

the City of Glasgow Act 1891; 4th, that the said road is a private street within the meaning of the Glasgow Police Acts 1866 to 1900; 5th., that the respondents have been required by the Master of Works in terms of section 318 of the Glasgow Police Act 1866, and section 30 of the Glasgow Building Regulations Act 1900, to repair the defective portion of the roof of the culvert in said road with incombustible material in a secure and tradesmanlike manner and make good the roadway with a suitable material to a uniform level, and that the respondents decline to do so: Find in law that the respondents are bound to repair the said defective portion of the roof of the culvert in said road as required by the Master of Works and are liable for the cost of such repair: Remit to the Dean of Guild Court to grant warrant to execute the work specified in the said notice failing the respondents executing that work within fourteen days from the date of signing this interlocutor, and to ascertain and fix the cost thereof, and to decern against the respondents therefor: Find the appellant entitled to expenses both in this and in the Dean of Guild Court, and remit," &c.

Counsel for the Petitioner and Appellant—Dundas, K.C.—Lees, K.C. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents—Salvesen, K.C.—Cullen. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, March 6.

## FIRST DIVISION.

[Lord Low, Ordinary.]

EDGAR v. EDGAR.

*Husband and Wife—Divorce—Adultery—Condonation.*

In an action of divorce for adultery at the instance of a husband, the wife pleaded condonation. The pursuer, who was a warehouseman living in a house of two rooms and kitchen, had received the defender back into his house after the acts of infidelity libelled had come to his knowledge, but he explained that he had done so solely for the purpose of supporting her, and they had slept in separate rooms. His reasons for receiving her back were that the parochial authorities insisted upon his providing for her, that she was then pregnant, and that he had no money to pay for her maintenance elsewhere than in his own house. The defender was in the habit of taking drink to excess. About two months after the birth of her child the wife left her husband's house of her own accord. The Court held

that connection was not proved to have taken place between the spouses during the period in question. *Held* that the plea of condonation had not been established.

*Opinions* (per Lord President and Lord M'Laren) that there might be circumstances from which condonation would be inferred without connection having taken place.

This was an action of divorce for adultery at the instance of John Edgar, 3 Gibson Street, Edinburgh, against his wife Mrs Eleanor Ross or Edgar.

The pursuer averred that on or about 4th and 5th April 1900 the defender committed adultery with a man named John Macdonald at 3 Gibson Street and at 14 Cannon Street.

The defender denied the acts of adultery alleged.

She also pleaded "(2) *Separatim*—condonation."

The Court ultimately found that adultery was proved.

The facts with reference to the defence of condonation were as follows:—The pursuer was a warehouseman, and at the time in question lived in a house of two rooms and kitchen. The defender was in the habit of taking drink to excess. On 4th April 1900, being the day upon which the first act of adultery libelled was alleged to have taken place, the defender, in consequence as she asserted of her husband's cruelty, left the pursuer's house and went to the house of a friend, Mrs Macdonald, with whom she stayed till 8th April. Thereafter she went to stay with a Mrs Jameson, at 3 East Cromwell Street, Leith, with whom she lived for a week, after which she went to the Leith Poorhouse, where she stayed for a fortnight. Meantime, on 19th April 1900 the pursuer had received information from Mrs Macdonald which induced him to believe that the defender had been guilty of adultery, and to resolve that he would not live with her as his wife.

About the beginning of May the parochial authorities communicated with the pursuer and insisted on his removing the defender and providing for her. The defender was then far gone in pregnancy, and it was not suggested that the pursuer was not the father of the child with which she was pregnant. The pursuer in consequence of the demands of the parochial authorities and his wife's condition, and because he had not much money to keep her elsewhere, took the defender back to his house, to which she returned on 8th May. With reference to what took place upon her return there was a conflict of evidence. The pursuer deponed that he taxed his wife with committing adultery on the occasions libelled, that she ultimately admitted the accusation, that he then told her he would have nothing more to do with her as a wife, meaning that he would support her in his house, but that he would not cohabit with her, and that he had never had connection with her after she left the house in April. The defender,

on the other hand, deponed that the pursuer said nothing about adultery when she came back, that he had connection with her that night, that about a fortnight afterwards he accused her of adultery with Macdonald, that she denied it, and never either then or at any time confessed it. There was no one else in the house when the defender returned. After her return the defender did not sleep with the pursuer but with a daughter in the kitchen.

The defender's child was born on 11th June 1900. Thereafter she continued to live on in her husband's house till she left of her own accord on 11th August 1900. She deponed that about six weeks after the birth of the child the pursuer had connection with her, that about the same time she spoke to her husband about his having accused her of adultery, and that he said "that was all bye." The pursuer also deponed that the defender had connection with her upon two subsequent occasions. The pursuer denied that he had either had connection with the defender or had forgiven her.

The Court held that connection was not proved to have taken place between the pursuer and defender after the pursuer heard about the acts of adultery libelled.

The defender ultimately left the pursuer's house while he was away on a holiday. Her reason for leaving was that in her husband's absence she had run up an account and pawned some things to get drink, and that she was afraid to face him.

With regard to the footing upon which the defender was received back in May, a daughter of the pursuer and defender, aged twenty-two, examined for the pursuer, deponed as follows:—"I remember her returning from the poorhouse to our house on the 8th day of May, about a month afterwards. I was not in when my mother returned; my father had told me to go out. He said that he wanted to receive her himself. That night my mother slept in the kitchen with me, and always afterwards I slept with my mother in the kitchen as long as she remained in my father's house. *Cross.*— . . . I heard or saw nothing of my mother from the 4th of April until the night she returned. (Q) From the time of her return until August did you notice anything different in your father's treatment of your mother from what had gone on before?—(A) He was just the same. I saw nothing different in my mother's position from what it had been for years. She took charge of the house when she was sober, and acted as head of the household just as much as she had done previously. Our house consisted of two rooms, a kitchen, and a bed-closet. Before the time to which I have referred my mother had frequently slept with me in the kitchen; she used always to sleep in the kitchen before she left. That had been the custom for years."

By interlocutor dated 12th November 1901 the Lord Ordinary (Low) found the defender guilty of adultery and granted decree of divorce as craved.

*Note.*— . . . "There remains the question of condonation, which is not without difficulty. The reception by the pursuer of the defender into his house after he had good reason to believe that she had been unfaithful seems to me to be sufficiently explained. The defender was destitute and was in the poorhouse, and the local authorities had required the pursuer to remove her. She was also far advanced in pregnancy and the pursuer had no reason to suppose that he was not the father of the child of which she was pregnant. I therefore do not think that the fact that the pursuer received the defender into his house in such circumstances, and allowed her to remain there until after her confinement can be regarded as implying condonation.

"After the defender had recovered from her confinement however the pursuer allowed her to remain in his house until she left of her own accord about the 11th of August. The pursuer however said that with the view of instituting proceedings for divorce he had instructed his law-agent to attempt to ascertain where Macdonald, who had disappeared, was. In such circumstances I am of opinion that it did not amount to condonation for the pursuer to allow the defender to remain in his house in the meantime. She was still his wife, and it is plain that if he had turned her out she would have spent any allowance which he gave her in drink, and would speedily have fallen into destitution and probably crime. The defender however says that upon several occasions the pursuer had connection with her. On the other hand it is proved that the pursuer never occupied the same room with her after her return, and he swears that there was no intercourse between them. That is a matter upon which no one can have any knowledge except the parties themselves, and as the pursuer appeared to me to be an extremely honest witness, which is more than I can say for the defender, it seems to me that I must act upon what I believe to be the truth of the case.

"I shall therefore grant decree of divorce."

The defender reclaimed, and argued—it was enough to support a plea of condonation if a husband received his wife back into his home and put her in the same position as before, even though it was not proved that there had been sexual intercourse subsequent to his becoming aware of her infidelity—Fraser, Husband and Wife, ii., p. 1176. Here there was also evidence that connection had taken place after the defender's return.

Counsel for the respondent was not called upon.

LORD PRESIDENT—[After dealing with the facts relating to the alleged acts of adultery, and stating that he had come to the same conclusion as the Lord Ordinary, his Lordship proceeded]—The next question is, whether there has been anything in the conduct of the husband which can reasonably be represented as evidence of condonation, that is, of full forgiveness for the wife's adultery.

It is said that the pursuer had sexual intercourse with the defender after he knew of her adultery, but I do not think that this is established by the proof. The question has also been raised, whether sexual intercourse is essential to establish condonation? I am aware that different opinions have been expressed upon this question, and it is sufficient to say that I am not at present satisfied that it is essential, if there is otherwise adequate evidence of full forgiveness.

If, for example, a man, in a different station in life, in full knowledge of his wife's adultery, took her back to live with him in his house, placed her at the head of his table, and gave her the full control of his household, went about with her as his wife, and invited his friends to meet her at his house, this might not unreasonably be regarded as unequivocal evidence that he had fully forgiven her offence. There is, however, nothing in this case to indicate that the pursuer took the defender back to live with him as his wife. He appears rather to have allowed her to come to his house only out of pity, when the parochial authorities had refused to afford her shelter any longer. She appears to have slept with the eldest daughter, and there is no evidence that he lived with her at bed and board as his wife, or did anything to indicate that he had forgiven the wrong which she had done to him.

LORD M'LAREN—[*After dealing with the facts relating to the acts of adultery founded upon, in regard to which his Lordship stated that he agreed with the Lord President, his Lordship proceeded as follows*]:—A more interesting question is the point raised as to condonation. I agree that there may be different ways of forgiving an injury of this kind. As at present advised, I have no doubt as to the validity of a discharge of his right by a husband who in full knowledge of all circumstances binds himself not to take proceedings for divorce, and at the same time makes it a condition that his wife should live separate from him. I think also that if in knowledge of the circumstances a husband restores his erring wife to her position at the head of his house, and entrusts her with the management of his domestic affairs, that is enough, and it is unnecessary to inquire if he has had her as his companion at bed as well as at board. But, on the other hand, it is a principle of Scotch consistorial law that one act of intercourse would bar an action for divorce, on the ground that it is not conceivable a man so wronged would consort with his wife unless he had forgiven her, or had made up his mind that he had not been wronged. But these questions do not arise in this case, because I agree with the Lord Ordinary in thinking that it has not been shown in fact that there was intercourse after the husband had knowledge of his wrong, the wife only having been admitted to his house as a shelter for her when destitute and till the questions between them should be settled.

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—Trotter. Agent—Malcolm Graham Yool, S.S.C.

Counsel for the Defender—Christie. Agent—Walter Finlay, W.S.

Friday, March 7.

## FIRST DIVISION.

### NEILL'S TRUSTEES v. NEILL.

*Succession—Faculties and Powers—Power of Appointment—Exercise of Power Partially ultra vires—Restriction of Fee to Liferent—Gift to Parties not Object of Power—Vesting.*

A trustor directed his trustees to hold the shares of the residue falling to his daughters for their behoof in liferent alimentary, and to and for behoof of their respective children *per stirpes* in fee, "payable and divisible the said fee in such shares or proportions, under such conditions and restrictions, and otherwise in such way and manner as my said daughters may respectively appoint by any writing under their respective hands, which failing, then to and among such children equally, and that upon their respectively attaining the age of twenty-one years, and upon the death of their said respective parents." It was further provided that in the event of any of the daughters dying leaving issue, but of such issue not surviving to take in terms of the destination thereinbefore contained, then the share of the residue liferented by such daughter should devolve upon her surviving brothers and sisters along with the issue of any brother or sister who might have deceased leaving issue. In the event of any of the daughters dying without issue, or of such issue not surviving to take, it was provided and declared that it should be competent for her to test upon her share.

N, a daughter of the trustor, died leaving three sons, having executed a settlement the effect of which was that her trustees were directed to pay half of her share in her father's estate to her sons absolutely on the youngest attaining twenty-five years of age, while they were to pay an alimentary liferent of the other half to her sons, and hold it "for behoof of their respective issue *per stirpes* in fee," with a power of appointment to the sons. No power was given to the sons to test upon the half as to which they were restricted to a liferent. *Held* that the appointment was wholly invalid, and that a fee of one-third of the share of her father's estate liferented by N vested in each of her sons on their respectively attaining the age of twenty-one.