The petition was allowed to stand over till the Summer Session.

The petitioner argued that his right as father to the custody of his child was clear, unless the respondent took steps to obtain a judicial separation with right of custody of the child.

The respondent moved for a proof of the statements in the answers, which, if true, would show that the petitioner was not a fit person to have the custody of the child.

At advising—

Lord President—I think that the law and practice in this matter are well settled, and I do not see how we can refuse the prayer of this petition, subject of course to proper conditions as to the wife's access to the child. The wife is living in separation without the consent of the husband, and, indeed, against his protest. She has taken no means to get a judicial separation, and, in short, no means to justify the position she has taken up. In these circumstances the custody must be given to the father, unless the mother shows that the health or morals of the child would be placed in peril by its being in the custody of the father. Here we are bound to grant the father's petition subject to proper conditions as to the mother's access.

Lord Deas—I am of the same opinion. We have no choice in the matter. The petitioner admits he has been to blame in the way he has treated his wife, but that will not lead to the conclusion that without a separation the wife can demand the custody of the child. If her complaints are to be seriously persisted in there is no way for her but a process of separation.

Lord Mure—I am of the same opinion. I think that however relevant the wife's statement would be in a process of separation, they are not relevant in such a petition as the present.

Lord Shand—If this case had been disposed of at the date of presenting the petition in January or February last, I think the petitioner could not then have succeeded, for the child was not then weaned, and it might have been injurious to its health to remove it from the mother. But as the case now stands, I think it is ruled by the authorities cited at the bar that the husband, though not entitled to have the petition granted at the date at which he presented it, is entitled to have it granted now.

Lord Deas—I agree with Lord Shand in thinking the question would have been different as at the date of the presenting of the petition.

Guthrie, for respondent, moved for expenses.

Rhind, for the petitioner, objected to expenses being granted. It was not matter of course that a husband should in a petition for custody of children have to pay the expenses of the wife—Fraser on Husband and Wife; *Lang* v. *Lang*, January 30, 1869, 7 Macph. 445; *Symington* v. *Symington*, July 16, 1875, 2 R. 974.

Lord President—In this particular case we think the wife should have expenses. The husband's petition was premature.

The parties being agreed as to the access to be afforded to the mother, the Court found the petitioner entitled to the custody of the child, subject to its being sent to the mother's residence one day in each week from 11 to 6, and to her being entitled to visit it at the petitioner's residence at such times as she might choose.

Counsel for Petitioner—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—Guthrie. Agents—Henderson & Clark, W.S.

Tuesday, May 16.

SECOND DIVISION.

[Lord Fraser, Ordinary.

COLLINS *v.* COLLINS AND EAYRES.

Husband and Wife—Divorce—Condonation—Competency of Proof of Prior Acts of Adultery.

Held, in an action of divorce by a husband on the ground of adultery, alleged to have been committed subsequently to certain other alleged acts of adultery which were admitted to have been condoned by him, that though the acts condoned could never be made the sole ground of divorce, the husband was not to be excluded by his condonation from leading evidence as to these prior acts of adultery in order to throw light on the subsequent conduct of the parties.

Question as to the effect of proof of the alleged adultery prior to condonation.

The pursuer in this case, Alexander Glen Collins, was married to the defender in Glasgow in June 1872, and the parties thereafter cohabited there as man and wife. In February 1882 the present action of divorce on the ground of adultery was raised by the husband against his wife, and against the co-defender Eayres, a fiddler, for damages. The pursuer alleged that in July 1881 he, for the first time, became aware of a guilty intimacy between his wife and the co-defender, and libelled several specific acts of adultery in that year; averring also that his wife had admitted to him her misconduct, but that he had, however, for the sake of his children, of whom there were four born of the marriage, condoned his wife's misconduct on the express condition, undertaken by her at the time, that she should never again speak or write to the co-defender. He further averred that in the months of December 1881 and January 1882 the defender had renewed her intimacy with the co-defender, who had then come from London, where he usually resided, to fulfil a musical engagement in Glasgow; that they had been in the habit of meeting and walking together alone; that on or about the 26th of January they had committed a specific act of adultery; and that he had in consequence since withdrawn from his wife's society.

The defender denied adultery, and averred that the pursuer, in belief of the prior intimacy alleged by him in May and June, and in knowledge of the meetings with the co-defender in December and January, which she admitted, had continued his cohabitation up to the 2d of February. The co-defender also denied adultery, but admitted having on one or two occasions met and spoken to the defender.

The defender and co-defender pleaded that the acts of adultery libelled as prior to the condonation could not be admitted to probation.

The Lord Ordinary repelled the plea and allowed proof, adding the following opinion:—"The defender maintained that no proof ought to be allowed of acts of adultery prior to the condonation, which the pursuer himself states that he had made in favour of the defender, as set forth in his condescendence. If it had not been for the qualified terms in which the condonation was given, the Lord Ordinary would have sustained this plea. He is of opinion that the law of Scotland, following in this respect the canon law, absolutely wipes out any guilt prior to condonation, and it cannot be brought up again to the prejudice of the pardoned spouse for any purpose whatever — *Lockhart* v. *Lockhart*, Morison, App. v., Adultery, No. 1—'that reconciliation is a complete objection on both sides to proof of prior guilt then known to the parties.' The exact point decided in the case was, that condoned adultery could not be revived with the view of making it a substantive charge entitling to divorce, and this is the length to which Erskine carries the effect of *remissio injuriæ*. He says—'Cohabitation by the injured party, after being in the knowledge of acts of adultery committed by the other spouse, if it has not been constrained by force or menaces, imports a passing from or forgiveness of the prior injury, and is therefore sufficient to elide any action of divorce that may afterwards be pursued upon those injurious acts' (i. 6, 45).

"The pursuer, however, says that he does not mean to found upon the condoned adultery as a ground for divorce, but as showing how intimate the defender and co-defender were with each other, and the high probability that if they had opportunity they would repeat their adulterous conduct. Even to this limited extent (and the demand is plausible enough) the Lord Ordinary could not admit any proof of what the condonation had swept away. He conceives that the authorities upon this subject, such as Sanchez, which have guided the Consistorial Courts in Scotland, forbid any reference whatever to the wife's former adultery. The case is to be treated the same as if the marriage had just begun, and the wife were pure and innocent. The case is different, according to English law, which treats all condonations as conditional, and as being repealed by any subsequent conjugal misconduct. A striking illustration of this will be found in the most recent cases on the subject (*Newsome* v. *Newsome*, 6th June 1871, 1071 L.R., Prob. and Div. 306), and the import of the English cases is, that to revive condoned adultery it is not necessary that the new injury should be of the same nature, but that cruelty, desertion, or other improper conduct was sufficient—*Snow* v. *Snow*, 2 Notes Cases, Supp. XIII.; *Bramwell* v. *Bramwell*, 3 Hags. 619; *Westmeath* v. *Westmeath*, 2 Hag. Supp. 113, and other cases noted in Pritchard's Digt., p. 74, No. 71).

"This is not the law of Scotland, as the case of *Lockhart* shows. Sanchez states the doctrines (10, 5, 21) in a sentence—'Primum illud adulterium est remissione extinctum at crimen semel transactione aut indulgentia accusatoris extinctum non potest amplius ab eodem in judicium deduci.' Had, therefore, this been the simple case of the innocent husband claiming right to prove condoned adultery against a wife who had relapsed, with the view merely of showing the intimate relationship between her and her paramour, the proof would not have been allowed. But the specialty in the case is, that the pursuer avers that condonation was given 'on the express condition undertaken by the defender at the time, as the condition of the condonation, that she should never again speak or write to the co-defender. The said condition has been broken by the defender as after mentioned.' That a husband who has been wronged by the infidelity of his wife may attach a condition to his pardon is a proposition to which no sound objections are apparent. It was within his power to give or to withhold the pardon, and if so, there is nothing contrary to principle or to public policy to hold that he could state the terms and conditions upon which she was to be again reinstated in her place as wife. This, in truth, is shown by the present state of the law of England, which is the same, without any express condition, as the alleged express condition would make the present case.

"In these circumstances it is necessary to allow the pursuer a proof of the conditional nature of the *remissio*, and seeing this proof must be taken, it would divide the case without any apparent advantage if a proof were not allowed at the same time of the condoned adultery. Of course, if the condonation was unconditional, no attention whatever will be given to such proof."

The defender reclaimed, and argued against the Lord Ordinary's opinion in regard to the specialty in the case, and that condonation—which was to be inferred from cohabitation—was absolute and unconditional, and excluded all inquiry into the past, whether for the purpose of establishing a substantive ground of divorce on prior acts of adultery or for strengthening the case as to alleged subsequent acts, and referred to the authorities quoted by the Lord Ordinary, and to Fraser on Husband and Wife, p. 1180.

The pursuer argued that condonation was always conditional on future good behaviour on the part of the erring and forgiven spouse, and did not exclude inquiry into previous conduct in an action founded on an allegation of subsequent acts of adultery. This was the law of England as well as of Scotland (*Keats* v. *Keats*, 28 L.J. 57).

At advising—

Lord Craighill — The Lord Ordinary has allowed a proof, and the defender reclaims against his interlocutor, not because a proof has been allowed, but because there has not been an exclusion from the proof of the averments set forth in the condescendence. These averments relate to acts of adultery said to have been committed in the beginning of 1881, and, as admitted by the pursuer himself, subsequently condoned. The contention of the defender is, that having been condoned, evidence regarding them, for any purpose whatever, cannot be admitted. I am of opinion that this contention is erroneous, and properly has been overruled. I am not to be held, however, as concurring in all the reasons which the Lord Ordinary has given for his judgment. It is sufficient for me to say that upon one ground, even if there were no other, the proof granted, as I think, has been properly allowed. Assuming the acts of adultery condoned

can never be made grounds of action for a divorce, it does not follow that evidence as to these may not be received when the question is whether subsequent acts of adultery have been committed. There is no authority against this, for it is a misapprehension to say that the decision in the case of *Lockhart* or the passage quoted from Erskine is an adverse authority. The reason of the thing appears to me to be an ample justification. Were an opposite doctrine to be sanctioned, the effect of condonation would be not merely to protect against divorce for the adultery condoned, but to limit the proof by which subsequent acts could be established. This consideration of itself appears to me to be sufficient to support the judgment of the Lord Ordinary, though certainly it is not the ground upon which that judgment has been rested. The view upon which the Lord Ordinary proceeds is that the acts of adultery condoned may not be made grounds for a subsequent divorce; the present must be treated as an exception from the rule, inasmuch as the condonation was conditional. Whether there is room for this distinction may be questioned, because much may be said in favour of the opinion that every condonation is conditional upon subsequent behaviour. A decision upon this point, however, is at present unnecessary, and therefore ought not in the meantime to be pronounced. Should circumstances after the proof has been led render a decision necessary, the question will be taken up and be the subject of judicial determination. Meantime I reserve my opinion.

There is another specialty in the present case. A co-defender is here sued for damages, and whether the effect of condonation extends to him is a point which hitherto has not been decided, not having previously been presented for judgment, and it appears to me to be fortunate that the proof asked by the pursuer being competent upon another ground, the decision of this point may properly be postponed.

Lord Rutherfurd Clark—The pursuer of this action alleges that his wife committed adultery on various occasions in the spring and summer of 1881 with the co-defender, and that he condoned her offence on the express condition that she should never again speak or write to the co-defender, but that he has since discovered the guilty parties renewed their intimacy in December following. The question now before us is, whether we should allow proof of the acts of adultery prior to the condonation, reserving in the meantime the effect of such proof—should the acts be established—on the result of the action. It is possible that one or other of two effects should attach to proof of the alleged prior acts of adultery. On the one hand, they might form substantial ground of divorce, or, on the other hand, they might be regarded as throwing a certain light on the behaviour of the defender and co-defender in December and subsequently, so as to enable the Court to form a correct conjecture as to the truth of the accusation made against them.

I give no opinion on the question as to whether the pursuer is entitled to found on the prior acts of adultery as affording ground for divorce. I purposely refrain from expressing any opinion upon that point, because if the acts be proved it must necessarily come up for decision at a later stage. But upon the question whether they may be properly used for the other purpose which I have indicated I have no doubt whatever.

I do not proceed in any degree on the condition said to have been attached to the condonation. I think that the pursuer is entitled to lay before the Court all the evidence which will enable it to form a correct judgment on the facts of the case; and I do not think that in such a case there is anything more important than all possible evidence as to the behaviour of the parties throughout their whole intimacy. For that purpose I think that the evidence in question should be admitted.

The Lord Ordinary has said that in the law of Scotland condonation wipes out all guilt prior to it, so that it cannot be brought up again to the prejudice of the pardoned spouse for any purpose whatever, and quotes authorities to support that view. I do not, however, look at these authorities in the same way. It seems to me that an act of adultery which has been condoned cannot of itself form the sole ground of divorce, and that the *dictum* of Erskine is to precisely the same effect. The opinion of Sanchez, which is also relied upon, appears to go no further. These authorities lay down that acts of adultery prior to condonation will not ground an action for divorce, but they do not say that the Court is not to have evidence of the whole conduct of the accused persons before it. I think the Lord Ordinary's interlocutor should be adhered to, though not for the reasons assigned in the note.

Lord Young—I concur with both of your Lordships. It has not been doubted, at all events since the case of *Lockhart* in 1799—and I should have difficulty in finding grounds for a contrary view—that a husband who has condoned an act of adultery on the part of his wife should have no action against her for what he has condoned, there being no subsequent misconduct. This is the feature of *Lockhart's* case. The circumstances there were—The wife had misconducted herself in 1793, or at least her husband believed she had, and he forgave her, and cohabited with her as a forgiven wife, and she thereafter behaved herself with propriety. But then he gave himself up to adulterous practices, and she brought an action against him in 1797. In answer to her action he said—"You have yourself committed adultery in 1793, and that bars your action." The Court, however, held that adultery on the part of the wife, which had been forgiven and condoned, could not be made a bar to her action, and formed no ground for divorce. In that case the wife's adultery, which had admittedly been condoned, was the sole charge against her, and I should have thought there was very little difficulty in deciding that that could not be made a ground of divorce. That is all that *Lockhart's* case decided. It has not decided nor given any indication as to what the law is in such a case as this, and what amount of subsequent misconduct will be sufficient to forfeit the condonation, so as to obliterate it, and disentitle the forgiven person to plead it. No decided case or *dictum* lays down any rule as to that. It is not necessary at this stage of the case to determine whether, if the pursuer established misconduct on his wife's part subsequent to the condonation, she shall be held disentitled to plead condonation. But I think it is perfectly competent,

in an action in which subsequent misconduct is alleged, for a husband to prove the conduct of the accused parties prior to the condonation. That is plain common sense, and the authorities lay down nothing opposed to it. There is no such rule of law, as the Lord Ordinary seems to think there is, to the effect that the conduct of a guilty party prior to condonation may not be inquired into with respect to subsequent misconduct. The law in England seems to be undoubted on this point.

I am clearly of opinion that this case is not made at all special by the alleged express condition adjected to the condonation when given. I do not think there is anything in that at all, and I cannot agree with the Lord Ordinary when he says:—"That a husband who has been wronged by the infidelity of his wife may attach a condition to his pardon is a proposition to which no sound objections are apparent. It was within his power to give or to withhold the pardon, and if so, there is nothing contrary to principle or to public policy to hold that he could state the terms and conditions upon which she was to be again reinstated in her place as wife." I cannot agree with that at all. I am not of opinion that if she spoke or wrote to the man she would therefore forfeit the condonation. By Act of Parliament a man is entitled to entail his estates on any lawful condition he may please, but I am not aware that a man can say to his wife—"We will let bygones be bygones, but if you do something—say, don't get up every morning at 6 o'clock and give me my breakfast—I shall have my action." That cannot be so. I think that condonation must be rational. It must simply be—I forgive you for your own and the children's sake, but you shall not be entitled to plead this against me if you misconduct yourself with this man again.

All we need determine at this stage of the case is that the whole case must be put before the Court—the conduct of these accused parties over the whole time of their intimacy. I, in common with your Lordships, reserve my opinion on the other point, although I have a strong impression as to what will be the effect of the evidence of former misconduct if the pursuer's allegations be accurate.

The Court adhered.

The co-defender did not appear.

Counsel for the Pursuer (Respondent)—D.-F. Macdonald, Q.C.—Pearson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender (Reclaimer)—Robertson—Jameson. Agents—J. & J. Ross, W.S.

Tuesday, May 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STEWART *v.* DALGLEISH.

Arrestment—Holding Fund in Double Capacity.

Money came into the hands of a trustee in a sequestration and was available for payment of dividend. The trustee was also attorney of a creditor of the bankrupt. He kept it in a safe and made payment of dividend out of it to various creditors, but took no step to transfer any part of it from himself as trustee to himself as an attorney for the creditor. *Held* that such a transfer could not be effected by mere intention to hold as attorney, and that an arrestment used in his hands as trustee in the sequestration was a good arrestment.

On 17th June 1879 Thomas Sneddon, then residing at Bellshill, Airdrie, being about to go abroad, executed a power of attorney in favour of James Stewart, Andrew Cassells Struthers, and Hugh Thomson Kennedy, and the survivor of them, and the heir of the survivor, containing all the usual and necessary powers, and *inter alia* power to receive and discharge sums of money, debts, and demands of whatever nature which were owing to and due by him, declaring a majority in number of the said attorneys formed a quorum at 10th November 1879. Thomas Sneddon was a creditor of James Leishman Sneddon, iron broker, Coatbridge, to the amount of £420, 9s. 6d., and Stewart, one of the attorneys of Thomas Sneddon, was appointed trustee on his estate.

On 15th November, Stewart, as factor, mandatory, and attorney of Thomas Sneddon, by authority of his co-attorneys, lodged a claim for £420, 9s. 6d. on the sequestrated estate. On 19th November Stewart was confirmed as trustee on the estate. As such trustee he on 23d May 1880 sold the whole of the sequestrated estate to Matthew Whitelaw in consideration of a payment to him on behalf of the creditors of a composition of 8s. 6d. per £1 on their debts, and in addition all preferable claims and expenses of sequestration and trustee's commission and outlays.

James Shirlaw, as sole partner of James Shirlaw & Son, and as an individual, was also a creditor on James Leishman Sneddon's sequestrated estate for a sum of £100 contained in a bill for that sum for which James Leishman Sneddon and Thomas Sneddon were jointly liable. His estates were sequestrated on 17th May 1880, and James Dalgleish, accountant in Glasgow, was appointed trustee thereon, and he intimated his appointment to Stewart, and received from him payment of the composition on that sum together with £4, 6s. of interest to the date of sequestration, and £4, 14s., being the expense of protest. Dalgleish on 17th December 1880, protested the bill against Thomas Sneddon, and thereafter on 18th December, used arrestments in the hands of Stewart as trustee on James Leishman Sneddon's estate, as attorney of Thomas Sneddon, and as an individual. He then raised this action of furthcoming concluding for the amount still unpaid of the bill with expenses against Thomas Sneddon as common debtor, and Stewart in his capacities of James Leishman Sneddon's trustee, of attorney for Thomas Sneddon, and in his individual capacity as arrestee. Stewart defended the action as such trustee and as attorney for Thomas Sneddon, and appearance was also entered for the common debtor. Stewart averred that on 10th December 1880, as trustee on the sequestrated estate of James Leishman Sneddon, he paid over to himself as one of the attorneys of Thomas Sneddon, and as representing his co-attorneys, the dividend to which they were entitled as creditors on that estate, and that afterwards he had disbursed a part of it on Thomas Sneddon's behalf.