

be separate agents and counsel to represent what is practically one interest, and refusing to lay the burden of such unnecessary expense upon the pursuer. The correctness of this view of the practice of the Court was admitted by all the counsel at the bar. I do not enter upon the question whether the practice is a good practice. It is enough for the present case to say that it is the practice, and that one Division of the Court should not at its own hand alter a recognised and established practice.

I think that rule is applicable to the case before us, and applying it, the pursuer should, in my opinion, be held liable in expenses (since the closing of the record) to the defenders, but only as for one appearance, and in a watching fee to the other defender. The proof and hearing before the Lord Ordinary occupied two days, and the debate on the reclaiming-note two days. I think the watching fee may be fixed at £16, 16s.

As regards the question raised between the defenders themselves, I think the expenses allowed to one defender and the watching fee should be added together, and the *cumulo* amount equally divided, because I see that at the proof the burden of leading evidence was equally borne by the parties.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

“Recal the said interlocutor [9th November 1899] reclaimed against: Assoilzie the defenders from the conclusions of declarator and interdict: Find the pursuer liable in expenses, but that only as for one appearance from the date of closing the record; and in addition in a watching fee of £16, 16s. sterling, the amount of the said expenses hereby found due falling to be divided equally between the two sets of defenders: Remit the said expenses to the Auditor to tax the same, and to report to the said Lord Ordinary, to whom remit the cause to proceed therein, with power to him to discern for the taxed amount of the said expenses hereby found due.”

Counsel for the Pursuer—W. Campbell, Q.C. — Wilson. Agents — Drummond & Reid, S.S.C.

Counsel for the Defenders M^cCracken Brothers — G. Watt — A. M. Anderson. Agent—William Balfour, S.S.C.

Counsel for the other Defenders—Ure, Q.C. — Hunter. Agent — W. B. Rankin, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Stormonth Darling,
 Ordinary.]

SMEATON v. SMEATON.

Husband and Wife—Separation and Alimony—Cruelty—Condonation—Effects of Acts of Cruelty Condoned.

An action of separation at the instance of a wife on the ground of her husband's cruelty was settled, and decree of absolvitor was pronounced. Cohabitation was resumed. In a subsequent action by the wife on the same ground, held that the alleged acts of cruelty prior to the first action might be looked at, not as substantive grounds of separation, but as giving colour to later acts of cruelty which would, taken alone, not be of a character sufficiently gross to entitle the wife to decree, the issue in the case being whether the wife can, with safety to her person and health, live with her husband. Evidence on which held that the proof of cruelty considered on this principle was insufficient.

In 1896 Mrs Elizabeth Margaret Smeaton or Smeaton, wife of Thomas Wright Burgh Smeaton, of Easter Coul, Auchterarder, Perthshire, brought an action of separation and alimony against her husband. In this action decree of absolvitor was pronounced on 22nd October 1896 in pursuance of the following joint-minute:—“Graham Stewart for the pursuer and Grainger Stewart for the defender concurred in stating that the parties had resumed cohabitation, and that they withdrew all imputations made on either side on record. Counsel therefore craved the Court to discharge the diet of proof, to assoilzie the defender from the conclusions of the summons, and to find no expenses due to or by either party.”

In January 1899 Mrs Smeaton brought another action of separation also on the ground of cruelty. In her condescendence she averred a general course of violent conduct on the part of Mr Smeaton from the date of their marriage in 1882, and particular acts of cruelty in 1895, 1896, and 1898. The averments of cruelty in 1895 were the same as those contained in the previous action.

Mr Smeaton lodged defences, in which he denied having been guilty of cruelty.

A proof was taken, the import of which sufficiently appears from the opinion of the Lord Ordinary (STORMONTH DARLING) and Lord Adam.

On 19th January 1899 the Lord Ordinary assoilzied the defender from the conclusions of the summons.

Opinion.—“This is a painful and in some respects a narrow case, but I am of opinion that the pursuer has failed to prove cruelty of such a kind as to justify judicial separation.

“It is always necessary in these cases to consider the station and mode of life of the

parties in order to apply the appropriate standard of conduct. Now, the station in life of these parties is very respectable. They are persons living on a small property belonging to themselves. But I am sorry to say that the conduct of the husband did little credit to his station in life. He was very much addicted to drink, in the sense of having occasional bouts of drinking with long intervals of sobriety, during which he seems to have discharged public functions with credit to himself and with acceptance to his neighbours. But when he did exceed, as he too frequently did, undoubtedly his language, and to some extent his conduct, were of an exceedingly reprehensible kind, and much more like that of an uneducated man than that of a man of his position in society.

"Now, I am most unwilling to say anything unpleasant of the lady, because I think that she had reason to complain of many things in her husband's conduct; at the same time it would not be possible, I think, to take a just view of this case without having regard to the fact that she was a person of excitable and sometimes of violent temper, and that she showed her temper in occasional acts of personal violence both towards her husband and his relations of a kind very unusual in her position in life. I gladly pass from that disagreeable aspect of the case with the observation which I think it right to make, that a woman of that kind can hardly expect to be judged by the same standard that would be applied to one of more gentle nature, and that certainly she cannot be supposed to have been so readily alarmed by violent conduct on the part of others as most other women of her class would be.

"Now, the outstanding fact of the case is that these people married in 1882, separated in 1895, and came together again in the autumn of 1896, and that during the period of separation an action was raised by the pursuer against her husband founding on the earlier acts which are set out in this record. But the result of that action was that the wife allowed decree of absolvitor to pass in favour of her husband. Now, I do not dispute for a moment that in spite of absolvitor having been granted, the wife was entitled, on a recurrence of the same kind of violence, to revert to the alleged acts from which the husband had been assoilzied, not for the purpose of founding on these as a substantive ground of separation, but for the purpose of giving colour to the later acts. At the same time the circumstance of the wife having agreed to absolvitor makes it difficult to believe that she regarded these acts at the time as of so serious a nature as to put her in fear of her health or her life, and the difficulty becomes, I think, an impossibility when regard is had to the letters which she wrote to her husband in the early part of 1896 urging him to return to her and the children. The question therefore really comes to be, whether the acts subsequent to that decree of absolvitor, which are only two in number, when read in the light of the prior incidents, acquire a significance and a seriousness which they

would otherwise not have had. Accordingly, I think the proper way to take the case is, first, to consider these acts of July and September 1898.

"The act of July 1898 was not one of violence, but of drunken ill-nature and bad language. I do not say a word to defend or to palliate it, but I think that by itself, when attention is paid to the evidence of Mr Carruthers, the only independent witness of the scene, it is impossible to say that it affords any ground for judicial separation.

"The incident of September 1898 is undoubtedly of a more serious character. I think the result of the evidence is that the husband came home the worse of drink; that during the night there was an altercation between him and his wife; and that in the morning the quarrel was renewed. It seems to have related principally to her going to church—whether she was to walk or to drive. The result was that she took up writing materials, and he was curious to know what she was going to do with them. Apparently there were high words between them, and she refused to give him an answer, and he thereupon took advantage of her going out at the back-door to lock it behind her, and he afterwards locked the front door to prevent her getting in there. Now, if I thought that he thereby intended to drive her out of his house and prevent her returning, I should be prepared to hold that that was an act of cruelty justifying judicial separation. But I cannot so regard it when read in the light of his former conduct, had in some respects as I think that conduct was. Throughout his whole conduct to his wife I think there is this uniform note, that he never had any personal ill-will to her; that he never intended to injure her; that throughout his bad language and his occasional roughness of treatment there was a sub-stratum of self-respect and of affection for her; and I think these were sufficient to prevent him ever having had for a moment the design of striking her, in the sense of doing her any bodily harm. That I apply to the whole course of his conduct, and therefore when I find he locked her out on that day in September, I think it was the result of temper, and although it would have been much more becoming that he should have expressed his regret to her at the time than that the apology should be left to be made by his counsel now, still I cannot believe that he wished, or that she believed that he wished, to drive her from his home.

"Now, if these incidents of 1898 are not of themselves sufficient to oblige me to separate this couple, I ask whether they receive from the earlier incidents a gloss or colour which would oblige me to take so serious a step? I think not. Again, I find in these earlier acts much to condemn in the husband's conduct, but I am bound to add that I also find in the wife's evidence with respect to them gross exaggeration, so that she is not supported by the evidence of independent witnesses whenever it is possible to test her in that way. I may mention as a sample of that, the kind of allega-

tions made in Cond. 6 and Cond. 7, where, if the facts had come out as there averred, undoubtedly there would have been disclosed a very serious case of cruelty. But the facts have come out in a sense which falls far short of the averments, and therefore I cannot accept the evidence of the pursuer when it stands alone as conclusive on the question of the husband's conduct.

"Now, the most serious of these earlier incidents was undoubtedly that of 16th December 1895, when the defender burst into his mother-in-law's room and removed the child from it, and then had a scuffle with his wife—because it certainly amounted to that—with reference to the possession of the child. If I believed that on that occasion he had either kicked or struck her with the intention of doing her any bodily harm, I should have thought that cruelty in the legal sense was proved, but it turns out that the alleged kick was merely a raising of his bare foot when she was trying to get possession of the child, and that it was only a passing incident in what I have ventured to describe as a scuffle. The subsequent incident of 19th December is garnished on record with stories about loaded guns and that kind of thing, but when you come to examine it, although a constable was summoned, there really was no ground for alarm as to the defender's conduct towards the pursuer. He did not do or threaten to do any harm to her, and I believe that the brandishing of the gun, which was certainly not loaded, and was a perfectly useless old weapon, was entirely due to the fact of his annoyance at the policeman having been sent for.

"Accordingly, on the whole matter I have come to the conclusion that these earlier incidents do not oblige me to take of the incidents of 1898 a view more serious than that which they themselves suggest. I think the short and the long of the story is that most unfortunately for himself as well as for the peace of his family the defender has not had the manliness to give up those drinking habits which have been his bane. But the mere fact that a wife has a husband who persists in dissipation is no reason for judicial separation, unless when under the influence of drink he so far forgets himself as to put her in reasonable fear for her life or health. It is because I do not believe that this lady has ever had reasonable fear either of the one or the other that I think it would be unwarrantable to pronounce decree of judicial separation. Accordingly, I shall grant absolvitor, but I shall find the pursuer entitled to expenses."

Mrs Smeaton reclaimed, and argued—The Court must look at the recent acts of cruelty in the light of those which occurred before and had been condoned, to see whether in the whole history of their married life the pursuer could safely live with her husband—*Macfarlane v. Macfarlane*, Feb. 7, 1849, 11 D. 533; *Graham v. Graham*, July 19, 1878, 5 R. 1093; *Collins v. Collins*, Feb. 18, 1884, 11 R. (H.L.) 19, per Lord Blackburn at p. 25. So regarded, the evidence showed cruelty which entitled the

pursuer to separation—*Mackenzie v. Mackenzie*, Dec. 21, 1892, 20 R. 636, affirmed May 16, 1895, 22 R., (H.L.) 32.

Argued for the defender—The recent acts of cruelty must, in order to open up previous history, be of a serious character, and must be such as to put the wife in serious apprehension of the recurrence of past violence. Nothing of that kind was proved here.

At advising—

LORD ADAM—This is the second action of separation and aliment by the pursuer against the defender—the first having been disposed of in October 1896 by absolvitor being pronounced in favour of the defender. The Lord Ordinary has also in this case assoilzied the defender. The question involved being entirely a question of fact, the opinion of the Lord Ordinary would of course be entitled to the greatest weight. But it was argued to us that that was not so in this case, because it was said the Lord Ordinary had misapprehended the law applicable to a case such as this, where there had been a previous case between the parties, and consequently had not considered the evidence in a proper light.

The law is, I think, accurately stated by the late Lord President Inglis in the case of *Graham v. Graham* when he says—“Where a wife comes into Court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed at an earlier period have not prevented her from living with him, or going back to him after they have been separated, cannot be made the sole foundation of an action of separation, they may form the subject of investigation and proof with a view to determine what is the true issue in the case—whether his wife can with safety to person and health live with him now.”

If this be the law, then it appears to me that the logical way of considering the evidence is first to consider the evidence applicable to the acts of cruelty or violence alleged to have been committed subsequent to the renewed cohabitation, because they may not be proved, or they may be entirely disproved, and in that case the evidence of previous acts would not be relevant, because even if proved they would form the sole foundation of the action of separation, and would not warrant a decree of separation.

On the other hand, it may be that the subsequent acts are proved, and are of such nature and gravity as of themselves to warrant a decree of separation, and in that case it might not be necessary to recur to the evidence of previous acts at all.

But then there is the third case, that the subsequent acts proved may not of themselves, standing alone, be of such a character as to warrant a decree of separation, yet if they be but a part or sequel of a course of similar acts they may acquire a

character of so much gravity or seriousness as to warrant separation.

Now, the way in which the Lord Ordinary has considered the evidence in this case is the way which I have suggested as the proper way. He has first considered the evidence bearing on the two acts of alleged cruelty or violence alleged to have occurred in July and September 1898, subsequent to the renewed cohabitation of the pair, and having come to the conclusion that these incidents are not of themselves sufficient to oblige him to separate this couple, "I ask," he says, "whether they receive from the earlier incidents a gloss or colour which would oblige me to take so serious a step as to separate the couple." He then proceeds to consider the evidence bearing on the earlier incidents in the case in connection with that bearing on the later, and having thus considered the whole evidence in the case he comes to the conclusion that the pursuer can with safety to person and health now live with the defender, which is the true issue in the case. I do not see, therefore, that the Lord Ordinary has misapprehended the law applicable to the case, or that there is anything in the way in which he has treated the evidence to detract from the weight to which his opinion is entitled.

I concur with the Lord Ordinary in the view he has expressed with regard to the general character of the evidence. The pursuer's case appears to me to depend mainly on the evidence of the pursuer herself, and I concur with the Lord Ordinary that it is so grossly exaggerated that when it is not corroborated by independent evidence it cannot be relied on, and if that be so then there is little evidence left to support her case.

With regard to the earlier instances of alleged cruelty or violence prior to the resumed cohabitation, these are the same as were founded on in the previous case and are now founded on in this case. It will be observed, however, that the case we are now dealing with is not one in which cohabitation was resumed in respect of any admission of bad conduct and promise of reformation on the part of the husband and forgiveness on the part of the wife. The attitude which he assumed throughout was that he had not been guilty of any conduct such as to justify the action of separation; and as we see from the evidence of his agent he refused to allow the previous action to be settled on any other terms than that the imputations made against him should be withdrawn, and decree of absolvitor should be pronounced in his favour.

I agree with the Lord Ordinary that the fact that the decree of absolvitor was pronounced in the defender's favour does not preclude the pursuer from again founding on these earlier incidents in this case; but I also agree with him that it is difficult to believe that if they had been of the gravity she then alleged and now repeats she would have resumed cohabitation with her husband, or could possibly have written the letters to him in February 1896 in the

terms in which they are expressed. It appears to me that what led to the separation in 1895-96 was not any apprehension of injury to person or health on her part, but she was an only child, and when she married the defender he had not the means to maintain an establishment of his own, the result being that they lived together in her mother's house at Coul for thirteen years. In 1895, however, he succeeded to the small adjoining estate of Easter Coul, and very naturally wishing to have a home of his own, took up his residence there in the beginning of 1896. She refused to join him there, obviously, I think, because she much preferred to live in her mother's house, and desired that their old mode of life should continue, and was most unwilling that he should set up a separate establishment at Easter Coul. It was for that reason, I think, that she refused to join him there, and not as I have said from any apprehension of injury to person or health, and I think the proceedings she then took were with the view of concussing him to accede to her wishes in that respect.

The incidents occurring after they resumed cohabitation are two in number. That in July 1898 requires, I think, no observation. But that of 11th September is of a more serious nature, and if the facts had been as alleged in article 14 of the condescence, must have led to a separation. The facts, however, are not as there alleged. They appear to be that the defender had come home at a late hour the night before the worse of liquor, and then had a quarrel with the pursuer. The quarrel was renewed early next morning. They appear, however, to have breakfasted together as usual, and after breakfast she proceeded to write a note or letter. He desired to see what she was writing, but she would not allow him to do so. He was not altogether sober and this angered him. There is no evidence, that he used any violence towards her except her own statement, which I decline to accept. She then appears to have taken up her writing materials and walked from the dining-room through the kitchen and out at the back door, which was open. Jessie Gow, who was examined for the pursuer, and is the only independent witness examined, was in the kitchen at the time, and describes what she saw. "When the pursuer came into the kitchen after breakfast Mr Smeaton was following her, wanting to see what she was carrying. She did not want him to see what it was, and the back door was open, and to get from Mr Smeaton she passed out at the back door. He followed and locked the back door. (Q) Did he seem to want her out?—(A) I do not know. I do not remember him saying anything. He then went and locked the front door. Mrs Smeaton did not say anything." Then she says that Mrs Smeaton did not appear distressed on either occasion when she saw her on the Sunday morning—that she did not seem angry, and that she did not seem at all frightened either of the times she saw her on the Sunday morning. That so far as appears was all that took place.

Now, if this evidence is to be taken as truly representing what took place on the occasion in question, and I do not see why it should not, it does not appear to me to disclose a case of the husband forcibly driving his wife from his house, and locking her out to prevent her returning to live with him. They had had one of their too frequent quarrels and both were angry, and the evidence rather suggests to me that, in order to get rid of his importunities about seeing what she was writing, she left the house to go to her mother's, which was within a few minutes' walk, and he followed her and locked the doors behind her, as the Lord Ordinary says, in a fit of temper. I do not think that there is more in the incident than that, and if so, it furnishes no sufficient ground, either alone or in connection with the previous incidents in the case, for a judicial separation.

Agreeing as I do with the opinion of the Lord Ordinary, I do not think it necessary to add any further observations.

The Lord President and Lord M'LAREN concurred.

LORD KINNEAR was absent at the advising.

The Court adhered.

Counsel for the Reclaimer—Campbell, Q.C.—Hunter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Respondent—Solicitor-General (Dickson, Q.C.)—M'Clure. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, March 20.

FIRST DIVISION.

FREELAND v. MACFARLANE, LANG,
& COMPANY.

Reparation — Workmen's Compensation Act 1897, Schedule I, clauses 1, 2, and 12 — Estimation of Compensation — Earning Capacity.

When, as the result of an accident, the earning capacity of a workman is diminished, he has a claim to compensation under the Workmen's Compensation Act 1897, and the fact that he actually receives the same wages after the accident as he did before it, is merely an element to be taken into account in fixing the amount of compensation. The fact that the pursuer would but for the accident probably have been employed in a different capacity at higher wages, and the question how far the wages given after the accident partake of the nature of a gratuity, are also relevant considerations in fixing compensation.

When an arbitrator finds that on these considerations a workman is not at present entitled to any compensation, but that the accident will probably result in a loss of earning capacity, his

proper course is to make a declaration of the liability of the employer, leaving the amount and duration of the compensation to be fixed on an application to vary the award under clause 12 of Schedule I, should the workman at any future time be unable by reason of the accident to earn the same wages.

By the Workmen's Compensation Act 1897 it is provided in respect to a claim for compensation (Schedule I (1) (b)—“When total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months . . . such weekly payment not to exceed one pound. (2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.”

By clause 12 of the same schedule (I) it is provided—“Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased.”

In a case stated for appeal at the instance of Robert Freeland junior in an action at his instance against his employers, Messrs Macfarlane, Lang, & Company, bakers, Glasgow, for compensation under the Workmen's Compensation Act 1897, the Sheriff-Substitute (FYFE), found the following facts admitted or proved:—(1) That appellant, a boy of about fourteen years of age, had been for about three months prior to 12th November 1898 in the employment of respondents at their bakery in Wesleyan Street, Glasgow; (2) that his duties were general, but he was chiefly engaged preparing fruit for baking; (3) that on 12th November 1898, in the course of his employment, and upon instructions from respondent's foreman, appellant proceeded to dust the rollers of a machine used for crushing almonds; (4) that whilst so engaged, his right hand was drawn between the revolving cylinders and injured; (5) that in consequence portions of his thumb and of three fingers had to be amputated, occasioning permanent partial disablement; (6) that said accident arose out of and in consequence of appellant's employment within the meaning of the Act; (7) that prior to the accident the wage earned by appellant was 5s. per week; (8) that whilst he was off duty respondents continued to pay appellant 5s. per week (9) that when he was able appellant returned to the factory, and the respondents employed him at nondescript work at the same wage of 5s. per week, which has recently been increased to 6s.; (10) that in respondents' factory the ordinary course of employment as regards boys is, that after some months' nondescript service a boy is employed as a packer (on piece work),