficiently proved, as the evidence of the facts upon which it is founded would, in another case, have been sufficient to convict either of the married persons of a criminal conversation.

3d, The Court ought to have allowed the appellant to prove the practices used to suborn some persons to become witnesses in the cause.

Pleaded for the Respondent.—The plea of *remissio injuriæ* set up by the appellant at the very time the respondent was commencing and carrying on the suit, is in itself most improbable, unsupported by any credible proof, and inconsistent with what was proved by witnesses of undoubted veracity; and, from the manner in which it was first proposed, after the defence of cohabitation, though twice insisted upon, had been over-ruled, seems plainly to have been an after-thought of which the appellant was not apprised at the time she first appeared in this action.

2d, Her application to the Court for liberty to bring proof of several allegations, relative to the subornation and corrupting of witnesses, was only resorted to for the purpose of delay, and was in itself without foundation.

After hearing counsel,

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

For the Appellant, *Alex. Lockhart, W. Murray.*

For the Respondent, *Wm. Hamilton, C. Erskine.*

1743.

WEIR v. NAISMITH, &c.

WM. WEIR, Esq. of Waygateshaw, . *Appellant;*

ARTHUR NAISMITH, JOHN SYME, CHARLES HAMILTON, WM CULLEN, JAS. HAMILTON, WILLIAM ALLAN, and Others, } *Respondents.*

House of Lords, 3d March 1743.

RIOT—DAMAGES—MAGISTRATES OF BURGH.—At a time of famine, when meal was scarce, a riot took place in the burgh of Hamil-