ballast, but at any rate the other was an absolute impossibility. And why? Simply because the vessel was too large, and that fact appeared in the original charter-party. It is not disputed that a vessel capable of carrying 400 tons of cargo, as this one was, must have such a draught as to disable her when loaded from crossing the bar. When the defenders' agents made this sub-charter-party they committed a breach of contract with the pursuers, for under it the ship was to do an impossibility. That was not providing a homeward cargo. It put the master of the vessel in a very great difficulty. Instead of giving him a cargo they brought him into a state of contention with Moreira, Irmao, & Co., the sub-charterers, and the upshot of what they did was that Moreira & Co. say—"You may go to Estancia and load as much as you can take away over the bar, but we will allow nothing for dead freight. This was not a proposal to which the pursuers were bound to assent. They were entitled to a full cargo, and that was not provided. For it is impossible to say that a charter-party is fulfilled by providing a cargo which the ship cannot reach.

As regards the question whether the master was not bound to have stated his objection at Santos, all I can say is that I entirely agree with the view taken by the Lord Ordinary. I think the master was entitled to rely on the defenders' agents knowing the port, and when they made the sub-charter-party they must have known about the place. Charpentier was not, I think, entitled to assume that they were ignorant of the port, and to proceed on the word of a person who told him that he could not get there.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Balfour—Robertson. Agents—Wright & Johnston, L.A.

Counsel for Defenders (Reclaimers)—Kinnear—Mackintosh. Agents—J. & J. Ross, W.S.

Friday, July 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

GRAHAM *v.* GRAHAM.

Husband and Wife—Separation a mensa et thoro *— Violence Necessary to Justify.*

The Court will give decree of separation *a mensa et thoro* where there is reasonable apprehension from the past history of the parties that if the wife were ordered to return to her husband some serious violence might thereafter be used against her.

Husband and Wife—Cruelty of Husband—Condonation.

When a wife comes into Court complaining of her husband's violence, that opens up the history of their whole married life, and the fact that the wife, after leaving the husband some years previously on account of his violence, subsequently returned to him, does not shut out from the consideration of the Court the previous acts of violence, although these acts cannot by themselves be made the ground of an action for separation.

This was an action of separation and aliment raised by Mrs Janet Spence or Graham against her husband Thomas Graham. They had been married in 1839, and had had four children. The ground of action was cruelty, and the pursuer founded on various acts of violence, going back to within three months of their marriage, and coming down to July 21, 1877. The defender pleaded that the statements were unfounded, and further, that the pursuer having returned to the defender's society, and having been completely reconciled to him, was not entitled to found on any alleged facts prior to the date of the reconciliation.

It appeared from the proof led in the case that there had been quarrels between the parties all through their married life, and that in 1871 the pursuer had left the defender's house, accompanied by her children, in apprehension of a renewal of recent violent conduct, and raised an action of separation against her husband. But in consequence of various promises made to her she had abandoned her resolution of living apart from him, and had returned to her husband's house, giving up the action. In 1876 the defender had resumed his violent conduct, and again on a day in 1877 had used threats of serious violence to her.

The Lord Ordinary gave decree of separation as craved, and £120 a-year of aliment, adding this note to his interlocutor:—

"*Note.*—The pursuer and defender have been married for nearly thirty-nine years. They have four grown-up children. Their married life has been rendered unhappy by repeated quarrels, which have now culminated in the present proceedings.

"The defender appears to have a sincere affection for his wife, and to have been very generous to his children, but, unfortunately, he has a very irritable temper, which he cannot control, and he becomes violent when irritated. The Lord Ordinary thinks that if the pursuer, knowing the irritable temper of her husband, had shown more forbearance towards him than she did, many of their numerous quarrels might have been avoided. The result has been that on more than one occasion she has previously left his house. The last of these occasions was in January 1871, but she returned to live with him in May of that year.

"The Lord Ordinary entertains no doubt that, in consequence of his violent conduct towards her she was then justified in leaving him, and that if the proceedings which she then commenced against him had been insisted in she would have obtained a judicial separation.

"But she was then induced to return to live with him, and the question now is, whether what has since occurred is sufficient to justify the Court in pronouncing a decree of separation?

"In 1875 they went to live at the Bridge of Allan.

"Two instances of violence by the defender towards the pursuer are alleged to have occurred there—one in the summer of 1876, and the other on the 21st of July 1877—which led to the pursuer leaving the defender's house.

"On the first of these occasions there was a quarrel about a very small matter, when the defender became irritated and violent, and seized

the pursuer by the arm and shoved her forcibly out of the bedroom. In doing so her arm was considerably injured by being crushed between the door and the side-post. The pursuer alleges that this was done intentionally; but the Lord Ordinary does not think so. He thinks the injury was accidental, although no doubt it was caused by the reckless way in which the defender closed the door while putting out the pursuer.

"The pursuer then intended to leave her husband, but was induced by her daughters to remain.

"On the 21st July 1877 there was again a quarrel between them, when the defender again became violent, and although he used no personal violence to the pursuer he appears to have threatened to do so, and to have used language of a violent description.

"The parties did not make up this quarrel, and the pursuer next day left his house.

"No other instances of violence are alleged to have occurred subsequent to 1871, but the pursuer complains generally of the defender's conduct to her. Had the Lord Ordinary only to consider the defender's conduct subsequent to 1871 he does not think it would have warranted a decree of separation, but read in the light of the history of their previous married life it assumes a different aspect.

"Having regard to the repeated instances of previous personal violence by the defender towards the pursuer, which the Lord Ordinary thinks are proved, he is of opinion that the pursuer was under a reasonable apprehension of danger to her person when she finally left him. He thinks that the defender's temper is so violent when irritated, and that he is so easily irritated, that further cohabitation between them would be unsafe, and that it is his duty to pronounce a decree of separation. The Lord Ordinary has already said that he does not think the pursuer has exhibited that amount of forbearance towards her husband which she might and ought to have done. But he cannot say that her conduct was such as to justify the conduct of her husband towards her, or to disentitle her to the remedy which the Lord Ordinary has given her.

"With reference to the amount of aliment to be awarded to the pursuer, the defender has already made over to his children, in compliance with the desires of his wife, the greater part of his property, for which they did not appear to the Lord Ordinary to be sufficiently grateful.

"The defender has still, however, an income of about £450 a-year. Having regard to the social position of the pursuer, it appears to the Lord Ordinary that a sum of £120 per annum will be a sufficient allowance for her."

The defender reclaimed.

At advising—

Lord President — Whenever the Court is called upon to decree a separation *a mensa et thoro* on the ground of what for brevity's sake has been called cruelty, it has a very difficult duty to discharge. This arises from the great difficulty of finding any precise definition of the ground of action necessary to sustain such a demand. It is quite settled that personal violence is enough. It is quite settled that something short of personal violence is enough. But the Court occasionally, as we have been taught by the highest authority, allows feeling to get the better of judgment in deciding at what point short of personal violence maltreatment will justify a decree of separation.

Now, I know no better exposition of the law on this subject than that given by Lord Brougham in the case of *Paterson* v. *Russell*, 7 Bell's App. 363, and I take that as the best we have. He says,—"Personal violence, as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health—these are both by the law of Scotland and England a sufficient ground for divorce *a mensa et thoro*. Furthermore, any conduct towards the wife which leads to any injury either creating danger to her life or danger to her health, that too must be taken as regarded by the law of Scotland and by the law of England a sufficient ground for divorce."

Taking that as our guide, the circumstances here may be summed up without much difficulty. These spouses have certainly not had a happy life, and I agree with the Lord Ordinary in thinking that the faults are not entirely on one side; for while the husband is of a violent and irritable temper, it is by no means clear that the wife treated such a husband in the way she was bound to treat him. It is also quite clear that on several occasions the violence on the part of the husband quite came up to what Lord Brougham calls conduct "which leads to an injury either creating danger to life or danger to health." No doubt that conduct is not very recent. That had occurred before 1871, and in January 1871 she left home, and I agree with the Lord Ordinary in thinking that if she had then instituted proceedings she would have succeeded in obtaining a judicial separation.

Now, that advances us a very important step towards approval of the Lord Ordinary's interlocutor. It is quite true that the wife condoned these acts of violence by coming back to him. But "condone" is a misleading term, for in actions for divorce on the ground of adultery any act of infidelity, if condoned, is wiped out and can never be referred to again, just as if it had never taken place; but when a wife comes into Court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed before she went back cannot form the sole foundation of an action of separation, they may form the subject of an investigation with a view to determine what is the true issue of this case, viz., Whether the wife has such reasonable ground for apprehension of violence as to make it advisable that she should not be forced to go back to her husband? Because not only are they indications of what the man's temper and habits are, but they also show what may be the result of still continuing to live with him if there have been acts of recent occurrence although they may not be of the same type. So that we are quite entitled to take into account the previous acts of violence, even before 1871, in connection with the acts of 1876 and 1877. That of 1876 is of a somewhat ambiguous nature, for although the wife sustained a considerable injury, and that injury was the direct result of her husband's violence, there is

no evidence that it was his intention or object to inflict it. Then in 1877 we find threats of very serious violence indeed used. The question I put to myself then is this—Is it safe for this woman to live in the same house with her husband, or will the result of her doing so not probably be some very aggravated act of violence? It would be a very serious matter if we were to order these married persons to live together, and then some act of violence, which I need not particularise, were to occur. I think that the acts spoken to make it dangerous for these parties to live together, and therefore I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—In an action for the separation of man and wife on account of maltreatment there is not the same room for the plea of condonation as in an action for divorce on the ground of adultery. On the contrary, we are entitled and bound to look to the whole previous history of the married persons. Taking this case in that view, it is right and proper that these parties should be separated. If we were to decree that the wife should go back to her husband, we have no guarantee that some very serious evil might not result. It is quite plain that this woman was in apprehension—reasonable apprehension—of the safety of her person and life. An individual of such a temper as was displayed by her husband might very well on the next occasion go a step further, for there is no indication that he was gaining command of his temper as he grew older. Perhaps that was not to be expected. One thing that satisfies me of her being in bodily fear is the anxiety she displayed that his mother—her husband's mother—should not leave the house.

Lord Mure—This case is an important one and a delicate one, but I see no reason to differ from the result arrived at by the Lord Ordinary and your Lordships.

There is a considerable interval between 1870–71 and 1876–77, when the final disputes arose, and there is a gap in the evidence as to the married life in that period. The facts proved to have occurred previous to 1870 would have warranted a separation. The facts said to have occurred since that are not so distinctly proved. The Lord Ordinary says he thinks the more serious of these acts is not made out. I am disposed to take a different view. It is really a matter for inference whether it was through the direct act of the defender that the pursuer got her arm severely injured, and whether accordingly that gave ground for reasonable apprehension that similar acts might occur again. His account of it—that as she was going out of the room he accidentally shut the door on her arm—is extremely improbable, and I think that if that act of violence is proved, then upon the authorities we have violence of a character sufficient to create a reasonable apprehension of danger, and to justify the pursuer in taking the step she has done.

Lord Shand—The peculiarity of this case is that parties after quarrelling with each other were re-united in 1871 and lived for a considerable time without any open scenes of violence. Now I entertain no doubt that it is impossible to shut one's eyes to what had occurred before this in order to get a true view of the more recent acts of violence. The inference I draw from the proof is that the pursuer had reason to dread from past acts of violence that some new act might readily occur tending to severe bodily injury, and accordingly I think she was justified in doing what she did.

As to the amount of aliment awarded by the Lord Ordinary, I think that is reasonable, especially having regard to the fact that the defender has recently been relieved of a burden of £50 payable by him to his mother.

The Court adhered.

Counsel for Pursuers—Trayner—J. A. Reid. Agent—Henry Buchan, S.S.C.
Counsel for Defender — Asher — Thorburn. Agents—Boyd, Macdonald, & Co., S.S.C.

Saturday, July 20.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

STEWART *v.* BUNTEN AND OTHERS.

Property—Restriction against Building above a Certain Height—Right to Enforce where other Restrictions departed from.

If a proprietor in a row of houses wishes their symmetry in height or otherwise to be maintained, and if there is a sufficient stipulation to this effect in his title, it will be enforced though the restriction be no longer necessary or reasonable and the interest to enforce it be merely æsthetical, and it will be no good answer that other building stipulations equally enforceable have been contravened without exception being taken, for in such a case acquiescence goes no further than the thing acquiesced in.

This action was raised by John Stewart against James Bunten and others, and the summons concluded for declarator that the pursuer was "entitled to raise the three lodgings in Bath Street, Glasgow, Nos. 156 to 164 inclusive, belonging to him, to the height of three square storeys, besides a sunk storey in front, by building an additional storey or part of a storey thereon," and that the defenders "had no right or title to prevent him from so raising the said lodgings and building the said additional storey or part of a storey thereon."

James Croil in 1829 had acquired in feu from the Blythswood trustees a steading of ground on the south side of what afterwards formed one of the divisions of Bath Street, Glasgow. That ground was afterwards occupied by seven houses, of which the westmost belonged to the defender Bunten (who alone appeared), while the pursuer Stewart was proprietor of three, being the three eastmost but one. They had been erected about 1830. The two corner houses were of three storeys and one sunk storey to the front. The five centre houses were of two storeys to the front and a sunk storey. The height of all to the back was the same, viz., four square storeys. Croil had sold the whole steading to James Auchie, but the latter had never made up any feudal title except to the eastmost stance. Auchie had sold the remaining stances to John