

to take her back if and when the long delayed explanation which he had demanded should be forthcoming, and that he had not until then entirely abandoned hope of a reconciliation with her. . . .

If then the attitude of plaintiff towards his wife was what he testifies it was, and the jury must have found it to have been, what effect, if any, has the fact of his separation from his wife, unjustifiable as, in my opinion, it was, upon his right to recover in such an action as this against defendant for the adultery of which he was guilty in having, as admittedly he has had, sexual intercourse with plaintiff's wife on and after 23rd September, 1899.

It was at one time . . . held that such an action does not lie where, at the time the act of adultery is committed, husband and wife are living apart by mutual agreement, the ground . . . being that the criminal act is not the gist of the action, but that it is a civil action brought to recover satisfaction for a civil injury done to the husband, and that no injury is done to the husband who has voluntarily relinquished his wife, and cannot therefore be said to be deprived by the act of adultery of her comfort and society: *Weedon v. Timbrell*, 5 T. R. 357.

The authority of that case has been much shaken, I think, by what has been said and decided in subsequent cases, though the principle of it was applied as late as the year 1873 by Sir James Hannen in *Malcolmson v. Givins*, reported in the *London Times* of 27th February, 1873 . . . and by the Court of Queen's Bench in this Province in 1869 in *Patterson v. McGregor*, 28 U. C. R. 280. . . .

An examination of the pleadings (in the last mentioned case) . . . shews, I think, that they went further than did the defence in *Weedon v. Timbrell*, and alleged substantially what is spoken of by Alderson, J., in *Winter v. Henn*, 4 C. & P. 494, as a total and permanent giving up by the husband of all advantage to be derived from the society of his wife.

The authority of *Patterson v. McGregor*, so understood, is, I think, recognized by Osler, J.A., in *Bailey v. King*, 27 A. R. 703, where he quotes, apparently with approval, the language of Alderson, J., in *Winter v. Henn*. . . .

[Reference to *Evans v. Evans*, [1899] P. at pp. 198, 201, 202; *Izard v. Izard*, 14 P. D. at p. 46; *Gardner v. Gardner*, 17 Times L. R. 331; *Constantinidi v. Constantinidi*, [1903] P. 246.]