

Saturday, November 24, 1900.

OUTER HOUSE.

[Lord Low.

A B v. C D.

*Husband and Wife—Nullity of Marriage—Incapacity—No Proof of Physical or Structural Incapacity—Consummation impracticable from Causes beyond Control of Defender—Refusal to submit to Medical Examination.*

In an undefended action for declarator of nullity of marriage at the instance of a husband, held that, in order to warrant decree, it was not necessary to prove physical incapacity, either structural or functional, on the part of the defender, but that it was sufficient to show that, from causes, physical or moral, beyond her control, consummation of the marriage was impracticable.

*Circumstances* in which, applying this rule, decree of nullity of marriage was granted.

The parties to this action were married at X in India on November 9, 1898, the man A B being then twenty-five years of age, and the woman C D about twenty-seven. From November 9, 1898, the date of the marriage, to June 1899, they resided together in several houses in different places in India. From June 1898 to November 3, 1899, C D occupied a separate house up-country, where A B visited her three or four times, remaining a couple of nights on the occasion of each visit. On November 3, 1899, C D returned to Scotland, and since that date the parties had not resided together.

In this action A B, the pursuer, sought to have it declared that C D, the defender, was, at the time when the pretended marriage between them was entered into, and still was, impotent and unable to consummate the marriage, and that the said pretended marriage was and should be in all time coming null and void.

The action was undefended.

The pursuer averred—"The said marriage was never consummated. The pursuer frequently endeavoured to do so, but all attempts failed owing to the impotence of the defender, and her inability to have sexual intercourse with the pursuer. The defender has acknowledged to the pursuer her inability to have intercourse with him, or to live with him as his wife, and the pursuer is satisfied that any further attempt to consummate the marriage would be fruitless, owing to the incapacity of the defender. In these circumstances the pursuer desires to have the marriage annulled."

The pursuer pleaded—"The defender being impotent and unable to consummate her marriage with the pursuer by carnal intercourse, decree of declarator of nullity of the marriage ought to be pronounced as concluded for."

At the proof pursuer gave evidence to the following effect:—On the afternoon of the day of the marriage pursuer and defen-

der left on a journey up country, and travelled all night by rail. They were alone in a separate compartment all the way. No attempt was then made by the pursuer or wish expressed to consummate the marriage, and defender showed no desire for this either. The following night they stayed in an hotel, and occupied two beds in the same room. It was not unusual in India to find double bedrooms arranged in this way. The pursuer did not ask for a room with two beds when engaging a bedroom (which he did by letter). The beds were placed close together, but at the defender's wish they were separated, and placed one on each side of the fireplace. The defender assigned no reason for her request except that she said she did not like them close together. She was not very well that day, having been rather upset by the train journey, and complained of a headache, and the pursuer assented to her wish, and said or did nothing towards consummating the marriage that night. Next day the defender said she was quite well again, and that night the pursuer expressed a desire to consummate the marriage, and attempted to have intercourse with the defender, but she showed great repugnance to this, and exhibited so much passive resistance that the pursuer felt that nothing short of actual force would accomplish consummation, and he did not wish to resort to this. Pursuer and defender resided in the hotel for other three or four days. During part of that time defender complained again of not feeling well. On more than one occasion during their stay there the pursuer repeated the attempt to have intercourse with her and entirely failed. The defender showed the same repugnance to it, and passive resistance as before, and pursuer again felt that only physical force could accomplish it. Afterwards pursuer and defender stayed at the house of a friend. There they occupied separate beds pushed close together and made practically into one. Pursuer again attempted there to consummate the marriage, but this again was without result, as defender refused to have intercourse with him, and continued to exhibit the same invincible repugnance to it as before. After that time the defender complained of feeling out of sorts and general seediness, and the pursuer called in a doctor to see her, who said that her nervous system had got out of order. In the end of 1898 the pursuer and defender went to a furnished house which pursuer had taken. They occupied the same bedroom in the house for a few nights only, and slept in separate beds. The beds were placed on opposite sides of the room. During that time the pursuer asked the defender how long this sort of thing was going to last, and expressed the wish that they should now live as man and wife. She replied that she was very sorry, but that her feelings were too strong, and that she could not bring herself to have intercourse with him. After that they occupied separate rooms, and this continued until the month of June following, except for a night or

two, during a spell of cold weather, when defender occupied her own bed again in pursuer's room. During that time the pursuer spoke to defender several times on the subject of the consummation of the marriage, and asked her to allow this to take place, although he did not again use physical means to accomplish this. She, however, persistently refused, alleging that she was incapable of having connection with him. At the same time she expressed regret that this was so, and said that she knew it was wrong, but that she could not overcome her feelings of repugnance to it, and never would. In June 1899 the defender went up country for the hot weather, where she resided in a hotel till 3rd November 1899, when she returned to England. During that time pursuer went to see her three or four times and remained for a couple of nights (generally a week end) at a time, but they always occupied separate rooms. During almost the whole time defender was in India she complained of being more or less out of sorts, but she rode and hunted regularly, mixed a good deal in society, and went to race meetings, balls, and everything that was going on. At the same time she often saw her doctor, and he and another medical man whom she consulted told pursuer that defender's nervous system was out of order. For a month before she left for England she was not well, and towards the end of October the doctor advised that she should return to England at once if she were to avoid a serious illness. She came home to England, and was now quite well again. When defender was resident in the hotel up country pursuer wrote to her several times requesting her to consent to live with him as his wife, but she always made the same answer that she could not. He also verbally asked her to do so on at least one occasion when he went to see her there, with the same result. He wrote to her since her return to England to the same effect, both while he was still in India and since his return to this country in May last, but she persisted in her refusal. He produced the last letter of defender to him on the subject, dated 16th July 1900. The letter contained the following sentences—"I have received your letter of 9th inst. in which you ask me to live with you as your wife, tho' you said in a letter you wrote me from India you would not do so again. You ask me to make a trial of living with you as your wife for a short time, to see if it were possible to hit it off together, but as I have told you over and over again it is impossible for me to live with you as your wife. I trust you will spare me the pain of again refusing, as this decision is final, and has only been arrived at after serious consideration. I am very sorry, and hope you will forgive me for causing you so much trouble, but I cannot help my feelings." The marriage was never consummated to any extent, the defender having always refused to consent to this, and shown and stated an invincible repugnance to it or to live with the pursuer as his wife. The pursuer deponed that he was physically fit to consummate the

marriage, but this had been defeated by the resistance of the defender and her incapacity to have sexual intercourse with him. A medical certificate was produced that the pursuer's generative organs were absolutely normal in structure and function.

A member of the firm of law-agents who acted for the pursuer in the action deponed that before serving the summons personally upon the defender he asked her whether this would be necessary, or whether she would even yet agree to return to her husband and to live with him as his wife. She stated in reply that she could not bring herself to do so, and that nothing could shake her resolution on this point. The defender also stated that the marriage had never been consummated, and that since the date of her marriage she had always occupied a separate room from her husband, with the exception of a short period immediately after their marriage and another short period during the very cold weather in December 1898 or January 1899, when they occupied the same room but separate beds. She also said that she had frequently tried to bring herself to live with the pursuer as his wife, but that her physical repugnance to him in that way was so great that she could never do so. In other respects they had had no quarrel. In view of these statements he believed the defender's resolution to be final, and accordingly then served the summons upon her.

The mother of the defender deponed that during defender's stay with witness after her return to Scotland the defender told her that she had never lived with the pursuer as his wife, and that the marriage had never been consummated. She said she would not do so. She had apparently got to dislike her husband, and had evidently an unconquerable repugnance to intercourse with him and to living with him as his wife. She told her they had always occupied separate rooms in their house except for a few days.

Other evidence was led in general corroboration of the pursuer's evidence, and to the effect that the defender had stated to witnesses that the marriage was not consummated, and that her repugnance to living with the pursuer as his wife was such that it was physically impossible for her to get over it.

A letter from the defender to the agents of the pursuer was produced, in which she "absolutely refused" to submit herself to medical examination.

Argued for the pursuer—The marriage had not been consummated, but it was admitted that this circumstance did not warrant decree of nullity, unless it could be shown that the non-consummation arose from inability upon the part of the defender. Wilful refusal was not enough. Here the evidence clearly showed that the consummation was attributable to failure upon the part of the wife. The only question therefore was, whether the failure was due to obstinate refusal or to causes beyond her control. The cases showed that it was not necessary that there should be any physical impediment to intercourse if from other

causes consummation was impracticable—*G v. G*, 1871, L.R., 2 P. & D. 287; *H v. P*, 1873, L.R., 3 P. & D. 126; *F v. P*, 1897, 7 L.T. 193. In this case the defender had refused to submit to a medical examination. It was impossible to say therefore whether any physical impediment existed. The refusal to admit of intercourse might arise from a knowledge of such defect, or from moral causes beyond her control, or, on the other hand, might be wilful and obstinate. But the evidence all pointed to the second—moral inability—and in any event *in dubio*, and in the absence of any power to order a medical examination, the pursuer was entitled to the most favourable inference.

LORD LOW — I am satisfied that I may grant decree as concluded for. I proceed upon the authority of the English cases which have been cited. These cases satisfy me that it is not necessary that there should be physical incapacity, either structural or functional, in order to warrant a decree of nullity on the ground of inability to consummate marriage. It is sufficient that from causes, whether physical or moral, which are beyond the control of the parties, consummation is impracticable. In the present case I should have had difficulty in proceeding upon the uncorroborated evidence of the husband in regard to the marital relations of the parties. But I find that the defender, whilst refusing to submit to a medical examination, has written a letter to her husband in which she in effect admits the non-consummation of the marriage, and, whilst professing her regret, maintains that the obstacle is insuperable. I think that this letter sufficiently corroborates the evidence of the pursuer that the marriage has not been consummated, and that the non-consummation arises from incapacity on the part of the defender, and not from any wilful refusal to fulfil her marital duties. I therefore pronounce decree of nullity.

The Lord Ordinary granted decree of declarator of nullity of the marriage.

Counsel for the Pursuer — C. N. Johnston. Agents—Russell & Dunlop, W.S.

Friday, July 20, 1900.

## OUTER HOUSE.

[Lord Kyllachy.]

### GILMOUR v. SUTHERLAND.

*Salmon - Fishings — Glebe — Possession — Decennialis et Triennialis Possessio — Church.*

A, the proprietor of an estate situated on the north side of a sea loch and a river, held titles capable of covering the whole fishings on both sides of the loch and river *ex adverso* of his land, but neither he nor his authors had had such possession of the fishing on the south side as could construe his title as cover-

ing the fishings from the south side. On the south side of the loch and river, opposite A's estate, was situated the glebe of the minister of the parish. There was no trace of a formal designation of the glebe, and the minister had no feudal title to salmon-fishings; but the minister and his predecessors had, as part of the benefice, possessed from time immemorial the salmon-fishing from the south side of the loch and river *ex adverso* of the glebe. The Crown made no claim to the salmon-fishing on either side.

*Held*, in an action of declarator and interdict by A against the minister, (1) that A had the sole right of salmon-fishing in the loch and river from the north side of the said loch and river *ex adverso* of the glebe, and *interdict* granted against the minister fishing for salmon from said north side; and (2) that while the minister did not, apart from his position as a churchman, appear to be entitled to dispute A's right to fish from the south side, yet, as a churchman who had possessed the salmon-fishings in the loch and river from the south side *ex adverso* of the glebe for the requisite period as part of the benefice, he was entitled to the benefit of the rule *decennialis et triennialis possessor non tenetur docere de titulo*, and therefore must be presumed to have a valid title to fish for salmon in the loch and river from the south side *ex adverso* of the glebe, and *interdict* against his so doing *refused*.

William Ewing Gilmour, proprietor of the estate of Inverlael, in the county of Ross and Cromarty, brought an action against the Rev. William Sutherland, minister of the parish of Lochbroom in said county, and against the Lord Advocate, as acting for the Crown and the Commissioners of H.M. Woods and Forests for any interest he might have. The action was brought to have it declared that the pursuer had the only title to the salmon-fishings in the river Broom and in Loch Broom *ex adverso* of the glebe of Lochbroom, and that he had the sole and exclusive right of fishing for salmon in the said river and loch *ex adverso* of said glebe, and that the defender had no right of salmon-fishing in said river and loch *ex adverso* of said glebe, and should be interdicted from fishing for salmon therein; or alternatively, that the pursuer had the only title to the salmon-fishings from the north or right bank of said river and loch *ex adverso* of said glebe, and that the defender had no right of salmon-fishing from said bank in said river or loch *ex adverso* of said glebe, and should be interdicted from fishing for salmon from said bank in said river and loch *ex adverso* of said glebe.

The pursuer was proprietor of the estate of Inverlael, and was infert therein conform to disposition in his favour by Sir Arthur George Ramsay Mackenzie of Coul, Baronet, dated and recorded in May 1899, in which disposition the estate conveyed was described as follows—"All and whole