

Lord Ordinary; and this *curator* is, of course, still a party to the cause. I understand the proposal made to the Lord Ordinary was that the grandfather of these children should be appointed in this process as factor or curator to them, and that authority should be given to him to discharge their claim. We were referred to two cases occurring in the Second Division of the Court, with the particulars of which we are not acquainted, but where something of this kind is said to have been done. But the practice in this Division has been opposite. I find a case of *Pratt v. Knox* reported in 17 D. 1006 (28th June 1855), which is to the following effect. [*His Lordship read the report of the case.*] Then there was another case before us which occurred in 1881—*Anderson v. Kidd and Others*, March 18, 1881, not reported. It has not been reported, but I have my papers with a note upon them of all that took place. There had been in that case a verdict for the pursuers, who were a certain mother and her children, and then a motion was made for a new trial. Before disposing of that motion the Court desired to understand whether the mother would undertake to hold the whole amount awarded by the jury in trust for herself and her children. She declined to do so, or, at all events, some difficulty arose in following that course, and accordingly, on 16th February 1881, the Court continued the cause until a factor *loco tutoris* should be appointed to the children. On 17th March, a factor having been appointed in common form, by application to the Court, he was sisted a party to the cause, and then he and the mother entered into a joint-minute which specified the proportions in which the sum awarded by the jury should be divided amongst the pursuers. We then refused the motion for a rule, applied the verdict, and decerned. The present case appears to me to be of precisely the same nature as those I have referred to. I think we cannot depart from our established practice, and that we should instruct the Lord Ordinary that nothing further can be done in the cause until a curator, or a factor of some kind, has been appointed to these children.

LORD MURE and LORD ADAM concurred.

Counsel for Pursuers — Armour. Agent —
J. A. Trevelyan Sturrock, S.S.C.

Counsel for Defender — Jameson. Agents —
Webster, Will, & Ritchie, S.S.C.

Wednesday, June 4.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

A. B. v. C. B.

*Husband and Wife—Constitution of Marriage—
Nullity of Marriage—Impotency—Personal Bar.*

A man of forty-seven went through a marriage ceremony with a woman of twenty. They lived together for twenty months, as a rule occupying the same bed, and then separated, holding no further communication with each other. More than three years after the separation the woman bore a child, of which

the man was admittedly not the father, and he thereupon raised an action of divorce against her on the ground of adultery. She defended that action, and herself raised an action for decree of nullity of marriage against her pretended husband on the ground that he was impotent. It was proved that there was no malformation or sign of ill-health in him; that no connection had taken place between them, although he had attempted it frequently for two months after the marriage ceremony. For the remainder of the time they lived together he made no attempt, owing, as he alleged, to her coldness and want of affection. She admitted that after they had lived together for a few months she had begun to dislike him. About a month after they separated the woman consulted a law-agent, who made her aware of her rights. In the action for decree of nullity of the marriage the Lord Ordinary (Kinnear), without deciding whether the pursuer was barred from maintaining the action, *held*, upon the proof, that impotency had not been established, and *assoluzied* the defender. The Court (*rev.* the Lord Ordinary's judgment—*disc.* Lord Rutherford Clark) gave decree in terms of the conclusions of the summons.

The parties to the action to be reported were married at Bombay on 29th November 1877, the man being then forty-seven years of age, and the woman twenty. They went on a honeymoon for ten days or a fortnight, and then returned to Bombay, where they remained until they left for Kurrachee about the end of February. Till within two or three days of going to Kurrachee they slept together in the same bed. They stayed at Kurrachee for about a fortnight, occupying the same bed, excepting the night of their arrival, on which occasion she refused to sleep with him. They then returned to Bombay, where they remained till the end of December, when they came to Scotland, where they lived together till June 1879. During all that time they still occupied the same room and the same bed. In June 1879 they separated. The man then went to London to seek for new employment. On his return they did not live together. Before he left there had been some variance between them, he complaining that she showed no respect for him, and she saying she felt none, and declining to change her manner towards him.

In October 1882 the woman bore a child. She registered its birth, and in the column of the register where the names, surnames, and rank of the father and mother fall to be entered she made this entry—"A. B." (her own name), "wife of C. B.," &c. &c. (the name and designation of the man), "who she declares is not the father of the child, and further, that she has had no personal communication with him since they ceased to reside together three years ago." This statement was true.

On 23d March 1883 her pretended husband served a summons of divorce, on the ground of adultery, upon her, and on 13th April she raised an action for decree of declarator of nullity of marriage against her pretended husband. The conclusions of the action were that "the Lords of our Council and Session ought and should find and declare that the defender was, at the time when the pretended marriage between him and

the pursuer was entered into, and still is, impotent and unable to consummate marriage by carnal copulation: And therefore our said Lords ought and should find and declare that the pretended marriage betwixt the pursuer and defender was from the beginning, is now, and in all time coming shall be of no avail, force, strength, nor effect, with all that has followed thereupon; and find and declare the pursuer to be in such case and condition as she was before the said pretended marriage, or as if she had never been contracted or married to the defender: Further, the defender ought and should be decreed and ordained to restore and deliver back to the pursuer all and sundry lands and heritages, sums of money, goods, gear, and others whatsoever which he received from the pursuer on occasion of or by or through said marriage, or might have received in any way *causa matrimonii et propter nuptias*."

The pursuer averred—"After the said marriage the pursuer and defender lived together in Bombay until about December 1878, when they returned to Scotland, and lived together there until June 1879. During the whole of the said period, with some short exceptions, the parties slept in the same bed, but notwithstanding their thus living and sleeping together, and of the solemnisation of the said marriage *de jure*, the said marriage has never been consummated *de facto*, no carnal copulation having followed thereupon between the defender and the pursuer, by reason of the defender being impotent and incapable of the act of carnal copulation. The defender's said impotency arises either from malformation or from functional or nervous defects in his constitution, or other causes to the pursuer more particularly unknown. By reason of the said impotency, consummation of the said marriage is rendered impossible."

The defender denied this, and stated—"Almost immediately after her marriage with the defender the pursuer conceived and manifested the greatest dislike and ill-will towards the defender, and treated him in a way calculated to alienate entirely his affection for her. The defender tried to remedy this state of matters, but without effect, the result being that the marriage of the parties was far from a happy one. The defender, though in bad health at the time of his marriage, has no malformation or other defect such as to cause impotency, and he was not then, nor is he now, in any way impotent or incapable of the act of carnal copulation."

To this statement the pursuer answered—"Admitted that the life of the parties after their pretended marriage was far from happy, but it is denied that this was due to the fault of the pursuer, who at and before the marriage ceremony was much attached to the defender, and was desirous of being a faithful and affectionate wife to him. Explained that subsequent to the said pretended marriage the pursuer began to suspect that the defender had entrapped her into a marriage which was only one in name, and that she would require to give up all expectation of ever becoming a mother. . . . The defender's general behaviour after the said pretended marriage was also very irritating to the pursuer's nerves and temper. The pursuer admits that these causes produced in her feelings of dislike to the defender, which may sometimes have manifested themselves in

rudeness towards him, which she herself regretted."

The pursuer pleaded—" (1) The pursuer is entitled to decree of declarator as concluded for, in respect that at the time when the pretended marriage between the parties was entered into the defender was impotent, and that he still is so."

The defender (who set forth the raising by him of the action of divorce) pleaded—" (1) This action ought to be sisted until the issue of the action of divorce instituted by the present defender against the present pursuer. (3) The pursuer's long silence and delay, coupled with her motives as disclosed by the facts condescended on, operate as an absolute bar to the present action. (4) The pursuer's statements being unfounded in fact, the action should be dismissed."

After a discussion upon the defender's pleas the Lord Ordinary (KINNEAR) on 23d June 1883 allowed the parties a proof of their averments.

"Note.—The defender maintained that this action should be sisted until the issue of the action of divorce for adultery which he has raised against the pursuer. He maintains that impotency does not render a marriage void, but only voidable; that the injured spouse may elect to hold to the contract or to annul it, and may be barred by conduct from setting it aside, and it is said to follow that if the wife has been unchaste while the bond of matrimony was still intact she has committed adultery, and that the husband is entitled to have decree of divorce without inquiry into the grounds on which (if they could be established) she might have annulled the marriage, but which she has abstained from bringing forward until after his right to divorce had emerged. The defender's contention that the marriage is not void is borne out by the authorities both in our own law and in the law of England. But there is no authority, so far as I am aware, for holding that a declarator of nullity will be barred by the mere institution of an action of divorce, or even by the unchastity of the wife at a time when she had taken no proceedings to annul the marriage. The case of *Guest v. Guest*, 2 Hag. 321, which was mainly relied upon by the defender, appears to me to be an authority to the contrary. In that case Lord Stowell refused to entertain a suit of nullity of marriage by reason of malconformation in the wife, on the ground that in former proceedings for divorce for adultery at the instance of the wife against the husband he had not opposed the plea which was indispensable to the success of such a suit, that there had been a lawful marriage between the parties. His Lordship points out that in that suit the husband had an opportunity of establishing that he was not the lawful husband of the plaintiff by reason of natural obstructions which would defeat the validity of the marriage, and he therefore held that since a decree of divorce had been granted the action for nullity could not be entertained, because the validity of the marriage was an essential part of a suit which the Court had already determined. The case therefore decides that the nullity of a marriage on such grounds as are alleged in the present case will afford a good defence to an action of divorce for adultery, and it follows that the prior institution of the husband's action of divorce will neither bar the wife's action of nullity, nor enable him to exclude inquiry into the grounds in

fact upon which that action is rested.

"In the more recent case of *Taverner v. Ditchford*, 31 L.J. (Matri. Cases) 105, it was held by Lord Penzance that an allegation of unchastity had no direct bearing on the question raised by a suit for nullity. The respondent to a petition by a woman for a decree of nullity on the ground of impotence pleaded that since the marriage the petitioner had committed adultery. The Court ordered the plea to be struck out as impertinent, observing, however, that evidence of the wife's conduct after the marriage might be admitted at the trial.

"It was further maintained that if the action is now to be considered on its merits it ought to be dismissed, because the lapse of time, coupled with indirect motives, which are said to be disclosed upon record, operate as an absolute bar to such an action. It has been decided in cases of this sort that the Court ought not to grant relief 'unless the petitioner seek that relief with a certain promptitude and under the real pressure of the grievance upon which the suit is grounded, to the exclusion of any collateral object'—*M. v. B.*, 33 L.J. 205, *per* Lord Penzance— but this involves questions of fact which cannot be determined without inquiry. In *Hall v. Castleden*, 29 L.J. 81, and 4 Macq. 160, a suit for nullity was brought twenty-four years after the marriage. It was held that the petitioner was barred by lapse of time and acquiescence. But this was decided after a trial, and it is manifest from the observations of Lord Campbell that the case was not regarded by the House of Lords as one that should not be entertained, but as one in which, by reason of the lapse of time, the 'clearest, strictest, and most unequivocal evidence should be required.'

"The result is that, in my opinion, the present action should have precedence of the action at the instance of the husband. There would be no advantage in allowing both to proceed simultaneously, as in counter actions of divorce, because while decree of divorce may be given at the same time in each of such actions, it is not disputed that in the present case a decree for the pursuer in either action would entirely extinguish the other. But further, it is plain that if there be no marriage there can be no adultery, and the pursuer is therefore well founded in her contention that the alleged adultery ought not to be made the subject of judicial investigation until the validity of the marriage which she contests has been determined. This will not affect the defender's right to lead such evidence of the pursuer's conduct as may be competent in support of his plea that the present action is barred."

A proof was led. It was shown that about a month after the parties separated the woman consulted a law-agent as to the business of the marriage-contract trust. On this occasion she had told the agent that her husband was impotent, and he had told her that if that was the case she was entitled to be free. Counsel were then consulted on her behalf, but no proceedings were taken or intimation made to her pretended husband till the action was raised.

On the merits it was proved by the evidence of both parties that no connection ever took place. The man attempted it frequently up to the date at which they went to Kurrachee, but never suc-

ceeded. After that time he did not attempt it, as he said, because of his wife's coldness. She admitted that after that time she had taken a dislike to him, but swore that he had never asked her to allow him to make further attempts, or done anything to indicate that he desired to do so. The man, while he admitted his failure to consummate his marriage at the date it took place, deponed that he then believed himself quite able to do so, but said that his health had not been quite so strong just before the marriage, and although he was in good health he had been nervous about the furnishing of his house and about some business affairs. He attributed his failure to nervousness and comparative weakness at the time. After February he said he felt himself quite capable. "(Q) Would you have performed that duty if your wife had been kindlier in manner to you?—(A) Yes I would, if there had been any affection shown me at all. (Q) Was there anything but her manner and treatment of you to deter you from the performance of that duty?—(A) Except her coldness and unkindness to me generally, there was not. (Q) Did you believe that you were, in the month of February and afterwards, quite fit, so far as physical conditions went, to be the father of a child?—(A) I did. (Q) And you believe that yet?—(A) I do." He admitted, however, that during the honeymoon, and for some time after, there was no coldness or change of demeanour on the part of his wife. He had never had connection with any woman nor attempted it till after his marriage. Before the age of 15 he had practised masturbation.

Several doctors were examined. Their evidence showed that there was no malformation in the person of the defender, who was a well formed healthy looking man.

Dr Joseph Bell, a witness for pursuer, deponed—" (Q) On what is your opinion based, that he was impotent at the time of his marriage?—(A) on his own confession that he utterly failed to have intercourse with a woman who was willing to receive him, he having every opportunity. (Q) Have you any reason for saying he was impotent between March 1878 and June 1879?—(A) I think if he had not been impotent he would have managed somehow to have had connection with her; they were occupying the same bed. (Q) Looking at the condition of matters between these dates can you say he was impotent?—(A) Looking at his organs there is no reason to say he is impotent; he could not escape a charge of rape on that ground. (Q) Your whole opinion is based upon his confession of failure in the early weeks of the marriage and from what you heard from pursuer?—(A) And from what I know of other cases. *Re-examined*—The lapse of time without any attempt at connection is very significant of the absence of power."

Dr Angus Macdonald deponed—"The condition of defender's organs is not exclusive of the idea of his being impotent. (Q) Assuming defender to have lived on affectionate terms with the pursuer for ten days after their marriage, that he slept with her during that time, and made attempts to have connection with her, do you think that is suggestive of incapacity?—(A) Extremely suggestive. This is confirmed by what took place subsequently. 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. . . . In the present case the opportunities recorded in the evidence were far too numerous to record for it without a distinct defect of virile power. . . . I do not believe that defender could have slept beside her so long without completing the act if he had been capable. He would have been stimulated by his organs, and could not have resisted. He would have found means of getting over her dislike to him. I do not think I am warranted in saying he is impotent now, for I have no present facts to go upon, but the presumption to my mind is, that he is incapable."

Dr Keiller gave evidence to a similar effect.

Dr Gairdner and Dr Gillespie were examined for the defender. The former deponed—"(Q) Taking the whole evidence into account, have you any warrant for forming the opinion that he was impotent at the date of his marriage, has been so since, and is impotent now?—(A) I believe he was incapable at the date of his marriage to the extent that he himself confesses. I don't think it is possible for anyone to tell when or how he would have become capable had matters been more favourable to him, but my belief is that if the lady had given him proper opportunities he would have come to it after a limited time. I cannot assign the particular time. I see no reason to doubt his competency now."

Dr Gillespie deponed—"I know cases where a man who failed in the first few weeks became subsequently the father of children. Worry about business might in a nervous man increase his chance of failure. From my examination of defender, and from what I have heard to-day, my opinion is that if he had favourable opportunities given him he could procreate children now, but he requires encouragement; he is a very shy, bashful man, and has been so long continent that he takes a much longer time to manage it. I think that if his wife had treated him lovingly within four or five weeks of the marriage he would have managed to do what was necessary. *Cross-examined*—. . . I agree with Dr Bell that the fact of fully developed organs is not conclusive in favour of potency. That is to be determined by his success or failure." Dr Gillespie further deponed that in ordinary circumstances where the parties were on affectionate terms he would expect that the marriage would be consummated in three or four weeks, and that if a man failed to do so in that time he would consider it probable that he was impotent. The circumstances would raise that presumption unless otherwise explained. He had never known a case in which, with opportunities extending over a space of two months, there had nevertheless been failure. "(Q) What do you find in the present case that enables you to avoid the conclusion of impotency?—(A) I heard what defender said to-day, and I heard a good deal more from himself; he said she never gave him any encouragement, even the first night."

On 24th January 1884 the Lord Ordinary pronounced this interlocutor:—"Assolziez the defender from the conclusions of this action."

"*Note*.—This action is brought under very unfavourable circumstances. The marriage took

place on the 29th of November 1877, and the parties lived together from that time until July 1879, when they separated. They have since been living apart; and in October 1882 the pursuer gave birth to a child, of which the defender is not the father. The defender thereafter raised an action of divorce on the ground of adultery; and it was not until after the summons had been served that the complaint on which the present action is based was brought forward.

"It is unnecessary, however, to decide whether this state of facts brings the case within the rule laid down in the House of Lords in *Castleden v. Hall*, 9 H. L. Cases, 186, that 'lapse of time, coupled with an indirect motive, is an absolute bar' to a suit for a decree of nullity, because, upon the evidence, I am of opinion that the pursuer has failed to establish her case.

"There is no serious conflict of evidence as to the most material facts; but where a conflict exists, I give credence to the statements of the defender, who gave his evidence with remarkable candour. He admits that he made several attempts to consummate the marriage, all of which were unsuccessful; that he desisted from making any further attempts to do so after January 1878, in consequence, as he says, of the repugnance towards him which his wife began to exhibit soon after the marriage, and continued to exhibit until their separation; that during the greater part of the time for which they cohabited they occupied the same bed, and that when they separated in July 1879 the marriage had not been consummated. There can be no question that this state of facts raises a presumption against the defender. But the medical evidence shows that the presumption is not conclusive. The defender has no visible defect from which it is possible to infer impotency, but, on the contrary, has every outward sign of health and capacity; and the medical witnesses are agreed that repeated failures to consummate a marriage, with such opportunities as are admitted by the defender, do not afford sufficient ground for inferring impotency. The medical witnesses for the pursuer think that if the defender had been a healthy and vigorous man he could not have cohabited so long as he did with the pursuer without finding means to overcome her dislike and to consummate the marriage. But they do not say that they can draw any certain inference from his failure during the time for which he continued to make any attempt to do so. Dr Keiller says he has 'known cases where attempts have been made for months without complete success.' Dr Macdonald says he does not think himself 'warranted in saying that the defender is impotent,' because he has 'no present facts to go on,' although 'the presumption in his mind is that he is incapable;' and Mr Bell's evidence is still more favourable to the defender. Apart altogether, therefore, from the evidence of Dr Gairdner and Dr Gillespie, who were examined for the defender, and having regard to the skilled opinion of the pursuer's medical witnesses alone in its application to the facts of the case, it is impossible to hold it proved that the defender is incurably impotent, and unless this be proved beyond the possibility of doubt it is clear that a decree of nullity cannot be pronounced."

The pursuer reclaimed, and argued—On the

legal question of bar, there was in England no divorce on the ground of desertion, and there being no release for the parties save by an action for decree of nullity, the injured party was bound to take that remedy timeously. In all the cases the time of delay had been much longer. There once was a rule in England that a three years' probation was necessary; that was not so now—*N. v. M.*, January 12, 1853, 2 Robertson 625; besides, that rule was founded on probabilities; a failure for three years was held to demonstrate impotency, but other evidence might be as cogent. There was such evidence in this case; it was proved that the man if not impotent to all was impotent as to this woman, and that was sufficient.

The defender argued—The evidence here showed an unwilling and cold wife. In such circumstances a longer period of probation was necessary—*Stagg v. Edgecombe*, June 16, 1863, 32 L.J., Mat. & Prob. Ca. 153; *Fraser's Husband and Wife*, i. 100; the repugnance of the wife was highly important—*H. v. H.* July 12, 1864, 33 L.J., Mat. & Prob. Ca. 159. This woman, too, knew her rights in 1879, and it was not until she was sued for divorce, and to hide her own guilt, that she brought her action. Where a party has any indirect motive—any motive other than the wrong done to him or her—the Court will give no aid—*B. v. B.* July 26, 1864, 33 L.J., Mat. & Prob. Ca. 203; *Hall v. Castleden*, 29 L.J. 81, 1 Swab. and Trist. 606, and 4 Macqueen 160; *M. v. C.*, March 2, 1872, L.R., 2 Prob. & Div. p. 414, *presertim* p. 419.

At advising—

The LORD JUSTICE-CLERK said that the majority of the Court were of opinion that the Lord Ordinary's interlocutor should be recalled, and that decree should go out in terms of the conclusions of the summons.

LORD RUTHERFURD CLARK said that he dissented from the proposed judgment.

The Court pronounced this interlocutor:—

“Having heard counsel for the parties on the reclaiming note for the pursuers against Lord Kinnear's interlocutor of 24th January last, recal the said interlocutor: Find and declare, and decern, and ordain, in terms of the conclusions of the summons,” &c.

Counsel for Pursuer (Reclaimer)—D. F. Macdonald, Q. C.—Jameson. Agents—Boyd, Jameson, & Kelly, W. S.

Counsel for Defender (Respondent)—Trayner—Armour. Agent—Beveridge, Sutherland, & Smith, S. S. C.

Tuesday, June 4.

SECOND DIVISION.

[Lord Adam, Ordinary.]

ROBB v. ROBB'S TRUSTEES.

Loan—Proof of Loan—Bank Cheque—Agent and Client—Current Account.

In an account-current extending over a series of years, between a client and his law-agents, which contained a long series of entries of money transactions of considerable amount, were certain items entered as “To paid you” or “To paid you in loan.” Those entries were six in number, and for five of them the only vouchers produced were bank cheques drawn by the agents payable to the client “or order,” and endorsed by him, there being produced for the sixth, in addition to the endorsed cheque, a promissory-note of the client of the same date and for the same sum as the cheque, the signature on which note had been deleted. In an action of count and reckoning by the widow of the client, who was liferentrix of his estate, against his testamentary trustees, she objected to the agent having received credit for these entries, on the ground that they were not properly vouched. *Held*, distinguishing the case from *Haldane v. Spiers*, March 7, 1872, 10 Macph. 537, that they were sufficiently vouched.

John Robb, builder and contractor in Edinburgh, died there in October 1875, leaving a trust-disposition and settlement dated a few days before his death, by which he conveyed his whole estate, heritable and moveable, to certain parties as trustees for certain purposes. By the first purpose the trustees were directed to pay to his widow during all the days of her life the free annual proceeds of his whole estate, but such proceeds to be liable to diminution corresponding to any advances which might be made out of the capital of the estate to his sons under directions to that effect in the immediately following purpose.

During the latter part of his life and up to the time of his death the deceased was engaged in large building transactions and contracts. For five or six years previous to his death he had employed Messrs Lindsay & Paterson, W. S., as his law-agents.

After his death the parties named in his trust-disposition accepted of the office of trustees and entered into possession of his estate, which they continued to administer according to his directions.

After some previous litigation with the trustees, Mrs Robb, in October 1881, raised the present action of count and reckoning against them, concluding for an account of their whole intromissions with the trust-estate, in order that the balance due to her in respect of the provisions of the deceased's settlement might be ascertained, and for payment of £1200 as the amount of the said balance. She produced certain accounts of the defender's intromissions with the trust-estate which had been rendered to her, and with regard to which she averred:—“The accounts are entirely incorrect. The first account is erroneous in regard to the following entry—