

and mandatory had explained his own or his client's intentions, but his continued absence when the case was in the roll has left the Court without much necessary information, and with no alternative but to dispose of the main part of the case as in the interlocutor. His absences indicate also that there cannot be very urgent reasons for withdrawing the child from the care of the near relations with whom she has been for a considerable time, and who are willing and anxious to continue in charge of her. Nothing was said at the debates as to the prayer for interdict. The case is ordered to the roll to have that disposed of."

"*Glasgow, 22d October 1872.*—Having heard parties' procurators, in terms of the appointment in the interlocutor of the 18th inst., for the reasons stated in the Note, continues the interim interdict already granted, and declares the same perpetual: Finds the defenders entitled to half their costs; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report; and decerns.

"*Note.*—The Sheriff-Substitute, although with hesitation, thinks that the craving for interdict against removal of the child out of Lanarkshire is one of the proceedings covered by the mandate, since by means of it further proceedings for delivery of the child, in terms of mandate, may be raised effectually either in this Court or in the Court of Session, whereas the removal of the child might render such proceedings abortive.

"There is also considerable difficulty as to the craving for interdict against the defenders interfering with the child when recovered and in the custody of the party to whom the principal pursuer may entrust her. Seeing, however, that the defenders have no natural or legal right to custody of the child, and that subsequent measures taken under the mandate in question may be effectual, it is thought not to be incompetent to deal with that part of the case in anticipation of such proceedings. Only half costs have been allowed to the defenders, on account of their failure on the question of interdict."

The pursuer appealed against these interlocutors to the Sheriff, who pronounced the following interlocutor:—

"*Glasgow, 29th November 1872.*—Having heard parties' procurators on their respective appeals, and reviewed the whole process, finds that the defenders' appeal, in as far as directed against the interlocutor of 18th October last, is incompetent, in respect that said interlocutor disposed in part of the merits of the cause, and was therefore appealable; but no appeal having been lodged within the statutory period, it cannot now be brought under review: Finds, as regards the conclusions for interdict, which are dealt with by the interlocutor of 22d October last, that the conclusion for delivery of the child in question having been dismissed, the conclusion for interdict against the defenders' interference with said child when recovered and in the custody of another party is inept, and falls to be dismissed, and dismisses the same accordingly; finds that the conclusion for interdict against the defenders removing the child out of Lanarkshire is also in the circumstances unnecessary and nimious; but in respect it was stated for the defenders that they would not object to interdict against their taking the child out of Scotland, grants such interdict accordingly, and to the above extent restricts and alters the said interlocutor of 22d Octo-

ber; alters also as regards expenses, and finds the pursuer liable in two-thirds of the defenders' costs; *quoad ultra* adheres, and decerns."

The pursuer appealed to the Court of Session.

For him the following authorities were cited in support of the competency of the petition—Wallace's Principles, 283; *Goadby v. Maccandys*, F.C., July 7, 1815; *Speid v. Webster*, Dec. 18, 1821, 1 S. 221; *Harvey v. Harvey*, June 15, 1860, 22 D. 1198; *Hood v. Hood*, Jan. 24, 1871, 9 Macph. 451.

Counsel for the defender were not called upon.

The Court recalled the interlocutor of the Sheriff, and dismissed the petition.

Counsel for the Pursuer—Watson and Lang. Agents—Muir & Fleming, S.S.C.

Counsel for the Respondents—Fraser. Agents—Drummond & Mackenzie, S.S.C.

Tuesday January 14.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

HELLON v. HELLON.

Divorce—Mora.

Circumstances in which *held* that a party was not barred by *mora* from obtaining divorce, although ten years had elapsed between the knowledge of his wife's adultery and the institution of the action.

The circumstances of this case are fully set forth in the interlocutor of the Lord Ordinary.

"*Edinburgh, 2d November 1872.*—The Lord Ordinary having considered the closed record, proof adduced, and whole process—Finds facts, circumstances, and qualifications proved relevant to infer that the defender committed adultery with Henderson Carrick, mentioned in the record and proof: Finds her guilty of adultery accordingly; therefore divorces and separates the defender, Mary M'Ormon or Hellon, from the pursuer, Stephen Hellon, his society, fellowship, and company in all time coming: Further, finds and declares that the defender has forfeited all the rights and privileges of a lawful wife, and that the said pursuer is entitled to live single or marry any free woman, as if he had never been married to the defender, or as if she was naturally dead; and decerns.

"*Note.*—The circumstances of this case are peculiar. The parties were married in Glasgow in June 1852. The wife, who is the defender, had her residence in Glasgow at the time of the marriage, and she has resided there ever since. The husband, who is the pursuer of this action, appears to have been at the time of his marriage, and ever since, a seafaring man. It also appears that the pursuer, soon after his marriage, went to Australia, leaving his wife in Glasgow. It has not been said, and the proof shows that there would be no ground for saying, that in going to Australia the pursuer intended to abandon his wife. He went there apparently with the laudable desire of bettering his fortunes; and it has been proved that he for some time corresponded with his wife: that on at least one occasion he sent money to her from Australia, and also that he had expressed a desire that she should join him there. In place, however, of doing so, the defender, within three or four years after the pursuer

had gone to Australia, went to reside with a man called Henderson Carrick, a married man, but who had separated from his wife, and that she and that individual have until recently lived together, chiefly in Glasgow, as man and wife. It is proved that three children have been born of the intercourse between the defender and Carrick.

"On the other hand, the Lord Ordinary thinks that the proof sufficiently shows that the pursuer came to the knowledge of his wife's (the defender's,) misconduct, about ten years before the institution of this action. But then the proof also sufficiently shows, in the Lord Ordinary's opinion, that the pursuer was, during the time which intervened between his becoming aware of the misconduct of his wife and his instituting this action, engaged in the prosecution of his calling, in the command of vessels trading between various ports in Australia, Tasmania, and New Zealand. The Lord Ordinary thinks he may also assume from the whole evidence that it would have been very difficult, if not impossible, for the pursuer to have returned to this country sooner than he did, without serious injury to his business and pecuniary prospects. He returned in the spring of this year, and the present action was raised in July thereafter.

"The Lord Ordinary may further add, as a circumstance which appears to him to be clearly enough established by the proof, that the defender had it always in her power to ascertain, if she had desired, from the relations of the pursuer, all necessary information in regard to his whereabouts. There is no foundation whatever, so far as the Lord Ordinary can discover, for the statement in the defences, that the defender had made enquiries about the pursuers, and that the result of her enquiries had satisfied her that he was dead. No attempt indeed was made by the defender to support this statement by evidence of any kind, and she did not adduce any proof at all.

"In these circumstances, the defender's adultery is beyond all question, and it has not been disputed. The only plea in defence which was attempted to be supported in argument by the defender's counsel was that of *mora*, and the relevancy of this plea, in the sense in which it is explained by Professor Bell (Prin., sect. 1533), as meaning such long delay as may be held to import acquiescence on the part of the injured husband, or in other words *remissio injuriarum*, was not contested. But it was maintained by the pursuer's counsel that there was no room for the plea in the circumstances of the present case, and the Lord Ordinary being of opinion that the pursuer is right, has pronounced judgment accordingly. He is of opinion that the absence of the pursuer in Australia in the prosecution of his ordinary and lawful calling, when he first received intelligence of his wife's misconduct, is sufficient fairly to account for the delay which occurred in instituting the present action, without imputing to the pursuer that he acquiesced in such misconduct, or holding that he is now barred from obtaining the ordinary and appropriate redress against the misconduct, on the principle *remissio injuriarum*. The cases of *A. v. B.*, 20th July 1853, 15 D. 976, and *Duncan v. Maitland*, 9th March 1809, F.C., relied on by the defender, were essentially different in their circumstances from the present, and cannot therefore be held to be precedents in point. In these cases the injured parties stated no reasonable admissible excuse for the great delay they had allowed to occur after they had come to the full know-

ledge of all the circumstances and the bringing of their action; and, besides, in the case of *Duncan*, the injured husband, after coming to the knowledge of his wife's misconduct, continued for some time thereafter to cohabit with her."

The defender reclaimed.

Authorities cited—Bell's Principles, 1533; Tunning Haggard Eccles. Rep. 53; *Wemyss*, 4 Macph. 660; *A. v. B.* 15 D. 976; *Duncan v. Maitland*, March 9, 1809, F. C.

At advising—

LORD JUSTICE-CLERK—I am clear the authorities quoted as to acquiescence do not apply here, where the party was living in Australia and prosecuting his occupation. The plea of *mora* can only apply since the date of the husband's return, and this action was raised almost immediately. I am clear for adhering.

LORDS COWAN and BENHOLME concurred.

LORD NEAVES—I agree. I think that delay in the sense in which Bell uses it in the passage quoted from his Principles, must be such delay as to infer acquiescence: mere delay will not infer it.

Counsel for Pursuer—Scott. Agent—A. K. Morison, S.S.C.

Counsel for Defender—Rhind and Mair. Agents—Menzies & Cameron, S.S.C.

Tuesday, January 14.

FIRST DIVISION.

[Sheriff-court of Lanarkshire.

SINGER MANUFACTURING COMPANY v.
KIMBALL & MORTON.

Interdict—Trade Mark—Name of Maker used as Name of Machine.

Interdict at the instance of the Singer Manufacturing Company, who for a long time had used the name "Singer" to designate and identify these sewing machines manufactured by them, granted against another sewing machine company, who had sold and offered for sale machines made by themselves under the name of "Singers," "Singer Machines," and "Singer Sewing Machines."

Where articles manufactured by a particular company have become known in commerce under the name of that company, that name is in reality a trade mark, and no one who manufactures such articles has right to sell them under that name.

This was a petition for interdict, presented in the Sheriff-court of Lanarkshire by the Singer Manufacturing Company and others against Kimball & Morton, sewing machine makers in Glasgow. The following is the petition for interdict:—

"That the said Singer Company have carried on business as sewing machine makers for many years, at least since the year 1863, and have sold their machines as Singer Sewing Machines, and the said machines are universally and exclusively known in the market as Singer Sewing Machines, and under that name are extensively sold and of great repute.

"That the respondents have recently commenced to manufacture and sell, and are advertising and