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.

He pleaded—"(1) The funds held by the said James Stewart being held by him and the said Andrew Cassells Struthers and Hugh Thomson Kennedy as attorneys of the said Thomas Stark Sneddon, all parties have not been called to this action, which should be dismissed with expenses. (3) The said arrestment having attached no funds in the hands of the defender, either as an individual or as trustee on the sequestrated estate of the said James Leishman Sneddon, belonging or due to the said Thomas Stark Sneddon, the action should be dismissed with expenses."

The Sheriff-Substitute (BIRNIE) allowed a proof, at which Mr Stewart deponed that James Leishman, Sneddon had died after the sequestration, and that his estate had been wound up in a peculiar manner by the sale of the whole estate to the relatives of the bankrupt for a sum which would yield the dividend which it had been estimated it would yield if wound up in the ordinary manner. He explained that he had received the price from the purchaser Mr Whitelaw on 21st August 1880, and had kept it in his safe with the other sum belonging to the estate until the dividends became payable on 10th December, when he began to make payment to the creditors, and continued doing so at intervals during that and the succeeding month. He stated that from 10th December he looked on the money representing the dividend due to Thomas Sneddon as that person's property, held by him as one of the attorneys for him, and that he paid out of it an account due by Thomas Sneddon. He made no entry in his books of any transfer of the money to Thomas Sneddon, and did not remove the balance of the money from the safe, and it was accordingly lying there on 18th December when the arrestment was used, along with the other money which was being used to pay dividend. The money was so treated, as he explained, in order to prevent it from being subject to arrestment by creditors of Thomas Sneddon, it being his view that money in his hands as attorney was as secure from arrestment as if it had been in the hands of Thomas Sneddon himself. A minute of the attorneys was produced at the bar by which Stewart was authorised to discharge the composition due to Thomas Sneddon.

The Sheriff-Substitute pronounced this interlocutor:—"Finds that on 18th December 1880 the pursuer arrested in the hands of the defender James Stewart, trustee on the sequestrated estate of James L. Sneddon, and attorney for Thomas Sneddon, as such trustee and attorney, and as an individual, moneys due by him to the said Thomas Sneddon: Finds that at said date the said defender had in his hands, either as trustee or attorney, moneys exceeding the sum arrested: Finds that he held said moneys as attorney for Thomas Sneddon: Finds that he is one of three attorneys for Thomas Sneddon, but that this was not known to the pursuer or his agent: Finds in law that the funds in his hands as said attorney were attached by said arrestment: decerns forthcoming against the said defender: Finds the common debtor, the said Thomas Sneddon, liable in expenses to the date of the lodging of the defences: Finds the defender, as attorney for the said Thomas Sneddon, liable in expenses since said date," &c.

He added this note—"Thomas Sneddon was ranked on James L. Sneddon's sequestrated estate, and entitled to a dividend of about £170. Mr Stewart, as trustee on James L. Sneddon's estate, received money to pay the dividend on that estate, and kept it in his safe. Off this money he paid the creditors other than Thomas Sneddon, having the dividend due to Thomas Sneddon in the safe. Circulars were sent to the creditors that the dividend was payable on 10th December, that is, eight days before the arrestment on which this action depends. Mr Stewart says that on the date of the arrestment the money must be held to have been in his hands as attorney for Thomas Sneddon, and could not be arrested for a debt of Thomas Sneddon's, as an arrestment in the hands of an attorney against his principal is invalid. I think it must be held that after the 10th December the money was in Mr Stewart's hands as attorney for Thomas Sneddon, but that it was competently arrested in his hands as such. By the power of attorney, Mr Stewart and his brother attorneys are entitled to intromit with and manage all Thomas Sneddon's property, and are expressly required to count and reckon with him. It seems to me that in such circumstances funds could be arrested in his hands. (*Telford's Executors* v. *Blackwood*, February 3 1866, 4 Macph. 369; *Lairments* v. *Shearer*, March 3, 1866, 4 Macph. 540; Dove Wilson, Sheriff-Court Practice, second edition, page 333.)

"Mr Stewart further argued that he was merely the agent of the other attorneys, and that it is incompetent to arrest in the hands of an agent; but he was not merely agent, he was attorney, and in possession of the funds as such, and, as it seems to me, is liable to and protected by the decree of furthcoming."

The Sheriff (CLARK) adhered on appeal, with this note—"At first sight this case appears somewhat complicated, but when examined into these complications disappear. It is said that the arrestee being merely an attorney for the common debtor resident abroad, arrestment is incompetently used in his hands. It may be sufficient answer to this, that from the power of attorney produced it is evident that the power given is that of commission, and, according to Erskine, 6, 5, arrestment used in the hands of one to whom the common debtor has committed the custody of his goods is valid. It was next argued that to make the arrestment effectual it should have been used in the hands of the whole body of attorneys or commissioners, or at least in the hands of their quorum. This might be very true if it were sought, by means of the arrestment used in the hands of one of their number to attach funds in the hands of the others; but in the present case it is admitted that the arrestee is in possession of the funds. It might be argued, in some circumstances, that it was necessary to convene the whole body of commissioners before the Court, in case they might have any plea to urge on the part of their constituent which was unknown to that one of their number in whose hands the arrestment was used. This objection, however, is plainly untenable, when it is considered that the common debtor has himself entered appearance and lodged defences, and these in no respect affect this matter."

Stewart appealed, and argued that an arrestmen. in the hands of one of several attorneys was bad. The case of *Black* v. *Scott*, January 27, 1830, 8 S.

367, was precisely in point, and equally so was the authority of Bell's Prin. 2276; see also *Macdonald* v. *Reid*, November 18, 1881, 19 Scot. Law. Rep. 119.

The respondent argued that such an arrestment was good (*Dunlop* v. *Collie*, 2 S. 156), but that independently of that question of law the proof showed that the money had been in the hands of Stewart as trustee all along, and had never passed to him as attorney.

At advising—

Lord President—This action of forthcoming is pursued by James Dalgleish, trustee on the sequestrated estate of James Shirlaw, and is directed against Thomas Sneddon as common debtor, and James Stewart as his attorney. There is no dispute about the debt due by Sneddon to Dalgleish, and there is as little doubt that arrestment has been used in the hands of Stewart as arrestee of money owing to the common debtor; but the question which arises is in what character Stewart held the money, or, in other words, in what character he was accountable to the common debtor Thomas Sneddon. The arrestment was used on 18th December 1880, against Stewart in three capacities—as trustee on the estate of James Leishman Sneddon, as one of three attorneys of Thomas Sneddon, and as an individual. If in any one of these capacities Stewart was then indebted to the common debtor, the objection to the validity of the arrestment is at an end. The common debtor Thomas Sneddon had a claim against the sequestrated estate of James Leishman Sneddon, and Stewart was trustee in that sequestration. The sequestration was brought to an end by a composition of 8s. 6d. being offered, and Mr Thomas Sneddon, the common debtor, being absent from the country, this matter was under consideration of his attorneys on 21st July 1880; and they came to a resolution to take payment of that composition, and at the same time authorised Stewart as one of their number to grant the usual discharge of the debt on payment of that composition. The composition was payable on 10th December, and from that date the sequestrated estate, and Stewart as trustee thereon, were indebted to Thomas Sneddon in the amount of the composition on his debt; and if the arrestment had been laid on 10th December, at which date the composition was payable, it would —there is no doubt—have been well arrested in the hands of Stewart as trustee on the sequestrated estate of James Leishman Sneddon. But it is said that something took place afterwards which operated a transference of the sum by Stewart to himself and the other attorneys, and if that be so, then the question arises which the Sheriffs have decided. But there is a previous question, whether after 10th December the money was not, just as it was before, in the hands of Stewart as James Leishman Sneddon's trustee, and the indebtedness of his estate remained undischarged till the arrestment on 18th December? Unless there was something to alter matters between the 10th and the 18th, the estate and Stewart as trustee remained indebted to Thomas Sneddon. What did occur? The natural thing for Stewart to do in his twofold capacity as James Leishman Sneddon's trustee and one of the attorneys of Thomas Sneddon authorised by his co-attorneys to discharge the debt, was to grant a receipt by himself as attorney to himself as trustee, and then to enter in the books kept by the attorneys a receipt for payment, and lastly—perhaps the most important thing of all—to deposit the dividend in bank to the credit of the three attorneys. Not one of these things was done. Nothing was done. When we read the evidence of Stewart it comes to this—"I resolved in my own mind that from 10th December the money was held by me as one of the attorneys of Thomas Sneddon." I cannot think that by the mere mental resolution of the holder he can cease to hold in one character and begin to hold in another. If he had separated the sum in his custody (he seems to have kept all the money he had in a safe—an extraordinary course in itself), and put it in a separate place, or in a separate part of the safe, so as to distinguish it, something might have been said as to its being held as attorney for Thomas Sneddon. But the whole money for payment of the dividend was put into the safe, and payment went on from time to time to the other creditors, and it was not at the time of arrestment all paid away so as to leave any of the money due to Thomas Sneddon. He says in his evidence that payment of dividend began on 10th December, and went on during December and January, so that a lump sum was being diminished from time to time by payment of dividends to particular creditors, and at the time of the arrestment there remained a lump sum consisting of the dividends due to Thomas Sneddon and other creditors. In that state of facts, the position of Stewart as trustee on the sequestrated estate, owing to Thomas Sneddon a sum of composition on his debt, remained unaltered down to the date of arrestment, and therefore the arrestment was well used in the hands of Stewart as trustee on James Leishman Sneddon's sequestrated estate.

Lord Deas—As your Lordship has explained, the arrestment was used in the hand of Stewart—(1) as trustee, (2) as one of the three attorneys, and (3) as an individual. On hearing the argument I have come to the conclusion that the arrestment in the hands of Stewart as trustee was good. If so, that is sufficient for the decision, and it is unnecessary any longer to enter into other questions in the case. I concur with your Lordship.

Lords Mure and Shand concurred.

The Court altered the finding in fact of the Sheriff-Substitute that at the time of the arrestment Stewart held the money arrested as attorney for Thomas Sneddon, found that he then held it as trustee of James Leishman Sneddon, and dismissed the appeal.

Counsel for Appellant—Trayner—Strachan. Agent—Alex. Gordon, S.S.C.

Counsel for Respondent—Gloag—Baxter. Agents—Davidson & Syme, W.S.