petition, but reserved to them all recourse for the recovery of the feu-duties payable down to the date of the reconveyance.

Counsel for Petitioners—Kirkpatrick. Agents—Pearson, Robertson, & Finlay, W.S.

Saturday, March 5.

SECOND DIVISION.

MOSS OR MACKENZIE *v.* MACKENZIE.

Husband and Wife — Voluntary Separation — Access to Child.

A wife who was residing apart from her husband under circumstances which did not disclose any ground in law for separation, petitioned the Court for access to the child of the marriage at all reasonable times, and in particular that she should have it sent to her at her separate residence for two whole days in each week. The husband invited her to return to cohabitation, or alternatively he offered access to the child at his own residence at any time she might come unaccompanied. *Held* that the wife not being entitled in law to absent herself from her husband's home, the petition fell to be refused.

This was a petition at the instance of Mrs Minna Amy Edwards Moss or Mackenzie for access to the only child (a girl aged two years) of her marriage with the respondent Osgood Hanbury Mackenzie "at all reasonable times," and "in particular" to be found "entitled to have the said child sent to her at Poolhouse for two whole days in each week," and to have access to the child "on the other days at all reasonable times during the day at Tournaig House, or where the child may be for the time, and that in either case outwith the presence of the said Osgood Hanbury Mackenzie or of Dame Mary Hanbury or Mackenzie, his mother, or anyone on their behalf."

The petitioner stated that since her marriage in 1877 the respondent, her husband, had "treated her with much neglect and unkindness," and that the differences between them had principally arisen from pecuniary matters relating to the manner in which her funds were settled on her by her marriage-contract. In February 1880 she left her husband's house at Inverewe, Ross-shire, with his consent, and until the following June remained with her parents at their residence near Liverpool. During this time she was in weak health, which she alleged was partly caused by her husband's treatment, partly by the climate of the west coast of Ross-shire, which had disagreed with her, and partly by the pain of leaving her child. In June she wrote to her husband expressing her intention of returning to Inverewe, and there rejoining him and her child. This letter contained certain proposals as to money matters. She received an answer from her husband, in which he informed her that he had left Inverewe and had gone to reside with his mother in Tournaig, at least in the meantime. The letter contained this sentence—"Should you like to come here, and write to say so, a room will be prepared for you." The petitioner went to Tournaig, where she remained for a month, when owing to certain painful circumstances "she left her mother-in-law's house." She then took Poolhouse, two and a-half miles from Tournaig, with the view of being near her child, but being by her husband's legal advisers informed "that the actual access which her husband is prepared to permit is that she should see her child for an hour three times a week at Tournaig House on the condition of her coming unaccompanied, but the child to be attended by either the nurse or Lady Mackenzie."

The respondent lodged answers, in which he explained that his reason for leaving Inverewe and going to reside at Tournaig with his mother was the fact that his resources had been much crippled owing to the marriage-contract trustees having at the instance of his wife's friends withdrawn from his use her portion of £10,000 settled by her marriage-contract, and in particular by their having called up a sum of £6000, part of that portion which had been lent to him on security. In these circumstances he offered to receive the petitioner as his wife at Tournaig House and to resume conjugal relations without reference to the past, the petitioner being mistress of the establishment as after the marriage; "Alternatively, in the event of the petitioner still wishing to reside at Poolhouse, to give her access to the child, provided she came unaccompanied and did not take the child out of the house except accompanied by its nurse, at all times when she might choose to come; and further, to arrange that during one or two hours on certain days in each week the child shall always be kept either in or immediately about the house, so that the petitioner might depend upon finding it."

After hearing counsel for the petitioner—

Lord Young—We do not think it necessary in this case to call for an answer. We have read the petition and answers and also the correspondence, and we are all of opinion that the course taken by Mr Robertson in abstaining from all reference to the cause of the disagreement, and also from all reference to the letters, is to be commended. The separation between these parties has not been so long as to destroy the hope of reconciliation. For the same reason I do not enter into the correspondence. It would be against the interest of the parties to do so.

This lady has not been living with her husband, and she declines to return to his house, though affectionately invited to do so. We must assume, in the absence of evidence to the contrary, that her conduct in so doing is not legally warranted. Her legal duty as a wife is to return. The considerations which induce her to remain away are not stated fully, and in a moral point of view she may be more or less excusable, but legally—and we must look at the matter legally—her duty is to be with her husband, and she is not acting according to her legal duty in absenting herself from her husband and child. The fact of her removing her separate income, and thereby compelling her husband to break up his establishment and go to live with his mother, whose only son he is, is not in her favour. She has been invited, but declines, to return unless she is to be mistress in her mother-in-law's house.

We consider that demand not legally warrantable, and I confess that my sympathies after perusing the correspondence are to a large extent

with the husband. Apart, however, from that, the circumstances are not such as to warrant a separation, and we know of no authority for a wife so deserting her husband applying to the Court for its authority to regulate her access to a child of the marriage. It will, I think, be in accordance with your Lordships' desire that I do not enter more into detail, and simply say that the petition is not legally maintainable, and should be refused. The affectionate terms of the husband's letters preclude the idea that he will in any spirit of vindictiveness deny or unduly limit the access of the mother to her child. The child may naturally be a bond of love to draw the spouses together.

We think the petition ought to be refused.

LORD CRAIGHILL and LORD LEE concurred.

LORD JUSTICE-CLERK was absent.

Counsel for Petitioner—J. P. B. Robertson. Agents—Mackenzie & Black, W.S.

Counsel for Respondent—Asher—Mackintosh. Agents—Adam & Sang, W.S.

Saturday, March 5.

FIRST DIVISION.

[Lord Adam, Ordinary.

EARL OF SOUTHESK AND OTHERS *v.* THE INCH BLEACHING COMPANY AND OTHERS.

Process—Issue—River—Nuisance.

In an action of declarator and interdict brought by riparian proprietors against the occupants of paper-mills and other works and the police commissioners of a burgh, to prevent them from polluting a river to the nuisance of the pursuers, the Lord Ordinary adjusted an issue, whether the defenders polluted the river "to the nuisance of the pursuers or their authors, or one or more and which of them?" The Court (*diss.* Lord Shand) *held* that the words "and which" should be deleted from the issue.

The Earl of Southesk and other riparian proprietors on the river South Esk raised an action of declarator and interdict against the Inch Bleaching Company, Messrs Guthrie, Gray, Peter, & Company, paper manufacturers, The East Mill Company, spinners and bleachers, Messrs Guthrie, Martin, & Company, distillers, and the Commissioners of Police of the Burgh of Brechin, to have them prevented from polluting the said river.

The Lord Ordinary (ADAM) adjusted this issue for the trial of the case—"Whether between the 11th day of June 1877 and the 11th day of June 1880 the Commissioners of Police of the burgh of Brechin did, by discharging sewage or other impure matters, or permitting sewage or other impure matters to be discharged, from the sewers or drains under their charge, at or near the burgh of Brechin, into the Skinners Burn, the Den Burn, and the Glencaldham Burn, or one or more of them, before their confluence with the river South Esk, and into the said river South Esk itself, pollute the water of the said river South Esk, to the nuisance of the pursuer or their authors, or one or more and which of them?"

The pursuer moved the Court to vary the issue by deleting therefrom the words "and which." They contended that the words were unnecessary, and contrary to the usual form of issue in such cases—*Duke of Buccleuch, &c.* v. *Cowan, &c.*, 23d Feb. 1866, 4 Macph. 475, and 21st Dec. 1866, 5 Macph. 214.

At advising—

LORD PRESIDENT—I think the issue should be "to the injury of the pursuers or their authors, or one or other of them."

LORD SHAND differed.

LORD DEAS concurred with the Lord President.

LORD MURE—My opinion has been distinct from the very first that the insertion of the words "and which" is a departure from the style of issue on which cases of this sort have been satisfactorily tried, and that the Lord Ordinary ought not to have put these words in the issue. I think they are more likely to confuse than to assist the jury, and that the issue without these words is well fitted to try the question. If the words are required here they might as well be required in every indictment where more than one person is brought up for trial in a criminal Court.

The Court remitted to the Lord Ordinary to adjust the issue in terms of the above opinion of the Court.

Counsel for Pursuer—D. F. Kinnear, Q.C.—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Defenders—J. P. B. Robertson—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, March 8.

SECOND DIVISION.

[Lord Adam, Ordinary.

TRAILL *v.* DEWAR.

Agreement—Partnership—Obligation to Enter on New Partnership at Termination of Subsisting Contract—Reparation.

Two persons who were carrying on business in partnership with a third, entered into an agreement that at the termination of the existing contract neither should enter into any new arrangement for carrying on the business without concurrence and consent of the other, and that unless otherwise agreed each should at that date retain an equal interest of not less than one-third in the business. *Held*, at the termination of the existing contract, (1) that this agreement could not be enforced against one of the parties who was unwilling to enter into a new contract, in respect that it supplied no *data* for determining the duration of a new contract; (2) following *M'Arthur* v. *Lawson*, July 19, 1877, 4 R. 1134, that in respect that the Court could not