

Thursday, March 19.

FIRST DIVISION.

[Lord Shand, Ordinary.]

SYMINGTON v. SYMINGTON.

Husband and Wife—Separation and Aliment—Adultery.

Circumstances in which held that the fact of adultery was proved.

Parent and child—Custody of children—24 and 25 Vict. c. 86, § 9.

Where a husband was found guilty of adultery, committed within his own house, with a servant who had the care of his children. (the eldest of whom was ten years, and the youngest one year of age) and it was proved that he had wilfully made false charges of intemperate habits and untruthfulness against his wife, and had threatened to bring up the children in the belief of their mother's immorality; Held that the father was not entitled to the custody of his children, and the custody meanwhile given to the mother.

Custody of Children—Amount of Aliment—Special Interlocutor.

Interlocutor framed so as to admit of a subsequent application to the Court with a view to alter the present order with reference to the custody of the children or amount of aliment, on cause shown.

This was an action of separation and aliment, at the instance of Mrs Mary S. Edmonston or Symington against her husband Andrew James Symington, merchant, Glasgow, on the ground of the alleged adultery of the defender. The parties were married in June 1860, and lived together till January 1871. There were six children of the marriage, the youngest of whom was born in August 1870.

The averments of the pursuer were, that from the commencement of the year 1870, the defender paid very marked attention to a girl, Elizabeth (or Ellie) Heron, a nurserymaid in the service of the parties, and that from the commencement of that year he frequently kissed and was guilty of other familiarities with the said Elizabeth Heron—going into the nursery with the object of practising these familiarities with her. The pursuer further alleged that in or about the month of January 1871 the defender succeeded in seducing the said Elizabeth Heron, and that he carried on an adulterous intercourse with her in his house at Nyeholm during the months of January, February, March, April, May, June, July, August and September 1871. And that in consequence of the said adulterous intercourse with the defender the said Elizabeth Heron became pregnant in or about the month of April 1871, and in the month of October 1871 the defender sent her to a relative of her own in Ireland, where she, on 26th January 1872, gave birth to a child, of which the defender was the father.

The defender denied the charge of adultery, and on his part charged the pursuer with having for some years previous to the raising of the action indulged to excess in narcotics and alcoholic liquors.

In course of the procedure before the Lord Ordinary it was explained for the pursuer that, in the event of her succeeding in obtaining decree of

separation on the ground of her husband's adultery, it was her intention, founding upon section ninth of the Conjugal Rights Act, 24 and 25 Victoria, c. 86, to ask the Court, on the final decree in this action, to give her the custody and maintenance and education of the pupil children of the marriage. To this the defender rejoined, that even assuming it were proved that he had been guilty of adultery as alleged, the pursuer was not a fit person to be entrusted with the care of the children, owing to her indulgence in intemperate habits.

In consequence of this state of matters, the Lord Ordinary allowed a proof embracing the whole charges by the parties against each other. The evidence led was very extensive, including not only oral, but also a mass of documentary evidence, consisting mainly of correspondence between the parties and their relatives.

Among other documents produced and strongly relied on by the defender was a letter written by Elizabeth Heron, the mother of the child, in these terms:—

“October 24.

“My Dear Miss Walker,—I know you wish me well, and it is only right to let you know that nobody at Nyeholm had anything to do with my trouble, and I am very sorry for the trouble I have caused you all, but I know that nobody at Nyeholm is to blame.

“I am not very well and must stop. Give my love to Mary and Jessie. I am very grateful for your kindness to me.—Yours truly,

ELLIE HERON.”

A letter was also produced, dated 15th May 1871, addressed to the pursuer by defender, in which the latter deals at great length with the matter of the alleged habits of the pursuer with reference to stimulants, &c., and her alleged untruthfulness. In this letter the following passage occurs:—“Don't delude yourself with the false hope that the uncertainties of the future will make black white. Truth shall not and cannot be so hid. I shall look carefully to that, and in the event of your persisting in your present evil course, the children, who as yet know nothing of all this, will, as they grow up, have to be told the plain truth concerning you, and be warned against you and your sinful untruthful ways; and painful though the duty be, I shall not have them either misled or contaminated by the neglect of it.”

Throughout the correspondence the defender uniformly adopted a tone of grave reprobation of his wife's alleged immoral conduct, exhibiting a more than ordinarily exalted strain of religious feeling on his own part. At length, after using great and continued pressure, the latter obtained from his wife a “confession,” in the presence of one of the witnesses, of her intemperate habits. This confession was subsequently embodied in a written agreement, drawn up and signed by the parties for the purpose of regulating the family affairs. The so-called confession, however, it was explained by the pursuer, was emitted solely with the object of enabling her to stay at home with her husband and children—that being made by her husband conditional on the making of such a confession. That confession, she declared, was false, and ultimately, feeling the falsehood a burden on her conscience too heavy to be borne, withdrew it altogether.

Further details, as brought out in the course of the proof, must be inferred from the analysis of the

evidence by the Lord Ordinary and by the Court at advising.

On 27th August 1873 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, Finds that it has not been proved that the defender has been guilty of adultery with Elizabeth Heron, sometime nurserymaid in his family, as alleged on record: Therefore sustains the defences and assolizies the defender from the conclusions of the action, except in regard to expenses, and decerns: Finds the pursuer entitled to expenses, of which allows an account to be given in, and remits the same when lodged to the Auditor to tax and to report.

"*Note.*— He (the Lord Ordinary) does not hesitate to say that he feels it a relief that the judgment at which he has arrived, on the question of the defender's guilt of adultery, has rendered it unnecessary for him to form a judgment on the farther question raised as to the pursuer's habits, for there is a great conflict of testimony on that subject, and undoubtedly it is one which, on the evidence, is attended with great difficulty. This difficulty has been a good deal enhanced by the pursuer's confessions, made as she states to gain a temporary end, and her retractions of these confessions. Should the Court be of opinion with the Lord Ordinary, in the event of the present judgment being taken to review, that the charge of adultery has not been proved, it will be found unnecessary to consider the true inference to be drawn from the very distressing and lengthened correspondence between the parties and some of their relatives which has been produced, and which refers almost exclusively to the defender's averments in regard to his wife's habits. This correspondence but too plainly shows the extent to which domestic unhappiness and bitterness has unhappily arisen between parties who had for a number of years been remarkable for the affection and tenderness which they entertained and exhibited towards each other.

"Coming to the charge of adultery, with which the Lord Ordinary has dealt by the preceding interlocutor, the pursuer's statement is that the defender during the year 1870 paid very marked attentions to a girl named Elizabeth Heron, who had come to be under-nurse in the family about the year 1868; that he frequently kissed her, and was guilty of other familiarities towards her, and that he afterwards carried on an adulterous intercourse with her from January to September 1871, in consequence of which she became pregnant and was delivered of a child in January 1872, of which he was the father. This girl, Elizabeth—or, as she was called, Ellie—Heron, was received into the defender's house when about fourteen years of age, and continued to reside there till October 1871, when she went or was taken to the house of her grandmother in Ireland, where she gave birth to her child, which died about nine days afterwards. She was examined as a witness for the pursuer, and stated that she was then about nineteen years of age, which makes her age about seventeen at the time when the adulterous connection is alleged to have gone on. The circumstances, as alleged and maintained by the pursuer to be proved, make the charge against the defender one of a peculiarly aggravated nature, for it is alleged not only that the defender used the influence which he had as a master, and which he acquired by kindly attentions, to enable him to seduce his servant in his own

house, but that the intercourse between them took place while the girl was in bed with one or more of his young children, of whom she had charge.

"The Lord Ordinary has approached the consideration of the proof in such a case with a strong conviction that the evidence must be very carefully weighed, and that in order to such a charge being held to be established, particularly against a man of hitherto unblemished character, the evidence of the girl, who is necessarily the principal witness in the case, must be found to be consistent, and not contradicted in any material particulars, and must be corroborated by some reliable evidence of familiarities or otherwise, to support her statements. If the statements of a witness so important be inconsistent, or be contradicted in any material point by other testimony on which reliance can be placed, her evidence as a whole cannot safely be made the ground of judgment; and if there be an absence of corroborative evidence bearing on the conduct of the defender, it would be unsafe to pronounce judgment against him which would substantially rest on the statements of the girl contradicted by him. It is a matter of obvious remark that there are perhaps no circumstances in which the proof must be more scrupulously weighed than in reference to a charge like the present, for it must happen in the nature of things that opportunities for intercourse will occur between a master and servant living for years together in the same house, and the servant may frequently be able with some show of reason to charge her master with the paternity of her illegitimate child, particularly where, as in the present case, she has not been known or seen to associate with men as visitors or acquaintances. Even in such circumstances the denial of alleged intercourse must be taken to outweigh the statement of a servant who has become the mother of an illegitimate child, and no real weight can be attached to such opportunities of intercourse as have naturally arisen from the relations between the parties. In the present case the Lord Ordinary is satisfied that, however little real love or affection has been latterly entertained by the defender towards his wife, he has been much attached to his young children, and found pleasure in frequently visiting them at all hours of the day when he was at home, in their nursery or sleeping place, where the girl Elizabeth Heron was in the discharge of her duty, and he thinks it would not be reasonable towards the defender to attribute frequent visits to the nursery to anything but his love of his children, and his desire to be with them.

Even taking up the case, however, from this general point of view, the Lord Ordinary has not found the decision to be free from difficulty. There are circumstances in the conduct of the defender in relation to this charge—just as there exist the circumstances to which the Lord Ordinary has already alluded in the conduct of the pursuer in reference to the charges made against her—which create suspicion and difficulty. In particular, the circumstances attending the obtaining of a letter from Elizabeth Heron, in which she stated that nobody at Nyeholm had anything to do with her trouble, and that nobody at Nyeholm was to blame, has weighed strongly with the Lord Ordinary, and occasioned a difficulty in the case which otherwise would not have existed. He has, however, after full consideration, come to the conclusion that the obtaining of this letter, however injudicious, has been explained so as to deprive it of the

force which it otherwise might have had; and that, on the whole, the evidence is not such as to warrant the Court in holding that the adultery alleged has been proved.

"The main evidence in support of the charge is of course the testimony of Elizabeth Heron, of whom the Lord Ordinary may say that she was a girl of modest appearance, who gave her testimony generally with an air of truthfulness, although at one part of it, to which reference will afterwards be made, she appeared to hesitate somewhat. Her statement is, that during 1870 the defender was in the habit of paying her attention and kissing her, and of going to the nursery for that purpose. In January 1871, the estrangement on the defender's part, arising, as he alleges, from his wife's habits, had reached such a point that the pursuer, by his desire, left the house to reside with her brother for some time. Some time after this, according to Elizabeth Heron's statement, the defender came to her bedside during the night, whilst she was asleep with one of the children in the bedroom of the house which the pursuer had occupied, and she then allowed him to come into bed and have connection with her. Acts of connection, she states, were repeated three or four times at night in the same room, at intervals of several days, and again upon two or three occasions in the inner nursery of the house, between May and August 1871, in which latter month she went to Troon. Her sister, Mary Heron, was, as she states, asleep in the nursery on one or two occasions when the defender came to her there at night, and on all the occasions of his visits to her she stated that he was in his night dress.

"The other regular inmates of the house (besides the defender and his young children), all of whom have been examined, were Elizabeth Heron's sister, Mary, younger than herself, who was housemaid, Jessie M'Clymont, who was cook, and Miss Walker, who came in 1870 to be governess to the children, and ultimately took charge of the housekeeping for a time before the pursuer left the house. In addition to these witnesses, there were two persons who occasionally worked in the house, and remained there a few days at a time, who were also examined as witnesses, viz., Mary M'Kinnon, who used to wash and do house work, and Jessie Harkness, who first went to the house in August 1870 as a nurse, for eight days, when the pursuer had her youngest child, and was afterwards repeatedly back engaged in sewing. Of these persons, Mary Heron and Mary M'Kinnon were examined for the pursuer, while Miss Walker, Jessie M'Clymont, and Jessie Harkness were examined for the defender. The defender's witnesses negative all appearance of familiarity on the defender's part towards Elizabeth Heron; and it is to be observed that Jessie M'Clymont has for some time been away from the defender's service. The pursuer's witnesses, again, do not speak to acts of apparent familiarity to which, in the opinion of the Lord Ordinary, any importance can be attached. Mary Heron corroborates her sister in the statement that the defender repeatedly called her sister from the kitchen, after it became dark in the evening, to shut the shutters in the outer nursery, and that he followed her into the room, but this is one of those circumstances which might quite naturally occur without any improper motive on the defender's part. She further speaks to one occasion on which she heard Miss Walker make an exclamation, im-

plying that she had seen some familiarity between the defender and her sister, but Miss Walker denies that anything of the kind occurred, and Elizabeth was not examined on the subject. The only other direct evidence of familiarity, or of suspicious acting on the defender's part, is given by Mary M'Kinnon, who states she was called to take away the infant on one occasion, on a Sunday, after it had been crying a good deal, and that she then left Elizabeth and the defender alone in the nursery. But, again, it would be attaching too much importance to this circumstance, as to which also Elizabeth Heron was not examined, to accept it as an opportunity made for indulging in familiarities. The pursuer further referred to a statement of M'Clymont, to the effect that she had observed the defender and Elizabeth Heron going out on several occasions, apparently about the same time, when the family were at the coast, but the Lord Ordinary is really unable to make anything intelligible of this evidence, and it rather appears, taking M'Clymont's statements on the subject as a whole, that this matter was mentioned only after Elizabeth had been removed from the house in a pregnant state, and when, owing to her determined silence about the paternity of the child, the parties were conversing and speculating as to who the father could be, and when, owing to the circumstance that Elizabeth had no male associates known to her fellow-servants, or coming about her, every circumstance connected with her relations towards the defender would naturally be brought up and discussed. The witness Mary M'Kinnon was examined in replication, to prove a statement made by Jessie M'Clymont on one occasion when she was at work and staying at Nyeholm, apparently some time before July 1871, for she says that she ceased to go to Nyeholm to wash after the Glasgow Fair two years ago, that is, after July 1871. This statement was to the effect that she had on one occasion seen the defender put his hand around Ellie and kiss her, and if this had been sworn to as a fact by M'Clymont it would have been corroboration of a material kind, much more in point than any of the evidence to which the Lord Ordinary has alluded. Whether it might have been sufficient, with the other proof, to have established the case it is unnecessary to consider, for M'Clymont distinctly denies that she made any such statement, and, at the best, the evidence can only be used to throw discredit on her testimony, and not as proof of the fact that such familiarity occurred. At the same time, the Lord Ordinary thinks it right to add that he saw no reason to come to the conclusion that M'Clymont was untruthful, and he cannot regard it as proved that she made such a statement. She appears to have no particular personal interest in either of the parties, while Mary M'Kinnon has apparently received such kindness from the pursuer as may have created a bias in her mind. There is an absence of corroboration in regard to the use of familiarities, and the observation of the defender's counsel is not without weight, that if the defender was going through the house in the middle of the night in his night dress, and at times into the room in which not only Elizabeth, but her sister slept, there was a probability that this would have been noticed by Mary Heron, or some of the other inmates of the house, while there is no evidence to that effect. On the proof, accordingly, which the Lord Ordinary has considered up to this point, he is satisfied that

the case has not been made out. A more important piece of evidence, however, is to be found in what occurred in regard to the letter of October 24, written by Elizabeth Heron, above referred to, and the correspondence which took place between Miss Walker, with the defender's knowledge, and the girl's aunt, Mrs Heron, in Ireland. It appears that Miss Walker, who was in charge of the household, had occasion to notice, in the course of the summer of 1871, that Elizabeth was not in her usual state, and repeatedly spoke to her on the subject, but always with the same result, viz., a denial that anything particular had occurred to account for it. In October, however, Miss Walker requested that she should be examined by Dr Stark, who was in the house, a request to which, she states, the defender at once acceded, and after that examination he stated his opinion that she was pregnant. Miss Walker and the other female inmates of the house then besought her to state who was the father of her child, but she denied that she was pregnant at all, and asserted that she had never had to do with any man. On her way to Ireland, to which she was accompanied by Miss Walker, as explained in the proof, she gave Miss Walker the letter or declaration, in which she stated that no one at Nyeholm was to blame for the condition in which she was, and down to the time when she parted with Miss Walker, and was left with her friends in Ireland, she seems to have continued to assert that her state must be the result of disease or illness, as she had never had to do with any man.

"The account which Elizabeth Heron gives of the granting of this letter is, that the defender first asked for it, and suggested the terms in which she should write, which are worthy of notice, viz., that he, the defender, had nothing to do with the state in which she was, and that no one in Nyeholm had to do with her state—but that she refused to give the letter—that he subsequently pressed her to do so, and that Miss Walker having also asked for such a letter, she agreed to write it, but was afterwards told by the defender that she ought not to write it in the house, but after she was away. Elizabeth Heron does not say that the terms of the letter were dictated or suggested to her by Miss Walker in Ireland, but that she wrote it from her recollection of the terms suggested by the defender. It will be noticed, however, that the letter as written does not refer to the defender personally, as she states he requested it should do, but refers to persons at Nyeholm generally, being the terms which Miss Walker states she had suggested. Miss Walker's evidence is to the effect that she suggested that the letter should be obtained, and asked for it, but that Elizabeth refused repeated requests to give it, and afterwards voluntarily proposed to give, and gave it, on her way to her destination in Ireland. Jessie M'Clymont also states that she asked Elizabeth two or three times to write the letter, but she said there was no use in doing so.

"For the pursuer it is maintained that even taking Miss Walker's account to be correct, the taking of the letter at all is a most material and suspicious circumstance, sufficient with the other evidence in the case to establish the charge against the defender. It is said that the defender was thus preparing his defence before he was accused, in the full knowledge that there was too good ground for the charge. On the other hand,

it is said for the defender that the proposal originated with Miss Walker, and was made on her part in consequence of a passage occurring in Mr Biot Edmonston's letter to the defender's brother, Mr J. S. Symington, of 21st July 1871, in which he refers to a statement which had been made to him as having come from some servant at Nyeholm, implicating the defender as being 'in the way of practising certain familiarities with one of his servants.' Miss Walker states that she regarded this not only as a charge against the defender, but as a slur upon herself in the management of the house, and that she desired to have the letter in the belief that a further charge would be made, and in order to meet it. It is material to observe, that the letter which was asked for, and obtained, does not contain any statement which the girl had not herself again and again made, and, injudicious as it was to take such a letter in the circumstances, the Lord Ordinary is of opinion that there is enough to account for this being done without assuming the defender's guilt, or even taking it as a circumstance of sufficient weight, along with the other evidence, to establish the charge against him. There had been charges and recrimination, angry interviews between the pursuer and her brother on the one hand, and the defender on the other, and charges and discussions in presence of Mr Leckie, and the explanation of the obtaining of this letter is not an unnatural one in the light of all this, and of the statement which Mr Biot Edmonston had made, and when the state of mind into which the parties had got is considered.

"The correspondence between Miss Walker and Elizabeth Heron, founded on by both parties, is peculiar. The pursuer's counsel maintains that there runs through it a suggestion that Elizabeth should be induced at all hazards to assign the paternity of the child to some one so as to free the defender, and as an inducement to this that pecuniary help could only be given when this was done. For the defender, it is pleaded that the terms of the correspondence do not justify this observation, and that Miss Walker's reiterated, and almost imploring entreaties that the girl would speak the truth, show how far she was from thinking that the defender had been guilty of the charge now made against him, or that there was any idea of such a charge being made by the girl. Unfortunately, there appears to the Lord Ordinary to be expressions in the letters which admit of either view being maintained, but on the whole he thinks the pursuer's view is not justified. It necessarily involves Miss Walker as acting in concert with defender to avert a charge which she believed or strongly suspected to be true, and as being anxious to get a false account, if possible, from the girl, to be used by the defender. If this had been the fact, the Lord Ordinary thinks there would have been some evidence of an attempt on the part of Miss Walker or the defender, at some time in conversation with the girl, to get her induced to assign the paternity to some known or unknown person, but nothing of the kind seems to have occurred, and it is strongly against the pursuer's view, and in favour of that maintained by the defender, that Miss Walker, not only in the correspondence pressed to have the name of the father of the child disclosed, and begs-above all she will tell the truth, but that from the time when pregnancy was announced, and on the journey to Ireland, she constantly begged the girl

to say who was the father. On this part of the case the Lord Ordinary may in passing remark, that it is a point in favour of the defender that although he must have had reason to know or strongly suspect the state in which the girl was, if the evidence be true, long before October, he did not attempt to have her quietly removed from the house, and avert the scandal which her state was certain to produce.

“Before advertng particularly to the matters on which Elizabeth Heron has been contradicted by other witnesses, and which to a material extent have influenced the mind of the Lord Ordinary in the decision at which he has arrived, he may notice, as the only other matter which has appeared to him of importance in the proof against the defender, the circumstance that on two occasions before Elizabeth Heron's pregnancy had been made known, or at least had come to the knowledge of the pursuer, allusion had been made to intimacy or familiarity between him and one of his servants. The first of these allusions is contained in Mr Biot Edmonston's letter in July 1871, just referred to. The second was at the interview between the pursuer and defender with Mr Leckie on 31st October, when the remarkable agreement between them, which has been produced, was entered into and signed. These two references to familiarities, before the pregnancy was declared, or at least known to the pursuer, tend to the inference that some conduct on the defender's part had been observed which gave rise to suspicion against him. The Lord Ordinary has, however, felt in regard to this subject that he is not entitled to proceed on such indirect evidence, and all the more so that there is nothing to show with any degree of distinctness what the familiarities referred to were. The statements thus made cannot of course be regarded as proving that familiarities occurred. Mr Biot Edmonston refers to some third party as his informant. It does not appear whether Elizabeth Heron was the servant referred to. Mr Edmonston's informant was not the witness M'Kinnon, for she states that she did not speak of what M'Clymont had said to her until quite recently, and Mr Edmonston, when examined as a witness, was not asked to give any explanation of the matter referred to. Then, although the pursuer spoke specially of Ellie in her remark made in presence of Mr Leckie, the particular incident which gave rise to it is not explained, and she expressed herself satisfied with her husband's explanation. The pursuer's counsel adverted to Mr Leckie's statement, as showing that he had not been quite satisfied with the defender's manner of denial when this subject was spoken of; but the Lord Ordinary cannot say that, in a question of this kind, the evidence of Mr Leckie, who would not say that the defender really did hesitate in his denial, can be regarded as at all material. The same observation applies to the circumstance that neither Mr Leckie nor Mrs Slimon was at once informed of the cause of Elizabeth Heron's leaving Nyeholm. It would have been better that the truth had at once been told; but it was not unnatural, in the circumstances, that this should be kept back. This evidence, like that of the fact that the letter was taken from Elizabeth Heron, is fitted to create some suspicion, but does not supply such material corroboration of the pursuer's case as in the opinion of the Lord Ordinary is necessary in order to make out the grave charge made against the defender.

“Accordingly, even if there had been no material contradiction of the evidence of Elizabeth Heron, the Lord Ordinary would have held that sufficient proof in support of the charge to warrant the decree asked had not been adduced. He is however farther of opinion that there has been contradiction of Elizabeth Heron sufficient to throw doubt on her testimony, and to make it unsafe to place implicit reliance on her statements: The point to which the Lord Ordinary particularly refers is her absence from Nyeholm on the evening of the first Monday of May 1871. It is unnecessary here to go in detail into the proof. Mrs Harkness, Miss Walker, and Jessie M'Clymont state quite distinctly that on that evening she remained out beyond her usual time of about seven o'clock for several hours; and it appears from the evidence of the two latter that she gave different and unsatisfactory accounts of the reason of her absence. This occurrence is one which she could not have forgotten, and in answering the questions on this subject her manner was not apparently so candid as throughout her examination otherwise. The Lord Ordinary is satisfied that the occurrence took place, and, besides being somewhat suspicious in itself, her denial of it and failure to give any explanation are calculated to throw doubt on her entire truthfulness, and to make it unsafe to proceed on her evidence without at least a much greater amount of corroboration than is to be found in the case. Along with this, and as a part apparently of the same incident, her denial of having had any mark upon her dress which attracted notice, and of which she was anxious to get rid, are also important, and calculated to shake confidence in her evidence as a whole. She is also contradicted by Jessie M'Clymont in regard to a conversation between them in regard to a joiner who was working about the house. The counsel for the defender farther founded on the evidence of Bridget Heron as showing that Elizabeth had made different statements in Ireland from those given in evidence as to the alleged intercourse between her and the defender; for it appears from Bridget Heron's testimony that Elizabeth had stated that the defender had first had connection with her while she was making a bed in a room upstairs, and had spoken of the defender as a person who seldom was free from drink. But while such statements are not to be altogether thrown out of view, the Lord Ordinary does not attach the same importance to them as to the other matters above alluded to, because Bridget Heron, although apparently a decent, kindly woman, did not seem to be a person of much accuracy, or on whose recollection of particular expressions reliance could be placed.

“On the whole, therefore, the result at which the Lord Ordinary has arrived is, that the evidence of Elizabeth Heron cannot be relied on as establishing the charge against the defender, and that, even if she were uncontradicted, and her testimony could be accepted, if sufficiently corroborated, sufficient corroborative evidence has not been adduced, though there are circumstances sufficient to create suspicion against the defender.

“Having come to the conclusion that the charge of adultery has not been established, the Lord Ordinary has refrained from even forming an opinion, from the evidence and correspondence in the case, as to the truth or falsehood of the charges made by the defender in reference to the pursuer's habits.

"The Lord Ordinary has found the pursuer entitled to expenses, because she would have been open to the plea of condonation if she had renewed her intercourse with the defender in the knowledge of the circumstances which had transpired, and because he thinks the circumstances justified her in having the judicial investigation which has taken place, if she desired to do so.

"At the close of the argument for the defender it was stated he would be quite willing that a decree of separation should be pronounced of consent, if that could competently be done, he being at the same time acquitted of the charge made against him. It is obvious, however, that the Court has no such power, at least in the present action. The Lord Ordinary regrets that he has not the power to grant a decree of final separation, and at the same time to secure to the pursuer reasonable access to her children, and association with them. It is impossible to read the proof and the correspondence without coming to the conclusion that the parties cannot again live together in harmony. The pursuer was treated during her later residence at Nyeholm more like a prisoner in solitary confinement than a wife in her own house, and this treatment, coupled with the defender's persistent refusal to allow the pursuer that access to her children to which she is entitled, are sufficient, in the view of the Lord Ordinary, to show that the pursuer cannot again live happily with him; and at the same time, even on the assumption of the truth of the defender's charges against the pursuer, take away a good deal from the weight of the evidence given to the character of the defender as a man of high or good feeling."

The pursuer reclaimed to the First Division of the Court.

In point of law, the main question in the case, and indeed the issue on which the parties agreed the real interest turned, was the question of the custody of the children in the event of a separation.

On this point the pursuer cited the cases of *Ketchen*, 8 Macph. 952; *Nicolson*, 7 Macph. 818; *Harvey*, 22 D. 1198; *Lang*, 7 Macph. 445; and argued that the rule recognised in these cases was applicable to the present case, and that the defender should be refused the custody of his children.

The defender argued—(1) that the effect of the cases cited by the pursuer (so far as applicable to the present case) was, that unless there was reason to fear cruelty or immoral training, the Court will not interfere with the natural guardianship of the father. The case of *Stuart*, 8 Macph. 821, (Lord Deas opinion, p. 830), confirmed the rule adopted in *Lang* (*ut sup.*). With reference to the case of *Ketchen* (*ut sup.*) it was argued that there the case was one of aggravated adultery, and was therefore quite special; (2) that in this case the father was a model father, and any sin he might be found to have been guilty of was secret and not persisted in.

At advising—

LORD DEAS—This is an action of separation and aliment at the instance of a married lady against her husband on the ground of adultery. That charge, if well founded, might of course have justified a conclusion for divorce. But there may be many reasons why a wife does not urge such a charge to that result. She may have no means of her own, and the husband may have the means of

affording her a sufficient aliment. There may also be reasons connected with the children and their prospects which disincline the wife to annul the marriage. In short, the pursuer was entitled to choose between the two courses, of separation or divorce, and the choice she has made is not a matter either for surprise or observation.

The parties were married in July 1860. They had both been liberally educated. There was no inequality in their rank in life. The pursuer was the daughter of a medical practitioner in the north of Scotland, and the defender carried on business as a sewed muslin manufacturer in Glasgow. There were six children of the marriage—the last was born in August 1870, and five of them are still alive. The establishment of the married parties consisted in 1870 and 1871 of a cook, a housemaid, and a nurserymaid, with occasional assistants called in to sew, wash, and do house work. The adultery is said to have been committed with the nurserymaid, Elizabeth or Ellie Heron, an orphan girl, who had been received into the service from a charitable institution at the age of 14, and who at the time when the adultery is supposed to have begun could not have been much over 16 years of age. That implies, as the Lord Ordinary has remarked, an aggravated charge of seduction as well as adultery, and demands clear proof before it can be held to be established. The question is, whether we have such proof here.

As was naturally to be expected, the principal witness is the girl herself. If she is to be believed the fact of the adultery is undoubted. But we are not entitled to rely upon her evidence without corroboration. The amount of corroboration necessary depends however very much on how far her deposition is or is not in itself clear, credible, and consistent. If it be so, very little corroboration may suffice. And I need not say that according to our law and practice the real evidence of facts and circumstances may afford even better corroboration than the testimony of a second witness, which in such a case as the present it would be out of the question to expect.

The girl's deposition occupies fully a dozen printed pages, of which one-half consists of cross-examination and answers to questions put by the Court. It would be out of place to go over that deposition in detail. I cannot detect in it anything startling, suspicious, or inconsistent. On the contrary, I think the girl's narrative has the air of being natural and truthful, while it is at the same time so detailed and circumstantial that she could hardly have failed to diverge into improbabilities, or to fall into inconsistencies, especially considering her tender age and inexperience, if her story had not been substantially true.

It is necessary, however, with a view to the consideration of the other evidence, just to indicate the outline of her story, which is, that in the course of the year 1870, or at least during the latter months of that year, the defender, who had always been in the habit of visiting the children in the nursery, began to kiss her, and use freedoms with her when he came there, which he sometimes did in the morning when she was dressing or was not yet up, and sometimes after business hours at night. That sometimes he came to her at night in the kitchen when she was with the other servants, and told her to come and shut the nursery shutters, which she did in his presence—generally in the dark—and that on these occasions he kissed her,

or tried to kiss her, and that ultimately, in February 1871, he came in his night dress to the nursery, where she was in bed with the two youngest children and asleep,—wakened her,—came into bed, and had connection with her,—and that this was repeated, in the same bed and elsewhere, on frequent occasions afterwards, which it is unnecessary to trace, up to August of the same year, when she went with two of the children to Troon. She admits that a change occurred in the state of her health a month or two after her first intercourse with the defender, but she says that this did not lead her to think she was pregnant, till Dr Stark (who had been called to the house for a different purpose) examined her person in October 1871, and said she was pregnant. She admits that she denied to Dr Stark having had intercourse with any man (a common enough assertion in such cases, amounting sometimes almost to a delusion, when the truth is peculiarly unpalatable.) She admits that before she left for Ireland, which she did within two or three days after Dr Stark's examination of her, she said that nobody in the house had anything to do with her state; but she says at the same time that the defender had desired her to say this, and that if she would write a letter from Ireland to that effect he would provide for her; and she explains the circumstances (which I shall afterwards notice) under which she did write a letter of that kind, and that she went home to her aunt and grandmother at Dunkineley, where she bore a child on 25th January 1872, and a few days thereafter, being strongly pressed on the subject, she attributed the paternity to the defender.

Of her story, as she tells it, there is certainly nothing in the evidence which can be called a contradiction, unless the denial of the defender can be so regarded. The Lord Ordinary says that the defender's denial "must be taken to outweigh the statement of a servant who has become the mother of an illegitimate child." That view strikes me as one of some novelty,—to take the denial of the party accused as sufficient of itself to outweigh the testimony on oath of the principal witness would be a course I could hardly adopt, even if the defender were entitled to the high character which some of the witnesses attribute to him—of which afterwards. But the mere absence of contradiction in such a case goes undoubtedly for very little. There must be corroboration; and I shall now inquire, 1st, whether such corroboration is not to be found even within the limits within which alone the Lord Ordinary has looked for it; and 2d, whether it is not still further to be found within the range of an enquiry into the correspondence, habits, and character of the married parties,—as to which the Lord Ordinary very properly allowed a full proof, but on which he says he "has refrained from even forming an opinion."

I think there is no view of the case in which it was not incumbent on the Lord Ordinary to have formed an opinion on that part of the evidence as well as the rest. If the adultery was not proved otherwise, it was necessary to go into this branch of the evidence, to see whether it did or did not afford any corroboration of the direct evidence of adultery. And if the adultery was otherwise proved, it was necessary to go into it with a view to the question involved as to the custody of the children.

I shall, first, however, consider the case as the

Lord Ordinary considered it, without going into that portion of the evidence on which he thought it unnecessary to form an opinion.

And here, I must say I am unable to agree with his Lordship that the corroborative evidence, which he fully and carefully discusses, does not amount, along with the direct testimony, to more than a case of suspicion.

The manner and circumstances in which a letter was taken from the girl importing the defender's innocence, create of themselves a stumbling-block in the defender's way very difficult to get over, and look very like the uneasy anxiety of conscious guilt, which so often leads to its own detection. But before going into that matter it is necessary to notice the position in the household of the witness Charlotte Walker, who was a chief actor in obtaining that letter. She was examined at great length on behalf of the defender, and cross-examined largely for the pursuer. She had come to the house as governess in January 1870. The pursuer's youngest child was born in August of that year. Subsequent to that event Miss Walker, by the defender's orders, or with his sanction, virtually superseded the pursuer in the management of the household. In January 1871 the defender compelled the pursuer to leave his house in circumstances which I shall afterwards have to advert to, and Miss Walker thereafter reigned supreme. If there is any truth in the story of the girl Elizabeth Heron, the defender's attentions to her began in the course of the year 1870, and his using freedoms with her began not later, at all events, than the period of the pursuer's last confinement in August of that year. Acquainted as your Lordships and the parties at the bar are with the details of Miss Walker's evidence, it would be superfluous on my part to attempt to analyse it. But as introductory to what I have to say as to the letter referred to, it is necessary to state my opinion, that—taking the cross-examination along with the examination in chief, and keeping in mind what appears otherwise in the proof—Miss Walker cannot be regarded as an impartial, candid, and reliable witness. I do not mean to say that she has stated wilful falsehoods. But I think she very early attached herself as a partisan to the defender's cause. She was obviously flattered with her position in the household after she had superseded the pursuer in the management, and strongly desirous of retaining that position.

She says she first noticed that Elizabeth Heron was not as she should be in April 1871, and that she then spoke to her in consequence (p. 169, B.) She afterwards says (p. 184 C) "I ascertained this from the things at the wash. This was before the occasion in May when she was out late." She says she spoke again to Elizabeth about it in May (p. 169, B, C), and from time to time till Elizabeth went to Troon in August, and that in October Elizabeth's appearance was so marked that she (the witness) requested Dr Stark (when visiting herself) to examine Elizabeth's person, and he reported her to be pregnant.

I may here pause to observe that the Lord Ordinary thinks it a point in favour of the defender that he did not long before October attempt to have the girl removed from the house, and "avert the scandal which her state was certain to produce." But this remark is by no means so strong when we recollect that in October the pregnancy had not yet run above two-thirds of its course; for, although

Dr Stark said (p. 169, E) "that the birth might be expected in three days or in three weeks," it did not actually occur for three months. Nor is it easy to see how the defender could have removed her from the house at any period more quietly than he did in that same month of October.

But to resume as to the letter—The girl says that after Dr Stark had (p. 97, E, F, G) examined her, the defender knew of the pregnancy, and spoke to her about it; that he read to her a note bearing that neither he nor any one in Nyeholm had anything to do with the state she was in, and asked her to write one like it; that she refused to do so, whereupon he intimated that in that case he could do nothing for her; that on the day she left Miss Walker asked her to write the note, and she said she would do so, but that the defender afterwards told her not to write it in the house, but when she was on the way to Ireland. Miss Walker depones (p. 171, A), "I am certain that that suggestion, that Elizabeth should write a letter, came entirely from myself, and that defender never said a word about it." But she departs from this afterwards; for, being asked, "was defender aware of your desire to have that note?" her answer is, "Yes," and she adds, "I asked him if he would suggest it to her, and he did so in my presence, I having failed" (p. 172, B, C, D). And again she says, "I asked defender if I might ask Ellie for such a letter, and he said, if I liked I might do so" (p. 188, B, C). The arrangement made with the girl about the letter was therefore the joint act of the defender and Miss Walker, and what followed, as well as what preceded, stamps what the girl says about the note with the impress of truth. Not only did she write the note on the way to Ireland, but one reason at least why Miss Walker accompanied her on the journey obviously was, to make sure that it should be written and posted, and probably also in the hope that the girl might be induced to account to her for the pregnancy in some other way than by implicating the defender. Miss Walker's own power of self-persuasion was certainly very considerable, for she depones (p. 186, C), "I thought she might have fallen into the hands of some bad man, and that the thing might have happened without her knowledge." She wrote to Mrs Heron on 19th October 1871, "Your grand-daughter Lizzie has, in some way unknown to herself, fallen into the sad position of being about soon to become a mother." Miss Walker had observed the symptoms of pregnancy from time to time, and yet she depones that when she wrote this letter to Mrs Heron it was her "private opinion that she (Lizzie) had a growth, but it was Dr Stark's opinion that she was with child" (p. 185, C, D). She adds, that although she thought Dr Stark might be right, she "thought it more likely that he was wrong" (Ib. F). She persevered, however, in obtaining the proposed letter from the girl in terms plainly affirmative of pregnancy, although calculated to deceive in other respects.

The girl says that what she wrote in the letter, about nobody at Nyeholm having anything to do with her trouble, was adopted from the letter the defender had read to her before leaving. But it was Miss Walker who gave her the paper, sat beside her while she was writing the letter, and who no doubt suggested the feigned naturalness of its tone, although she may not have absolutely dictated the words. Miss Walker states that Elizabeth

proposed to write the letter at Londonderry, but she (Miss Walker) "objected because it was Sunday. It was not written at Londonderry. It was written next day in the waiting room at a place where we changed trains." The parties have concurred in explaining that the place here referred to is the junction station called Strathbane, the next station to Stranorbar, where the parties left the Railway, having then 20 miles to travel by road to Donegal and some additional distance to Mrs Heron's residence. The bearing of this we shall see immediately. Miss Walker further says that "Ellie had said before she left the house, meaning Nyeholm, she would write. It was not written before she left because we were in a great hurry getting ready, and I did not at first know that we would have to go so early as Saturday. When she gave me the letter I put in an envelope and posted it to myself at Nyeholm, and I found it on my return. It had not been opened. I opened it and gave it to defender to give to Mr Robertson, his agent."

Now, it is important to consider minutely the nature and object of this letter, 1st, As affecting the reliance to be placed upon Miss Walker. And 2d. As affecting the position of the defender.

Miss Walker represents herself as never having had the slightest suspicion of familiarities between the defender and the girl—as so convinced of the defender's innocence that she was prepared to believe that the girl had been got with child by somebody else than the defender, in her sleep (it was not suggested *where*), or in some still more unintelligible way without her knowledge—that although Dr Stark had affirmed the pregnancy of which she herself had observed the usual symptoms—although she had written to the relatives in Ireland that the girl was "soon to become a mother,"—and although she had advised the defender to obtain a writing declaring that he was not the father—she all the time (p. 185 B to F) and even after she returned from Ireland (p. 192 F) expected it would turn out that the girl was simply afflicted with an internal growth.

Now, assuming that Miss Walker was impressed with this invincible conviction of the defender's innocence, it is not easy to see why she should have thought of suggesting to the defender, as she says she did, that he should obtain a writing acquitting him of the paternity, and for that purpose bring him into the personal presence of the girl, in the humiliating position of suing, along with herself, for the writing which the girl was declining to give. At all events, if this arose from zeal inspired by an upright and honest admiration of the defender's character, one would have expected a religious lady like Miss Walker to go about it in an upright, honest, and straightforward manner, in place of which there are several things in her conduct as to this letter which cannot be so characterised. More particularly—

1. She says the reason why the document which the girl had agreed to sign was not got before leaving Nyeholm was because they were in a great hurry getting ready (p. 188 E). Now that cannot possibly be taken off Miss Walker's hands. They did not leave Nyeholm, according to her own showing, till three or four days after Dr Stark had declared the girl to be pregnant (p. 171 D). The true reason obviously was, that the girl had been told, as she says she was, that she must not write it in the house but when on the way to Ireland,

otherwise "people would just think that they wanted me to do it."

2. The hand-writing of the letter and the spelling (not correctly given in the print) coupled with the artful terms of the letter, are strongly suggestive of the necessity of aid in the composition of it. It bears "I am not very well and must stop. Give my love to Mary and Jessie. I am very grateful for your kindness to me." If Miss Walker did not suggest these words for the purpose of deception, she at all events adopted them, which is much the same thing. She did not need the letter to make her aware either of the girl's gratitude or her then state of health, and she could have conveyed the message to Mary and Jessie without having it in writing.

3. Miss Walker says the letter was written and posted on the Monday, which the Almanac shows to have been the 23d (October 1871); but the letter, which bears no place, is dated the 24th, the day they would arrive at Dunkineely; and the postmark, which is also the 24th, is the postmark, not of Strathbane, nor Stranorber, but of Donegal (some twenty miles from the railway), which is the same with the postmark on all Mrs Heron's letters produced—the object of all these elaborate devices, no doubt, being that the letter might pass as a friendly letter, spontaneously written by the girl, after she had arrived among her relations, and with their knowledge and approval. These considerations probably came in aid of Miss Walker's respect for the Sunday, when she objected to the letter being written and posted at Londonderry.

4. The trick of posting the letter in Ireland, addressed to herself at Nyeholm, was certainly not the less to be reprobated on the part of Miss Walker that she was thereby schooling her young protégée in the art of falsehood and deception, by making her a party to it. It was obviously intended that the letter might be shown, without disclosing the fact to those who did not know it otherwise that Miss Walker had accompanied the girl to Ireland at all. Now, if she went with the girl simply in order, as she says, that she "might be sure she arrived there safely" (p. 171, E), and, from feelings of mere humanity contributed out of her own small salary of £25 a-year towards the expenses of the journey (p. 172, F G), it is not easy to understand why she should have been so anxious to conceal the charity and humanity she had reason to be proud of.

5. Miss Walker says she got and opened the letter on her return to Nyeholm, and gave it to the defender to be given to his agent Mr Robertson; and she adds, "I wished Mr Robertson to keep it, because pursuer had threatened to injure me" (p. 188, F G). Here, again, the reason assigned for what she did is neither adequate nor satisfactory, if indeed it can be regarded as at all intelligible.

Miss Walker's conduct as to the letter in question seems to me, in the various particulars I have just enumerated, very difficult to be accounted for consistently with the supposition that she was, as she says, so certain throughout of the defender's innocence that she did not need to put a question to him on the subject (p. 190, E), and that she was prepared to believe anything, however extravagant, rather than to doubt it. If that was so, why did she resort to falsehood, trickery, and deception to bolster up his vindication? And if that was *not* so,—if she had the slightest doubt or mis-

giving on the subject, what reliance shall be placed on her testimony, seeing that she swears positively that doubt or misgiving she had none?

Anything more crooked, dishonest, and deceptive than her whole conduct with reference to this letter, it is difficult to conceive. Miss Walker may have been bred in the school which teaches that the end justifies the means. I see no other excuse that can be made for her. But if that excuse is to be admitted on the one hand, it must be accompanied by the announcement, on the other, that we cannot accept the evidence of a witness who becomes a partizan upon that principle, as to anything on which she is either contradicted, or not supported by other testimony than her own.

The same considerations which thus go to discredit Miss Walker as a witness, militate strongly against the defender, and afford corroborations of the testimony of the girl Elizabeth Heron, who speaks from direct knowledge of the facts.

The defender was a party to all that Miss Walker did about the letter. He joined her in the humiliating course of personally pressing for the letter after it had been three or four times refused. In this the girl and Miss Walker concur with each other. They concur also in saying that the girl ultimately agreed to write the letter before leaving Nyeholm. The girl says this was not done because the defender told her it must be written after she was away; and to support this we have the fact that it was not only written after she was away, but was so treated as to make it appear that neither the defender nor Miss Walker had had any knowledge of its being written till it reached Nyeholm. The defender adopted all that Miss Walker had done about the letter in so far as not previously arranged between them. He received the letter and its envelope, addressed to Miss Walker at Nyeholm, and posted at Donegal at a time when he knew Miss Walker herself had been there. He handed the letter and its envelope to his agent Mr Robertson, to be preserved as evidence, although we were not allowed to see the envelope till we called for it towards the close of the argument at the bar, when it was found to be addressed by Miss Walker to herself in her own handwriting, and to bear the Donegal postmark, as I have already pointed out. The defender referred repeatedly to the letter, in his conversations with Mr Leckie as a document which happily would keep him all right (p. 124 A B). And he authorised his agent Mr Robertson to found upon it as conclusive in the letter he addressed to Mrs Bridget Heron, of 4th March 1872, where Mr Robertson says the allegation of the defender being the father of the child, "is a gross falsehood. I have in my possession positive proof of its falseness" (p. 92). When a man of education and intelligence in the defender's position, who is described as at once a man of business and a man of letters, resorts to falsehood, fraud, and wilful imposition to prove his innocence, nobody can think him entitled to complain if this is regarded as an important corroboration of the direct evidence of his guilt.

As regards Miss Walker's letters to the girl's grandmother or aunt (p. 190 bot., and 191 top), it is impossible to read them without seeing that they are throughout strongly suggestive of getting the girl to explain the paternity in some way that should exculpate the defender. In the first one (19th Oct. 1871, p. 85), Miss Walker suggests no difficulty as to its being the fact that Ellie had

"in some way unknown to herself, fallen into the sad position of being soon to become a mother;" and she says, "She shall be safely delivered into your hands, and we will at any time be glad to do anything for her that lies in our power, out of sheer pity for the poor thing."

It is in vain for Miss Walker to represent the "we" in this passage, and all the professions in the letter of interest in the girl, as applicable exclusively to "the cook, her sister, and myself" (p. 186, E F G). The servants at Nyeholm could hardly be the parties, or at least the only parties, to whom the letter expresses a hope that God would give grace to them "to care for this his poor, stricken, sorrowful child," in Ireland.

Miss Walker's next letter to Mrs Heron (p. 86), wishing her a happy new year, was certainly calculated to keep Mrs Heron's right side, if gushing friendship could do it, and to introduce favourably the hope expressed in the letter which followed receipt of intelligence of the birth, that the girl "will now at last confess who is the father" (p. 87, E F G), especially when accompanied by an intimation that none of her friends will be able to do much for her till she tells the truth as to the parentage." Then follow suggestions which it would obviously have been agreeable to have had confirmed, as to its being "any one who could marry her or support the child," or "one who has deserted her, or who can't help her; or if, as we sometimes think, she has had violence done her in some place by some one of whom she knows nothing;" in all or any of these cases, "if she will be honest about the parentage, we will all stand her friends, and do all we can to help her to the right." "Talk kindly and lovingly to her, dear Auntie, and try if you cannot bring out the truth." "I will write her a short note, just to soothe and comfort, but will leave the business part in your hands."

Here again the "we," who were all to stand her friends, could hardly be understood to mean Miss Walker and the servants only; and Mrs Heron could hardly be so dull as not to see that a palatable account of the paternity was the condition announced from Nyeholm, or "9 Cochrane Street, Glasgow," which alone "would leave her friends here free to help her in her time of need, as we all wish to do."

But however well Mrs Heron may have performed the "business part" entrusted to her, the girl, unfortunately for the success of Miss Walker's policy, took the pressure upon her to tell the truth too literally; and, as Mrs Heron wrote on 2d February 1872, "It was in her deepest distress that she confessed the truth," that it was one "Andrew James" (meaning the defender) who was the father of the child.

This at once led Miss Walker, in a tone of surprise and indignation, to answer Mrs Heron's letter by saying, "The insinuations contained in it are utterly false, groundless, and untrue." It is not quite clear how Miss Walker could know this so decidedly, as she says she never asked the defender the question (p. 190, E). But however that may be, she deposes that she showed the defender Mrs Heron's letter, and read to him her own answer to it, which leads to the inference that the defender had been made acquainted with the correspondence throughout. At all events, Miss Walker's answer, which the defender did see, still held out to the girl inducements to tell a different

story. It stated that Miss Walker "would gladly help her if she were truthful and penitent;" and the postscript runs in these terms:—"I have not named anything about your letter here. I would not lend myself, even for a moment, to what is false and libellous, and which, for her own sake, she may withdraw." Miss Walker deposes that she meant she had not spoken of the letter among the servants (p. 190, F G). But that gloss cannot be accepted. Taking the postscript in connection with the intimation in the letter that "I cannot" use any influence of mine in aiding and abetting the "wrong," it is obvious that Miss Walker meant that she could not even name the letter to the defender unless the allegation in it were withdrawn. The defender thus saw and was a party to the falsehood in the postscript, as well as to the suggestion that the girl, "for her own sake," should still withdraw the statement she had made, and thereby earn the help which would then be gladly given to her.

These insidious letters therefore, addressed to Mrs Heron, go to increase the discredit attaching to Miss Walker in consequence of the obliquity of her conduct in regard to the letter obtained from the girl herself; and, in so far as a knowledge of them is brought home to the defender, they add at the same time to that corroborative evidence of guilt which is always afforded by abortive attempts to elicit proof of innocence in an insidious and dishonest manner.

The next corroboration I have to notice of the evidence of the girl Elizabeth Heron arises out of the small but very remarkable fact,—passed over by the Lord Ordinary,—that at the time when the girl could know nothing of what was to be spoken to by the Rev. Mr Leckie, who was examined some three weeks after her, she deposed that when she refused to submit to the defender's wishes and said it would not be right, the defender, to overcome her scruples, quoted the example from the Scriptures of King David as having sinned,—insinuating, no doubt, that he himself might be a saint although then bent on being a sinner. If we are satisfied, from what Mr Leckie speaks to, that this part of the girl's story is true, it seems impossible to resist the conclusion that it is equally true that,—aided it may be by this wicked mode of reasoning,—the defender was successful in his object. The evidence of the Rev. Mr Leckie which bears on this point is to the effect that, in a conversation with the defender, about a month or two after the birth of the child, with reference to the rumours afloat to the defender's prejudice, the defender made a remark which Mr Leckie says "struck me very much at the time, but I cannot say that it was put as a comparison between himself and his wife. He said there is a great difference between such a course of iniquity as her's and a single fall: we know that David fell." "(Q) What did you understand to be his allusion to David?—(A) I thought the reference was to Bathsheba. (Q) What impression did it produce on your mind at the time?—(A) I felt puzzled: it produced a painful impression. (Q) What was the impression?—(A) I wondered if he thought he was in a similar position" (p. 123 F.G. and p. 124 A.) The construction put upon this by both of the defender's counsel at the bar was that the defender meant to indicate that his wife's course of iniquity was greatly worse than King David's single act. That seems to me a very lame and forced construction, and not at all a favourable

one for the defender,—apart altogether from the extraordinary and revolting sentiment it would have conveyed. A more favourable view for the defender would be that what he meant to say was that, even if the accusation against him had been true, his fault would have been venial compared with the habits imputed to the pursuer—a sentiment which, although repulsive enough, may not necessarily have imported an admission of his own guilt; and I do not therefore construe it as implying that admission, although I am not surprised at the uneasy impression it made upon Mr Leckie.

But the remarkable coincidence remains between the allusion the defender made to Mr Leckie and the allusion the girl says he made to her, indicating the existence in his mind on both occasions of the same false sentiment, which we know to be not uncommon, derived from the character and conduct of King David,—that the guilt of immoral acts may be counterbalanced and excused by the cultivation of religious feelings—falsely so called—which men easily deceive themselves into substituting for that genuine religion which is known by its fruits. That was the mistake recorded in immortal verse by our greatest Scottish poet as having been made by a character whose holy designation is too familiar to require to be mentioned; who did not, however, go the length of pleading his saintship as a licence for the sin he was about to commit, but only as covering up the sin he had already (no doubt very recently) committed. Turn the matter in our minds, however, as we will, the facts remain, that the defender quoted to Mr Leckie the seduction of Bathsheba by King David as the isolated transgression of an undoubted saint, and that it incidentally crops out in the deposition of the girl, who knew nothing of the conversation with Mr Leckie, that King David's example was urged by the defender to her as an argument to facilitate her own seduction by himself. Every circumstance which aids the probability that the girl is telling a true story must be taken as less or more corroborative of her evidence, and I think it is impossible to say that there markable conversation spoken to by Mr Leckie is not to be regarded as of that corroborative character.

As regards evidence of familiarities between the defender and the girl, it was not to be expected that the defender would allow much of that to be observable in his own household. But there is by no means such an absence of it as to discredit the girl's testimony. Mary Heron, her sister, appears to me to show no desire to inculpate the defender, and it is to be kept in mind that neither of the two sisters had any motive to do so in giving their evidence, but rather the reverse. For long before they were examined the child was dead, and, while hopes of assistance were held out through Miss Walker to the girl if she would retract her confession as to the paternity, there was nothing reserved for her but wrath at a contrary course. As to the supposition that the pursuer might have desired to influence either of the sisters, it cannot reasonably be entertained for a moment; for it is painfully clear that the pursuer would have sacrificed everything else within her power to have been able to believe the defender to be guiltless.

Mary Heron stated that she had seen the defender several times coming out of the nursery where her sister then was, about two hours after the children had gone to bed; that on a good many

occasions the defender came for Elizabeth to the kitchen to shut the nursery shutters, and followed her there; that one night on coming down stairs from lighting the gas, but before it was lighted in the lobby, she saw the defender and her sister in the lobby, and heard Miss Walker say "Oh! shocking, Mr Symington" (p. 107 E F G.); and further, that the defender used to go into the nursery with a cup of tea for the children about six o'clock in the morning, while her sister was still in bed.

It is obvious that affection for the children hardly accounts for the defender remaining in the nursery at night with the girl after the children were asleep; that it could scarcely require both the defender and the girl to shut the nursery shutters; and that it would have been fully as satisfactory if it had been left to the pursuer or to Mary Heron to take in the cup of tea for the children at six o'clock in the morning while the nurse-maid was still in bed. As Mary Heron occasionally slept in one of the nurseries, she had of course opportunity of observing things of this kind which the other servants had not. As to the expression attributed to Miss Walker in the lobby, it is true, as the Lord Ordinary observes, that Miss Walker denies having used it. But that does not satisfy me that Mary Heron's memory is not the more accurate of the two; and it is obvious enough that, whatever Miss Walker did not distinctly recollect, if it was unfavourable to the defender, she could easily persuade herself had never occurred.

Mary M'Kinnon, the cook, speaks to an incident which must also be regarded as of a corroborative character. On a Sunday afternoon, apparently after the pursuer had been sent away from the house, the witness, at the request either of the defender or the girl, took the baby to the kitchen, as "Ellie said she was tired of the baby, it was crying so sore"—leaving the defender and Ellie in the bedroom,—the other servants being at church. The witness kept the baby till Ellie came for it in about a quarter of an hour, and although she had frequently had the baby in her arms before, she says she thought the occurrence "curious at the time." The same witness says that after she had left the service and had come to understand that Ellie was in the family way, she remarked to Ellie that she was like another girl she had known who had a child to her master (p. 113 C.D.), and the witness afterwards explains that the reason why she thought Ellie was with a child to her master was that she "did not see any other person coming round her."

The Lord Ordinary notices two things, and two only, as indicative of familiarities having been observed between the defender and the girl Elizabeth before the pregnancy had become known to the pursuer, viz., *first*, the allusion made in Mr Biot Edmonston's letter to the defender's brother of 21st July 1871 (p. 28 F G); and *second*, what passed at the interview with Mr Leckie on 31st October 1871. The last of these appears to me to be of more importance than the Lord Ordinary attaches to it. The pursuer expressed difficulty in complying with a request made to her to withdraw something she had said about Ellie and the defender. Mr Leckie said, surely she could not think such a thing to be true. "She then looked towards the defender and said—'Well I don't know, Andrew knows, let him deny it.' She said it looked very bad, and she also said something about

coming out of a dark room, but she did not give precision to that statement—it seemed vague, as if she did not want to give particulars about it. She said, 'Can Andrew say there is nothing in that.' He looked a little and said there was not. (Q) Do you mean that he paused?—(A) Yes, slightly. She then said 'Well I am bound to believe what Andrew has said, but it looked very bad.' (Q) Were you satisfied with what he said?—(A) I had no business to express an opinion, but I was struck with the thing altogether. I was struck with her question and her apparent unwillingness to say out all that she had on her mind, and I was also struck with the manner in which he answered. There was more hesitation in his manner than I would have expected in denying a statement of that kind." (p. 121 bot. and p. 122 A to F.)

Now, this is legitimate evidence, given by an intelligent and impartial witness, whatever inference may be drawn from it. The parties were face to face. The defender might have cross-questioned the pursuer if he had chosen as to the grounds of her suspicion about him and Ellie and the particulars "about coming out of a dark room," which "looked very bad." But he did not. On the contrary, Mr Leckie was struck with the hesitating manner in which he answered and "with the thing altogether." To this we must add some facts which the Lord Ordinary passes over with very slight notice. At the date of this interview (31st October), Miss Walker had been some days home from Ireland, but not a word was said either of the pregnancy or of Ellie having left the service. Some days after the interview the defender told Mr Leckie "that her friends had written for her from Ireland, and that he had allowed her to go as she was not of much use." Mr Leckie adds, "I did not then know that she was in the family way. What he said did not lead me to think so. I did not know until some months afterwards that she was in the family way and had left in consequence." It thus appears that the defender not only concealed the true reason why Ellie had left but assigned a false reason. Further, at a subsequent interview, some two months or thereby after the birth of the child, the defender volunteered a statement to Mr Leckie "that he had no doubt that the father of the child was Ellie's cousin, a married man, who, he said, had frequently seen her home when she was out in the evening." (p. 122 bot. and p. 123 A to F.) That the defender had no foundation whatever for this statement must be inferred from the fact that he did not attempt to prove that Ellie had ever been seen in company with this married cousin, or even what was his name or designation—if he existed. It cannot be doubted that all this concealment and falsehood on the part of the defender adds to the probability that the girl's statement is true, and must be taken into account in estimating the value of her testimony.

As to the supposed contradictions to that testimony noticed at page eleven of the note of the Lord Ordinary, these are two in number—*first*, what relates to or arose out of the occurrences of Monday the 1st of May 1871; and *second*, the discrepancy between Bridget Heron's account and that of the girl of some parts of the conversation which had passed between them.

I dismiss this last at once, by concurring in the Lord Ordinary's observation that "Bridget Heron, although apparently a decent kind of woman, did not seem to be a person of much accuracy, or on

whose recollection of particular expressions reliance could be placed." I think, so far as appears, the girl's memory is likely to have been more accurate than hers, and, apart from difference of memory, there was no motive for discrepancy between them.

As to what related to Monday, the 1st of May, the attempt to exaggerate its importance seems to me only to indicate the poverty of materials for getting up a counter story to account for the birth, it being true, as Miss Walker latterly wrote to Mrs Heron, that "the child must be accounted for somehow." Elizabeth had been allowed to go to Glasgow, and was to be back between six and seven in the evening, but did not return till about ten, having as she said missed the train and consequently walked home. Miss Walker says she observed nothing on Elizabeth's dress when she returned, "but the following week I observed a large mark upon the back of the skirt of the dress she had worn that night, just about where she would sit. Mrs Harkness tried to take out the mark but failed. I believe Elizabeth also tried to take out the mark,"—(p. 173 bot. and 174 top). Here Miss Walker exhibits her usual exaggeration, for Mrs Harkness, who did the sewing work, says that Elizabeth showed her the mark and asked if she could take it out. "The mark was about the size of half-a-crown. It seemed to me to be tar. I did not see her attempt to take it out." Mrs Harkness afterwards explains that it was not till she went to sew in the house in the last fortnight of June—that is about six weeks after the 1st of May—that Elizabeth showed her the mark, and consequently it could not have been till then, that in making up the dress in the customary manner after the washing, she adjusted the plaiting so as to cover the mark, as M'Clymont says was done, although Mrs Harkness herself was not asked whether she had done it or not. Now, it was not till July 1873—some fifteen months afterwards—that the girl herself was examined about the mark, and what she says seems to me to amount to little more than this, that she may have had marks on her dress, "but nothing that would be spoken of," or to which her attention had been called as remarkable till she was precognosed about it by the defender's agent when about to be examined as a witness. Nor indeed was there anything remarkable about it. I asked the defender's counsel how it was that a small spot of tar, or paint, or oil, or whatever it might be, of the size of half-a-crown on the girl's dress, "just where she would sit," as Miss Walker expressed it, was supposed to presume illicit intercourse either with the girl's will or without her will, and what it was they conjectured to have occurred that evening, but they both admitted they could present no theory on the subject. All the witnesses on both sides, including even Miss Walker herself, concur in saying the girl had no followers; and unless a joiner or a mason doing some little repairs about the house could be supposed to have got her with child by looking at her, the probability of her having taken up with a stranger was so small that Miss Walker persisted in believing it was a growth which caused the alarm, although the doctor declared it was a child. Even the charitable supposition, that the girl had been ravished in her sleep, was attended with the difficulty that, at the period of conception, and for months before and after that period, she never appears to have slept out of the house, and there was only one male inmate who

could have visited her in her sleep, and to him Miss Walker it is presumed could not mean to refer.

But it is said that the defender could not have been the father of the child, because, according to Miss Walker, "he was taken ill on 2d May 1871 and was laid up entirely in bed from Saturday the 6th till the following Saturday" with rheumatic croup and was confined to his room for a fortnight. This, however, does not go to incapacitate the defender on the 1st of May—the very day the defender's advisers fix upon as the probable day of the conception. The birth was on the 25th January 1872. But we know quite well that the period of gestation cannot be reckoned upon with precision in any particular case, and Miss Walker deposes distinctly that she observed the symptoms of pregnancy in April 1871 and spoke to the girl on the subject, and that she again spoke to her in May and asked her to send for a doctor. This of itself upsets the whole theory—weak enough in itself—founded on the fact that the girl did not come home from her visit to her friends till about ten o'clock on the 1st of May (some two hours after sun-set), and that she had a small black spot on her dress, to which neither she nor anybody else thought at the time any importance was or could be attached. The whole story really would not have been worth serious consideration had the Lord Ordinary not dwelt upon it as making it unsafe to proceed on the girl's evidence, and had the defender's counsel not clung to it in argument before us as the sheet anchor of their case, although they were constrained almost to let it go in the end.

And now that I have sufficiently analysed the whole of the evidence to which the Lord Ordinary confined his attention, I am bound to say that I have no doubt at all that—even stopping short here—the charge of adultery is legally and satisfactorily proved.

But, at the same time, I am of opinion that the proof of adultery is not exhausted without forming an opinion—which the Lord Ordinary says he refrained from doing—upon "the evidence and correspondence in the case, as to the truth or falsehood of the charges made by the defender in reference to the pursuer's habits," and as to the footing upon which the parties lived both before and after the period when the adultery is alleged to have commenced. We could not lay out of view this part of the evidence, even if the only question before us were the question of adultery; but as we have also to consider the question as to the custody of the children, it becomes our imperative duty to form and express opinions upon the relative characters and conduct of the husband and wife, much more positive and plain than we otherwise might have been inclined to do. A duty of this kind is never otherwise than painful, and in common with your Lordships I always endeavour to perform it as delicately as possible, where justice to another person than the one reflected on does not forbid all delicacy. But when the choice comes to be between the character and conduct of two individuals, which of them is to be considered innocent and which guilty, it would be mere moral cowardice to shrink from pronouncing between them in the most unequivocal terms.

Here, however, the materials unfortunately become so voluminous, the correspondence alone extending over a period of two years, and occupy-

ing considerably upwards of 100 printed pages that I can no longer follow the analytical and exhaustive method I have up to this point pursued, of not merely expressing my views and opinions, but proving their accuracy in detail by reference to the passages relied on. In what I have further to say I must to a great extent content myself with expressing the opinions I have formed, leaving those who are interested to verify these opinions for themselves by reading and studying, as I have done, every word of the proceedings which have been laid before us.

The defender has himself put his character in issue by adducing gentlemen of high respectability to prove it. Two of these the Lord Ordinary specially singles out; the one I know only by reputation as an eminent clergyman, the other I of course know to be an artist, of whom any age and any country might be proud, and whose friendship is unquestionably a privilege to whoever possesses it. But if these gentlemen desire not to have to modify their favourable opinion of the defender, I should recommend them not to read all that we have had the painful duty of reading in this case. The defender has also put the pursuer's character in issue by bringing against her three distinct charges—1st, drunkenness; 2d, untruthfulness; 3d, excessive use of narcotics, particularly laudanum and chloroform.

For ten years, at least, the parties had lived happily together. That is proved most satisfactorily, and hardly, if at all, disputed. At the lapse of that period the defender, for the first time, challenged the pursuer for the faults he now alleges to have been habitual from the date of their marriage downwards. On 21st November 1870 he wrote to her sister Bella—"Mary has pressure of blood on the brain, but it is occasioned by the constant use of stimulants—brandy, whisky, wine, and ale, and also laudanum and chloroform." She takes them to the extent of constant excitement, "sometimes every other day, so that she can neither stand, nor speak, nor be awakened. This has gone on more or less for years." Then he says, "the saddest feature of it is, that it involves utter untruthfulness to such an extent that nobody in the house can possibly believe one word she says; and when she wishes to strengthen any statement known to be false, she calls her Saviour to witness the truth of her statements, and openly and repeatedly perjures herself on the slightest questioning of her word"—(p. 9, A. to D). "Under such a painful state of matters can you, dear Bella, wonder at my being anxious to attribute it to her head too, and to consider her not accountable"—(ib. bottom).

It is a very unfortunate coincidence for the defender, that it was just shortly before this time that he had begun to pay attentions to the girl Ellie, according to her deposition, and that the girl had begun to presume upon these attentions, as we may infer from a passage in this same letter, coupled with Miss Bella's letter, to which it was an answer, and in which she had said that most men "would have turned that girl adrift long ago," for the disrespectful, not to say insolent, way in which she treated her mistress, and which Miss Bella added she had herself seen. The passage in answer in the defender's letter is this, "I do not believe that Ellie is either disrespectful or insolent, but know she has been ground down and badly treated, and the difficulty is not to cast her

adrift, poor orphan that she is, but to get her and the others to stay"—(pp. 11, E, G). He then states his conclusion to be, that there will be nothing for it but that the house be broken up,—the pursuer boarded in some establishment, and the children cared for at school—(p. 13, E.).

The defender had apparently before this time left the matrimonial bed, and it does not appear that he ever returned to it. My opinion is, that about the time the defender wrote the above letter to his sister-in-law he had formed the deliberate design of reducing the pursuer to such a position, and placing her character and habits in such a light, that nobody would believe a word she might say against him, however he might misconduct himself, and probably also the design of driving her permanently from his household. He first entered upon this task with her brother, the Rev. Biot Edmonston, and her sister Bella—persons of education and intelligence both of them—and what is remarkable, by dint of persevering and unscrupulous assertions of his own personal knowledge of all that he alleged, he for a time succeeded in poisoning their minds in the way he desired. They could not think of doubting the word of so good and virtuous a man.

To aid this purpose the defender's great stroke of policy was to extort from the pursuer a confession. To pave the way for this, Miss Walker had been placed in full charge of the household some short time after the pursuer's last confinement, and the pursuer had been reduced to what Miss Bella Edmonston, in the letter already quoted, justly calls "a most terrible position in her own house; her servants paying no attention to her orders, and when she scolded them they just pass it over and take no notice, while you and Miss Walker watch her unobserved and treat her as one not quite accountable for her words or actions." This degradation not proving sufficient for the defender's purpose, the pursuer was told that she must either confess or leave the house. This is clear enough from what the pursuer had said to Mr Leckie prior to a meeting in his house, at which a confession is said to have been made. Mr Leckie deposes—"She had more than once previous to this meeting said to me she had often felt a strong temptation to give in and confess to what she was not guilty of in order to be allowed to stay at home." And that, Mr Leckie adds, "was the end he thought she had in view" when she was brought to his house by Miss Walker and the defender in January 1871—(p. 120, B.C.). She was by this time, however, on the brink of being permanently banished from the house, and so Mr Leckie deposes, "she said immediately on my entering the room, 'I have to confess that I have been guilty of all that Mr Symington charged me with and much more.' She said that just as I went in. It occurred to me that I had been sent for for the purpose of hearing it. I was very much struck with what she said"—(p. 120, A. B.)—and consequently he asked her whether she was not making this confession for an end, to which she simply said No, she was not doing it for an end—(ib. C, D). Mr Leckie, in a previous part of his deposition, had explained that the defender on several occasions about that time had told him that the pursuer took too much brandy; that he had found her dead drunk shortly after their marriage, and that he had ground to believe she had been addicted to that habit from the time of their marriage down-

wards. Mr Leckie had farther explained that, in these conversations, the defender persistently adhered to the necessity of a confession of these charges of drinking as being "a *sine qua non* to any amicable arrangement between them;" and Mr Leckie adds, "he always put that in the foreground"—(p. 119, A to F). It is indeed a remarkable fact that throughout the whole two years or thereby of the painful correspondence between the defender and his wife, his object never seems to have been reform, but always confession—open and degrading confession—which, if reform was really necessary, could only have rendered it hopeless.

But the confession, so strangely and vaguely made before Mr Leckie, did not lead to the result the pursuer expected from it. The farther condition was laid upon her that she must leave the house for a period of six months, as a period of probation, so it was called, before she could be fit society either for her husband or her children, and Miss Walker. Being thus excluded from her own house, her brother, the Rev. Biot Edmonston, the parish minister of Kincardine, readily received her into his house at Blairdrummond. In the end of March, while still being there, she addressed to the defender a letter (post-mark, March 27, 1871) which, to be judged of must be fully read; but the burden of which was an entreaty for a searching investigation into all her conduct, in place of resting upon the vague confession she had been induced to make before Mr Leckie, which she complained lay heavy on her conscience as conveying an erroneous impression of what her habits had really been. The letter bore, *inter alia*, "By the many years I have lain in your bosom, by the children I have borne you, by a still higher and holier motive, the Christian name you bear, I implore you to go fully into this matter now, and sift it to the very foundation"—(p. 43, E, F). The letter continues, "I do not care though all the world called me innocent if you still believe me guilty; but well I know your voice would be the first to pronounce me innocent if you could truthfully do so"—(p. 44, D). She then repeated, that as it was only to clear herself in *his* sight that she was begging for investigation, she could not doubt he would grant it; and she added, "Any friends of your choosing will satisfy me."

The defender's answer of 3d April 1871 bore "I am deeply grieved at the ground you take, which is appalling, and only another step in the wrong direction"—(p. 46, B, C). "Pause and consider ere you close the door on any chance of future peace or happiness. Your last move is to me sadder than all that has preceded it"—(ib. bot.)

In her next letter, of 4th April 1871, the pursuer pointed out in detail how every specific charge the defender had ever made against her might readily be ascertained to be either well or ill founded, and asked him, "Is it right, dear Andrew, for any one to say or think that he *cannot* be mistaken? that it is *impossible* for them to have formed an erroneous opinion of another's conduct? Has no one ever before been as certainly convinced as you are and seen occasion to alter their opinion? The opinion of all the rest of the world is as nothing to me compared with yours."

The defender, however, was obdurate. He would hear of no investigation, and accordingly his next letter (10 April 1871) bore, "It is therefore worse than useless for you ever to write more in that

strain to me" (p. 54, G). The pursuer wrote again (April 15) deploring the defender's resolution in terms too touching to be abbreviated, but too long to be quoted, beyond a single sentence, in which she says, "Surely you do not know, you cannot know, that when you promise me restoration to your favour and confidence on my confession of this thing, that virtually you hold out to me the highest bribe the universe contains to tempt me from God, and away from instead of into the path of rectitude; do not do it I beseech you"—(p. 58). The heartless answer she got (April 17) was, "Your letter of Friday horrified me. If you do not choose to write differently it would be infinitely better that you did not write at all."

By this time the film was beginning to fall from the eyes of the pursuer's brother and sister, and consequently Mr Biot Edmonston had become as anxious for investigation as the pursuer herself. They had made sure that when the pursuer came to Blairdrummond she had brought with her no narcotics nor stimulants of any kind. They knew she had got and could get none there. She had not a farthing of money to get them with. They saw that the want of them produced neither uneasy feelings nor any of the symptoms which generally result from a sudden cessation of such habits as she had been accused of. On the contrary, her health visibly improved in the quiet atmosphere of the manse. Her brother latterly held with her serious conversations of her own seeking, and she had impressed him by the earnestness with which she lamented that she had so far yielded to the tempting condition on which alone the defender proposed to concede to her his society and that of her children, as to admit an excess of which she had never been guilty. Mr Biot Edmonston accordingly, in his letter to the defender of 26th March 1871, explained the result of his conversations with the pursuer, and added, "Such being the state of matters, it seems to me, and will to you also, I have no doubt, appear clear that we are shut up to one, and one only course. I believe God has so shut us up, viz., to have the whole miserable affair thoroughly sifted to the very bottom."

The defender's answer was, "I am appalled at the melancholy turn things have taken;" "no amount or kind of negative evidence could make the slightest difference to me on what I positively know. Should it be needed, confirmation abounds on all sides, but could do nothing whatever towards restoration, which can only be gained through repentance. I still think the period of six months, which was originally fixed by medical advice and arranged for, is quite short enough as a time of probation for Mary, and at the end of that time we shall see how she then is, and what is to be done."

In July 1871, when the prescribed six months were nearly out, the pursuer's brother drove her to the house at Nyeholm, and left her there by her desire. Miss Walker immediately sent written notice of the pursuer's return to the defender. So soon as the defender came home he demanded a renewal of the pursuer's confession as the only condition on which she could be allowed to remain. She refused to comply, and after calling in the assistance of the gardener, the defender carried her by force out of the house. Miss Walker being asked, "Was pursuer all right that day?" Her answer is "Yes; I should think so." (Q) "Was she under the influence of drink or narcotics?—(A) Such an idea never entered my mind." It is

superfluous to add, that from the time the pursuer went to the manse in January to the time when Mr Biot Edmonston left her at Nyeholm in July, she had neither tasted nor had the opportunity of tasting either the one or the other. Her father, who had called at the house about the same period in hopes of seeing his grand-children, was treated in the same style that she had been, and had the door slammed in his face.

We now know—what the pursuer and her relatives did not then know—that, according to the story of the girl, Ellie Heron, the defender, before he sent off the pursuer from his house in January 1871, had been kissing and seducing the affections of that girl whom he could not think of turning adrift, "poor orphan as she was," and that forthwith, after he had got rid of the pursuer, he fully completed that seduction, clothed in the sheep-skin of King David.

It is, as I have already indicated, a most unfortunate coincidence for the defender, both as bearing on the charge of adultery and as bearing on the truth or falsehood of the charges brought forward by him against his wife—for the first time after a married life of happiness of ten years' duration—that the one set of circumstances thus dovetails into the other in a way so unfavourable for the defender's truthfulness, both as to the one story and the other.

On being driven from the defender's house in July 1871 the pursuer went to lodgings. By the end of October of that year she had become so heart-sick of living apart from her husband and children as to sign an agreement written by Mr Leckie, which has been familiarly called in the discussions, her written confession of 31st October 1871; but which, when carefully examined, contains really no confession at all. It expresses the pursuer's belief in the defender's veracity,—that from his point of view the charges he made against her as to the use of stimulants might not have appeared unreasonable, as it was quite possible she might have taken more than her system was able to bear,—that she also acknowledged "to a habit of untruthfulness or tendency to exaggerate and misrepresent;" but that, with regard to the use of opiates, "Mr Symington expresses his regret that Mrs Symington will not make any admission; but he is willing, meantime, to waive this point in the hope that by-and-bye more satisfaction may be obtained." The paper also expresses the pursuer's belief that her suspicions of the defender's fidelity were groundless.

The so called admissions by the pursuer in this paper are in so extraordinary and qualified a style as to be nearly valueless even in their terms. But such as they are they were wrung from the pursuer in a manner which deprives them of all value whatever, for according to Mr Leckie's evidence it took from seven in the evening till one in the morning to extort them from the pursuer, and even when in the act of making them, Mr Leckie says, "she denied to a very large extent all he (the defender) said about the drinking habits; she denied absolutely about the opiates, and made a qualified statement about the untruth. (Q) Did she appear to be anxious to conciliate him?—(A) Exceedingly anxious. (Q) Did she say anything with reference to whether he really believed in the charges or not?—(A) She said she had great difficulty in seeing how these charges could be sincere on his part."

Mr Leckie had on a previous occasion become

aware, as we have seen, that the pursuer like a victim on the rack was inclined to confess to almost anything that would end the suffering she endured, and I rather wonder therefore that Mr Leckie should have countenanced the exhausting process which the pursuer was subjected to at this second meeting to squeeze out of her what would satisfy the unscrupulous requirements of the defender. I have no doubt, however, that Mr Leckie was moved by the consideration the pursuer herself frequently alluded to in her letter, that "whom God has joined no man shall put asunder."

The further conditions of this agreement were substantially conditions for the pursuer's continued degradation. It was agreed that the pursuer should live for four months wherever the defender should indicate to her; that her first year of return to Nyeholm should be a year of probation, during which she should occupy whatever position in the house the defender might wish; that their living together afterwards should depend on his satisfaction with her, and that none of her relations should come to Nyeholm till the defender himself should ask them.

Let it be remembered that at the date of this last meeting and agreement the defender was aware that the girl Ellie was with child; that she had charged him with being the father; that Miss Walker had returned from spiriting the girl away to Ireland,—had armed the defender with the letter bearing the post mark of Donegal to prove its truth and authenticity; that no hint was given of the pregnancy; that the defender, when he afterwards spoke of the girl to Mr Leckie, still said nothing of that fact, but told him falsely that her friends "had written for her from Ireland and he had allowed her to go as she was not of much use"; just as Miss Walker falsely told Mrs Slimon, the matron of the institution in which Ellie had been trained, that they had to part with Ellie owing to her untidy habits and because her friends had wished her to come to them; and when all these things are put together we must ask ourselves whether here again there is not matter bearing unfavourably on the question of paternity as well as on the question of the defender's character as a man making charges against his wife which he could not himself have believed to be true.

I shall not follow the history of the pursuer through her four months' additional period of solitary residence in lodgings, nor the still more degrading period of servitude she was doomed to pass in her own house under Miss Walker, forbidden to receive even her own father, restrained from free intercourse with her own children, and to a great extent confined like a culprit to her own bedroom, and latterly sent away again to lodgings, on a separate allowance, although all the time, from October 1870 till October 1872, when she finally broke with the defender on hearing that Ellie had become a mother, it is not so much as suggested from any quarter (laying aside the absurd conjectures of Laird and Robertson (pp. 100 and 101-2), which are not worth noticing) that either strong drink or narcotics had ever crossed her lips. To reconcile all this with a *bona fide* desire on the part of the defender for the pursuer's reform—if reform had been necessary—seems to me altogether impossible.

The opportunity for investigation so anxiously longed for by the pursuer, and so long demanded in vain by Mr Biot Edmonston, came at length in

the course of this action, and both parties fully availed themselves of it, under the authority of the Lord Ordinary, as appears from his note, in which he says that, although he would willingly have limited the inquiry, "he came to the conclusion that it was proper that the proof should embrace the whole charges by the parties against each other—a view which, indeed, was not opposed by the counsel on either side."

The result of that investigation has been, as I have already indicated, altogether to negative the charges made against the defender. I do not propose to go over the proof in regard to them in detail, and luckily it is not necessary to do so, for the confiction is so trifling that there is no difficulty in gathering the result. As to the charge of drinking to excess, it is very remarkable that, except through the nurse or the doctor, on the occasion of her confinement, nobody whatever, not even Miss Walker, ever saw the pursuer taking either brandy or whisky at all, nor taking either wine or ale in any unusual or irregular way. It is equally remarkable that all the witnesses who are asked the question, including even the defender's own sister, with the single exception of Miss Walker, say expressly that they never on any occasion smelt drink on the pursuer. Miss Walker says she often did so, and that the habit of drinking was so palpable that it could not fail to be known in the house. But I have already given my reasons for not trusting Miss Walker; and upon this point she not only is not supported, but substantially contradicted, by all the other witnesses; for we know that even wine is very readily detected in the breath, and the odour of brandy or whisky cannot possibly be concealed, not to speak of the certainty that an habitual smell of drink, if observable by Miss Walker, must have been observable by others who came into the pursuer's presence.

As to narcotics, with the exception of what were prescribed to or furnished to the pursuer by the doctor during her confinements, there is no evidence whatever of her ever having used any of them. It may be that on these occasions she may have used those which the doctor left with her, as well as the brandy in the room, more freely than the nurse or the doctor thought good for her, which would account for all Dr Stark ever said to the pursuer on that subject, although, as Dr Stark's information would come through the nurse, we do not know how far the brandy may have been helped away by others, as it generally is on these occasions. It is admitted that the pursuer had a habit of retiring to and resting in her room for an hour and a half or so before dinner, and much is inferred from her looking confused or flushed when she returned from her room. I can only say that if such appearances on such occasions in persons previously exhausted, whether from weak health, nocturnal studies, or from such anxieties as the pursuer was subjected to, were to be held to indicate the habits attributed to the pursuer, I could often have proved them against some of my most temperate friends, medical and legal, and notably they might be easily proved against myself. The pursuer's habit was to rise at six in the morning, and to engage in household duties till the children's dinner was over. She was subject to violent headaches, and of a delicate constitution, rapidly bearing a family; and the nurse Mrs Jack, a witness adduced for the defender, and who attended

the pursuer at five of her confinements, says her habit of retiring to sleep during the day "was a very proper thing to do. If she had consulted me I would have recommended her to do it."

After Miss Walker was put in charge of the house the pursuer was often seen in tears. Miss Walker attributes this to her mourning for her sons. But your Lordships will probably think it an adequate cause that the pursuer felt she had lost the affection of her husband, and that she was considered no longer worthy to have the charge of her own household.

As to the charge of untruthfulness, which the defender reiterated against the pursuer, as amounting to deliberate lying, equivalent to perjury, the instances given are simply ludicrous, even as instances of exaggeration. As charges against her moral character, nothing could be more extravagant and groundless.

There is one passage in the defender's letter to the pursuer of 15th May 1871, which I have omitted to quote, in which he says he will have to warn the children as they grow up against the pursuer and her sinful and untruthful ways. But I shall not go back upon it at present, because, if your Lordships shall affirm the adultery, it will have to be gravely considered along with the rest of the correspondence and proof, with reference to what is to be done as to the custody of the children.

Meantime, I have to express my opinion, clearly and distinctly, that not one of the three charges made by the defender against the pursuer has been established.

Even had these charges been all true to the extent alleged, or had the defender believed them to be true, the terms in which he wrote to his wife, and the mode in which he treated her, would have been harsh, cruel, and most unjustifiable. Being however substantially untrue, and to a great extent known to him to be untrue, it is impossible to find words adequate to express the savage nature of the defender's conduct and correspondence. For about two years almost every letter he wrote to the pursuer was a stab infinitely more cruel than if he had stabbed her with a dagger in the flesh. Week after week, and month after month, he saw with apparent satisfaction the iron enter her soul, and the more she submitted and entreated for pity the more determinedly he persevered in re-opening afresh, with the most refined cruelty of language, the wounds he had inflicted. The Lord Ordinary places it to the defender's credit that he is "possessed of great literary taste," and has "a large acquaintance of literary men." I must say that I never saw literary attainments turned to such a purpose of cruelty and persecution as in these letters of the defender to the wife of his bosom, whom he was bound to cherish and protect. Her letters to him are full of love, tenderness, and devotedness,—of all that confiding trust which is the characteristic of genuine affection in a wife. She was ready to do, or to say, or even to believe, almost any thing rather than have a thought that was not his, or to suppose it possible for him to do wrong, or even to be mistaken. And, when the light at last broke upon her, it was only to render her existence miserable. Anything I have quoted from the protracted correspondence which has been here presented to us can give no adequate idea of that correspondence, which, to be judged of, must itself be fully read. I shall only say, in conclusion,

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that whoever can read it without pain and emotion must be either less or more than human. My opinion is, that the interlocutor reclaimed against should be recalled; the adultery found proved; and, if your Lordships are of the same opinion, that we should then proceed to consider as to the custody of the children, and the amount of aliment to be awarded.

LORD ARDMILLAN—An action concluding for judicial separation between man and wife is always serious and painful, and rarely has so sad a story of domestic life been presented to the Court as in this case. The Lord Ordinary has decided in favour of the defender. The case is certainly one requiring and deserving very serious consideration.

The pursuer, a young lady from Shetland, well educated, well brought up, and evidently very intelligent and very sensitive, with dispositions warmly affectionate and intensely devotional, was married in July 1860 to the defender, Mr Symington, a manufacturer in Glasgow. For ten years it appears that the married pair lived harmoniously, and a union seemingly happy and certainly peaceful, was crowned by the birth of six children, of whom five still survive. The youngest of these children was born in August 1870, and in October and November of the same year a great change, a dark shadow and a deep sorrow, fell upon the wife,—a sorrow which nearly drove her to distraction and despair,—and which was undoubtedly caused by the accusations, true or false, which her husband, the defender in this action, suddenly, mercilessly, and persistently made. If these accusations were true, then her sorrow was of her own causing; though even in that case no mercy, kindness, or tenderness seems to have been shown her. If the accusations were false, then the time of making them—the manner of making them—the spirit in which they were made and urged—and the spirit in which they were met,—and the import and effect of proof adduced as contrasted with proof alleged—are all of great importance as elements of evidence in support of the leading charge of adultery made against the defender.

These accusations were very serious. The charges made by the defender against his wife were,—habitual drinking of spirits and other intoxicating liquors—habitual use of narcotics—and habitual wilful untruthfulness—wilful falsehood up to the measure of blasphemous perjury. With these dreadful charges, expressed in the strongest terms, the pursuer was suddenly overwhelmed. Though the defender says that his wife's habit of drinking to excess had commenced early, and had continued through nearly all their married life, yet he had never warned her or remonstrated with her on the subject till October 1870; and then, in November 1870, he launched these tremendous accusations against her. The charges were not lightly, hastily, or rashly made. They did not and could not arise from misapprehension. They did not spring from passing anger or any other transient feeling. They were made deliberately, bitterly, solemnly, and persistently. The charge of drinking was constantly repeated from November 1870 till this action commenced, and has been re-asserted at the bar; and the fearful charge of wilful falsehood and perjury is distinctly made in this correspondence ten or twelve times; and that charge also, with a little qualifying of what is called its exaggeration, was re-asserted at the bar.

As an illustration of the nature and the language

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and the spirit of these charges I refer to the defender's letter of 21st November 1870, addressed to the pursuer's sister, Miss Edmonston,—“Mary has pressure of blood on the brain, but it is occasioned by the constant and secret use of stimulants,—brandy, whisky, wine, and ale, and also laudanum and chloroform. I have no tetotal prejudice, but mean what I say. She takes them to the extent of constant excitement as her normal state, and of utter prostration from time to time; sometimes every other day, so that she can neither stand nor speak, nor be awakened. This has gone on more or less for many years, but in the hope of amendment and for the sake of the children I have all along screened her in every conceivable way. Latterly it has got greatly worse, and the saddest feature of it is, that it involves utter untruthfulness to such an extent that nobody in the house can possibly believe one word she says; and when she wishes to strengthen any statement known to be false she calls her Saviour to witness to the truth of her statements, and openly and repeatedly perjures herself on the slightest questioning of her word.”

In the same letter he says, and he repeats it in other letters, that her taking of stimulants was patent to him and others for long beyond all question of God or man. Again, in the same letter he says,—“I say it deliberately, that in result her daily life for years has been a spoken and acted lie, a deception with no truth in it, and the fact of the boys growing up and exposed to be contaminated, is a very bitter side of the trial.”

These charges, which are made over and over again in the letters, were certainly susceptible of proof; and proof by many witnesses was frequently threatened by the defender. It is manifest that the Rev. Mr Edmonston, Miss Edmonston, and the Rev. Mr Leckie, and probably others, did at first believe these accusations. But they did so on no other evidence than the positive and repeated assurance of the defender. The fact of such belief on the part of her friends had the effect of depriving the pursuer of the benefit of their countenance, sympathy, and support for some time; and unaided and unadvised,—with a still unbroken love for her husband, and a mother's ardent affection for her children, and the fear of losing all, tugging at her heart,—she had to meet the charges as best she could.

It appears that in the end of October 1870 she gave to her husband a promise or pledge of entire temperance, and indeed of total abstinence. She states in her letters, and she stated verbally to her brother and to her aunt, Mrs Cruickshanks, that she had never been guilty of taking intoxicating liquors to excess, but that to satisfy and pacify her husband, and remove even a groundless suspicion from his mind, she gave the promise. To Mrs Cruickshanks she said,—“No, aunt, for two years I have not touched anything. You know I never took it, and for two years, to please him, I took the pledge and made a solemn promise not to take it, and I have kept that solemnly.”

Our enquiry, therefore, is naturally divided into two parts; first, the period before October or November 1870, referred to in the letter which I first quoted; and secondly, the period after that date.

On considering the proof in regard to the conduct of the pursuer prior to the date of this pledge in October 1870, into the details of which I do not

feel it necessary to enter, my opinion is that the defender's accusations, as made in his letters and urged at the bar, are without any reliable support on the evidence. He repeatedly said that he would overwhelm her with proof,—that he had many witnesses to prove his charges; and this he persisted in saying, though at the same time he uniformly resisted all enquiry, even by relatives and friends, when the pursuer and her brother demanded and urgently entreated it. He has now had ample opportunities of proving it in this action. He has attempted proof, going back for years, and making searching investigations. He has entirely failed.

Impressions, or suspicions, or conjectures to explain appearances, are easily stated. But we must distinguish between mere impressions, or opinions, and statement of actual fact, and when that distinction is made there is no proof at all which can support the serious accusations made, unless the testimony of Miss Walker is believed. Apart from her evidence, the proof is ridiculously feeble. It can scarcely bear statement. The counsel for the defender could scarcely present it for consideration. It is really on Miss Walker's testimony that these charges rest; and even her evidence relates rather to inference and opinion than to facts. On the weight and credit due to Miss Walker's testimony I reserve my remarks till the rest of the case, in which she bears a conspicuous part, has been considered. In the meantime, I only say that I do not think Miss Walker a reliable witness.

Then take the period between October 1870 and the raising of this action. It is the defender's allegation, advisedly repeated and insisted in at the bar, that since the date of October 1870 the pursuer has continued her habits of drinking to excess and of taking narcotics to excess. On this point, I do not entertain any doubt. I am clearly of opinion that the defender has failed in his proof; nay, more, I am of opinion that on this point the evidence refutes and disproves the accusation. We have the evidence of persons of high respectability, who during this period had ample opportunity of observing. It is clearly proved that, neither at Blair-Drummond, nor at Port Glasgow, nor at Paisley Road, nor at any other place, did she once exceed since October 1870. We have the Rev. Biot Edmonston, the pursuer's brother, evidently a gentleman of character, intelligence, and feeling, and we have Miss Edmonston, her sister, a kind and considerate person, of both of whom it may truly be said that their only fault in this sad history seems to be that for a time they too readily and confidently trusted the word of the defender and assumed the truth of his charges against his wife. We have Mrs M'Lachlan and Mrs Shaw and Mrs Watt, and other witnesses on this point; and even Miss Walker herself, though certainly disposed to say all she could against the pursuer, does not speak to the fact of her drinking, or to any reasonable suspicion of her drinking after October 1870.

But then it is said that in January 1871 the pursuer made a confession in the presence of the Rev. Mr Leckie in these words—“I have to confess that I have been guilty of all that Mr Symington charged me with and much more.” Mr Leckie was much struck with this sudden and singular confession, and questioned her whether she was not making it to gain an end. She said she was not. But Mr Leckie adds—“She had more than once previous to this meeting said to me that she had often felt

a temptation to give in, and confess to what she was not guilty of in order to be allowed to stay at home." The pursuer herself says that that confession was untrue and made in a moment of bitter trouble and fierce temptation, and this she told her brother; and thereafter she retracted the confession. On considering all the evidence which we have in regard to that confession,—to the making of it, to the nature of it, and to the retracting of it—it is my opinion that the confession was wrung from the wounded affection and the maternal fears and anxieties of a loving, sensitive, trembling, and almost despairing woman, induced to make it by fear of being driven from her home and separated from her children. Her own description of her temptation, of her struggle, of her yielding, of her subsequent remorse, and of her solemn retraction, is heart-rending. It is my belief that she yielded to temptation, and, as she herself says, sinned in making the confession, but that she acted rightly and truly in retracting it. It was given under temptation and in despair, it was repented of when conscience awoke, and it was retracted when duty and truth prevailed over the wife's weakness and the mother's fears. In a very touching and impressive letter she thus writes—"I did not love you wisely, dear Andrew, but I did love you with all the passionate intensity of my nature; year by year my love seemed to grow more absorbing, and I fear more exacting. I spoke, and wrote, and thought with the one aim of pleasing you. I never saw any one I would for a moment compare to you; I felt hot and angry if any other body did. I impiously said in my heart that earth would be a desert and heaven no heaven to me without you. All this was very sinful, and I had to feel what every one must feel, sooner or later, in time or eternity, who rears an idol in God's place. I see now, and can adore the wisdom of my heavenly Father in sending me this cup of affliction through your hand; none other could have pulled the veil from my eyes; for had all the rest of the world believed me guilty, and you had not, I would have nestled the closer to your heart, and defied any one to touch me there. You were an instrument in his hand when you put me from you and disregarded my prayers and tears, for I never gave him my whole heart till you cast me out; and then 'sinful and wounded, and heartstricken, his infinite love took me in. Surely you do not know—you cannot know—that when you promise me restoration to your favour and confidence in my confession of this thing, that virtually you hold out to me the highest bribe the universe contains to tempt me from God, and away from instead of into the path of rectitude—do not do it I beseech you. Weak and frail as I am, the arm on which I now lean will not suffer me to fall again, but I tremble for you." Surely the writer of that letter deserved better treatment.

On the other hand, the defender, while positively refusing to adduce proof, or to enter on enquiry, holds her fast to this confession as the only condition of restoration to her home and her children. In a letter of 5th June 1871 to the pursuer, the defender says—"There can be no interview such as you suggest till you revoke the withdrawal of that truthful statement you solemnly made to Mr Leckie, but which you yourself now persist in saying was a lie and perjury, although I know it to be true."

Again, referring to her retracting the confession, he says—"The door for your return was wide open; you rose and deliberately closed it." And

then he proceeds to say, in words which are of great importance in another part of the case:—"In the event of your persisting in your present evil course, the children who as yet know nothing of all this, will as they grow up have to be told the plain truth concerning you, and be warned against you and your sinful untruthful ways; and, painful though the duty be, I shall not have them either misled or contaminated by the neglect of it."

A subsequent confession or acknowledgment, though more qualified and less comprehensive, is contained in a document called an agreement between the pursuer and defender, and dated 31st October 1871. This document, which I need not again read, seems to have been prepared by the Rev. Mr Leckie in the amiable but vain hope of effecting a reconciliation between husband and wife, on the footing of mutual concession and compromise. It took a long time to adjust it, and a long time to get the pursuer to consent to it. It did not answer the purpose contemplated by Mr Leckie, for the defender himself denounced it, and the pursuer was turned out of her house and still separated from her children. In excess of trustfulness and lack of firmness the pursuer again yielded and signed this agreement in a hope of restoration, which was never fulfilled. The introduction into this agreement of the pursuer's satisfaction that her suspicions in regard to the defender's relations to other women were "wholly groundless," is important on another part of the case; and the very remarkable date of this agreement, in reference to the proof on the question of adultery, must be noticed hereafter. In the meantime, I am satisfied that neither the verbal confession to Mr Leckie nor the written agreement can be held as proof of the pursuer's guilt: I think they prove only the defender's cruelty and cunning, and the pursuer's weakness and trustfulness.

On the first part of this case, in reference to both the periods which I have mentioned, before and after October 1870, I hold it established that the defender's charges against the pursuer have been cruelly, persistently, and untruly made.

Then the question naturally arises—Why were these accusations made, and made in the manner and spirit which characterises them? Why did he then for the first time seek to get his wife out of the house? Why did he then overwhelm her with false charges of drinking and of lying, to destroy her credit and prevent her being believed? In answering these questions the date is important. The charges were made in November 1870, and she was turned out of the house in January 1871.

Now, observe the position of matters at that time. Miss Walker, an important person in this case, had come to reside, and to preside, at Nyeholm early in 1870. She had great influence over the defender, an influence observed by Mr Leckie. She had a great dislike to his wife. The pursuer's youngest child was born in August 1870—I think in the end of August 1870. Elizabeth Heron, a young orphan girl, taken from an Orphan Asylum, then rather over seventeen, had been in the house two years, and was then nursery-maid in the family. The pursuer had expressed to the defender some suspicion of his over-familiarity with that girl, and the girl is said to have been insolent or uncivil to her mistress. If Elizabeth Heron is to be believed, the approaches of the defender to

her in familiarity and minor impropriety—in kissing and caressing—had commenced before October 1870, and had been observed by the pursuer. The passion which, if Elizabeth Heron speaks truly, impelled him soon afterwards to seduction and adultery, was then gathering strength and beginning to sway him. At that very time, when temptation was near him, and opportunity desirable, when the absence of a vigilant wife was convenient, and the discrediting of a wife suspecting and likely to accuse, was of great importance; these charges—I now say these unfounded charges—were for the first time made by the defender against a wife with whom he had lived for ten years without complaint. The time chosen for the charges was most singular, and the fact that the charges so made answered the purpose of getting her out of the house in January 1871, cannot be otherwise than serious, when we proceed, as I now do, to consider the proof of the defender's adultery. The desire to get rid of the wife, the precise time of making the accusation, the manner of supporting it, and the policy of extorting confessions from her, must enter deeply into the proof of adultery.

On this point, of course the most important point in the case, the testimony of Elizabeth Heron, if confirmed and believed, is conclusive. Her evidence must indeed be received with caution; but it must not be lightly rejected. If she is not to some considerable extent corroborated, then her single testimony is not sufficient. We must have some corroboration, and it must be not mere concurrence, but corroboration on matters really touching the merits of this question. On the other hand, if the testimony of Elizabeth Heron is believed, and is corroborated, there can be no doubt as to its meaning and its effect, and no doubt as to the result of this cause.

I cannot perceive any sufficient reason for doubting the truthfulness of Elizabeth Heron. The law requires some corroboration. But if that requirement be satisfied, then her testimony is direct, clear and conclusive. She had no interest to swear falsely. When she first made her statement, on the birth of her child, she had no ill-will against her master, and no interest to promote by accusing him, and she certainly had no particular favour for her mistress, who had found fault with her insolence, and had suspected her conduct. We have not seen her, but her appearance and manner as a witness did not in any respect impress the Lord Ordinary unfavourably; and in my opinion she was not seriously shaken on cross-examination; and she has not been contradicted on material points by any witness whom I consider reliable. On the other hand, we have in the evidence of Mary Heron and Mary M'Kinnon, and the Rev. Mr Leckie, and in the correspondence, and in the real evidence supplied by the conduct of the defender, and of Miss Walker, important confirmation of the testimony of Elizabeth Heron. I think her testimony honest, credible, and reliable; and I cannot withhold my belief in her truth; and I think there is important confirmation of her evidence.

Now there can be no doubt that, if her story is true, the defender's adultery and seduction is conclusively established. She speaks clearly to the whole course of insidious procedure by which he made his approaches to her, until, having got his wife out of the house in January, he, in February, accomplished her ruin by having connection with

her for the first time. She then continues her narrative of repeated intercourse at intervals during the next four or five months. She then discovered she was with child, and she was informed of the fact by Dr Stark. Of course her denial to Miss Walker that any man had approached her was simply nonsense, the result of shame, and also, as she herself says, the result of her promise to the defender to keep their intercourse a secret. One circumstance, however, during this intercourse is too important to be overlooked. The defender made a high religious profession, and it seems that even when departing from moral duty he could refer to sacred things. The girl swears that she never had previous connection with any other man, that she remonstrated with him, and refused to allow him at first, that he said he would not do her any harm, he said that he had his own character to think about as well as hers, and that "David had sinned," meaning, as she says, "David in the Scriptures." She could scarcely have invented this; used at such a time and place, they were strange and wicked words; and it cannot be supposed that this young girl makes a false statement in regard to the use of them. But on this point there is a very singular confirmation of her statement. Long after she had been sent away from the house, the defender, in conversation with Mr Leckie about the relations between himself and his wife, said to him, "We know that David fell." Mr Leckie says he thought the defender's reference was to Bathsheba, and that the words produced a painful impression, for he wondered if the defender thought that he was in a similar position. Now, when Elizabeth Heron was examined as a witness she could not know anything of this conversation between the defender and Mr Leckie. Yet by her simple statement, see how she lifts for a moment the veil or mask before the defender's mind and shows us the very thought which, in strong confirmation of her story, it is proved that he afterwards expressed to Mr Leckie in regard to David's fall. I cannot pause on this point. It is too painful. It is difficult indeed to conceive anything more wicked than the attempt thus to allay the conscience of a young girl, and the attempt to plead the example of David's sin as an excuse for seduction and adultery. David's fall has been a stumbling block to many. It were well that his penitence were followed as an example.

On discovering that the girl was pregnant, she was sent to Ireland to her relatives. It was arranged that Miss Walker, who ruled in Nye-holm in the absence of the wife, should accompany her. The pursuer had previously expressed suspicions of her and of the defender's familiarity with her, and of the insolence to the wife, which is not uncommon in the husband's favourite. Before she left the house it was concerted between the defender and Miss Walker—Miss Walker says she suggested, but that matters little—that Elizabeth Heron should write a letter "clearing everybody in the house from blame,"—a curious thing in reference to a house full of females. There was no man in the house but the defender. Miss Walker at first says that the suggestion came entirely from herself, that the defender never said a word about it; and she adds, "I did it for my own sake." It is difficult to understand, and more difficult to believe this. Let us see what she says afterwards. She says, in answer to special questions, that the defender was aware of her desire to

have that note, that he agreed with her in thinking that it should be given, and that he suggested it to the girl herself, she, Miss Walker, having failed. She is again asked for whose protection the letter was necessary? She answers, "for the entire household,"—a household consisting of females, with one man alone in it, and that man the defender. Being pressed further, she says: "It was for our own protection." She is then asked, Do you mean for the defender's protection? She answers, "It was more for my own protection and that of the servants. (Q) Do you say that seriously?—(A) Most seriously." To my mind it is impossible to believe Miss Walker in these statements. Indeed, in her subsequent cross-examination, she is compelled to admit that the letter was asked for and obtained after arrangement with the defender, and for his protection. Miss Walker suggested that they had not time to get the letter from her before she left the house. The girl says that the defender asked her to write the letter, but not to write it till after she had left the house, and to write it on her way to Ireland; for that if she wrote it in the house, people would think that they wanted her to do it. On the way to her home in Ireland, and as Miss Walker says, at a railway station, the following letter was, on the 24th of October 1871, taken from Elizabeth Heron:—"October 24,—My dear Miss Walker,—I know you wish me well, and it is only right to let you know that nobody at Nyeholm had anything to do with my trouble; and I am very sorry for the trouble I have caused you all; but I know that nobody at Nyeholm is to blame. I am not very well, and must stop. Give my love to Mary and Jessie. I am very grateful for your kindness to me.—Yours truly, Ellie Heron."

Miss Walker put this letter into an envelope, addressed it to herself in Glasgow, and posted it so that it should arrive before her, although she left for Glasgow soon after. Lord Deas has explained the cunning evinced by Miss Walker in this matter. On her arrival in Glasgow she found the letter awaiting her. She opened it, and gave it to the defender, and it was handed afterwards to his agent. As near as I can calculate—for the precise day is not stated—Miss Walker must have reached Glasgow, on her return from Ireland, about the 27th or 28th of October. Now the defender, on getting from her this letter, and learning that the girl had been left with her relatives, "about soon to become a mother," and "within a few weeks of her time," immediately proceeded to arrange a meeting with his wife; and on the 31st of October he succeeded, after an interview, an argument, and a pressure on her of many hours, in obtaining from her the agreement, including the acknowledgment that her suspicions regarding his relations to other women were wholly groundless. Thus doubly armed, first with the letter which he and his confederate Miss Walker had obtained, and secondly with the acknowledgment in the agreement, the defender takes a bold position. He shows the letter to Mrs Leekie, and he tells Mr Leekie that he had "happily got a letter which would put all right." The letter of the girl was handed to the defender's law agent. He wrote to her aunt that he was in possession of it; and it has been produced and founded on by the defender in this action. It was asked, it was obtained, it was transmitted, and it has been used, for the protection of the defender. But there is

more even than this in the conduct of the defender and Miss Walker in this matter. The girl swears that in speaking about her pregnancy both Miss Walker and the defender suggested to her that "some person must have done it whilst I was asleep, or must have given me something,"—a very strange suggestion for the defender and his lady confederate to make to a girl of seventeen. Here again there is a curious confirmation of the girl. The child was born on 25th January 1872. Miss Walker, in her letter to Bridget Heron says, "The child must be accounted for somehow. If the father be any one who could marry her or support the child, if we only knew we would do all we could to have her thus put right; while if he be one who has deserted her, or who can't help her, or if, as we sometimes think, she has had violence done her in some place, or by some one of whom she knows nothing—(it must have been, it seems, too, in the month of May)—why does she not tell it, and leave her friends here free to help her in her time of need, as we all wish to do?" The coincidence between the suggestion in this letter and the suggestion which the girl swears was made to her in the house, is singular, and tends to confirm the girl.

The suggestion by Miss Walker of the month of May as the time when the child must have been conceived, is not without importance. The defender made a point of this, and he argued that the allegation of his guilt was excluded by taking that date, as he was from the 2d of May till the 16th of May confined to his room and his couch by the effects of an accident. Miss Walker speaks to the fact and date of that accident, and the defender mentions it in one of his letters. I do not see any other evidence to that effect, but it may be so. The suggestion of the month of May is clever on the part of Miss Walker. But let us examine it for a little.

The child was born on the night of the 25th of January 1872. Elizabeth Heron speaks of intercourse continued at intervals for several months after February 1871. During the month of April, and down to the 2d of May, there was ample opportunity and nothing in the defender's condition to make intercourse improbable. The usual or average period of gestation is stated by Professor Sir James Simpson to be 277 days, and by Professor Matthews Duncan to be 275 days, and Dr Taylor states that the average period may be taken at from 274 to 280 days. Now, it is manifest that any one of these periods of gestation carries back the date of possible or probable conception to a period prior to the 2d of May. Besides this, Miss Walker herself, forgetting the suggestion about May, speaks of the end of April as the commencement of the girl's pregnancy, and plainly that was quite possible. This sets aside entirely the defender's plea that he could not be guilty because the conception must have been in May, and that plea cannot avail the defender.

But again, another piece of evidence is afforded by the defender himself. About a month after the birth of the child he said to the Rev. Mr Leekie, commencing the conversation himself, that "he had no doubt that the father of the child was Ellie's cousin, a married man, who, he said, had frequently seen her home when she was out in the evening. He did not mention her cousin's name, and I," says Mr Leekie, "did not ask it. He said "he stayed on the other side of the water." That

cousin thus voluntarily suggested by the defender as explaining the matter has not been produced. It has not been proved—nay, no attempt has been made to prove—that there was any married cousin on the other side of the water who saw her home in the evening. But at the date of this conversation the defender had been told by Miss Walker that the girl had had a child and had said that the father of the child was a married man named “Andrew James,” the name of Symington not being mentioned at first. The device of suggesting a married cousin as the father—there being, so far as we can see or can ascertain no such cousin, and there being no attempt to prove the existence of such cousin—is just one of these refuges of guilt, by examining which the truth is reached.

When Miss Walker received the letter from Mrs Heron intimating the birth of the child, she, having previously procured the letter from the girl and made the strange suggestions to which I have already adverted, was writing to Bridget Heron, a poor woman who cannot read or write, and she appeals to her as “Dear Auntie” to try and bring out the truth; and she writes another letter to her of the most affectionate kind, with pious suggestions, excellent in themselves, and which would be interesting and edifying if addressed by a good woman to a friend, but of which, when addressed by Miss Walker to an ignorant old woman whom she had only seen for an hour or two, and who could not read what she wrote, I shall not express my opinion. It is not material, and does not look like reality. The next letter written by or for Bridget Heron discloses to Miss Walker the girl’s confession that the defender was the father of her child. The reply of Miss Walker is at once characteristic and important. She is writing on the 6th of February 1872. She had before October 1871 been made aware of the pursuer’s suspicions in regard to the conduct of the defender and Elizabeth Heron. She had, because of these suspicions, obtained from the girl for the protection of the defender the letter of 24th October 1871. Yet, on receiving the letter from Mrs Heron disclosing the defender as the father, she says—“The tone of your letter surprised and pained me beyond the power of words to express. The insinuations contained in it are utterly false, groundless, and untrue.” Is it possible to believe that Miss Walker was really surprised at that statement? I think not. Plainly she had expected it, and had done her best to protect her friend against it. In the postscript to her letter Miss Walker says,—“I have not named anything about your letter here.” Now, is that true? Why, on cross-examination she admits that she showed the letter to the defender whenever it was received.

Taking together the whole of Miss Walker’s testimony, and her letters, and her suggestions, and her conduct, I find it quite impossible to consider her as reliable, or deserving of credit as a witness in this case, either in regard to the first part of the case in relation to the conduct of the husband and wife towards each other, or in regard to the second part of the case relating to the charge of adultery.

I have only to add that, even apart from the correspondence, and from the evidence furnished by the conduct of the defender in getting his wife out of the house by groundless charges, and seeking to discredit her by groundless accusations of lying and perjury, I think there is sufficient corroboration of Elizabeth Heron to afford adequate proof of

the defender’s guilt of adultery; and I am further of opinion that when the relations between the parties and the conduct of both husband and wife are considered, and the time, the manner, and the spirit of the defender’s groundless accusations against his wife are brought to bear on the proof of adultery, the evidence, taken in combination, is conclusive beyond a doubt.

LORD JERVISWOODE concurred.

LORD PRESIDENT— In the first place, in common with all your Lordships, I consider the husband’s adultery to be clearly proved. In the second place, I consider the charges made by the husband against the wife—of intemperance, of the excessive use of narcotics, and of untruthfulness and lying—to be disproved; and I am of opinion, farther, that the charges made in those frightful letters of the defender’s are false charges, knowingly and wilfully made. In these circumstances, of course, there can be no difficulty about giving decree in terms of the libel.

But we have another question to consider, and that is as to the disposal of the pupil children of this marriage; and I think I need hardly say that a husband who has added to the sin of adultery, committed within the sacred precincts of his own house with a young girl in his own service, the further sin against matrimonial life of bringing wilfully false charges against the moral character of his wife, and threatening, as he has done, to bring up his children in the belief of these false charges against their mother—a threat which is not, down to this moment, withdrawn—is unfit to have the custody of his pupil children. In my opinion, therefore, our order ought to be in substance that, at present at least, the custody of the children should be with the wife. As to the precise terms of the order that we shall make, or the conditions of that order, it is perhaps not necessary to say much at this moment.

I may only add that the two eldest children being boys, and of an age to be sent to school, it is most desirable that some arrangement shall be made for that purpose; but except as regards them, I think the most beneficial course for these children—and that is really what we have now to consider—is that they should live in family with their mother. That arrangement will, of course, bear in a very important way upon the amount of aliment which is to be awarded to the wife for the maintenance of herself and these children.

But upon that matter it would probably be right that we should hear counsel for the parties before coming to any definite conclusion.

Counsel for the pursuer referred to the cases of *Lang*, 7 Macph. 24 (compare with *Lang*, *ut sup.*); *Wotherspoon*, 8 Macph. 61; *M’Millan*, 9 Macph. 1067; which, it was argued, recognised as a fair rule to be applied, that the wife should be allowed a proportion equal in amount to about one-fourth of the defender’s income. As to the aliment to be allowed for the children, the pursuer desired to leave the decision of that question to the Court.

The defender replied that there was no fixed rule in such cases, but that each case depended on its own special circumstances. That in England effect was given to such considerations as whether or not the wife brought a fortune to the husband, and the state of health of the wife

and children as requiring any special place of residence or mode of living.

[In answer to LORD DEAS]—Defender's counsel stated that in England there were precedents for either party making a motion to the Court with a view to having the amount of aliment varied from time to time, and cited the Scotch case of *Donald*, 24 D. 499.

LORD PRESIDENT—I should now like to have the opinion of your Lordships upon this matter as to the custody of the children

LORD DEAS—I have had occasion more than once judicially to recognise the high favour with which our law regards the right of a father to the custody of his pupil children born in lawful wedlock, and I neither depart from nor qualify the passage which was quoted in the course of the discussion from an opinion of mine to that effect in a former case. But the present case is peculiar. We have here not only adultery, accomplished by what I may call seduction under trust, but we have disclosed to us a malignant design deliberately formed and perseveringly persisted in on the part of the defender, to ruin the character and credit of his wife, and an intention declared in his letter of 15th May 1871—not to this hour retracted—to bring up his children in the belief that she has been guilty of the charges he falsely brought against her, and his representations of which we are all of opinion he could not himself have believed to be borne out by the truth. Now, this poisoning of the minds of the children against their mother would be a calamity to the children, which is not to be left out of view in considering whether they should be exposed to it till they are more able to judge for themselves; and taking this into account, along with the other circumstances and the advantage to the children of being brought up together as a united family, I am, upon the whole, of opinion with your Lordship that the custody of all the children (the oldest of whom is only ten years of age), ought in the meantime to be entrusted to the mother, subject to such regulations or variations as we may from time to time find necessary or expedient, on the application of any party interested.

LORD ARDMILLAN—On the question of the custody of the children I agree with your Lordships, and I have only a word to add. In addition to the fact of his adultery within his own home, and of his false and cruel charges against his wife, we have his declared intention, persisted in to the end, to teach his children to look on their mother as “untruthful,” and “sinful,” and “contaminated.”—sad training for the children of a lady against whom no evil has been proved. Besides this, and on the question of custody, assuming his own guilt, the defender has alleged and pleaded that the mother is unworthy to have the custody of her children. He says that she could lie, and that she did lie, for on her own showing she made a false confession—that she falsely confessed the charges which he untruly made. He says, “in falsely admitting that my charges were true she lied, and by lying she has disqualified herself.”

This is a cruel charge by the wrong-doer against the sufferer. It reminds one of the closing scene of *Othello*, where the matchless delineator of all phases of human passion describes *Emilia* bending over the dying *Desdemona* :—

Emilia—“Oh, who hath done this deed?”

Desdemona—“Nobody; I myself; Farewell.”
Commend me to my kind Lord; Oh, farewell.”

Othello—“You heard her say herself, It was not I.”

Emilia—“She said so; I must need report the truth.”

Othello—“She's like a liar, gone to burning hell,—'Twas I that killed her.”

The whirlwind of the Moor's passion was followed by a fatal paroxysm of remorse. I sincerely trust that this story may close in remorse, repentance, and forgiveness.

LORD JERVISWOODE concurred.

The Court accordingly pronounced the following special interlocutor :—

“Recall the interlocutor reclaimed against Find it proved that the defender committed adultery with Elizabeth Heron, a nursery-maid then in his service, within his dwelling house called Nyeholm, at Ibrox, in the neighbourhood of Glasgow, in the months of February, March, April, May, June, and July 1871, or in one or more of these months: Find, therefore, that the pursuer has full liberty and freedom to live separate from the defender, her husband; and decern and ordain the defender to separate himself from the pursuer, *a mensa et thoro*, in all time coming: Find the defender liable to make payment to the pursuer of the sum of £100 yearly for aliment to her, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof as at Whitsunday 1873, for the half-year immediately following, and so forth half-yearly thereafter so long as they live separate, with the lawful interest of each half-year's aliment from the term at which same falls due till payment, but subject to deduction of such sums of aliment as the pursuer has received from the defender since the said term of Whitsunday 1873, and decern: Find the pursuer entitled to the custody of the children of the marriage during their respective pupillarities, so long as no other or different order may be made by the Court with regard to them, or any of them, and decern and ordain the defender forthwith to deliver over the said children to the custody of the pursuer accordingly: Find the defender liable to the pursuer in aliment at the rate of £25 per annum for each of the said children so long as they shall respectively remain in her custody in terms hereof, subject to the burden on her part of providing for the clothing and education of the said children respectively, beginning the first payment of the said aliment on the 1st day of April next, for the period between that date and the term of Whitsunday next, and the second payment at the said term of Whitsunday next for the half-year immediately following, and so half-yearly thereafter at the two terms of Whitsunday and Martinmas, so long as such aliment shall be payable as aforesaid, with the lawful interest on each termly payment from the date when the same falls due till paid; and decern for the foresaid respective sums of aliment accordingly, and allow the foresaid judgment and decrees to go

out and be extracted *ad interim*; reserving to both parties respectively, in the event of any material change of circumstances, or of any dispute arising as to the education of the said children, or any of them, or of any different or further regulations becoming necessary, to apply to the Court for such variation on the foresaid sums of aliment, or any of them, or upon the foresaid directions as to the custody or education of the said children respectively, or for such regulations as to access to the said children, or otherwise, as the Court may consider reasonable: Find the pursuer entitled to expenses, and remit to the Auditor to tax the accounts, and to report."

Counsel for Pursuer—Dean of Faculty (Clark), Asher, and Mackintosh. Agents—J. & R. D. Ross, W.S.

Counsel for Defender—Fraser, Scott, and Burnet. Agent—J. Galletly, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.]

MARSHALL v. LORD ADVOCATE.

Inventory-Duty—5 and 6 Vict. c. 79, § 23—Marriage-contract Provisions.

In a case where a husband, by antenuptial contract of marriage, after securing a liferent of his estate to his wife, settled on his children "the fee of three-fourth parts of all and sundry lands, &c., which he shall happen to conquest, acquire, or succeed to, during the standing of this present intended marriage"; and providing "that upon the marriage or majority of each of such children one-half of the share of conquest which shall belong to such child in virtue of this provision shall then be payable or prestable to him or her, and shall be enjoyed by him or her unburdened by the said wife's liferent; and for ascertaining the extent of the said conquest it is hereby agreed that the same shall comprehend and extend to the whole estate, heritable and moveable, real and personal, belonging to the said husband at the dissolution of this present intended marriage"—*Held* that this provision to the children was not a debt due by the deceased in terms of the Act 5 and 6 Vict. c. 79, § 23.

This action was raised by the executors of the late Lord Curriehill for recovery of £230, "being the amount of inventory-duty falling to be returned or repaid to the pursuers." The marriage contract of Lord Curriehill and his wife, then Miss Bell, contained *inter alia* the following provision:—"And further, the said John Marshall binds and obliges himself and his foresaids to provide and secure to the said Margaret Tod Bell the liferent, and to the child or children who may be procreated of the present intended marriage the fee, of three-fourth parts of All and sundry lands, heritages, and sums of money, goods, gear, and other estate, heritable and moveable, real and personal, that he shall happen to conquest, acquire, or succeed to during the standing of this present intended marriage; declaring however, that the said Margaret Tod Bell shall be bound and obliged to employ the

funds which she shall acquire in virtue of this provision of conquest, after the said John Marshall's death, not only in supporting herself, but also in alimenting and educating the children of this present intended marriage, until the said children shall attain the years of majority or be married; and upon the marriage or majority of each of such children, one-half of the share of conquest which shall belong to such child in virtue of this provision shall then be payable or prestable to him or her, and shall be enjoyed by him or her unburdened by the said Margaret Tod Bell's liferent; and for ascertaining the extent of the said conquest it is hereby agreed that the same shall comprehend and extend to the whole estate, heritable and moveable, real and personal, belonging to the said John Marshall at the dissolution of this present intended marriage, after deduction of the debts due by him, and the sums of £2000 and £2500 contracted to be invested by him in manner before written."

The question arose under this provision whether the three-fourths of the conquest payable to the children was a debt due by the deceased within the meaning of the Act 5 and 6 Vict., cap. 79, sec. 23.

The Lord Ordinary pronounced the following interlocutor:—

"Edinburgh, 24th February 1874.—The Lord Ordinary in Exchequer Causes having heard counsel for the parties, and considered the argument and proceedings, assolizies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, allows an account thereof to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—As the principles upon which the Lord Ordinary has proceeded in this case are the same as those upon which the case of *Moir's Trustees* was recently disposed of by him and the Court (7th January 1874, Scottish Law Reporter, vol. II., p. 157), a very brief explanation will now suffice.

"In that case, as here, the children's provisions, upon which the discussion turned, are to be found in an ante-nuptial contract of marriage. It has been maintained by the pursuers, who are claiming a return of inventory-duty in the present case, just as it was maintained by the pursuers in the case of *Moir's Trustees*, that the amount of these provisions must be held to be of the nature of a debt owing by the late Mr. Marshall (Lord Curriehill) to his children, in the sense of the Revenue Statute 5 and 6 Vict., cap. 9, sec. 3, and therefore that no duty is due upon them. But here, as in the case of *Moir's Trustees*, the Lord Ordinary has been unable so to decide. He thinks, on the contrary, that the provisions referred to must be held to have had for their object not the constitution of a debt in the proper and ordinary meaning of that term, but rather the regulation of the children's rights in reference to their father's succession.

"It is quite true that in the present case, differing so far from that of *Moir's Trustees*, the rights secured to the children have relation to the means and estate of their father at the date, not of his death, but of the dissolution of his marriage; but the Lord Ordinary does not think that this is sufficient to require that the two cases should be differently decided, for he thinks it clear that in the present as in the case of *Moir's Trustees*, the amount of the provisions did not fall to be ascertained, and did not become enforceable till the father's death. In short, he thinks that in the one