way to allowing a proof of the averment referred to. And perhaps I may add, although it may not be in strictness relevant, that if the averment is intended to apply to the particular and, as it strikes me, somewhat peculiar clause which is here in question, I should have had some difficulty in thinking it credible. Clauses of the kind are of course common. But apart from the circumstance that the obligation to take over is not laid on the landlord directly, or indeed at all, the clause differs from that which was before the Court in the case of the *Duke of Argyll* v. *Macarthur* (November 28, 1889, 17 R. 135, 27 S.L.R. 87) and from any other clauses of the kind I have yet seen, in respect that it is entirely one-sided. The landlord is bound to some effect, but the tenant is left free at his outgoing to sell off the whole stock if he chooses; and although it may not generally be his interest so to choose, the very possession of the power gives him a hold over his landlord which might be extremely serious. All this, however, is by the way. What I decide simply is that the pursuer's averments are not relevant to support his conclusions, and the defender is therefore entitled to absolvitor with expenses."

Thursday, February 27.

SECOND DIVISION.

ZIEGLER *v.* HAMILTON.

Parent and Child—Husband and Wife—Access to Child—Divorce for Adultery—Discretion of Husband to Regulate Access to Child by Divorced Wife—Guardianship of Infants Act 1886 (*49 and 50 Vict. cap* 27).

"In Scotland the law is settled by the case of *Bowman* (*Bowman* v. *Graham*, July 17, 1883, 10 R. 1234, 20 S.L.R. 816), which had reference to a case of access alone, that where the wife has been divorced for adultery the matter of access to the children ought in general to be left in the husband's hands."

Circumstances in which the Court *refused* to interfere with the discretion of the husband, a Scotsman, in declining to allow his divorced wife, resident in America, access in this country to the only son of the marriage.

On December 13, 1907, Mrs Suzanne Van Valkenburg or Hamilton or Ziegler, wife of Edward Ziegler, journalist, New York City, U.S.A., and at one time the wife of James Neilson Hamilton, merchant, of Hamilton von Glehn & Company, Limited, London, E.C., presented a petition in which she craved the Court to find that she was entitled to free access at all reasonable times to James Hamilton, the only son of her marriage with Hamilton.

Hamilton lodged answers.

The petitioner, who was then a domiciled American, and the respondent, a domiciled Scotsman, were married in New York on 11th April 1898. There were born of the marriage two children—the son James, born 15th November 1900, and a daughter, Alice Suzanne, born 13th October 1903. The Superior Court of the State of Indiana, U.S.A., on 8th June 1905, pronounced a decree dissolving the marriage, at the instance of the petitioner, and, as stated, on the ground of cruel conduct on the part of the respondent. This decree awarded the custody of the daughter to the petitioner and the custody of the son to the respondent, and the defender in that action did not oppose, the matter having been arranged previously. On 11th September 1905 the petitioner married Ziegler and was living with him as his wife in America. In 1907 the respondent Hamilton raised in the Court of Session an action of divorce on the ground of adultery against the petitioner, now Mrs Ziegler, and, the action being undefended, obtained decree on 20th July, the Lord Ordinary in the case holding that the American decree was no bar to the action, as it proceeded upon the ground of cruelty, not recognised by the law of Scotland, and stating in his opinion—"The adultery which is the basis of the summons is said to have taken place during a period prior to 30th September 1904, and to have only come to the pursuer's knowledge subsequent to the divorce proceedings. I think the adultery during the period is sufficiently proved." The Scotch decree did not deal with the custody of the children. The son James, with the consent of the respondent, was taken charge of for some time—said to be up to 15th June 1906—by the petitioner's mother Mrs Peirce, in America and in England, and subsequently by the respondent's relations in Glasgow, where he still was, and where he was being educated at the Glasgow Academy.

The petitioner made general averments of neglect on the part of the respondent from early in their matrimonial life, of his long and frequent absences, more particularly at the time of the births of the children, of his failure to supply sufficient maintenance, of his want of affection for the children, and of cruel and harsh treatments towards the boy, and stated—"(5) The petitioner, who has always been devoted to her children, who have returned her affection, desires to have access to her son, but the respondent refuses to allow her any access at all. The petitioner is willing to come to this country for the purpose, and to see her son at such times and places and under such conditions as may seem suitable to your Lordships."

The respondent denied the petitioner's general averments, and explained his absences and his having left the son with Mrs Peirce to his having had to go on business and remain at Bussorah in Arabia. He averred that the petitioner had never cared for or taken any interest in the son, and that the petition was presented in the interest of Mrs Peirce, who was anxious for his custody, but under whose influence,

or that of the petitioner, and her mode of life, it was not in the interest of the boy to come to any extent.

In reply to the answers the petitioner lodged a minute in which she stated—"*Reply* 5. Admitted that Mrs Peirce, who is devoted to the boy, has for a considerable time endeavoured to induce the respondent to allow her to have some custody of the boy. Further admitted that the petitioner is not at present in this country. *Quoad ultra* the averments in answer are denied. The petitioner is willing and intends to come to this country as soon as her presence is required in course of the proceedings. The petitioner has never been anything but kind to her two children. On 19th June 1905 she wrote a letter to her mother, in which she begs to see her boy. This letter was opened by the respondent and kept by him from Mrs Peirce until February 1906. In August 1906 the petitioner came to London in the hope of seeing her son, but was unable to do so. In April 1907 Mrs Peirce offered, on condition of being allowed a limited custody of the boy, to maintain, clothe, and educate him, and to make an *inter vivos* settlement in trust for his behoof of a sum sufficient to yield £150 to 200 per annum, the income to be paid Mrs Peirce for her life, and the fee to be held for behoof of the boy. . . . Mrs Peirce resided in England, with the exception of one or two short absences, from February 1906 until 1st August 1907, since which date she has resided in Scotland, and she is willing to make a home in this country where the boy could be received by the petitioner. *Reply* 6. . . . The respondent's cruelty to the boy began soon after he joined the family in New York in 1902. On one occasion he struck the boy a severe blow on the head with a beer bottle 'to make him keep quiet.' In the spring of 1903 in New York he administered a brutally severe whipping to the boy for a childish fault at a time when he knew the child was slowly recovering from an attack of diphtheria and was very weak. In January 1906 he boxed the child's ears in a brutal fashion in the public dining-room of the Hotel St Lorenz in New York. When leaving New York for London with Mrs Peirce and the boy at the end of January 1906, the respondent refused to purchase any warm clothing for the boy on the voyage, with the result that Mrs Peirce had to buy it. Later, while visiting Mrs Peirce and the boy at Hastings, the respondent took the boy to a swimming-pool and kept him in the water for about an hour and a-half and boasted of the fact, although the child was then ailing and under the care of a doctor. The result was a severe attack of inflammation of the bladder. These are some instances only of the respondent's systematic cruelty and indifference."

It appeared from letters produced that during the whole of the family troubles Mrs Peirce had taken a great interest in and care of the son Jamie; that at one time she had taken him with her away from his mother, about which she wrote—(Cambridge City, Indianopolis, May 15, 1905) ". . . I came here Friday last, bringing Jamie as in case of your unexpected arrival in Ind'p's it seemed best that the child should be away till some course of action should be decided on. He has been having whooping cough and is far from well. He must be protected from 'scenes' and from 'threats,' and his mother has repeated to me recently and to others her old threat of suicide and killing the children. I do not suppose there is really any danger of anything so terrible, but she might do something or say something that would make a life-long impression on a child of Jamie's age and understanding"; that at a time (11th July 1905) subsequent to the American decree she had been afraid the petitioner would try to get him away from her, about which she wrote—"It would be a terrible thing for all of us, but worst of all for Jamie"; and that she had made proposals as to her having a share in his custody and making provision for him.

The petitioner argued—(1) Adultery *per se* was never a sufficient reason for excluding the mother entirely from access to her children—*Bowman* v. *Graham*, July 17, 1883, 10 R. 1234, 20 S.L.R. 816; *Symington* v. *Symington*, March 18, 1875, 2 R. (H.L.) 41, 12 S.L.R. 416. Beyond adultery no charge was made against the petitioner, and in the question whether her conduct was such as to disentitle her to access present conduct alone was to be looked to—*A C* v. *B C*, November 12, 1902, 5 F. 108, *per* Lord Justice-Clerk at p. 111, 40 S.L.R. 87. The fact that the petitioner was living in America was no bar to granting access, which was sought in this country—*Allan* v. *Allan's Trustees*, July 20, 1869, 41 S.J. 617. (2) Since the Guardianship of Infants Act 1886 (49 and 50 Vict. c. 26) the sole criterion was the welfare of the child, and *prima facie* the mother was entitled to access. The *onus* lay on the person resisting the application for access to show that if it were granted there would be reason to apprehend danger to the child's physical or moral welfare — Guardianship of Infants Act 1886, sec. 5; *Mackellar* v. *Mackellar*, May 19, 1898, 25 R. 883, 35 S.L.R. 483; *Sleigh* v. *Sleigh*, January 20, 1893, 30 S.L.R. 272; *Stevenson* v. *Stevenson*, June 5, 1894, 21 R. (H.L.) 96, 31 S.L.R. 350. The case of *Handley* v. *Handley*, [1891] P. 124, had no application, as it was based on an English statute, and the judgment of the Court of Appeal was a mere refusal to interfere with the discretion of the judge who tried the divorce case.

The respondent argued — Where a wife has been divorced for adultery the rule of law both before and after the Guardianship of Infants Act 1886 was, that unless in exceptional circumstances the husband had an absolute discretion as to his wife's access to the children—*Bowman* v. *Graham* (*cit. sup.*); *Handley* v. *Handley* (*cit. sup.*); *Bent* v. *Bent*, 1861, 30 L.J. P. 175; *Clout* v. *Clout*, 1861, 30 L.J., P. 176. Section 5 of the Guardianship of Infants Act 1886 did not apply to cases where there had been divorce,

but section 7 did apply to such cases, and it in no way changed the common law. The circumstances here were not such as to take the case out of the ordinary rule, but, on the other hand, they established the probability of danger to the child's welfare if the application was granted. The cases cited by the petitioner were not authorities in her favour. *Mackellar* v. *Mackellar* (*cit. sup.*), *Sleigh* v. *Sleigh* (*cit. sup.*), and *A C* v. *B C* (*cit. sup.*), had nothing to do with either divorce or separation. In *Symington* v. *Symington* (*cit. sup.*) the Court held that the husband had done nothing to forfeit his common law right of custody. In none of these cases had the wife been guilty of adultery. The case of *Allan* v. *Allan's Trustees* (*cit. sup.*) was a question between a widow and her deceased husband's trustees.

LORD STORMONTH DARLING — In this case the one thing that is perfectly clear is that the interest of the child is the main question for the Court to consider. The next circumstance of importance is that the parents of this child have already agreed as to its custody; what the mother now asks is that she should be allowed access. Now, I quite admit that in the ordinary case access is a thing which would not be denied a mother—that is to say, where she has been innocent of any conjugal transgression. But the law is the same, as I understand it, both in England and in Scotland where the mother has not been innocent in her conjugal relations. In Scotland the law is settled by the case of *Bowman*, 10 R. 1234 (which had reference to a case of access alone), that where the wife has been divorced for adultery the matter of access to the children ought in general to be left in the husband's hands. The law is the same in England, as is established by the case of *Handley*, (1891) P. 124; and it is important to notice that that was after the passing of the Guardianship of Infants Act 1886. A strong Court there held practically the same as the Court here did in *Bowman's* case, that there was no sufficient ground for interfering with the arrangements made for a child by the husband in the case of an erring mother, even where only access was asked, and that was after taking into account the passing of the Guardianship of Infants Act, which was referred to in the argument. Now here we have indications in the shape of letters that at the time when these proceedings first had their origin in America the grandmother of this boy was strongly of opinion that it was not in his interest that his mother (who was her own daughter) should have access to him. I do not say that that is by any means conclusive, though I must say that the evidence so far as it goes is very clear that, whoever was fond of the boy, the grandmother certainly was, and therefore any expression of opinion that came from her was deserving of the highest consideration.

It is true that if she is to have such access, and she admits it in her petition, it will be necessary for her to come over from America to this country, for it is only here that she asks or could obtain access to him. From the nature of the situation, however, it follows that access by a mother resident in America and coming over to this country for the purpose of seeing her child would almost necessarily take the form of a temporary custody. The child is at present residing in Glasgow in the house of his paternal grandmother, and is attending the Glasgow Academy. What future arrangements shall be made for his education it lies with his father to make, and he has indicated that he may ultimately send him to an English public school, but that is of course entirely in the future. The child is at present only seven years old. I am ready to decide this case upon the footing simply that it is not for the interest of the child at present that the mother's petition for access should be granted, and that she has averred no circumstances, she being the guilty spouse, to warrant us in interfering with the husband's arrangements and with the clear rule of the Scots law.

LORD LOW—I am of the same opinion. When on the 8th June 1905 the decree of divorce was pronounced by the Supreme Court of the State of Indiana (which appears to have been really an arranged divorce) the order of the Court was that the husband, the present respondent, should have the custody of the son of the marriage and the petitioner the custody of the daughter of the marriage, and neither party seeks now to alter that order. The petitioner, however, now says that she has a great affection for her son and that it is a great grief to her never to see him, and she comes to this Court to be allowed access to him in this country. Now a good deal has happened since the proceedings in the American Court. In 1907 the respondent brought in this Court an action of divorce on the ground of adultery against the petitioner, and it was proved that about the same time as the proceedings were going on in America the petitioner was living in adultery with a Mr Ziegler, and the learned Judge who tried the case found that there was no evidence that the present respondent was aware that that was going on. The petitioner subsequently married Mr Ziegler, and now she is living with him in America.

I think that the natural desire of a mother to see her child is by no means to be left out of consideration in a case of this sort; and the fact that she has been divorced for adultery is not in itself a sufficient reason for refusing access. But the main consideration is the welfare of the child, and in this case I have come to the conclusion that there would be serious risk, that it would be contrary to the welfare of the son that access should be granted. I do not for a moment suggest that the pursuer would intentionally or even consciously say or do anything which might have a demoralising effect upon the boy, although I doubt very much if he would in any case actually benefit by intercourse with her.

What I chiefly fear, however, is the effect which she might have on his relations with his father. The upbringing, education, and settlement in life of the boy is a duty which the father has to perform, and it is of the utmost importance that he should have the respect and confidence of his son. I greatly fear that the petitioner's influence would almost inevitably be in an opposite direction, because it is evident that she has very bitter, perhaps vindictive, feelings against the respondent; and her history, and what may be gleaned of her character from the correspondence, suggest that she would not be likely to exercise a wise self-control. These considerations, especially in view of the law laid down in the cases of *Bowman* and *Handley*, satisfy me that the petition should be refused.

LORD ARDWALL—I agree with what has been said by your Lordships. I think there is nothing in these proceedings to show that it is for the welfare of the child that the relations between him and his mother, which several years ago were broken off with her full consent, should now be resumed. On the contrary, I think that it is better that he should see and know as little as possible of her in the circumstances. In the next place, with regard to the law of the matter, it is quite settled that a father is entitled to the custody of his child, it is for him to direct what shall be done with the child, and his wishes are paramount unless it can be shown that they are unreasonable or that there is some good and just cause for running counter to them.

The only doubt I have in this case has been raised by the conduct of the father as shown in his letters; they seem to me to show that he has treated most unfairly the grandmother of this child, who has behaved in a most proper and ladylike manner throughout, and who has a strong affection for the child; but this is not sufficient to affect out judgment, as the father, being responsible for the education and upbringing of the child, must just take his own course.

LORD JUSTICE-CLERK—If I thought that the decision of your Lordships was to be taken as meaning that a decision at a particular time on a question such as this was final, and could never be reviewed or modified by the Court at a later date, I should have great difficulty in concurring in what is proposed to be done. The question whether a parent is to be suffered to have access to a child is one which although decided to-day may be varied or altered at a later date if ground can be shown for it. What may be unfavourable to the interests of the child at one time may not be so at a later date. Therefore the judgment your Lordships propose is upon the present state of matters, and as your Lordships all hold that the present petition must be refused I do not dissent from that judgment. If cause can be shown at any later date why what is now done should be recalled or modified, the Court will be bound to consider the application. That being so, I am not placed in the position of holding that a mother can never, whatever the change of circumstances, be allowed to see her child during childhood, which would be a thing I could not assent to.

The Court refused the petition.

Counsel for the Petitioner—Cullen, K.C. —Hon. W. Watson. Agents—J. & A. F. Adam, W.S.

Counsel for the Respondent—Dickson, K.C.—Horne. Agent—A. C. D. Vert, S.S.C.

Friday, February 28.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

RENNIE *v.* JAMES.

Process — Suspension — Decree in Sheriff Court — Res Judicata — Competent and Omitted—Suspension of Charge on Decree in Sheriff Court Correct in Form—Agent-Disburser.

A brought a suspension of a charge on a Sheriff Court decree in favour of B as agent-disburser for the expenses of a litigation in that Court, upon the grounds (1) that no intimation of a motion for such decree had been made to him, nor had such motion ever been made, nor had he had an opportunity of being heard upon it; (2) that B was not agent-disburser, being merely a clerk in the office of the agents conducting the cause; and (3) that B, not having paid the stamp duty exigible from a practising law-agent, was not in a position to take or enforce such decree. The decree was correct in form, and the proof failed to establish any irregularity.

Held with regard to ground (1) that the maxim *omnia presumuntur rite et solemniter acta* applied; and with regard to grounds (2) and (3), that, following *Ewing* v. *Wallace*, August 13, 1832, 6 W. & S. 222, the defence competent and omitted was available, and suspension *refused*.

On 18th September 1906 R. A. Rennie, writer, 136 Wellington Street, Glasgow, brought a note of suspension and interdict against William James, solicitor, Greenock. In it he craved suspension of a charge on a decree for expenses pronounced in the Sheriff Court at Dunoon against him and in favour of the respondent as agent-disburser.

The complainer pleaded, *inter alia*—"2. The said pretended decree is incompetent and *ultra vires* of the Sheriff-Substitute, and the charge following thereon is inept in respect—(1) That there was no motion made to the Sheriff asking for decree in name of the respondent as agent-disburser;