

ports and carries with it a licence to the transferees to occupy the premises for the purpose of the business and during the subsistence of the agreement, provided they fulfil the obligations which they have undertaken in consideration of the rights conferred upon them.

I agree with Lord Adam, therefore, that the agreement contains the terms that are necessary to the personal contract of lease. It is not necessary to consider what might be the defenders' right in a question with singular successors, but during the pursuer's life I think that he is not entitled to turn them out of the premises so long as they continue to carry on the business and perform the stipulations in his favour.

The LORD PRESIDENT was absent.

The Court varied the interlocutor reclaimed against by deleting the words "sustains the tenth plea-in-law for the defenders and in respect thereof;" *quoad ultra* adhered, and refused the reclaiming-note.

Counsel for the Pursuer—W. Campbell—Cullen. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—Shaw, Q.C.—Orr. Agents—George Inglis & Orr, S.S.C.

Tuesday, January 5, 1897.

## FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.

### SOEDER v. SOEDER.

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

Averments in an action of divorce on the ground of adultery, which held (*aff. judgment of Lord Stormonth Darling*) irrelevant to go to probation, on the ground that they were not sufficiently specific in point of time.

Johann Jjacko Louis Soeder, Edinburgh, raised an action of divorce on the ground of adultery against his wife Jane Mitchell or Soeder, and against William Shaw, spirit merchant, Edinburgh, co-defender, concluding against him for £500 in name of damages.

The pursuer in his condescendence, which consisted of thirty-five articles, specified certain occasions on which adultery had been committed by the defender with the co-defender, and with another man named Berthout. He averred, *e.g.*—" (Cond. 9) On or about 26th June 1893 the pursuer sailed from Leith to Germany, and was accompanied to Leith by the defender. It is averred that after parting with the pursuer, the defender, under previous arrangement, met the co-defender Shaw, whom she took to the pursuer's house in Dublin

Street aforesaid, and that he remained with her there for a considerable time, and on that occasion the defender committed adultery with him."

He further averred—" (Cond. 11) During the said years 1893, 1894, and 1895 the defender was in the habit of visiting the said co-defender Shaw at his said shop at No. 2 High Riggs, Edinburgh, and she then within his said shop on the occasion of such visits committed adultery with him. These visits were made for the sole purpose of obtaining drink and for immoral purposes. On such occasions the defender was shown into Shaw's private room in his said shop, where she remained with him for hours. They frequently left this shop and went to the house of a Mrs Munro at No. 4 High Riggs aforesaid, and the pursuer avers that they committed adultery there. (Cond. 15) During the year from July to December 1893, and during the year 1894, and from January to April 1895, Shaw used frequently to meet the defender at the house of a Mrs Boyd, tenanted by her at No. 11 South St James Street, Edinburgh, from Whitsunday 1893 to Whitsunday 1894, and subsequently at No. 38 Balfour Street there, which she occupied from Whitsunday 1894 to Whitsunday 1895, and which houses were well-recognised houses of ill-fame, and well known as such to the defender, and were frequented by men and women for immoral purposes. On the occasion of all such visits the said defender committed adultery with Shaw. (Cond. 24) The pursuer avers that the defender and the said Berthout were in the habit of frequently meeting at the house of the said Mrs Boyd at No. 11 South St James Street aforesaid during the years 1893 and 1894 while she resided there, and that the defender then committed adultery with him. (Cond. 25) The pursuer further avers that the said Berthout, during the year from Whitsunday 1894 to Whitsunday 1895, frequently met the said defender at Boyd's house at Balfour Street aforesaid, and that she committed adultery with him there. The pursuer reserves all claims of damages competent to him against the said Berthout."

On 25th November 1896 the Lord Ordinary (STORMONTH DARLING) allowed parties a proof of their averments contained in certain specified articles of the condescendence and relative answers thereto, but these did not include articles 11, 15, 24, and 25 above quoted.

*Note.*—"I have refused to allow a proof of certain articles of the condescendence, because they are in my view much too vague to be admitted to probation. With regard to articles 15 and 24, inasmuch as the averments refer to visits by a married woman to a house of ill-fame, I should have been disposed to allow proof, if the pursuer had been able to assign a good reason for taking so great a latitude in point of time as two years; but he has not done so, and I am not satisfied that he has taken the usual and proper means of as-

certaining what evidence is available to him, and thereby of making his averments as specific as possible. Indeed, I have never seen the condescence in an action of divorce for adultery so vague and discursive in its whole scheme."

The pursuer reclaimed, and argued—A proof of all the pursuer's averments should be allowed. No doubt it was proper that a defender should have fair warning of the case she had to meet; but where, as here, it was averred that the defender had been pursuing a systematic course of adultery and frequenting brothels, it was not necessary for the pursuer to condescend on particular instances of such conduct. Such specific averments of adultery as that contained in condescence 9 were always difficult to prove, but the pursuer would derive great assistance in his task from the more general averments which the Lord Ordinary had not admitted to probation. — *Steel v. Steel*, July 10, 1835, 13 S. 1096; *Walker v. Walker*, July 20, 1871, 9 Macph. 1091; *Graves v. Graves*, 3 Curt. 235; *Smith v. Smith*, 29 L.J. Mat. Cases, 62.

Argued for the defender—The Lord Ordinary was right. The latitude claimed by the pursuer as regards time in these averments was grossly excessive. The cases cited by the pursuer were all distinguished from the present case by the fact that in them the defender was actually living with her paramour. The law on the matter was well laid down by the Lord Justice-Clerk (Inglis) in the case of *Tulloch v. Tulloch*, February 28, 1861, 23 D. 639, at p. 644, to the effect that the averments of the pursuer of a divorce on the ground of adultery must be as precise and pointed as they could be made.

LORD M'LAREN—It is the usual, though by no means the invariable practice when a summons is held relevant, to allow to each party a proof of his averments. Such an order does not imply that everything averred is relevant or a proper subject of probation, and where the averments are remitted to proof generally, it is always understood that evidence as to particular facts may be objected to on the ground of non-relevancy or insufficient notice in the record.

These qualifications of the effect of a general allowance of proof seem to be especially necessary in divorce cases, which are of a nature cognate to criminal proceedings. But I think it is primarily a matter for the discretion of the judge making the order for proof, whether he is to make a general order, reserving such questions as I have alluded to for determination at the proof, or whether he should limit the proof to these matters as to which he thinks a relevant averment has been made.

Now, the pursuer comes into Court with a condescence consisting of thirty-five articles directed to the establishment of a case of adultery against his wife, and he has so little confidence in his case that he

wishes to be allowed to prove these charges that are objected to on the ground of indefiniteness in preference to those which are clear and specific. This seems eminently a case for the revision of the record by the Lord Ordinary with a view to extracting from it the proper issuable matter. The Lord Ordinary has done so in the present case with great care, specifying articles which he thinks not objectionable, and giving his reasons for rejecting one or two where there might be a question. I am of opinion that the Lord Ordinary has dealt properly with the action in limiting the proof as he has done. If he had limited it still more, probably we might not have differed, but his Lordship has proceeded on the principle of giving the pursuer leave to prove every fact which is stated with the latitude of place and time allowed in criminal proceedings.

LORD ADAM—I am of the same opinion. I think the Lord Ordinary has allowed the pursuer a very large latitude as regards time by the interlocutor reclaimed against. The particular articles of the condescence of which the pursuer now seeks to be allowed a proof are 11, 15, 24, and 25. Article 11 covers a period of three years without specifying a single date or any one particular occasion on which an alleged call was made. Now, to allow a proof of so vague and general a statement would be very unfair to the defender, and I am certainly not disposed to allow a proof of it. The other articles in question appear to me to be open to the same objection, that they fail to specify any one particular date or a single occasion, so that the defender can be in a position to meet any evidence that may be led in support. I therefore agree that the reclaiming-note should be refused.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court adhered, and found the defender entitled to the expenses of the reclaiming-note.

Counsel for the Pursuer—Shaw, Q.C.—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defender—Baxter—Orr. Agents—Buchan & Buchan, S.S.C.