

Counsel for Pursuers—Dean of Faculty (Watson)—Trayner—Darling. Agents—Rhind & Lindsay, W.S.

Counsel for Defenders—Balfour—J. P. B. Robertson. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, May 24.

FIRST DIVISION.

[Lord Craighill, Ordinary.

C. v. C.

Husband and Wife—Marriage—Impotency—Nullity.

Impotency on the part of the woman, whether congenital or not, is a ground for declarator of nullity of marriage.

The pursuer in this action sought a declarator of nullity of marriage against his wife on account of her impotency. The action was not defended. The Lord Ordinary assailed the defender, on the ground that whereas it was alleged in the libel that this impotency was congenital, the import of the evidence was that it was rather the result of age, the woman being 54 years old at the date of the pretended marriage, and that therefore the ground of action had not been established.

The pursuer reclaimed.

Authorities—*Liber officialis sancti Andreae*, published by the Abbotsford Club, Nos. 138, 137; *Williams v. Humphrey*, 30 L. J. (Mat. Cases) 73, 2 Swabey and Trisham, 240; *H. v. P.*, July 15, 3 L. R. 126; *G. v. G.*, June, 22 1871, 2 L. R. (Prob. and Mat.) 287.

At advising—

LORD PRESIDENT—That marriage may be declared null by reason of the impotency of one of the spouses, at the suit of the other, cannot be doubted. To state the rule of law in the form of a definition of impotency would be dangerous, and is unnecessary.

But it may, I think, be safely affirmed as the result of all the authorities that inability to copulate arising from such a physical obstruction in the woman as cannot be removed or remedied without danger to her life or the infliction of bodily pain, *plus quam tolerabile*, constitutes impotency on her part.

Persons beyond the age when procreation of children may be expected, may marry without hope of issue, but with the expectation of real *commixtio corporum*, which is the proper consummation of marriage, and the disappointment of that expectation by impotency arising from irremediable physical obstruction in the woman may entitle the man to a decree of declarator of nullity.

I am of opinion that such an irremediable physical obstruction to copulation has been proved to exist in the defender in this case, and that the pursuer is therefore entitled to judgment declaring the marriage null.

I cannot concur in the technical ground of judgment adopted by the Lord Ordinary, which in my opinion proceeds on too strict a reading of the summons.

LORDS DEAS, ARDMILLAN, and MURE concurred.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel for the pursuer—no appearance being made for the defender—on the reclaiming note for the pursuer, against Lord Craighill’s interlocutor, dated 9th December 1875, Recal the said interlocutor: Find and declare the pretended marriage betwixt the pursuer and defender to have been from the beginning, to be now, and in all time coming, null and of no avail, force, strength, nor effect, with all that has followed thereupon; and divorce and separate the defender from the pursuer’s society, fellowship, and company; and find and declare the pursuer to be in such case and condition as he was before the said pretended marriage, or as if he had never been contracted or married to the defender, and decern.”

Counsel for Pursuer—Fraser—Mair. Agent—William Officer, S.S.C.

Tuesday, May 30.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GARDNER v. GARDNER.

Parent and Child—Legitimacy—Proof—Presumption.

An action of putting to silence was raised against one who averred that she was the legitimate daughter of the pursuer. The defender was admittedly the child of the pursuer’s wife, and was born two months after their marriage, which took place nearly twenty-five years prior to the date of the action. It appeared, on the one hand, that the man whom the pursuer alleged to be the real father of the defender had connection with the mother prior to her marriage, and that the pursuer did not treat the defender as his daughter, but sent her away immediately after her birth, and although he all along maintained her, had no communication with her whatever. On the other hand, it did not appear whether the intercourse with the alleged father corresponded in time with the birth of the defender, and it remained doubtful whether the pursuer had not had illicit intercourse with his wife prior to marriage. It further appeared (1) that the mother’s pregnancy took place during the pursuer’s courtship; (2) that on his own admission the pursuer was aware of her condition when he married her; (3) that the pursuer did not openly disclaim the defender, but on the contrary assumed the burden of her maintenance and education; and (4) that he never said to any one that he was not the father, or put the paternity on any one else for four-and-twenty years.—*Held* that although the presumption of law *pater est quem nuptiæ demonstrant* did not apply—conception not having taken place during marriage—there was a strong presumption of fact that

the pursuer was the defender's father, arising from the fact that the defender was born in wedlock—that therefore the obligation of unquestionable proof to the contrary lay on the pursuer, and that he had not discharged that obligation.

This was an action of declarator and putting to silence at the instance of Robert Gardner against Mary Gardner; and the summons concluded for declarator that the defender was not the child of the pursuer, and for decree putting her to silence in asserting or representing directly or indirectly that she was so. The pursuer in his condescendence set forth that in August 1850 he was married to Miss Brodie, with whom he had never previously had any intercourse. The second article of the condescendence was as follows:—"About a month previous to the said marriage Mrs Gardner, then Miss Brodie, informed the pursuer that she feared she was with child, but did not declare at that time to whom. As she was not quite certain as to her condition, it was arranged between the pursuer and her that she should consult the late Dr Thatcher of Edinburgh. This she did in the course of a few days afterwards, and Dr Thatcher confirmed her suspicions. Notwithstanding of this state of matters, it was arranged that the marriage between the pursuer and her should go on, and accordingly it took place, of the date before mentioned, at Cademuir." On 16th October 1850 Mrs Gardner was delivered of a female child (the defender), and the pursuer arranged with Dr Thatcher, now dead, for the child's removal, and its maintenance at the pursuer's expense. The pursuer averred that about a year after the birth of the defender, Mrs Gardner, when very ill, told him that John Laidlaw was the father of the child, a man who was shepherd to her brother in 1849 and 1850; and further, that "in or about the winter previous to her marriage he had illicit connection with her on two or more occasions, and the defender is the fruit of that intercourse. On one of these occasions the intercourse took place on Cademuir Hill, near Peebles, and on another occasion at the farm of Cademuir." Finally, the pursuer stated that he had maintained Mary Gardner to avoid scandal and save his wife's character, but that recently the girl's demands had become so extravagant that he had been, in self-defence, obliged to raise this action.

The defender averred that she was the child of Mr and Mrs Gardner, and denied the truth of the confession said to have been made by Mrs Gardner.

The Lord Ordinary appointed a proof, and the following are the more important parts of the evidence:—

The following letters between Mrs Gardner and Laidlaw were put in evidence:—

"Letter, Mrs Gardner to Mr Laidlaw.

"*Gattonside, Friday night.*

"Dear Sir,—Mr Gardner has got a threatening letter to-day, and I send you a copy of what I think you should write out, and sign and send it by return of post. The sooner that things are settled—for I think I cannot stand it much longer.—Yours truly,
E. GARDNER.

"P.S.—By doing this it will be the only thing that will bring it to a settlement soon."

"Copy letter referred to.

"*Peebles, March /74.*

"Mrs Gardner,—I acknowledge myself to be the father of the child you had, born in the year Eighteen hundred and fifty."

"Letter, Mr Laidlaw to Mrs Gardner.

"*Peebles, March 12th, /74.*

"Mrs Gardner,—You desired me to write by return of post, but I have got such an astonishment that I scarcely know what I am doing. But I would have thought if you were that way to me you would have told me before you left Cademuir; at least you ought to have done so, for the truth saves one from much trouble afterwards. I cannot deny that we met that day on the hill. But I did not waylay you, for we met by appointment when you were going to Peebles. It was a cold day like this, and we sat down with the plaid about us, but we had better kept walking. So if you swear the child was mine, I will not deny it, tho' I mind neither the month nor year.—I am, your obt. st.
J. L.

"P.S.—If my wife hears of it I may take the road; but I did not know, or I would never have had one."

Mrs Gardner, *inter alia*, deponed—"Within a short time of the marriage I found it necessary to make a communication to my husband. I thought it my duty to make that communication to him. I don't think it was more than a fortnight from our marriage when I made the communication, but I cannot exactly state the time. The communication was that I had reason to believe that I was in the family way. I was afraid of that, and was in great distress at it. I was in the family way, and this came about through my having met a man—John Laidlaw—who had come to my brother's house on Cademuir Hill seven or eight months before my marriage took place. Improper familiarity took place between him and me once, and another attempt was made in the barn at Cademuir. That attempt was not successful. The first occasion was at Cademuir Hill, where I had connection with him. Previous to my marriage I never had at any time any undue familiarity or connection with my present husband. From the time when Laidlaw had connection with me at Cademuir Hill my usual courses did not come on at all. After I had told Gardner that I was afraid I was in the family way, he agreed to go on with the marriage, which took place as appointed. My family did not come to know anything of the matter. With the exception of Laidlaw, no one had ever connection with me before my marriage."

The pursuer, *inter alia*, deponed—"About four or five weeks before I was married she made a communication to me. (Q) What was it?—(A) That she was afraid she was in the family way. . . . That fact caused me great distress. She was also very much distressed; and after considering a little time we agreed that the marriage should take place, and that we should try to smother up the thing as much as possible. Up to the date of our marriage I had had no improper intimacy with her. I did not meet her in any clandestine way at all. I never met her in my life at Cademuir Hill. During that winter, when I stopped at Crockston along with Mr