a considerable deduction must be made from the amount of the pursuers' claim. The pursuers were found entitled to their expenses, subject to deduction of one-fourth.

Agents for Pursuers—J. W. & J. Mackenzie, W.S.

Agent for Defenders—James Webster, S.S.C.

Saturday, July 2.

KETCHEN *v.* KETCHEN.

Parent and Child—Custody of Child—Petition for Delivery. A petition at the instance of a husband (who had been divorced from his wife on the ground of adultery) for delivery of his child, *refused. Held* that, in the circumstances, the mother was the proper guardian of the child, who was a girl between four and five years of age, allegations of lightness against the mother not having been substantiated.

This was a petition at the instance of a husband who had been divorced for adultery, craving an order against the mother for delivery of a child between four and five years of age. The mother and child were living at the wife's father's house. The petitioner was about to proceed to India, but offered, in the first place, during the remainder of his residence here to keep the child at home under the charge of a suitable governess, and thereafter, on his leaving the country, to place her at the disposal of his uncle, a gentleman who had occupied the office of Inspector-General of Hospitals. The petitioner further offered, alternatively, that the child, after a short stay with him, should be sent to a boarding school, and he had no objection that reasonable access to the child should be enjoyed by his wife, whose sister is married to a brother of the petitioner. The petitioner made averments of lightness of character against his wife, and of undue intimacy with another gentleman. The petitioner had made similar allegations in his defences to the action of divorce at his wife's instance, and founded upon them pleas of condonation and connivance, but he led no evidence in support of the averments, and did not insist in the pleas. Even before the action these allegations had been withdrawn, and apologised for by the husband, and the wife, in regard to a part of her own conduct, had on her part asked her husband's forgiveness. The child was alleged to be in very delicate health, and the last survivor of five children born of the marriage.

BURNET for petitioner.

LANCASTER in answer.

The following authorities were cited:—Fraser on Parent and Child, 2d ed., p. 73; *Harvey*, 22 D. 1198; *Stewart* v. *Stewart*, 7 S. L. R. 506; *Lang* v. *Lang*, 7 Macph. 446; *Nicolson*, 7 Macph. 1118; *Marsh* v. *Marsh*, 1 Sw. and Tr. 312; *Suggate* v. *Suggate*, 1 Sw. and Tr. 492; *Boynton* v. *Boynton*, 2 Sw. and Tr. 276; *Chetwynd* v. *Chetwynd*, 1 Law Reports (P. and M.), 39.

At advising—

LORD JUSTICE-CLERK—Though a father has the right to the custody of his children, and that right may be rashly asserted, yet by adultery he loses the rights he would otherwise possess, and there is nothing in the ordinary case to take the custody from the mother. The case of *Lang* v. *Lang* was not one of divorce but of misconduct on the part of the husband, which was found not sufficient to deprive him of the custody. I shall not say how far I would agree with Lords Ardmillan and Deas in their remarks in Lang's case in the case of *Nicolson*. That question is not raised here. Here we have a husband who carries on an illicit intercourse with the nurse of this child where they were all living. Then he makes accusations of improper conduct against his wife and retracts them. Then, when negotiations for a reconciliation are going on, he makes professions of sorrow for his conduct, but at the same time is carrying on the illicit intercourse with the nurse. When his wife refuses to resume cohabitation he threatens her. Both on the question of right and the case raised by the circumstances I have no doubt whatever.

The remaining question is whether the mother is a proper person. In the general case no greater calamity can befal a girl of tender years than to be taken from her mother, and the right of the husband cannot be exercised without injury to the child. Here the child is between four and five years of age, and consequently the mother is the only proper person, unless there is something absolutely rendering her an improper guardian. There are some statements as to the wife's intimacy with Dr M'Dowall which are perhaps not satisfactorily explained by her. But, notwithstanding, it is not for the petitioner to bring up these against her. He has retracted every word of the imputations, and it is pretty plain that they were not well founded. I am therefore for refusing the husband's petition. But it is not necessary to decide as to the future. We leave her with the mother for the present.

LORD COWAN founded his opinion on the circumstances of the acts of adultery, and the continuance of it for so long. Mr Fraser only says that a guilty party in an ordinary case of adultery may still have the custody of the child. But that is not applicable to an extraordinary case; and even what is laid down may be doubted. I think that *prima facie* a decree of divorce for adultery against the husband deprives him of the custody of the children, and he must make out a special case to entitle him to their custody. But here the special facts are very strong against him. The woman with whom he committed adultery was the wet-nurse. He kept her in the house as cook when she was not required as nurse, to facilitate the intercourse. She was dismissed when his wife returned, and again returned when she left. In regard to the suggestion that the child should be put in neutral custody, that is not prayed for in the prayer of the petition, and I think that it should be specially prayed for, and founded on special grounds, which should be set forth.

LORD BENHOLME—A father divorced for adultery desires the custody of his daughter, a girl of four or five years of age. There is no case in the books where such has been granted. On the other hand, a living author is quoted, whose dictum seems to imply that still there might be a case where the Court would grant it. I am not prepared to say that in every case where adultery and nothing else has been proved, the Court must deny the father the custody. I can suppose a case where the father's conduct after the divorce would prevent the Court from applying such a rule. But here is

a case which the husband required to meet, by alleviating circumstances. But, so far from there being extenuating circumstances, his conduct is highly discreditable. It is an aggravated case—and I agree that we should deprive him of his paternal power.

LORD NEAVES—I concur. We should refuse this petition in the special circumstances. I do not lay it down as a general rule that a husband when divorced for adultery is to forfeit the rights of the *patria potestas*. There may be innumerable cases where his rights may continue, notwithstanding his divorce for adultery. The law of this country in this respect is stricter than in other countries—allows divorce for a single act of adultery at any distance of time, if not knowingly condoned, and in whatever circumstances of temptation, for a single lapse in an otherwise virtuous life. In other countries other circumstances require to co-exist with the adultery. But it is not so in this country. The principle is as laid down in *Lang's* case. Would it injure the children? I do not concur with the Lord Justice-Clerk that the injury to the child in losing its mother is sufficient. That is not the kind of injury referred to. But here there is an aggravated case, which disqualifies the father. The illicit intercourse was continued with the nurse at the time when there was a negotiation for a reconciliation going on. Is then the mother disqualified? I agree with Lord Cowan that a special case must be set forth, for she has the next *prima facie* right. And his objections to her are excluded by his own conduct. His allegations against her character were made long before, and he retracted them. We do not foreclose the other question as to the father's access to the child, which I trust will not be refused.

Agent for Petitioner—N. M. Campbell, S.S.C.
Agents for Respondent—H. & A. Inglis, W.S.

OUTER HOUSE.

POLLOCK & ANOTHER (STRANG'S TRUSTEES) *v.* METEYARD AND OTHERS.

Heritable and Moveable—Jus relictæ—*Legitim*—*Act* 1661, *cap.* 32—*Provisions of Trust-Disposition in favour of Trustees.* In a competition betwixt trustees, the widow of the truster, and certain beneficiaries, *held* (by Lord Mackenzie, and acquiesced in) (1) that, as in a question with the widow, a sum of money mortgaged on the security of the works and rates of the Glasgow Water Company was heritable; (2) that in respect two of the truster's children had forfeited their liferent rights under their father's deed by their election to take legitim, that forfeiture operated in favour of the residue which was by that deed burdened with the liferent; and (3) that in respect of the provisions of the deed the trustees were entitled to receive the whole residue after certain payments, and to hold the same for behoof of the respective issue of the truster's children, and to manage the same during their respective pupillarities and minorities.

The late William Strang executed a trust-disposition and settlement in 1861, by which he conveyed his estate, heritable and moveable, to certain trustees therein named, for certain and in particular the following purposes, viz:—to pay to his widow, Mrs Margaret M'Dougall or Strang, the free yearly rents of his whole estate, and at her death or marriage to convert his property into money, and divide it into three equal parts, one-third to go to his daughter Julia Strang in liferent, and her children equally in fee; a third to go to his daughter Margaret Strang in liferent, and her children equally in fee; and the remaining third to his son William Strang in liferent, for his liferent use allenarly. The issue of the truster's children were to receive their shares of the fee provided to them on the death of their parent, and on majority or marriage in case of females. Further, the trustees were appointed tutors and curators to those of the truster's grandchildren who might become entitled to provisions under the deed of settlement for the management of these provisions during their respective pupillarities and minorities, with all competent powers. The truster was married a second time, and his second wife, Barbara Campbell or Strang, survives him. There were no issue by that marriage. There also survived the testator Julia Strang or Thomson, having four children, of whom three were in pupillarity. Margaret Strang or Meteyard also survived, having five children, all in pupillarity. William Strang survived his father, but died before this action was brought. Julia Strang or Thomson and Margaret Strang or Meteyard repudiated the liferent provisions in their favour, and claimed legitim. The trust-estate was entirely moveable with the exception of £1500, lent by the truster on 11th November 1864, on the security of the works and rates of the Glasgow Water Company. The mortgage is declared to be moveable by the Water Company's Acts, and there is no sasine on it. A great part of the Company's works are situated in burgh. Questions having arisen between the parties as to the amount of the widow's right in the succession, and as to whether the truster's widow had either right of terce or *jus relictæ* in the said £1500 stg., as to the extent and scope of the trustees' curatorial rights, and others, the present multiplepoinding was brought.

BRAND for the trustees.
SCOTT for Mr and Mrs Meteyard.
CAMPBELL for the widow.

For the trustees it was maintained that the £1500 contained in the mortgage granted by the Water Company, being a loan for a tract of time, and bearing interest payable periodically before the term of payment of the principal, was heritable so far as regarded the rights of the claimant as a widow, and fell to be deducted from the fund *in medio* before the claimant could claim her *jus relictæ; Downie* v. *Christie*, 14th July 1866, 4 Macph., 1067. The widow relinquished any claims to the said £1500, but maintained that out of the debts and charges payable from the estate, in reckoning with her, and amounting to £680, 16s. 6d. stg., a proportion thereof, consisting of debts proper, fell to be allocated upon the said sum of £1500 as being moveable, *quoad* the children of the truster, and equally liable with the remainder of the fund *in medio* in payment of the debts and charges. In support of this contention, reference was made to the Act 1661, cap. 32, providing that in certain circumstances bonds are to be holden and interpret as moveable. The reply of the trustees was, that this was an attempt on the widow's part to get the benefit to a certain extent of the said £1500 in an indirect way, seeing that