

The Court adhered.

Counsel for the Reclaimers (Pursuers)  
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Thursday, November 21.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

M'LENNAN v. M'LENNAN.

*Husband and Wife — Wife's Separate Estate—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21), sec. 5 Wife Living Apart from Husband — "With His Consent."*

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), section 5, enacts — "Where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

*Held (rev. judgment of the Lord Ordinary (SALVESEN), who had allowed the parties a proof) that where a husband had, as shown by his averments, acquiesced in his wife's living apart by taking no steps to end such relations, although he had protested, the wife was living apart "with his consent," and a petition to dispense with his consent to a deed dealing with her property, granted de plano.*

On July 12, 1907, Mrs Marion May Duncan or M'Donald or M'Lennan, Glasgow, wife of H. A. M'Lennan, wine and spirit merchant there, presented a petition under section 5 of the Married Women's Property (Scotland) Act 1881, in which she craved the Court to dispense with her husband's consent to such dispositions, assignations, or other deeds of transfer, as might be requisite to effectually convey to a purchaser a bill-posting business carried on by her, which she desired to dispose of owing to the state of her health, and for which she had received advantageous offers.

The husband, in answers to the petition, *inter alia*, averred—"1. Admitted that the petitioner is the wife of the respondent, and that their marriage took place on 19th June 1895. Explained that the marriage, at the request of the petitioner, took place secretly in London, that the petitioner made all the arrangements for said marriage, and that, at her earnest desire, knowledge of said marriage was concealed from relatives and friends on both sides, and, also at her request, the parties arranged after marriage to live as they had done before that event, each at their own residence, and each using their own names,

and appearing to the public as unmarried persons. The circumstances which led up to said marriage are of importance as explaining the subsequent conduct of parties. The respondent in 1888, when nineteen years of age, went to the Argentine, South America, to engage in cattle ranching. He returned in 1893 to Glasgow on a visit of three weeks. At that time he first met the petitioner, having been introduced to her by a mutual friend. The petitioner invited him to call upon her and he did so, and got every possible encouragement from her to spend time in her society. The result was that the parties became attached to one another, and before the respondent's three weeks' visit expired the parties became engaged to one another. At this date the respondent was twenty-four years of age and the petitioner a widow, and about forty years of age, of attractive personality, and a smart business woman. The petitioner was well aware at the time that the respondent had no independent income or business to enable him to set up house, and she herself had the business described in the petition, and other means. She was also aware that the respondent had been in the Argentine for several years earning his own living. The respondent was not aware of the petitioner's pecuniary position, and did not inquire, as his affection for her was too sincere. He knew that she carried on a billposting business, but understood this to be of trifling dimensions. The respondent thereafter returned to South America, but before going the petitioner made arrangements with him that on his return to Glasgow he would marry her.

"At the date of said engagement the petitioner explained to the respondent that, although she went by the name of Mrs M'Donald, she had also the name of Mrs Grieten, the latter being the name of a Frenchman, Mr Grieten, who was a musical composer, whom she had married after her former husband's death, but who had been unfaithful to her and ill-treated her, and whom she had divorced. She also said that her marriage to the respondent could not take place for some time, till the divorce became effectual. She clearly led the respondent to believe that Mr Grieten, who had managed her business for some years, had been her lawful husband, and the respondent, fully trusting her, felt sympathy with her for having been badly used. She also impressed upon respondent that she was very much afraid of Mr Grieten, who was still alive, and this made it necessary that she should continue to be known as Mrs M'Donald, and that their engagement should be kept secret. It now appears that the petitioner was never married to Mr Grieten, although she lived with him as husband and wife for several years, and she never required to and never did divorce him. In point of fact Grieten constantly blackmailed her, and she paid him hush-money to leave the country.

"The respondent returned to South America in December 1893, and remained there till he returned to Glasgow about April 1895. During his absence the parties

corresponded on affectionate terms. On the respondent's return to Glasgow in 1895, it was arranged that the parties should get married. As already stated, the marriage was wholly arranged by the petitioner, and carried out in London with the utmost secrecy. The reason the petitioner gave for such secrecy was her previous marriage to Grieten, and her fear of him, and also that her marrying a third time would hurt her billposting business, which had, she explained, been previously carried on by her first husband. She was at this date called by some of her friends Mrs M'Donald, and by others Mrs Grieten. The respondent being very much in love with the petitioner, and believing that she had been badly used by Grieten, allowed himself to be persuaded to keep their marriage secret, especially as he was returning to South America. After a brief honeymoon in London the parties returned to Glasgow, and in accordance with petitioner's request resumed, so far as the public were concerned, their former lives, though the respondent saw as much of the petitioner as possible, including visits to her at her coast house. No one, not even the parties' relatives, knew they were married.

"2 and 3. . . At the time of said marriage it was arranged that the respondent should return to South America at the close of the summer of 1895, and that the petitioner should, as soon as possible, dispose of her business and go out and join him as his acknowledged wife. The respondent acted as agreed on, and the parties corresponded on affectionate terms. The respondent pressed the petitioner to join him as promised, but she put him off, saying she could not dispose of her business. She never asked the respondent to set up house in this country, but always gave respondent to understand she would join him in South America.

"The respondent became dissatisfied with this state of affairs, and about the end of 1895 returned to this country and urged the petitioner to take up house either in South America or in this country, but she was decidedly opposed to the latter proposal, and said she could not possibly settle here on account of Grieten. It was then that for the first time the petitioner disclosed to the respondent that she had never been legally married to Grieten, although they had lived as husband and wife, and she had been known as Mrs Grieten. This disclosure caused the respondent great pain, and he threatened to leave the country on account of the petitioner's deceit. The petitioner implored the respondent to say nothing about the matter, and she used all her arts of persuasion and affection to get him to condone her deception. The respondent having a real love and affection for the petitioner, and she having acquired a great influence over him, ultimately agreed to let the matter pass.

"The petitioner still desired the marriage to be kept secret, urging as her reason her fear that Grieten would blackmail her. As the situation was so uncomfortable it

was arranged that the respondent should again return to South America, and the petitioner promised to join him there later on without fail. She did not do so, and the respondent being heartily sick of the position of matters, returned to this country in the early summer of 1896 to fix up matters one way or another. On his arrival he found his father, who was a wholesale wine and spirit merchant in Glasgow, in ill-health, and he had to enter his business, and on his death in November 1896, to take up that business and carry it on. The respondent always informed the petitioner of his affairs, and then again offered to take up house with her and let the marriage be known. The respondent repeatedly urged her to adopt this course, and end what he regarded as an intolerable position, but she always declined, and laid the greatest possible stress upon the consequences of the exposure of her past life with Grieten. The petitioner is by religion a Roman Catholic, and she also gave the respondent to understand that if her past life was known she would incur the displeasure of that Church.

"In the autumn of 1902 the petitioner informed the respondent she was going to South Africa for a trip, and consulted him about a will she proposed to make. The respondent informed her that she could do what she liked with her own money, and suggested the names of certain of her relatives whom she should not forget. The petitioner then informed the respondent that she did not intend to employ her Glasgow law agent, as it would never do for him to know she was married, and that she was going to Edinburgh to get a strange lawyer. She subsequently informed the respondent that she had consulted Messrs Cowan & Dalmahey, W.S., Edinburgh, had sworn one of the partners to secrecy, and got him personally to write out her will, so that there would be no chance of the secret leaking out. She also informed the respondent that said lawyer had told her that her husband should sign the will merely as a matter of form, and asked him to do so. The respondent informed her that he did not want to read the will or interfere in any way, but as she pressed him to sign, he resolved to consult a lawyer, having never previously asked legal advice as to his position. He accordingly consulted Mr Hugh Duncan, of Messrs Russell & Duncan, writers, Glasgow, in October 1902, and out of loyalty towards his wife put only an A B case before him, and was advised that in the circumstances the husband should not sign. He accordingly refused to do so, and this annoyed the petitioner.

". . . Admitted that the respondent is now a partner of the firm of M. Robin & Sons. Explained that the respondent has never been asked to contribute to the support of the petitioner, who has ample means of her own. Nor has the respondent ever asked the petitioner to contribute to his support. Specially denied that the respondent ever suggested that the petitioner should make

over to him one-half of her whole means and estate. In reference to the statements put on at revisal, specifically denied that the respondent's treatment of petitioner has in any way been cruel or unnatural, or that she in any way suffered in health. Reference is made to the foregoing answers. Admitted that in or about the year 1902 the petitioner gave the respondent the sum of £300 by way of loan for business purposes, interest on which she has never asked payment of. No other loan of money was ever asked by respondent. Denied, in particular, that the respondent ever suggested collusive divorce proceedings. On the contrary, explained that as recently as 9th July 1907, since these proceedings were instituted, the petitioner, after persistent pressure on her part, was accorded an interview with the respondent at his office, where, after professing great affection for him, she urged him to withdraw these answers. On being informed by the respondent that he was entirely guided by his lawyers the petitioner changed her tactics, and suggested to the respondent that he should commit adultery, and she would, on his giving her the opportunity, immediately start divorce proceedings. This suggestion the respondent indignantly scouted. . . .

"8. Denied that the petitioner has been deserted by the respondent. The petitioner and the respondent have all along been constantly in one another's society. Denied that she is living apart from him with his consent. Explained that, on the contrary, the respondent has all along objected to the petitioner's refusal to reside with him as husband and wife, and has persistently offered to make a home for her, and urged her to live openly with him as married persons."

On 6th November 1907 the Lord Ordinary (SALVESEN) allowed parties a proof.

*Opinion.*—"The petitioner in this case is the wife of the respondent, from whom she is living apart. She proposes to sell a bill-posting business which she has been carrying on for a number of years, and she has asked her husband's consent, so as to enable her to grant a valid conveyance to the purchaser. This consent he refuses to give; and the prayer of the petition is that the Court should dispense with his consent, and so enable her to deal with her property in the same way as if she were unmarried.

"The application is made in virtue of section 5 of the Married Women's Property (Scotland) Act 1881, the terms of which are quoted in the petition. It is a condition of the petitioner succeeding under this section that she should instruct either that she has been deserted by her husband, or is living apart from him with his consent; and her counsel urged me without inquiry to come to the conclusion that it sufficiently appeared from the pleadings that the petitioner was living apart from the respondent with his consent; and if so, that this was obviously a proper case for the Court exercising its power of superseding the respondent's curatorial rights. On the latter point I should not have much diffi-

culty, because I do not think it is a good reason why the husband should refuse his consent to the sale of the separate business carried on by his wife that she may thereby be enabled more readily to defeat any legal rights of succession that he might have in her estate if she predeceased. *Prima facie* the curatorial power of the husband ought to be exercised with a view to the wife's benefit and the protection of her estate, and not in order to protect his rights of possible succession, or, as the petitioner suggests, with a view to coercing her to make payment to him of a substantial sum of money as the price of his consent. It is admitted here that the petitioner is a clever business woman; and as she has managed this bill-posting business without her husband's interference with much success, it would seem that she may well be trusted to dispose of it on advantageous terms.

"The other question, however, is primarily one of fact, and I have to consider whether there are sufficient admissions by the respondent to justify me in holding that the petitioner is living apart from him with his consent. The Dean of Faculty, for the petitioner, maintained that it was sufficient for his purpose that there were no relevant averments in the answers that the petitioner had deserted her husband; and if so, it followed that she must be living apart from him with his consent in the sense that he acquiesced, whether reluctantly or not, in her so doing. I confess that I would gladly have reached that conclusion, because the broad facts of the case appear to be best explained on this footing. The parties were married in 1895, and since the end of 1896 they have been both resident in Glasgow; and both have had ample means to enable them to take up house together. They have been apparently seeing each other from time to time, and communicating on friendly terms, and yet all the time the petitioner has been living under the name of her first husband in her own house, while the respondent has been residing with his mother. On carefully considering the respondent's answers, however, I am unable to take that *prima facie* view of the case. He says that in November 1896 he 'again offered to take up house with her, and let the marriage be known. The respondent repeatedly urged her to adopt this course, and end what he regarded as an intolerable position, but she always declined.' Again, the respondent denies that the petitioner has been deserted by him; and his answers proceed as follows—'The petitioner and respondent have all along been constantly in one another's society. Denied that she is living apart from him with his consent. Explained that on the contrary the respondent has all along objected to the petitioner's refusal to reside with him as husband and wife, and has persistently offered to make a home for her, and urged her to live openly with him as married persons.' I was at first disposed to think that the absence of any allegation that the respondent had taken a house for his wife to which he had invited her to

come might indicate that his alleged offer was not such as she was bound to accept; but, on the other hand, it may well be that the respondent was not bound to interrupt his present mode of life or to go to the useless expense of taking and furnishing a house if he was assured that his wife would not join him there. I have therefore with some reluctance come to the conclusion that I cannot dispose of this application without inquiry; although I fully realise that it might be in the interests of both parties that many of the matters which are dealt with in the petition and answers should not be made public property."

The petitioner reclaimed, and argued—The petition should be granted *de plano*. The Lord Ordinary was in error in thinking that inquiry was necessary. It was enough if the parties were *de facto* living apart. The respondent in refusing consent to the sale was obviously acting in his own interests, and not in his curatorial capacity as his wife's guardian. That being so, his consent would more readily be dispensed with—*Bryce's Trustee*, March 2, 1878, 5 R. 722, at page 728, 15 S.L.R. 412. *Esto* that the respondent proved all that he averred, that would not be sufficient, for mere protests by him against their living apart were not enough—*Niven*, May 19, 1883, 20 S.L.R. 587. There was no averment that the petitioner was in desertion, and therefore the respondent's consent to their living apart must be presumed. The respondent ought to have insisted on his wife living with him, and given facilities for her doing so. He could, if necessary, have raised an action of adherence. The petitioner ought not to be compelled to prove negatively that she was not in desertion.

Argued for respondent—The Lord Ordinary was right. Proof was allowed in the case of *Niven* (*cit. supra*), and in that of *Gibson*, November 18, 1893, 1 S.L.T. 323. The respondent averred that he had put an end to their living apart with his consent. He averred four separate occasions on which he had pressed the petitioner to join him. The respondent was not bound to incur the expense of taking a house, aware, as he was, that his wife would not join him. She was the recalcitrant party, and that being so, section 5 of the Act of 1881 was inapplicable. The respondent was not bound to bring an action of adherence; it was sufficient if, as he averred, he had done all in his power to induce her to live with him. To read the words "living apart" in section 5 as meaning *de facto* living apart would lead to abuse, and that was not a construction which the Court would readily favour.

LORD PRESIDENT—This is an application to the Court by a married lady, who has for some years conducted a business, to dispense with the consent of her husband to a deed relating to that business, namely, a deed in which she proposes to sell it. Her husband has refused to give that consent, and she makes this application under the fifth section of the Married Women's Property Act of 1881. The answer that is

made by the husband, who appears, is that she is not within the words of that section, the words of the section being that where a wife is deserted by her husband or is living apart from him with his consent, then such dispensation may be granted by the Court. The husband says that she is not a wife who is either deserted by her husband or is living apart from him with his consent. The Lord Ordinary has thought it necessary to allow a proof upon that matter, but in the argument before your Lordships counsel for the petitioner have asked your Lordships' judgment upon the facts as disclosed by the respondent, her husband. That is to say, they are content to put their case as if everything which the respondent says in his answers were proved upon a proof. I think they are quite entitled to take that position, and I do not think that the respondent can ask that we should go through the trouble of a proof in order simply to put in the mouth of witnesses what he has put in his statement. He cannot expect to prove more than he has averred, and if what he has averred is taken for the purposes of the argument as true, it surely is not for him to complain. Taking all that is averred as absolutely true, it seems to me that this lady is in the position which is contemplated by section 5, because I think she is a wife who is living apart from her husband with his consent. The state of affairs, as disclosed by the husband's answers—and I look at nothing else—is that these parties, who were married secretly, have as a matter of fact never lived openly as husband and wife before the world. There were certain reasons as to why they should be married secretly originally. There may have been, and I assume that there was, a different view between the spouses at a subsequent time as to the cogency of these reasons as preventing a change of their position, and as preventing their taking up life as married people in the face of the world. Whatever the view may be as to who was right as to the cogency of the reasons, the fact is that no change was *de facto* made, and that this separate life went on just as it had commenced. In fact, as disclosed to us, the parties, except for a short honeymoon when they were married, have never lived together as man and wife, and according to the two tests of living as man and wife—that is to say, living at bed and board, as the expression is—they have lived at neither, although as a matter of fact they seem to have actually seen each other very frequently. It seems to me, when one looks at the section of the statute and the reason why it is put there, one sees that in a case of this sort the Court is not called upon to go into the matter in the way in which it would have to go into it in a purely consistorial case. That is to say, if parties were asking for divorce for desertion or for separation a different class of inquiry would require to be made. What seems to me to be considered by the statute is that the wife is *de facto* living apart from the husband, and that *de facto* the separation from the

husband is due either to the husband's desertion or to his consent, which I really think comes to no more than a *non renitentia* on the part of the husband to the state of affairs. It has been urged by Mr Fraser, and I take his statement as we are bound to do, that the husband on many occasions objected to this state of affairs; but I think the fallacy of the argument based thereupon rests in this, that a person may often consent to a thing to which he greatly objects and against which he protests. You may consent in fact to something which you do not at all like, and which you would much sooner have otherwise. Upon the circumstances as disclosed by the husband himself I think it is perfectly clear in this case that there was consent in fact by the husband to the wife living apart from him as she did.

In granting this petition your Lordships are really just exercising the curatorial power from the same point of view as the husband, and the only proper point of view of the husband in exercising his curatorial power is not how it will affect himself, but how it will affect his wife's interests. It is shown to us that this lady has had a successful business in the city, and not being in very good health she wishes to turn her business into money. That seems perfectly right from the point of view of the wife, and I cannot doubt that any prudent husband would give his consent. Accordingly I think we ought to recal the Lord Ordinary's interlocutor and grant the prayer of the petition.

LORD M'LAREN—I am of the same opinion.

LORD KINNEAR—I also agree with your Lordship.

LORD PEARSON—I concur.

The Court recalled the interlocutor reclaimed against and granted the prayer of the petition.

Counsel for Petitioner (Reclaimer)—Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Campbell & Smith, S.S.C.

Counsel for Respondent—Solicitor-General (Ure, K.C.)—M. P. Fraser. Agents—Patrick & James, S.S.C.

Thursday, November 21.

## FIRST DIVISION.

(EXCHEQUER CAUSE).

[Lord Johnston, Ordinary.]

EADIE AND OTHERS v. GLASGOW TOWN COUNCIL.

*Burgh—Common Good—Accounts—Objections—Timeous Lodging of Objections—Royal Burghs (Scotland) Act 1822 (3 Geo. IV, c. 91), secs. 3, 10—Royal Burghs (Scotland) Act 1833 (3 and 4 Will. IV, c. 76), sec. 32—Glasgow Municipal Act 1879 (42 and 43 Vict. c. cxxviii), sec. 10.*

The Royal Burghs (Scotland) Act

1822 provides that the accounts relating to the common good and revenues of royal burghs shall be made up annually on the day preceding the annual election of magistrates, and in sections 3 and 10 that any objections thereto must be lodged within a specified period thereafter. The Royal Burghs (Scotland) Act 1833, by section 32, provides for an account being made up on the 15th October. The Glasgow Municipal Act 1879 alters the date from 15th October to 31st May, and provides that no other annual accounts shall be required to be made up, but nothing is said as to the time within which objections are to be lodged.

*Held* that the Act of 1879 in altering the date for making up the accounts has not thereby altered the period prescribed by the Act of 1822 for lodging objections, and that objections to the accounts for the year ending 31st May 1906, which had been lodged in accordance with the "time-table" of the Act of 1822, had been timeously lodged.

*Burgh—Accounts—Vouchers—Production of Vouchers for All Sums Charged in the Accounts.*

In the abstract of a burgh's accounts appeared the entry—"Taxation of land values (suspense account), including £1142, 9s. 6d. spent during the year, £2457, 2s. 1d." Certain burgesses presented a petition and complaint in the Court of Exchequer against this entry. The corporation sought to have the order to be pronounced restricted to that for a detailed account, the production of vouchers altogether, or at least for sums spent in previous years, being dispensed with.

The Court ordered the production of vouchers.

*Process—Citation—Corporation—Citation by Individual Members—Disclaimer.*

A corporation may be cited either by its corporate name or by calling the individual members thereof in their representative capacity; and where a corporation is cited in the latter mode the individual members, being cited in their representative capacity, not as individuals, cannot disclaim or avoid being present so long as a majority of the corporation desire to defend.

The Royal Burghs (Scotland) Act 1822 (3 Geo. IV, cap. 91), commonly known as Sir William Rae's Act, which provides in section 1 for accounts of the Common Good and revenues of the Royal Burghs, made up to the day preceding the annual general election of the magistrates, being stated annually, in section 3 enacts—"And be it enacted that every such annual account shall be deposited in the office of the town-clerk of the burgh to which it appertains within three months after the annual election of the magistrates thereof; and such account shall remain there for thirty days after the expiration of the said three months, open to the inspection of the