mitted that they are bound to cause all passenger trains running on their line for the ordinary service and traffic of the district to stop at Crathes.

I have been at some loss to understand the meaning or extent of this admission on the part of the defenders, and rather turn back on the real question, What is a passenger train? It would seem to me that every train of the company over which the company retains its general control and dominion, and by which the company professes or offers to carry for hire such travellers as may take advantage of it on payment of their fares, is in ordinary parlance and within the meaning of the stipulation in controversy a passenger train. It may be a special or it may be an express train; it may carry the mail or a Queen's Messenger, or even excursionists, but it does not follow that it is not also a passenger train.

I am, my Lords, of opinion that in the construction of the obligation in question "all passenger trains" is to be interpreted as meaning "each and every passenger train," and as embracing the trains in controversy, save the special excursion trains which are run subject to special and peculiar conditions, and are not intended for ordinary travellers. It may be that the obligation assumed by the company was not wise or prudent on their part, but that is not for our consideration. It was not illegal or unreasonable on the part of the pursuer to insist on the stipulation for the benefit of himself and his tenants. We have but to interpret and give effect to the plain meaning of the language used. If inconvenience or injury may arise to the company from the enforcement of their contract, they have ample means within their reach to protect themselves.

The House ordered and adjudged that the interlocutor complained of in the said appeal be reversed; and "declared that the defenders (respondents) are bound regularly to stop at the station called 'Crathes' on the line of railway belonging to the defenders (respondents) between Aberdeen and Ballater, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station for the conveyance of passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company; and with this declaration it is ordered that the said cause be and the same is hereby remitted to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment; and it is further ordered that the respondents do pay or cause to be paid to the appellant the costs of the action in the Court of Session; and it is further ordered that the respondents do repay to the appellant the sum of £187, 16s. 4d. paid by him to them on 4th April 1882 in name of costs, and £1, 2s. 4d. paid by him to them on 9th April 1884 in name of dues of extract of the action in the Court of Session; and it is further ordered that the respondents do pay or cause to be paid to the appellant the costs incurred in respect of the said appeal to this House," &c.

Counsel for Pursuer—(Appellant)—Sol.-Gen. Herschell, Q.C.—Sol.-Gen. Asher, Q.C.—R. B. Haldane. Agents—Martin & Leslie—Baxter & Burnett, W.S.

Counsel for Defenders (Respondents)—Lord Advocate Balfour, Q.C.—J. P. B. Robertson. Agents—Dyson & Co.—Gordon, Pringle, Dallas, & Co., W.S.

Thursday, March 5.

(Before Lord Chancellor, Lords Watson, Bramwell, and Fitzgerald.)

A B *v.* C B.

(*Ante*, vol. xxi. p. 598, and 11 R. 1060—4th June 1884.)

Husband and Wife—Constitution of Marriage—Nullity of Marriage—Impotency.

A man of 49 married a woman of 20, and they cohabited for twenty months, occupying the same bed nearly all that time, and then separated finally. During their cohabitation no sexual intercourse took place, though the man had unsuccessfully attempted it during the first two months, and then desisted, owing, as he alleged, to the wife's coldness and lack of affection for him. In an action of declarator of nullity of marriage at her instance, on the ground of his impotency, it was proved that there was no malformation or sign of ill-health in him. No evidence from a physical examination of the wife was available in the circumstances of the case. The House (*aff.* judgment of Second Division) *held* that on a consideration of the proof the whole facts and circumstances showed that the non-consummation of the marriage was due to impotency on the part of the man, and gave decree of nullity of marriage accordingly.

Nullity of Marriage—Presumption—Three Years' Cohabitation.

The doctrine of the Canon law that impotency will be presumed from non-consummation during a cohabitation of three years has not been followed in Scotland. Assuming it to be applicable, it is merely presumptive evidence, and other evidence may be adduced and founded on where there has not been such cohabitation as to raise it.

Personal Bar—Incontinence of Spouse seeking Remedy.

The action before the House was not raised till after the wife had given birth to an illegitimate child, and had been served with an action of divorce, to which it was raised as an answer. *Held* that she was not barred from raising the action, and that there is no doctrine of "sincerity" requiring it to be shewn that the only motive for raising the action is the existence of the impotency complained of.

This case is reported in Court of Session, 4th June 1884, *ante*, vol. xxi. p. 598, and 11 R. 1060.

The defender appealed.

The respondent's counsel was not called on.

At delivering judgment—

Lord Chancellor—My Lords, in this painful case some questions of law which are of importance—in this sense that if they could be established they would be important—have been argued as constituting a bar to the treatment of the question

as one simply of fact depending upon the particular evidence in the particular case. My opinion is that no law which can have that effect has been shown to exist in Scotland.

Now, the two points mainly insisted upon were derived so far as they went from the English, or partly from the English and partly from the Canon law authorities, and the first observation which I make is that if there be positive rules of law upon which an exception to the trial of an action of this kind upon its merits can be founded, they must be proved to exist, and to be recognised as positive rules in the country in which the action is brought. Neither the doctrine which in the language of some of the cases may be described as the doctrine of "sincerity" on the part of the pursuer in an action of this kind, nor the doctrine of the necessity of triennial cohabitation, assuming those doctrines to exist, and to be rules of positive law, in the sense imposed upon them by the appellant's counsel, in England, is proved to be recognised by the law of Scotland, or to be a rule of positive law in Scotland, from which country this appeal comes to your Lordships' House.

That might perhaps be enough to dispose of all that has been said upon those subjects, because although the law of Scotland and the law of England so far as they proceed upon general principles of jurisprudence are sufficiently alike to make it often useful to illustrate the one from the other when those questions are involved, yet that never can be said of positive rules of law which may more or less be described as being of an arbitrary character. Now, I have said that perhaps that might be enough to say upon that portion of the argument; but I think that it may not be improper to say one or two words with reference to the English authorities, on both sides of the question, which have been referred to as bearing upon the Canon law, because I think that those authorities themselves have probably been misunderstood. I certainly think it unfortunate that when it happens that an expression is used by a Judge, however eminent, in explaining his view of a particular case and the principles on which it ought to be dealt with, if that expression was not previously a *vox signata*—a technical term of law—it should be taken up by other Judges in such a way as to constitute a foundation for the argument that the use of that expression or phraseology has either established or recognised a technical rule which did not otherwise exist. I asked the learned counsel who was the first Judge who used this word "sincerity" with regard to the subject in hand, and the answer was that it was used by a Judge of the greatest possible eminence in the Ecclesiastical Courts—no less a man than Lord Stowell. Lord Stowell presided over those Courts towards the end of the last and the beginning of the present century. I do not remember at this moment exactly in what year he became Judge, but, at all events, that would be a comparatively recent origin to which to ascribe a technical rule of law, and I cannot think that Lord Stowell ever meant to lay down a technical rule of law which could rightly be interpreted, as in some very modern cases, or at least in one very modern case, it has been interpreted, as meaning that a plaintiff bringing an action of nullity of marriage must be actuated in his or her own mind so purely and simply by the purpose of being relieved from the grievance arising from the want of the power which is said to be wanting in the husband or the wife as to have no secondary motive, or in the words of the case which I have in my mind, "no mixture of subsidiary motive."

Now, with the greatest deference to any learned Judge or Judges who may have used such an expression, it appears to me that no such rule of positive law can be introduced in that manner by such a use of judicial phraseology, except so far as it can be shewn to be founded upon a just and intelligible principle. My own belief is, that to whatever criticism the phraseology of learned Judges in those cases may be open (and I must say I think that the adoption of that particular phrase "sincerity" seems, as the learned counsel said, to suggest a psychological question rather than one of law and fact—that is to say, diving into the motive of a person's mind rather than trying whether a cause of action exists or not), whatever may be said, and to whatever criticism the phraseology used in some of those cases may be liable, I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which may estop that person from having this remedy; that a part of that conduct may be any act from which the inference ought to be drawn that during the antecedent time the party has with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of—has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well, now, that explanation can be referred to known principles of equitable and, I may say, of general jurisprudence. The circumstances which may justify it may be very various, and in cases of this kind many sorts of conduct might exist—taking pecuniary benefits, for example; living for a long time together in the same house or family with the *status* and character of husband and wife after knowledge of everything, whether of law or of fact, which it is material to know. I do not at all mean to say that there may not be other states of circumstances which would produce the same effect; but it appears to me that in order to give a reasonable foundation for any such doctrine as that which has been insisted upon at the bar, there must be a foundation of substantial justice depending upon the acts and conduct of the party sought to be barred. Further than that I do not think it necessary for the purposes of this case to go. Now, I must observe that if that be a true explanation of the doctrine, so far as it can be considered as law in England (for into Scotland it never seems to have found its way at all), under the name of "sincerity," or under any name distinguishing it from "approbate and reprobate" and the general principles of equity, then I say, that if this case had to be tried by that doctrine the circumstances would shew that it was quite inapplicable; for this lady, during the time that she and the appellant lived together, never had the benefit of conjugal rights.

Whether, upon the evidence, she is to be taken to have renounced them is a question of merits and of evidence, and not a question of abstract principle, but she never took the benefit nor had the benefit of conjugal rights.

The spouses separated within two years of the marriage, and the husband has never contributed to maintain the wife. So far as it appears, he has had no property at all. He could not even keep up the policy which he had contracted to keep up by the marriage-contract, and she had to do it out of her proper moneys, she being the person who contributed the property of the pair, and from the month of June 1879 she has resided with her own family and friends, he doing nothing whatever, and she deriving no other benefit whatsoever from the assumed marriage relation except when she passed by his name. The only thing alleged is that shortly before the institution of these proceedings a question was raised as to its being expedient to give up the policy for the surrender value, and she, rather to save her income, which it was still understood was the only thing to be looked to to keep up the premiums—in order to save her income from a permanent deduction rather than for any purpose connected with the performance of the marriage-contract—objected to that, and I think not unreasonably, because her income had already contributed a good deal more than the surrender value, and whether she was wife or not she had a clear right to a lien or charge upon that policy for the purpose of reimbursing to her the moneys which, not by the marital contract but against the marital contract, she had been compelled to contribute. Therefore I think nothing of that, and the result is that there is no single circumstance of conduct, except those circumstances which go into the question of merits and of evidence bearing upon the principal question of fact, which on a reasonable view of this doctrine of sincerity can be alleged against her.

My Lords, it is said (and it is no doubt perfectly true) that this lady has a motive for desiring to obtain the relief which she asks different from and in addition to that which would have existed if those circumstances had not happened which give its peculiar character to this particular case. The peculiarity is this, that the husband began by suing the wife for a divorce on the ground of adultery, and the wife had to defend herself against the husband's suit. One manifest defence, if it was open to her, was that she was not his wife, and she pleaded that defence. Undoubtedly it is quite true that she had a motive for asserting her right to be rid of him as her reputed husband, and to have the marriage declared void and null; she had a motive arising out of the situation in which she had unfortunately placed herself. The success of his action against her, depending entirely upon the relation of husband and wife, would have been in several respects prejudicial to her. In the first place, there would have been the stigma of adultery. In some minds it may appear to be a question of degree whether a woman is guilty of adultery or of incontinence, but by the letter of the law of Scotland it appears not to be clear that it may not be something more in that country. At all events, a person feeling that difference has a motive which in itself is a very intelligible and innocent motive for defending herself against that charge in any way which is open to her by law. But that is not the only motive; her fortune, or at least the whole income during her life arising from her fortune of £5000, would have been forfeited according to the law of Scotland by the husband's success in that suit. That again depended entirely upon her being his wife. If she was not his wife, what more reasonable than that she should be permitted to plead it in order to avoid such a forfeiture to which in that view she was not liable. Again, she is unfortunately the mother of a child of which the husband is not the father. The *status* of that child is a legitimate subject of care and consideration to her. If she is not the wife of the present appellant, there is a possibility, at all events,—if he can marry her,—of her marrying the father of the child, and that child, according to the law of Scotland, would then have the *status* of legitimacy; that is impossible if she is at present the appellant's wife. Can anybody say that those are motives of a fraudulent character, of a dishonest character, of a character upon which there is some moral estoppel, unless there is a legal estoppel by some positive rule of law to prevent her from acting upon them and getting the truth declared that she is not the man's wife, if in truth she is not? It appears to me that there is the utmost sincerity, in a reasonable sense of the word, in a suit brought under those circumstances. She has the most cogent motives for asking a competent Court to declare the truth—motives of an innocent and to some extent of a laudable kind. I do not of course mean to say that it was innocent to place herself in the unfortunate position in which she has placed herself as the mother of the child, but being in that position it is perfectly innocent to desire that the true character of her relation to the appellant should be ascertained by law, which depends upon the question whether she is the appellant's wife or not.

Therefore in the absence of any trace or scintilla of authority whatever from any Scottish source to the effect that this lady's suit under these circumstances is barred, and that the merits of the case are not to be inquired into, I think it would be wholly impossible for your Lordships to reverse on that ground a judgment of the Court of Session which has determined that they are to be inquired into, and that they are in the respondent's favour.

With regard to the second subject which is connected with that, namely, the subject of time, I will merely observe that what I understand all the authorities to say upon the subject of time is that that, like any other circumstances of the conduct, is a very material element in the investigation of a case which upon the facts is doubtful. Where there is a controversy of fact great delay in bringing forward the case increases, in proportion to that delay, the burden of proof which is thrown upon the plaintiff; but that there is any definite or absolute bar arising from a certain amount of delay is a proposition which I apprehend cannot be established either by any Scottish or by any English authorities.

I now come to the other point which was argued, which I really think depended upon a misconstruction of a rule recognised undoubtedly in the English Courts, that is to say, recognised in the sense which I myself place upon it, but as far as it appears it is not at least clear

that even to that extent it is recognised in Scotland, namely, the rule which seems to have had a very early foundation in the civil law, according to which two years—afterwards changed by Justinian to three years—was a fixed term for the purpose of raising a certain presumption. In the Canon law that rule for the purpose of raising that presumption was recognised, but subject to this, that it was to take effect when the matter to be presumed ("frigidity" was the language of the Canon law) could not be proved before—"*prius probari non potest.*" That rule has been referred to as, under certain limitations and in a certain sense, recognised in the English Courts by various authorities. It was distinctly explained by Dr Lushington in the cases before him, to which I shall have occasion to refer, not to be an absolute rule, because, on the one hand, when a three years' cohabitation had taken place, the inference to be presumably drawn from the absence of consummation within that time was capable of being rebutted, and, on the other hand, the rule did not exclude evidence to prove the same thing before—nor did the rule in any way exclude one kind of evidence for that purpose more than another. But the rule itself, as I understand it, has never been recognised either in *Lewis* v. *Hayward*, 35 L. J., Mat. (H. L.) 105, in this House, or in any other authority, beyond this point, that when you have a husband or a wife seeking a decree of nullity on the ground *propter impotentiam*, if there be no more in the evidence than that they have lived for three years together—living, as I understand the word "cohabitation," in the same house and with the ordinary opportunities of intercourse, no explanation being given to rebut the presumption—if during that time the ordinary results have not followed, if, in point of fact, there has been no consummation, and that is clearly proved, then if that be the whole state of the evidence, inability on the part of the one party or of the other will be presumed to have been the cause. But, as I say, this may be rebutted by evidence sufficient for that purpose, but, on the other hand, upon that mere state of the facts, a presumption will not be raised from the expiry of a less period of time. But it may be (as Dr Lushington has said, uncontradicted by any other authority, and, as it seems to me, appears on the very face of the Canon law, which has been referred to), that though no presumption can be raised from the mere absence of the fact within a less period than three years, yet evidence may be given from which the same inference of fact may be drawn, only it is not drawn by presumption from a certain length of time, but it is drawn from positive evidence. That is a very reasonable state of the law, if the triennial rule—which as far as it appears may be called arbitrary—is in force at all. In Scotland it has not been shewn that it has been recognised within recent times at all; and I think that the decisions of Dr Lushington upon this subject, in the two cases which are reported in the second volume of Robinson's Ecclesiastical Reports, are perfectly reasonable and perfectly satisfactory.

Now, upon those cases I propose to say no more than this. In the first of them, which is not the one reported in Spink's Reports, Dr Lushington, on page 618, says this—"I am of opinion that a *triennial* cohabitation is not an *absolutely binding rule.* It is a convenient and fitting rule, and one not to be departed from on slight ground. Still, circumstances may arise, as in the present case, to justify the Court in dispensing with it. I am not aware that there is any magic in three years. I conceive that the object of the rule is to provide that sufficient time may be afforded for ascertaining beyond a doubt the true condition of the party complained of. If the Court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it never ought to be driven, *sine gravissima causa*, after such a cohabitation as is proved in this case" (that was less than three years), "to order a return." And in the other case in the same volume, which follows later, and which is the same case as is reported under the initials of A. and B. in the first volume of Spink's Reports [p. 12], Dr Lushington enters further into the matter, and distinctly holds upon evidence in my judgment not a bit stronger than the evidence in the present case, not only that there is no obstacle to granting, but that he is obliged to grant, a decree in favour of the promoter of the suit.

My Lords, that is all that I think it necessary to say upon the subject of the points of law which have been argued, because the last argument which Mr Wallace with ingenuity as well as zeal advanced, but which your Lordships, I think, did not hear from his learned leader—namely, the argument that the lapse of the respondent had produced an alteration of *status* which rendered her no longer able to bring this action—seemed to me to turn upon the most transparent fallacy possible. He seemed to me to think that a woman who was not in a situation to ask for restitution of conjugal rights was not in a situation to say that she was not the wife. Why? To say that she is not the wife, and to ask for the restitution of conjugal rights are absolutely inconsistent and incompatible things. She cannot do both, and therefore it is quite clear that in order to obtain a declaration that she is not the wife, she is not only not obliged to ask, but she is not in a position to ask, for the restitution of conjugal rights.

Now, my Lords, upon the facts of the case I should like to be as brief as I possibly can, because this class of facts is one which it is neither agreeable to oneself nor edifying or useful to others to dwell upon, and in truth there is only one reason why I go at all into the particulars of them. My reason is this, that there is undoubtedly upon the evidence a point at which a question arises whether the lady is chargeable or not with putting difficulties not justifiable on her part in the appellant's way, and whether that should or should not alter the conclusions to be otherwise drawn from the evidence. That question does appear to me to arise upon the evidence, and therefore it is necessary for me to present (I will endeavour to do it very briefly, and with as much reticence and reserve as I possibly can) my view of the evidence, which will show the grounds upon which I am unable to dissent from the conclusion of fact which was arrived at in the Court below. It is clear (I will not read the passages in the evidence; some of them will be found at pages 37 and 44) that in this case at the time of the marriage there were

mutual attachment, attraction, and regard. The gentleman says that he was very much in love with the lady, and it is perfectly clear that it was a marriage of inclination on her part. That seems to me to be an exceedingly important circumstance in connection with what follows, because, even allowing that the man was bashful, even allowing whatever weight is due to his inexperience in intercourse with women, yet still I cannot but think that as long as their mutual attraction and regard and attachment lasted at all events, which upon the evidence I conclude to have been at least till the end of the year in which they were married—more than a month at least—if there were no natural infirmity, the natural consequences would presumably have resulted. But they did not. The evidence of the gentleman and of the lady (I do not wish to impute to either of them any wilful misstatement of facts) is not quite consistent as to the degree of frequency with which the husband endeavoured to prove his powers. She says (and when I say that I do not wish to impute wilful misstatement to either of them, I must also say that I see no reason whatever to prefer his recollection to hers in such a matter), being asked, "Did your husband's attempts extend over the whole period from the date of your marriage on 29th November 1877 to the three days before 14th February 1878?"—"Yes." Then she is asked "Can you say how many times these attempts were made?" She answers, "I cannot say." (Q) "Were they tolerably frequent?"—(A) "At intervals of two or three days and sometimes less." Of course she is not to be held to a literal computation in those words, but the result is, that if there had been nothing else for your Lordships to draw your conclusions from, one would suppose that the attempts were frequently repeated, and occurred twenty times or more during the period, and I must say that I think the probability is rather that they would be so, because if the husband had any hopes he would not give up quickly; and if I accepted his statement that, when their affections were still unchanged during the honeymoon, he only made those endeavours twice, it would be so extraordinary that from that fact alone I should be disposed myself to draw the inference that there was some conscious inability.

Nobody can be surprised, I think, if on the part of the wife some coldness and alienation supervened after these repeated ineffectual attempts, but that undoubtedly was the case.

We are brought down to January and February, for according to the lady the latest attempt was about the 11th of February, or according to him it was at the end of January. And we then come to the evidence—which to my mind is exceedingly important—of Dr Sidney Smith, who says that he saw this gentleman and conversed with him as a medical adviser upon this subject not less than seven times, the first being on the 29th of January and the last being the 27th of March. The dates (and they are worthy of particular observation) are the 29th of January, the 31st of January, the 18th and 23d of February, and the 25th, 26th, and 27th of March 1878. Now, on the first of those occasions, the doctor, not volunteering it, but in answer to a request, prescribed for him certain medicines. He reports a conversation which took place as one in which the appellant had so spoken as to leave upon his, the doctor's, mind an impression that the case was one which might not be hopeless. "He asked me if anything could be done for him—could he take anything. I said Yes, and prescribed for him on that day the following mixture." He then gives the prescription. Then at each of the later interviews the subject was renewed between them, and Dr Smith reports the conversation thus. "I asked him on one of these occasions whether there was any reciprocity on the part of his wife, or whether he got the "cold shoulder." He said, certainly, she would not allow him to come near her; and on one occasion . . . I asked him how we were to know whether the medicine was doing him any good if there were no means of proving it. I said there was probably some disappointment on the part of his wife, and if he exercised a little tact the coolness might pass off and they might come together again." Now, to me it is manifest that if Dr Sidney Smith's recollection is to be trusted (and I do trust it), the appellant, though he asked for medicine, never told Dr Smith that he had not taken or used it, but left Dr Smith under the impression that he had done so, and that it was discouragement on the part of the wife which, and which alone, prevented it from being tested. No better advice could possibly have been given to a man in that position if there was a chance of things coming right than the advice which Dr Sidney Smith gave. I daresay that his prescription was a very good prescription, but his moral advice was unquestionably good. As far as I can see the appellant never really tried it.

Now, the appellant tells us that he never took those prescriptions. He excuses himself by saying, "He gave me some prescriptions which I did not take, because at that time my wife's conduct had done away with all affection for her for the time," and he seems to fix the date at which the wife's repugnance had produced repugnance on his part. He says that he gave up the idea of consummating the marriage finally at Kurrachee. To that subject I shall take occasion to advert afterwards. Now, at Kurrachee they were from, I suppose, the 17th of February or thereabouts for some little time afterwards, and it is a very remarkable thing if the appellant was not conscious of more than he admitted to Dr Sidney Smith that he should in those conversations with him not have said, "It is of no use talking about this any longer; her behaviour to me is such that I no longer have any desire to exercise those rights. I am not disposed to use any means which you recommend to me for that purpose. I give up the thing entirely."

My Lords, the only occasion on which we have any evidence whatever of the wife actually behaving to the husband in such a way as to impose an impediment beyond that which might arise from the absence of encouragement, and from the feeling evidently engendered by previous failures, is on that first night when they were at Kurrachee, and it is remarkable that the husband insisted after that night upon continuing to occupy the same bed with her, and did so in substance until their separation on the 29th of June 1879, and during all that period there is not the slightest trace whatever of there being

any disposition on his part to assert a husband's rights or to prove his power, or of his putting her to the test whether she would permit him or not. There is no trace of his doing that which Dr Sidney Smith had advised him to do, namely, exercising a little tact. If the subject was painful, or if her temper made it difficult for him fully to explain himself to her by word of mouth, he might even have written her to say that the difficulty had passed away, and that he had no doubt now of his sufficiency, that he was sure there was no other cause for alienation between them than that, and that he was now in a position to prove his ability; that the happiness, responsibility, and credit of both their lives would depend upon his having an opportunity of proving it; and that he must throw upon her, and upon her alone, the responsibility if she refused to give him such an opportunity. He does nothing of the kind, but he abides by the resolution which he says he formed at Kurrachee. Immediately after saying that he finally gave up this idea at Kurrachee, though he did not directly tell Dr Sidney Smith so, a question is put as to his having tried to have connection with her several times and failed, and he says "Yes." Then he is asked, "Do you think she had reasonable ground for believing that you had failed finally?—(A) I suppose you may call it a reasonable belief." That is to say, that the facts known to himself only were such that he could not deny that she had reasonable ground for that belief. Now, I do say that under those circumstances if he desired to retain a husband's place—if he was capable of doing a husband's duty—he had every conceivable motive to at least bring the matter to the point at which the burden of refusing would have been thrown upon her, and he had abundant opportunities of doing so. It is clear that he never did so. The separation which took place ultimately in June 1879 was, to say the least of it, voluntary on his part. He never shewed afterwards any serious desire to have a husband's place.

Well, my Lords, I think in that state of things, when you turn to the medical evidence you find the strong preponderance of the medical evidence to be this, that in that state of circumstances the reasonable conclusion is that, at least as to this lady (and as Dr Lushington said in the case reported in the first volume of Spinks, the conclusions of the Court can never go further than the facts presented to it), the appellant was incapable of performing a husband's duty. No doubt some of the medical men suggest that it is possible that under other circumstances, and with a great deal of help and assistance and encouragement, and so on, on the woman's part it is consistent with what they have observed that he might be found capable; but that is a mere speculation as to circumstances which have not existed, and opposed to the reasonable and practical conclusion from those which did exist. My Lords, I am not myself, I confess, in the least capable of forming an opinion of my own as to any inference which ought to be drawn from the antecedent circumstance of this man having lived an absolutely continent life till he was fifty years old, which was his age at the time of the marriage; but it appears to be the opinion of all these medical men that the habit of body which might result from that fact, taken in connection with the evidence which we have of what actually took place after he had been married, greatly strengthens the inference to be drawn from the direct evidence of his want of success in performing a husband's part that he was incapable of doing so. As I have said, I should not have been able myself to have drawn any conclusion of that sort; but with the medical evidence before me I am obliged to say that there is evidence that that is a material state of things to be considered in connection with the evidence of what afterwards happened. I am bound to add that I entirely lay aside (and I do not think the medical witnesses place any stress upon it) the short period of vicious practice which had taken place in the childhood of this gentleman. My own impression is that it is a pity it was introduced at all, although it was creditable to Mr Gordon to have acknowledged it to the medical witnesses. It has no real value whatever as bearing upon the conclusion to be drawn from the rest of the evidence.

My Lords, the whole result I think is this, if a jury had had to determine the question upon this evidence, and had found as the Court below have found, would it have been possible to say that that was a verdict which they were not justified in coming to? I think not; and being of that opinion, I cannot give my voice for reversing the decision to the same effect of the Court of Session. I therefore move your Lordships to affirm the interlocutors appealed from, and to dismiss the appeal with costs.

Lord Watson—My Lords, I am of opinion that the majority of the Second Division of the Court of Session were right in holding that they were not precluded from considering the effect of the evidence upon the merits of the case, and also that they were right in holding that upon that evidence the respondent was entitled to decree.

The first plea against any consideration of the merits of this case was rested upon the rule as to "sincerity," or more correctly speaking insincerity. I agree with the observations which have been made upon the English cases bearing upon that matter by my noble and learned friend the Lord Chancellor. It humbly appears to me that the expression is not a very happy one, and also that it has been used occasionally in circumstances which render it still more inappropriate, and I think that when those cases are dissected they do show the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect. If that be, as I am inclined to think it is, a rule of the law of England, I have no hesitation in holding that it is a rule which prevails in Scotland also. But if the rule goes further, if the rule goes to the extent to which it has been pleaded on the part of the appellant in this case, I have just as little hesitation in holding that it has no place and is of no authority in the law of Scotland. What has been contended for at the bar comes to this, that wherever, before the spouse complaining of the impotency of the other

has raised an action for the purpose of having the nullity of the marriage declared, there arose circumstances which rendered it a matter of legitimate interest that the nullity should be declared, if these facts and circumstances are what are called collateral to the marriage, all suit is barred. It is said that the addition of a strong and legitimate motive to that already existing, instead of strengthening, as I should have thought, the interest and title of the pursuer in such a case, is to have the effect of cutting it down altogether.

Then the second ground upon which it was maintained that it was incompetent to deal with the evidence in this case is the triennial rule as established in the Canon law. No doubt there is not much authority to show that that rule has been followed in practice in the law of Scotland, but I have no reason to suppose that as it is to be found in the Canon law, and is in itself not an unreasonable rule, and has been so recognised in the jurisprudence of England, the Courts of Scotland would hesitate to adopt it where it is applicable. But what is that rule as declared and established by the Canon law? It simply raises a legal presumption that where two persons after solemnising a marriage live together and cohabit for a period of three years, and the lady is able to show that she is *virgo intacta*, a fact from which the deduction follows that there has been no consummation, that state of things, in the absence of rebutting proof on the part of the husband, will entitle her to have the nullity of the marriage declared. But it is one thing to have a rule establishing a presumption, and quite another thing to have a rule of positive law excluding all other evidence than that which is derivable from such a presumption. The contention at your Lordships' bar has practically been that in certain circumstances where the impotence complained of is of a peculiar character you cannot have evidence establishing it, and no party can have a remedy against it unless he or she comes to the Court fortified by that presumption, even although that evidence should be in itself amply sufficient to convince every reasonable mind that the complaint is well founded. I have heard no authority for that. I do not think that any one of the English cases comes up to it, and if they did, I for one, speaking in a Scottish case, should not be prepared to adopt it as part of the law of Scotland.

I now, my Lords, come to the evidence in this case, and as I do not precisely adopt all the observations which were made upon the evidence in the Court below, I shall deal with it—but I will do so shortly and in general terms, because the subject is a remarkably uninviting one. Upon the evidence I am not prepared to say that the appellant is absolutely incapable of having sexual intercourse. At the same time I think it may be confidently affirmed that he is not in the ordinary sense of the term *vir potens*. The conclusion which I draw from the whole circumstances of the case is, that owing to the feeble virility and the nervousness of the appellant, and the feelings of indifference or dislike with which the respondent had come to regard him, the marriage never would have been consummated although they had continued to cohabit, and that consummation being thus in my opinion a practical impossibility, the respondent is entitled to the remedy which the Court below have given her. If non-consummation had been due to conduct on the part of the respondent which could have been characterised as improper or as in breach of conjugal duty, that might have led me to a different conclusion; but I can find no ground for imputing such conduct to the respondent. According to the evidence the respondent did not resist the appellant's advances; she neither encouraged nor repelled them; and the appellant cannot with justice complain of that state of indifference which was the natural consequence of his own weakness and repeated failures.

I therefore concur in the judgment which your Lordship has proposed.

Lord Bramwell—My Lords, I first propose to consider the question whether the impotency of the appellant is made out, and on that subject I have really very little to add to what has been said already. I am not sure that that which took place in his youth may not have had something to do with this matter, but I will only say about it that it is remarkable that he should have discontinued that practice, giving no reason why he did so. It may possibly have been from an inability to continue it. I need not, however, allude to that subject more particularly. After that period there were thirty years of abstinence from sexual intercourse. There were then these various attempts which were unsuccessful, and there was no further attempt. It is incredible to my mind that there would have been none if he had had those conditions of body which would have enabled him to perform his duty to this unfortunate young lady. Then there is his confession to Mr Glover ["the fact is, my dear Glover, that we have had some words, and I have not been able to accomplish my duty as a husband."] We must consider all these things; and although he says in his evidence that he does not believe that he is impotent, at the time of giving it, he does not say that his condition has ever been such as to afford any symptoms or indications that at any time of his life, if he had been so minded, and if he had had an opportunity of sexual intercourse, he could have availed himself of it.

Then there is the medical evidence, which seems to me to be, I may say, discreet on both sides—that is to say, the man having the material indications or appearances of virility the doctors do not undertake to swear, on the part of the respondent, that he never could at any future time perform a husband's duty to a wife; but they say that they do not believe, as a matter of belief—as a matter of conclusion from the evidence—that he would. And really, my Lords, with all respect to experts, attaching value to their evidence in so far as they say that their experience of other cases has enabled them to form an opinion, which of course is an advantage which one has not had one's self, yet as to other matters as to which they speak I take the liberty of saying that I consider myself free to form my own judgment, and my speculations as to the conduct of human beings under those circumstances are those which must govern my mind, and not those which they think fit to put before us, as to matters on which they have no greater knowledge than I have.

To my mind, upon this evidence, it is conclusively proved that this man was impotent, not

merely in the sense in which my noble and learned friend opposite (Lord Watson) has put it (which I think, however, is irresistible), but I should come to the conclusion that without doubt he was impotent, not only with respect to this particular woman but with respect to all women. And I avail myself of what was put by the noble and learned Earl on the woolsack. It is not possible to say that if a jury had found as a fact that the man was impotent, that would have been a wrong verdict. I will put it in another way. If he is liberated, as he will be, by the decree which has been pronounced against him, and if he were to marry another woman without informing her of what has happened with reference to this one, in my opinion he would be guilty of a most wicked and abominable act. I cannot have a a doubt that the respondent has made out her case.

Well then, I will just say one word as to the point which was made about her disqualifying herself by her incontinence with some other man. Suppose that she had *bona fide* believed that Gordon was dead (a thing which has happened), and had married another man and had had a child, that would be no answer in England (I do not know how it would be in Scotland) to an indictment for bigamy. The punishment would be small, but it would be no answer to the indictment, and the child would be a bastard. But there would be no moral guilt. Could it be pretended that in that case she would have disqualified herself? Then what is the difference? The only difference is that in this case there is the guilt of incontinence; there is a moral guilt which would not have existed in the supposed case.

Now, my Lords, one word as to this question of "sincerity." It is a most remarkable expression, a very curious word, and I am not at all sure that it has not resulted from this, that sincerity is a very important matter in ascertaining whether the spouse complained of is impotent or not, and sincerity has been dwelt upon for that purpose till at last it has been taken as a separate head of objection to the complaining party's proceedings. It seems to me very strange. What the complainant does in a suit of this sort is to come to the appropriate court for a declaration of the truth. "I say that this man is impotent, and was so at the time of the marriage, and I ask you to declare that fact." Well, then, as to this matter of sincerity, I will not read the words, but those are, I think, the very words of the summons, "Declare the truth, that this man was impotent when he married me." The Court say, "No, we will not," or the argument is that the Court ought to say, "No we will not, we know that it is true, but we will not say so." Why? In my opinion, a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining when she comes forward with her complaint of this wrong that he has done her, unless in some way or another he can shew that he sustained some injury from the double matter of her not having complained earlier and of her complaining now. In such a case I should indeed think that a law might be made (perhaps it exists for aught I know) that in some way or another the declaration of the truth should be accompanied by some compensation to him for the sort of injury which, as I have indicated, might have been done to him.

But supposing that there is such a rule (I do not know how to phrase it), in my opinion this case is not open to the objection of insincerity. This poor creature comes here, driven by the conduct of the appellant, for a reason which is, I think, perfectly intelligible. I do not think that men are altogether good judges in matters of this description. I can mention a very remarkable case which came before me in Monmouthshire, of a man who was indicted upon nineteen separate indictments for rape. In order to make sure that the man was guilty, I was not satisfied with a verdict upon the first case, but I tried three or four, and there was no doubt about it. The man himself practically stood in the dock and acknowledged it. The story is so incredible that I may mention some more of the particulars. It was upon the top of a lofty hill between two valleys in Monmouthshire, over which there was a footpath, and he used to lie in wait on the top of this hill, and when he saw a woman coming he assaulted her with any amount of violence which was necessary to enable him to accomplish his purpose. The reason why I tell the story is this. I was informed on the most trustworthy authority (and I believe it) that there was almost as many cases against him as those upon which true bills had been found, where he had similarly assaulted women, but that they, rather than submit to the indignity of having to come and tell of the outrage and disgrace which had been inflicted upon them, refused to appear against him. And I can very well understand that in a case of this description a woman would be most reluctant to come forward and stand the shocking ordeal of giving evidence. Read the evidence which the respondent had to give in this case, and see how distressing it must have been to her. She puts up, then, with the wrong which has been done to her by the appellant, until she is driven to bring this suit by his calling her an adulteress and seeking a divorce from her, which divorce would be followed by a forfeiture of her property if he chose to insist upon it. I put it to Mr Davey—suppose that after a man and woman had lived together under these circumstances, he being clearly impotent, his regard for her, if he had any (and I suppose he must have had, otherwise I cannot see why he should have married her), had failed, and he had taken to ill-using her, beating her, would it then have been open to the objection of insincerity if the woman had brought a suit for a declaration of nullity? Mr Davey arguing said (and I do not see how he could do otherwise) that it would. So that supposing a woman was ill-used by having this gross injustice done to her, but rather than complain of it put up with it until her life was made intolerable by the misconduct of her husband, she could get no redress of it. I think it is impossible that that can be law, and in my mind that goes a long way towards showing that it is not the law.

I will just add one word more about this matter. I really cannot understand how this appellant can have done otherwise than welcome the suit which the respondent brought for the purpose of making her offence against chastity less grievous than it would have been if she had been his lawful and true wife. I cannot understand how he could have done otherwise than meet her eagerly to have that decree pronounced which she was praying for. It seems to me to

have been a most cruel thing for him to have acted as he did.

One word more. It is now twenty-five years or nearly so since I delivered my judgment in *Castleden* v. *Castleden* [1 Swabey and Tristram, at page 616]. I think that I may claim credit for sufficient candour and for sufficient—what shall I say?—self-denial when I say that if I thought that that judgment was wrong now, after twenty-five years, I could afford to say, "Well, I was wrong then, but I know better now." But I have read it, and I will say that there is not one word which I uttered then, either in law or in reasoning upon the facts, or in feeling, which I would not repeat at the present moment, and it does seem to me that the judgment which was given in the Probate Court and in this House (I say it with very great submission) is a mixture of two things, either of which taken separately comes to nothing.

Lord Fitzgerald—My Lords, the procreation of children being the main object of marriage, the contract contains by implication as an essential term the capacity for consummation. There may be special circumstances in relation to the marriage of a character to deprive the parties, or one of them, of the right to be relieved on the ground of impotence. But there is no such special circumstance in the present case. The pursuer then rests her case on the ordinary rule that she is entitled to be relieved if she can establish by reasonable and reliable evidence that the defender was at the time of the marriage impotent, and has remained so. The defender denies permanent impotence, and that is the real question now to be determined, and upon that question from the beginning I have entertained no doubt whatever. He further relies upon the supposed rule as to the necessity of triennial cohabitation, as to the want of promptness in instituting the suit, and as to insincerity and the presence of a subsidiary motive.

My Lords, I rest content entirely with the judgment of the noble and learned Earl upon the woolsack as to these additional defences which the defender seeks to raise, but I would add, further, that even if the rule as contended for by Mr Wallace existed in the law of Scotland it would be totally inapplicable to the circumstances of the present case, and the special circumstances here would take it out of this rule if it existed at all. I can very well understand all these doctrines coming in aid, and I take them in aid, upon the question of evidence. For instance, it is alleged that there was insincerity in this sense, that this lady had another motive besides a strong desire to be relieved from the tie of this marriage. She has the strongest of all motives, a motive so strong that I should be inclined to regard her evidence, if in its main features it was controverted, not alone with caution but with suspicion. It is not only her eager desire to be relieved from the contamination of this marriage tie, but, further, she has to relieve herself from the charge of adultery; she has to protect her fortune, and to give her child the *status* of not being an adulterine bastard.

My Lords, when all these circumstances are taken into account they would lead me to consider what has been so much contested in this case, not as indicating rules applicable to the special case before us, but as laying before us reasons why we should regard with caution the evidence given on behalf of the pursuer. Then the question as I have thought from the beginning, and the only question in the case, is this—Is the evidence sufficient to establish a case of permanent impotency against the defender? There are certain states of fact not controverted but admitted on both sides, and I take it that the Lord Ordinary was correct (although I differ from him in his judgment) in saying that the real facts of the case, the real matters in proof, were not controverted, but there might be a great controversy as to what were the legitimate inferences to be deduced from the facts so proved. The question which we have to consider is really, What is the reasonable inference to be deduced from the facts absolutely established? What are we to deduce, having regard to the ordinary experience of life, and applying common sense to the facts which are before us?

My Lords, before dealing with these facts I will in a very few words advert to one other matter which Mr Wallace brought before us. He relied upon the unwillingness of the pursuer to continue cohabitation. No doubt she did exhibit after a certain period the strongest unwillingness, and I would ask with reference to that argument, how could it be expected to be otherwise? For two months this woman had submitted to what I should call treatment degrading in the highest degree, especially in reference to the later statements which the defender has brought forward as indicating that he thought there was a recommencement of his virile power, and she certainly would not have the feelings of a woman if she had been willing that that disgusting treatment should continue.

Again, it is said that she made no complaint. But is that statement well-founded? Why, from the time of the abandonment of his marital rights by the defender, which he tells us took place in February (I shall have a word to say as to that presently), her life has been a protest. Not only can it be said that there has been complaint, but through the whole of her married life there has been a protest against the trap into which she had fallen.

Now, let us consider what is the general character of the evidence, and ask ourselves as reasonable men, and applying our experience of the ordinary circumstances of life to the case, Ought there to be a doubt upon this subject? I do not allude to anything in the defender's early life. He certainly was a man of chastity for the thirty-five years that he lived before his marriage and after he left school. His statement is (and I have no doubt of its truth) that he never had intercourse with a woman. That may spring from virtue, it may spring from high principles of chastity, but there is another view to be taken of it, and a doubt may arise whether that continued abstinence from women did not indicate at the earliest period the absence and the continuance of a want of virile power.

My Lords, I called attention to that part of the case early in the argument as one of the important elements or one of the important lights in which we should regard the evidence. This gentleman up to the time of his marriage not only had no sexual knowledge of women, but, according to his statement to Mr M'Fadyen just

before his marriage, he did not even understand what his marital duties would be. He asked Mr M'Fadyen was it not expected of a married man that he should do something or another, and he evidently went to his friend Mr M'Fadyen to get information upon the subject. Well, then, when a man of fifty or in the fiftieth year of his life under these special circumstances marries a young woman of twenty, described as handsome, desirable, and one who is likely to create passionate sensation, and lives with her for a period of at least two months, but probably two months and eleven or twelve days, and makes not only one effort but repeated efforts to accomplish the duty of a husband, and in every instance with complete failure, from that the fair inference is the non-existence of marital capacity. But he says, "If I have time, and if I have opportunity, and if I have encouragement and assistance, I believe that all will come right in the end." But is that the kind of capacity which a wife seeks for in a husband? One of the doctors speaks of "due encouragement;" nay more, the wife is to submit to the degradation of "assisting;" and he adds, "If you supplement that by a bottle of champagne he may possibly effect his purpose," and we are asked, upon this evidence, upon a statement of that kind, and upon the opinion of a doctor based in part upon what he heard from the defender, to rebut the fair inference arising from the facts incontestibly proved that at the time of the marriage this man was incapable, and that during two months at least, notwithstanding repeated efforts, he proved his incapacity; but we are to go still further and complete the terms of three years' cohabitation, allowing effort upon effort to be made, in the hopes that in the end something may come of it.

Now, upon the medical evidence it is very curious that the defender himself tells us that in the month of February he gave up once and for all any further attempt. He says that he was induced to that because of the evident dislike which the pursuer shewed to his embraces. One is not surprised at it, but is it accurate? Is it true? Because more than six weeks after he has given up as he alleges once and for all any attempt to have connection with his wife, for sexual purposes we find him consulting Dr Sidney Smith; he consults him as late as the 27th of March. And what is the question which he puts in his conversation with Dr Sidney Smith? In these communications up to the 27th of March his conversation is as to his not being able to consummate the marriage. So that up to the 27th of March, six weeks after he says he desisted from attempts, he was in consultation with Dr Sidney Smith, and he was advising with him as to the means in which he might acquire the strength which would enable him to consummate the marriage. Dr Sidney Smith gave him recipes or supplied him with medicines, I do not know which. He says that he never took those medicines, but that is to me persuasive proof that he felt, when he desisted from having communication with his wife, that he was incapable, and that he hoped to restore his capacity by exciting medicines, but that he failed to continue taking them because he found them to be useless.

With regard to the remaining medical evidence, some of it I do not value much, but there is one pregnant sentence in the evidence of Dr Angus Macdonald which is extremely suggestive. He says—"I think it is hardly in human nature to imagine that he was capable of performing the marital act when he did not do so while they lived together. In some cases there is a temporary incapacity." He then alluded to transactions of newly married people, and proceeds to say—"In the present case the opportunities recorded in the evidence were far too numerous to account for it without a distinct defect of virile power." Then he enters into details such as the defender communicated to him or he has heard in his evidence. He adds—"And these" (that is, the conditions which the defender himself had described) "are just the conditions in which we find the worst cases of impotency in the male." According to that medical evidence he had in his statements indicated the worst features of permanent incapacity, and yet we are asked to act upon his own belief founded only upon the possibility that if time and opportunity were given to him, and if the adjuncts which I have already described were supplied to him, he might in the end find means of consummating his marriage.

My Lords, the inference which I draw is the very opposite. From the defender's history, from his two months of abortive attempts, from his one year and six months of lying beside this desirable young woman without even making an attempt to exercise his rights, I come to the conclusion, clear and plain to my mind, not alone that he was incapable as to her, but that he was impotent at the time of the marriage, and that that impotency was permanent and still continues.

It is said that the pursuer ought sooner to have instituted the suit. I ventured to observe in the course of the case, and I repeat it now, that there is not one of us who cannot recall to his memory the experience of some case in which a woman submitted to the worst of treatment—treatment degrading and humiliating—and allowed it to continue, rather than permit her name to become the subject of a public scandal. And when we add to this that the lady in question had two sisters young and unmarried who would necessarily be implicated in any disclosure as to her character, that would greatly strengthen her motives for silence, and probably she would have submitted to much more if she had not been driven to her present course by the institution of the action for divorce.

Upon these grounds, my Lords, I entirely concur in your Lordships' judgment.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

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