real evidence though the mark had not been actually seen in open Court. It was as if a jury after retiring had asked to see a production in the case. Reference was made to *Collison* v. *Mitchell*, 1897, 24 R. (J.) 52, 34 S.L.R. 528, 2 Adam 277; *Sime* v. *Linton*, 1897, 24 R. (J.) 70, 34 S.L.R. 664, 2 Adam 288; Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), sec. 75.

LORD JUSTICE-GENERAL—This bill of suspension is brought against a conviction for assault. It appears that the assault was committed on the person of a Mrs M'Nidder, whose arm was seized and compressed by the accused. Mrs M'Nidder was herself a witness at the trial and spoke to the assault and to the fact, as she alleged, that her arm still bore a mark which was the result of the violence used upon her. She was asked if she was willing to show the bruise on her arm, to which question she returned an affirmative answer, but the matter was not pursued further during the proof. After the evidence on both sides had been closed, however, and after hearing argument in point of fact, the Magistrates, having retired to consider their decision, asked Mrs M'Nidder to come into the room to which they had retired, and examined her arm there without the presence of the accused and of parties solicitors—one of the Magistrates being a medical man. Whether they asked her any questions or not we do not know, but I assume they did not.

This procedure, however well intended and however harmless it may have been in this particular case, strikes at the principle—deeply rooted in the criminal law of Scotland—that no proceedings in a criminal trial, and particularly no proceedings connected with the taking of evidence, can go on outwith the presence of the accused. The examination of the arm was just a means of taking evidence additional to that which was presented at the proof. The taking of such evidence in the absence of the accused is plainly an irregularity which vitiates the proceedings, and there is therefore nothing for it but to quash this conviction.

LORD CULLEN—I concur. I think that the examination of the arm by the Magistrates amounted to the reception of additional evidence by them, and therefore should not have proceeded in private, as it did, outwith the presence of the accused.

LORD BLACKBURN concurred.

The Court passed the bill and quashed the conviction.

Counsel for the Complainer — Patrick. Agents—Croft Gray & Gibb, W.S.

Counsel for the Respondent — Keith. Agents—Simpson & Marwick, W.S.

COURT OF SESSION.

Tuesday, May 31.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

SANDERSON *v.* SANDERSON

Process — Husband and Wife — Divorce — Final Decree—Custody, Maintenance, and Education of Pupil Child—Final Decree Regulating Custody but Containing No Reservation of Right to Apply for Further Orders — Subsequent Application to Vary Provision — Competency — Extract—Interim Extract of Decree Containing Reservation — Conjugal Rights Amendment Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 9.

In an action of divorce for desertion at the instance of the husband final decree of divorce was pronounced in the Outer House containing provisions as to the custody of and access to the pupil child of the marriage, but without reservation of any further right to the parties to apply to the Court to vary the provisions. The wife subsequently presented a minute to the Lord Ordinary asking that his order as to the custody and access should be altered. His Lordship having reported the case to the First Division, the Court, in respect that the final decree contained no reservation of right to the parties to make application for further orders as to custody, maintenance, and education, *directed* him to refuse the crave in the minute.

Observed (*per* the Lord President) that an interlocutor which by itself or along with previous ones disposed of the whole subject-matter of the case was none the less a "final decree" although it contained a reservation designed to provide for alterations in circumstances which could not be foreseen or dealt with by anticipation.

Observed further that final decrees so qualified were capable only of interim extract.

Arthur Buchanan Sanderson, sometime residing at Newbury, Berkshire, having brought an action of divorce against his wife, Mrs Stella Winifrid Woodthorpe Robertson or Sanderson, Basil Street, London, decree of divorce was granted containing provisions as to the custody of and access to the pupil child of the marriage, but without reservation of any further right to the parties to apply to the Court to vary the said provisions. The wife subsequently presented a minute to the Lord Ordinary asking that his order as to the custody and access should be altered. Answers were lodged for the husband and replies thereto by the wife.

The Lord Ordinary (BLACKBURN) reported the minute, answers, and replies to the Inner House. The facts and circumstances are fully set forth in his Lordship's report (*infra*).

Lord Blackburn—"It is provided by section 9 of the Conjugal Rights Amendment Act 1861 (24 and 25 Vict. cap. 86) that—'In any action for separation *a mensa et thoro* or for divorce the Court may from time to time make such interim orders, and may in the final decree make such provision, as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates.'

"The direction of the Court is desired on the question whether when a final decree has been pronounced in an action of divorce, and in the same interlocutor the custody, maintenance, or education of a pupil child of the marriage has been dealt with, the action may still be treated as a continuing process, in which if circumstances changed it would be competent for the Lord Ordinary to alter or vary his previous findings with regard to the custody, maintenance, or education of the child.

"In the present action I pronounced an interlocutor on 12th July 1920 in which I found the pursuer entitled to divorce on the ground of his wife's desertion. There was a conclusion for custody of the only child of the marriage, a boy aged nine. No defences were lodged to the action, but the defender was represented by counsel at the proof, and it was stated on her behalf that she would have opposed the conclusions for custody but for an arrangement which had been come to between the parties. Up to the date of the decree the boy had been in his mother's custody, and so far as the evidence in the case went there was nothing to suggest that she was unfitted to continue in charge of him. It appeared to me to be a case of marriage between two persons utterly unsuited to one another, which resulted in the wife refusing to adhere rather than continue a life which she found intolerable. I pronounced the following finding, which included at the request of both parties the terms of their agreement as to custody—'Finds the pursuer entitled to the custody of the pupil child of the marriage, and interdicts, prohibits, and discharges in terms of the conclusions of the summons to that effect; and in respect that it has been arranged between the parties that the said child should spend the first ten days of the Christmas holidays, the first ten days of the Easter holidays, and the first half of the summer vacation with the defender, finds it unnecessary to deal with the question of access, and decerns.'

"This interlocutor was not reclaimed and in that sense became final, but the process is still depending before me, as only interim extract was taken.

"The wife has now presented a note in which she states that the pursuer has gone to reside on a farm in East Africa, leaving the child in the custody of his grandmother, and on that account she asks that my previous finding as to custody should be altered to the extent of giving her the sole custody of the child during the pursuer's absence from this country.

"I should have disposed of this application by dismissing the note as incompetent had it not been that in a recent case in which a similar question arose—*M'William* v. *M'William*—Lord Sands reported the case to the Second Division for the reason that there is an alleged practice of treating divorce cases as continuing processes for the regulation of questions of custody. This practice was also referred to before me as being well established, and I was asked to report the case instead of dismissing it, with a view to avoiding the expense of printing the proof in the event of the minuter being forced to reclaim.

"The only authority to which I was referred as supporting this alleged practice was the case of *Rowat* (12 S.L.T. 449), where Lord Low, after pronouncing a final decree of divorce and fixing the amount of aliment for the children of the marriage in the same interlocutor, subsequently on a change of circumstances issued a second interlocutor increasing the amount of aliment. There was no discussion in that case as to the competency, and there is a material distinction between the competency of dealing with questions of aliment and of custody. A Lord Ordinary has jurisdiction to deal with questions of aliment apart from section 9 of the Conjugal Rights Amendment Act, and the continuing of the divorce action for the purpose of reconsidering questions as to aliment may be a more convenient way to deal with the matter than of raising a new and separate action. It humbly appears to me that Lord Low was entitled to deal with the matter as he did in the absence of any objection by the parties, and his action appears to be justified by the case of *Symington* v. *Symington* (1 R. 871) to which I shall presently refer.

"But a Lord Ordinary has no jurisdiction whatever with regard to custody except such as is conferred on him by the Act. In my opinion the section only authorises him to deal with the question of custody up to and including the issue of the final decree disposing of the divorce or separation. This was expressly decided in the case of *Lang* v. *Lang* (1868, 7 Macph. 445), in which it was held incompetent for the Lord Ordinary to deal with the question of custody a fortnight after he had issued an interlocutor pronouncing a decree of separation but containing no mention of the custody of the children. I do not think it is possible to differentiate that case from the present on the ground that there was no conclusion for custody in the summons in *Lang's* case, nor do I think, as was argued before me, that the fact that the Lord Ordinary had failed to deal with the question of custody *primo loco* when the decree of separation was pronounced had any effect on the judgment of the Inner House. I see no reason why the decision in *Lang's* case should not be regarded as binding, and in face of it I do not understand how a practice should have arisen of dealing with divorce cases as continuing processes for the purpose of regulating the custody of a child.

"As the circumstances which the Lord Ordinary is entitled to take into account in exercising his powers as to custody under

the Conjugal Rights Amendment Act are very much more limited than those which a Division of the Court may consider in an application under the Guardianship of Pupils Act 1886 (*Beedie* v. *Beedie*, 16 R. 648), it appears to me very undesirable that his power to deal with the matter should be extended beyond the pronouncing of the final decree.

"In the case of *Symington* v. *Symington* (1 R. 871, 2 R. (H.L.) 42, 2 R. 974) the First Division, reversing the Lord Ordinary, found the defender entitled to a decree of separation and to the custody of the children, and in their interlocutor reserved to the parties right in the event of any material change of circumstances to apply to the Court to have the provisions as to the custody, aliment, and education revised and altered. Any further application made in terms of this interlocutor would necessarily be to the First Division, which has jurisdiction to deal with the custody apart from the Conjugal Rights Amendment Act, and this reservation as I have said seems to justify Lord Low's action in the case of *Rowat*, but it does not appear to me to have any bearing on the question raised in the present case.

"In conclusion I refer to Lord Sands' note in *M'William* v. *M'William*, of which a copy was produced in the proceedings before me."

A similar case—*M' William* v. *M' William*—was reported to the Second Division by Lord Sands. His Lordship's opinion therein, which was lodged as an appendix to Lord Blackburn's report, was in the following terms:—

Lord Sands—"There is no common law jurisdiction in questions of the custody of children in the Outer House. By section 9 of 24 and 25 Vict. cap. 86, it is provided—'In any action for separation *a mensa et thoro* the Court may from time to time make such interim orders, and may in the final decree make such provision, as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates.'

"In the case of *Lang* v. *Lang* (1868, 7 Macph. 445) it was held that it was incompetent for the Lord Ordinary to pronounce an order for the custody, maintenance, and education of children after decree of divorce or separation had been pronounced. In that case decree of separation had been pronounced on 27th October. No decree had been pronounced for expenses. Upon 13th November the Lord Ordinary upon pursuer's motion dealt with the question of custody. This was held to be incompetent. Notwithstanding this decision there appears, so far as I can gather, to be an impression that an action of divorce may, after decree has been pronounced, be treated as a continuous process for regulation of questions of custody, and I believe that in one or two cases this idea has been acted upon. In these circumstances it appears to me to be desirable to ascertain authoritatively whether *Lang* v. *Lang* is to be regarded as law. Two Outer House cases noted are *Rowat*, 12 S.L.T. 449, and *Barnet*, 1918, 2 S.L.T. 249.

"The present case is an application by a father for the custody, owing to alleged change of circumstances, of a female child whose custody was awarded to his divorced wife. There is a specialty in the case in this way—In awarding custody to the wife I made the following finding:—'Finds the defender entitled meantime to the custody of the youngest child Martha Ann Sim M'William, with right to the pursuer to access to said youngest child at such times as may be arranged between the parties, and right to him if circumstances should arise to make it expedient in the interests of said child to apply to the Court for custody.'

"The qualification involved in the word 'meantime,' and the reservation of right to the pursuer to apply to the Court on change of circumstances, are what is implied in all orders of custody. I thought it right to insert them specially to accentuate the provisional character of the order, which I made with hesitation and some doubt as to whether I was not straining the law in giving custody of one child to the divorced spouse. I had not the form of future procedure specially in view, and I have doubts whether if *Lang* be law it would be competent to crave a continuous jurisdiction by the form of order.

"There remains the question whether, seeing that the Inner House has undoubted jurisdiction in matters of custody, they may not exercise it in this process even on the assumption that the rule in *Lang* precludes the matter being dealt with in the Outer House.

"If *Lang* were to be discarded it would be necessary to consider the bearing of the matter upon the question of extract. In the present case the decree has not been extracted. In another pending case it has.

"1. Apart from any specialty the general question here raised appears to be whether when a Lord Ordinary has dealt with custody in the final decree in a consistorial case he can subsequently vary his order? The specialty already adverted to suggests the further question whether, if this be so, the introduction of such a special finding is necessary to obviate the technical objection that otherwise the Lord Ordinary would be recalling part of his own interlocutor.

"There are two cognate questions upon which authoritative guidance is to be desiderated — 2. Whether where custody has not been dealt with at all in the final decree, either party may subsequently at any time move the Lord Ordinary to deal with it?—*Barnet*, 1918, 2 S.L.T. 249. 3. If the answer to either 1 or 2 be affirmative, is such procedure barred by extract, which brings the process to an end—*Mackay*, 319—and if so, can and ought this to be obviated by inserting 'and continues the cause' in consistorial decrees where there are pupil children?"

Argued for pursuer—There was no common law jurisdiction in the Outer House to deal with custody once the application for divorce had been disposed of. Such limited jurisdiction as existed was conferred by the

Conjugal Rights (Scotland) Act 1861, section 9, for reasons of convenience in view of the divorce proceedings. In disposing of the action the Lord Ordinary should deal (if at all) finally (as far as he was concerned) with the question of custody. Further, any reservation in the final decree of right to make further application as to custody involved difficulties as to extract and the indefinite retention of processes in the Clerks' offices. The following cases were referred to:—*Melvin* v. *Melvin*, 1918, 2 S.L.T. 209; *Lang* v. *Lang*, 1868, 7 Macph. 445; *Barnet* v. *Barnet*, 1918, 2 S.L.T. 249; *Beedie* v. *Beedie*, 1890, 16 R. 648, 26 S.L.R. 443; *Symington* v. *Symington*, 1874, 1 R. 871, 2 R. (H.L.) 41, 12 S.L.R. 416; *Stevenson* v. *Stevenson*, 1895, 21 R. 430, 31 S.L.R. 350; *Christie* v. *Christie*, 1919 S.C. 576, 56 S.L.R. 513; Fraser on Husband and Wife (3rd ed.) 861.

Argued for defender — It was a long-standing practice for the Lord Ordinary to regulate the custody, maintenance, or education of children after final decree of divorce had been pronounced. The practice was competent and reasonable since orders regarding custody, &c., were by this very nature interim. As regards interim extract and the retention of the process in the office of the Clerk of Court, these matters presented no serious difficulty. The following authorities were referred to:—*Stewart* v. *Stewart*, 1870, 8 Macph. 821; *Symington* v. *Symington* (*cit.*), also in 2 R. at 976, 14 S.L.R. 610; *Watson* v. *Watson*, 23 R. 219, 33 S.L.R. 151; *Rowat* v. *Rowat*, 12 S.L.T. 449; Walton, Husband and Wife, 112.

At advising—

LORD PRESIDENT—The Lord Ordinary's report raises an important point of procedure and practice in actions of separation and divorce. By section 9 of the Conjugal Rights (Scotland) Amendment Act 1861 power is given to the Court before which such actions are brought, to regulate the custody, maintenance, and education of the pupil children of the marriage. This power is exerciseable both by interim orders made during the course of the action and by provision contained in the final decree. It is with regard to the latter mode of exercise of the statutory jurisdiction that the question arises.

For a number of years immediately succeeding the passage of the Act of 1861 it was usual in cases in which the Court on a consideration of the merits and circumstances thought proper, to adject to the final decree a reservation of right to the parties to make application for such further orders with regard to these subordinate matters as might be necessary in future. Unfortunately this procedure fell largely into disuse, and a practice—irregular as it appears to me—arose of treating actions of separation and divorce generally, even though no reservation was attached to the final decree, as continuing processes for the regulation of the custody, maintenance, and education of the pupil children. In cases in which it is necessary or desired by the parties that actions of this character should be so treated—and considerations of convenience and expense make it often expedient so to do—recourse must be had in future to the older procedure, and a suitable reservation must be adjected to the final decree. If no such reservation is made the statutory jurisdiction of the Court is exhausted by the final decree, and should further regulation be needed thereafter it can only be obtained by means of fresh proceedings instituted for the purpose. In the present case, which is concerned with the custody of of a pupil child, there was no reservation in the final decree which regulated custody, and the note presented by the wife (six months after the date of the separation) in which she asks for fresh regulation is, as the Lord Ordinary would have held but for the doubt created by the irregular practice to which I have referred, incompetent.

By "final decree" in the Act of 1861 I understand the same thing to be meant as was subsequently defined by section 53 of the Court of Session Act 1868. In *Lang* v. *Lang*, 1868, 7 Macph. 24, 1869, 7 Macph. 445. decree of separation had been pronounced, leaving the question of the wife's aliment and also the matter of expenses still to be disposed of. Then the wife's aliment was fixed and decerned for, reserving right to her to apply for further orders thereanent. Shortly afterwards, and before expenses had been dealt with, a motion was made on her behalf for the custody and aliment of two pupil children. This motion was refused on the ground that final decree had been pronounced, and that therefore the statutory jurisdiction was no longer available. It is not clear from the report of the case that attention was fully directed to the fact that the question of expenses still remained to be decided. If the decision were to be read as implying that the stage of "final decree" is reached while expenses remain still to be disposed of, it could not be regarded as authoritative, but subject to that criticism it is in my opinion both authoritative and sound. An interlocutor which by itself or along with previous ones disposes of the whole subject-matter of the case is none the less a "final decree," although it contains a reservation designed to provide for alterations in circumstances which cannot be foreseen or dealt with by anticipation.

The irregular practice to which reference has been made naturally led to difficulties in the Extractor's department, as to which the guidance of the Court was sought and obtained. But as it is intended to restore the procedure in this matter to a regular footing for the future, it may be well for clearness sake to point out that the effect of such a reservation as used to be made (and in future will require to be made in cases suitable for it) is that the "final decree" so qualified is capable only of interim extract. The process is thus automatically preserved as a living process in which future orders can be moved for under the reservation. If "final decree" is pronounced *without reservation*—and there are many cases in which a reservation

is inappropriate or not desired by the parties—then if extract is asked, the extract is a *final* one, and the process is, so to speak, "killed" and cannot be further moved in. Lastly, the "final decree" may be allowed to remain unextracted. In that case the process to which it belongs becomes what is known as an "unextracted process," and falls to be dealt with under C.A.S., A. v. Such a process can generally be wakened (if necessary) and moved in for any competent purpose, but whether applications relative to the custody, maintenance, and education of the pupil children of the marriage can be competently made therein will depend on whether the final decree had a suitable reservation attached to it or not.

It is true, as the Lord Ordinary points out, that the Guardianship of Infants Act 1886 does not apply to proceedings in the Outer House. Neither for that matter does the Custody of Children Act 1891. But the discretion given to the Lord Ordinary as judge of first instance in actions of separation and divorce by the Act of 1861 is unqualified, and it is improbable that difficulties will arise unless in very exceptional cases on this account.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I do not think that there is any difficulty as to the true construction of section 9 of the Conjugal Rights (Scotland) Act 1861, which confers upon the judge or judges of what, for shortness, I will call the Divorce Court, an entirely new jurisdiction involving, as Lord Cairns, L.C., observed in the case of *Symington* v. *Symington* (2 R. (H.L.) 41, at p. 43) the exercise of "the widest and the most general discretion" with respect to the custody, maintenance, and education of any pupil children of the marriage to which an action of separation or divorce relates. The grant of this jurisdiction impliedly carries with it all the powers which are necessary for its proper exercise. Accordingly it seems to me quite certain that the Divorce Court may competently, if it thinks it discreet to do so, include in the "provision" which it makes in its final decree with reference to the custody, &c., of the pupil children of the marriage a clause such as was inserted in the judgments of the House of Lords and of the Court of Session (2 R. 974) in *Symington's* case, authorising either party to apply to it for any further or other orders which may become necessary in regard to all or any of these matters. On the other hand the Divorce Court is not bound to make any such provision for a change of circumstances and for a variation of the directions as to custody, aliment, and education contained in its final decree of separation or divorce. For example, if the children are near to puberty, or if the case is a plain-sailing one, or if the action is undefended, the Divorce Court may hesitate to suggest further litigation, and may prefer the simple course of giving directions which shall not be open to revision in that Court, leaving the parties to their remedies at common law in the event of some variation in the terms of the final decree being desired during the children's pupilarity. Accordingly it seems to me that the competency of applying to the Divorce Court for a variation of its order as to the custody, aliment, or education of a pupil child of the marriage depends upon whether "liberty to apply" does or does not form part of the "provision" as to these matters contained in the final decree of separation or divorce.

I demur to the notion that a clause of material importance in a scheme for the custody, maintenance, and education of pupil children can legitimately be read into the Divorce Court's final decree merely because all judicial orders as to custody, aliment, and education are in their nature provisional, or again because the clerk of the Divorce Court has inserted in the interlocutor an ambiguous expression such as "decerns *ad interim*" or "continues the cause." In order that there may be "liberty to apply," the propriety of granting such liberty to the parties must be considered by the judge or judges of the Divorce Court, and the liberty must be expressly given.

In the present case the Lord Ordinary's final decree of divorce dated 12th January 1920 is unambiguous. It disposes of the matter of custody once and for all, and it does not authorise either party to apply to the Divorce Court for a variation of its directions. The Lord Ordinary is therefore *functus*, and the same is true of the Inner House. We have in the Inner House occasionally stretched a point by exercising a power which inherently belongs to us *ex nobili officio* even though the matter came before us in an irregular or incompetent form, but the present is emphatically not a case in which such a course ought to be followed. I am accordingly of opinion that the Lord Ordinary should be directed to refuse the minute for the defender.

From what has been already said it will be seen that I agree with the observations made by your Lordship in the chair in regard to the meaning of the expression "final decree" as used in the Act of 1861. I also agree with what your Lordship has said with reference to the Guardianship of Infants Act 1886 and the Custody of Children Act 1891.

LORD CULLEN did not hear the case.

The Court directed the Lord Ordinary to refuse the minute.

Counsel for Pursuer—Macmillan, K.C.—Graham Robertson. Agents — Lindsay, Howe, & Company, W.S.

Counsel for Defender—Mackay, K.C.—Dickson. Agents—Waddell, M'Intosh, & Peddie, W.S.