it appears that the action is sought to be brought against the trustee not only in his capacity as trustee but also as an individual, but I can see no ground whatever in anything stated on record for personal liability, and upon that ground I think the action falls to be dismissed. The agent can claim in the sequestration and get his preference given effect to, if he has any.

LORD ADAM—This action is laid against the defender both as trustee and as an individual. A trustee may no doubt grant an obligation which he may be compelled to fulfil by an action at common law, but in the present case I cannot see anything indicating a shred of obligation undertaken by him as trustee. The receipt founded on was merely an expression of the legal rights of parties, as these rights are fixed by the Sequestration Statutes. It neither enlarged nor modified the rights either of the trustee or of the parties. So far as directed against the defender as an individual, this action is irrelevant. So far as directed against him as a trustee the ordinary and proper way was to claim in the sequestration. It is really a claim upon the trust funds, and the proper way to make such a claim effectual is to make it in the sequestration, where due effect will be given to any existing preference, and I see no reason why that course should not be followed here. There are special cases where different proceedings may be necessary, but we have no such case here. If the pursuers have a preference over the claims they will have the benefit given by the statute, but I agree with your Lordships in thinking that no sufficient reason has been stated why the present action was raised.

LORD DEAS and LORD SHAND were absent.

The Court refused the appeal.

Counsel for Pursuers (Appellants)—Young—Orr. Agents—W. Adam & Winchester, S.S.C.

Counsel for Defender (Respondent)—J. Burnet—M'Neill. Agent—Knight Watson, Solicitor.

Friday, May 30.

SECOND DIVISION.

MACFARLANE, PETITIONER.

Process—Poor's Roll—Application for Admission to Benefit of Roll—Remit to Reporters.

Circumstances in which, in an application for admission to the benefit of the poor's roll, the Court remitted to the reporters *probabilis causa*, and instructed them to inquire and report their opinion as to whether the case of poverty had been substantiated.

David Macfarlane applied for a remit to the reporters, with the view of obtaining the benefit of the poor's roll. The application was made with a view of enabling him to bring an appeal from an interlocutor of the Sheriff of Forfarshire in an action of damages for injury to the person raised at his instance against William Thomson.

Thomson opposed the application, and stated that during the proof in the Sheriff Court, Macfarlane had stated that he earned thirty-seven shillings a week, and that he could earn twice that sum when on piece-work. Since his recovery from the accident Macfarlane had been earning thirty-five shillings a week, and a certificate from his employers to the effect that he had been earning thirty-five shillings a week up to the date of the appeal was produced. In these circumstances, and on the authority of the case of *Snaddon*, June 9, 1883, 20 S. L. R. 648, the respondent maintained that Macfarlane was not a person entitled to the benefits of the poor's roll. Macfarlane replied that although it was true that he was earning thirty-five shillings a week, all the balance above £1 had been arrested at the instance (1) of the agents of Thomson for payment of their expenses, and (2) by his own agents for payment of their account, for which they held a decree. The poor's agent in Dundee was now acting on his behalf. On these facts Macfarlane argued that Thomson was not entitled to oppose the application, as they had themselves been the cause of his poverty.

The Court pronounced this interlocutor:—

"Remit to the reporters, and instruct them to inquire and report their opinion as to whether the case of poverty has been substantiated."

Counsel for Appellant—Gardner. Agent—J. A. T. Sturrock, S.S.C.

Counsel for Respondent—Law. Agent—

Friday, May 30.

SECOND DIVISION.

PATERSON *v.* WILSON.

Bankruptcy—Cessio—*Process*—*Sheriff*—*Appeal*—*Debtors Act* 1880 (43 *and* 44 *Vict. c.* 34), *secs.* 8 *and* 9.

In a petition at the instance of a creditor to have his debtor ordained to execute a disposition *omnium bonorum*, the Sheriff pronounced an interlocutor dismissing the action. The pursuer appealed to the Court of Session. The appeal was signed by the agents of certain other creditors, who had not appeared in the Sheriff-Court, but who lodged minutes in the Inner House craving to be sisted as appellants in the action. *Held* that, not having entered appearance before the Sheriff's interlocutor dismissing the action was pronounced, they were not now entitled to do so.

Charles E. Paterson presented a petition in the Sheriff Court at Edinburgh against David Hay Wilson, S.S.C., for decree ordaining him to execute a disposition *omnium bonorum* for behoof of his creditors, and for the appointment of a trustee on his estate. He averred that the defender was notour bankrupt within the meaning of the Bankruptcy Act 1856 or the Debtors Act 1880, and was unable to pay his debts; that certain of his effects had been sold by the Sheriff's warrant, under decree of sequestration for rent; and that he was a creditor of the defender to the extent of £9, 13s. 4d., which sum was composed of the amount of two debts both con-

stituted by decree against the defender, to which the pursuer had acquired right by assignation from the creditors who held the decrees. The pursuer gave a list of the defender's creditors as far as known to him, to the number of five, including himself, and stated that notice had been given to the defender in terms of the Act of Sederunt of 22d December 1882.

There were no answers to the pursuer's statements.

The Sheriff-Substitute (RUTHERFURD) on 4th June 1883, being satisfied from the productions that there was *prima facie* evidence of the notour bankruptcy of the defender, pronounced an order for service of the petition and deliverance upon him, and for publication of the statutory notice to the creditors in the *Gazette*, and ordained the defender to appear for examination, and to lodge a state of his affairs.

The defender entered an appeal to the Court of Session, but afterwards abandoned it. On the process being retransmitted to the Sheriff Court, the Sheriff-Substitute, on 10th of July following, gave decree against the defender for £3, 3s. of expenses.

On 22d January 1884 the Sheriff-Substitute, on the motion of the pursuer's agent, again ordered service of the petition and deliverance on the defender, and publication of the *Gazette* notice, and ordained the defender to appear for examination on 4th February following, and to lodge a state of his affairs.

On the 4th of February, after the bankrupt had been sworn with a view to his examination, his agent asked leave to state objections to the competency of the proceedings. The Sheriff-Substitute refused the motion, and in respect that no state of affairs had been lodged by the debtor, adjourned the diet till the 18th inst., on the understanding that a state of affairs would be lodged by the defender not later than the 11th.

The defender appealed to the Sheriff, and put in a minute stating that he had tendered payment of the debt alleged to be due to the pursuer along with the £3, 3s. of expenses awarded by the Sheriff-Substitute, in respect of the appeal which had been departed from, amounting in all to the sum of £12, 16s. 4d.; that the tender had been refused by the pursuer's agent; that under rehearings of the decrees referred to in the condescendence, the pursuer's agent had uplifted from the Sheriff Clerk sums amounting to £1, 8s. 5d., which fell to be credited to account of the said sum of £12, 16s. 4d.; and that he had consigned in the hands of the Clerk of Court the balance—£11, 7s. 11d.

The Sheriff (DAVIDSON) on 13th February, in respect of the minute and of the consignment, appointed the Clerk of Court to pay the consigned sum to the pursuer, and dismissed the action.

An appeal was taken to the Court of Session, the appeal being signed by the pursuer and by the agent for two alleged creditors named Meikle, and by two creditors named Hogg and Sturrock. The names of these creditors were not included in the list given by the pursuer in his condescendence, and they had entered no appearance in the Sheriff Court. They now lodged minutes in the Court of Session, craving to be sisted as appellants. The alleged debt of two of the appellants Meikle had been incurred before the date of a sequestration of defender which had taken place some years before the present process, and had never been constituted against him.

Argued for the appellants—(1) The Sheriff's interlocutor of February 13th was incompetent in respect that the case was not then competently before him. The appeal to the Sheriff from the Sheriff-Substitute's interlocutor of February 4th was incompetent in respect that it did not fall within any of the categories of questions on which appeals were allowed by the Sheriff Court Acts either of 1853 or 1876 (16 and 17 Vict. c. 80, sec. 19; 39 and 40 Vict. c. 70, sec. 26, sub-sec. 4)—*Adam & Son* v. *Kinnes*, February 27, 1883, 10 R. 670. (2) It was competent for the present appellants, other than the pursuer, being creditors, to appeal, for a *cessio* was analogous to a sequestration, in which the right of appeal was open to any creditor though he were not a petitioning creditor (19 and 20 Vict. c. 79, sec. 34). Besides, by the Cessio Act of 6 and 7 Will. IV. (c. 56) right of appeal was expressly given to "any person aggrieved" (sec. 8). Further, all the creditors were necessarily parties to a process in the Sheriff Court, for they were all called by *Gazette* notice, published by order of the Sheriff under section 9 of the Debtors Act of 1880. The "parties" to whom the Sheriff was directed (sub-sec. 3) to allow proof could only mean those who had been summoned by such notice to appear and state their claims.

Replied for the defender—The appeal was competent to the Sheriff under the Sheriff Court Acts. But even if it were not, the interlocutor of the Sheriff of 13th February was competently pronounced, for he might deal with a case which had been brought before his Substitute, who represented himself. The Act of William IV. applies only to the old form of *cessio* at the instance of the bankrupt himself, not to the present application, which was as that of a creditor under the Debtors Act. The pursuer had appealed merely on a question of expenses. (2) The other appellants had no right to ask to be sisted now since they had not appeared in the Sheriff Court. The analogy of a sequestration failed, because the right of appeal given to the creditors there was so given by special statutory provision. It could not be assumed to exist in a *cessio*, which was a process created and ruled by a statute which contained no such provision.

At advising—

LORD JUSTICE-CLERK—Assuming that the appeal to the Sheriff was competent—and I am inclined to think that it was—the appealing creditors have to get over the fact that they did not appear before the Sheriff's judgment dismissing the action was pronounced. I am of opinion that this judgment extinguished the process, and that no creditor who did not appear in the process before that is now entitled to do so. I therefore think the appeal should be dismissed.

LORD CRAIGHILL—I concur. Excluding the Meikles—whose debt being unconstituted and having been incurred prior to the defender's sequestration, can give them no right to appear at any stage of the case—the appellants here, other than the pursuer, seek to have themselves sisted here in an appeal from the Sheriff on a petition for *cessio*. Taking the case on the

assumption that it was competently before the Sheriff on appeal from the Sheriff-Substitute, of which I have great doubt, I do not think an appeal to this Court is now competent to those creditors who did not appear in the Sheriff Court.

Lord Rutherfurd Clark—I also share some doubts on the question of the competency of the appeal to the Sheriff But certain parties now seek to be sisted as appellants who did not appear before the interlocutor dismissing the petition for *cessio* was pronounced in the Sheriff Court. The question is, are they entitled to come here and complain of that interlocutor? We have here two sets of creditors—one of which appears in the Sheriff Court but does not seek to appear here, and another which did not appear there and now seek to do so here. I think as far as the latter are concerned they have by not appearing in the Sheriff Court put themselves out of Court, and that we should dismiss the appeal.

Lord Young was absent.

The Court dismissed the appeal, and of new ordained the Sheriff-Clerk to pay to the defender the sum of £11, 7s. 11d. consigned in his hands.

Counsel for Pursuer and Appellants—Campbell Smith—Rhind. Agent for Pursuer (Appellant) —Archibald Menzies, S.S.C. Agents for other Appellants—David Murray, L.A.—Parties.

Counsel for Defender (Respondent) — Comrie Thomson—Lang. Agent—Robert Broatch, L.A.

HOUSE OF LORDS.

Monday, February 18.

(Before the Lord Chancellor, Lord Blackburn, and Lord Watson.)

COLLINS *v.* COLLINS.

(*Ante*, vol. xx. p. 175; 10 R. 250.)

Husband and Wife—Divorce—Adultery — Condonation—Whether Condonation can be Conditional.

Held (*aff.* decision of Second Division) that condonation of adultery is by the law of Scotland absolute, and cannot be made conditional by paction, and that therefore condoned adultery cannot, by reason of breach of a condition attached to the condonation by the forgiving spouse, be afterwards proved as a ground of divorce.

Proof—Evidence of Adultery.

In an action of divorce brought on allegations of renewed adultery by the guilty spouse with the paramour, adultery which has been condoned may be proved, for the purpose of explaining the relations existing between them, and throwing light on the facts tending to prove the renewed adultery.

Observations (*per* Lord Watson) on the extent to which the canon law is adopted into the marriage law of Scotland.

Condonation—Nature of Condonation.

Condonation of adultery consists in the renewed cohabitation of the spouses as husband and wife in the knowledge by the condoning spouse of the guilt of the other, and the rule laid down by the institutional writers that the marriage thereafter continues in full force is traceable to the effect of cohabitation as man and wife as evidencing marriage.

This case is reported in the Court of Session, *ante*, vol. xx. p. 175, and 10 R. 250, December 1, 1882.

The interlocutor of the Second Division appealed against was:—". . . Find that the pursuer has failed to prove that the defender committed adultery with the co-defender on the 26th January 1882 as libelled: Find that the pursuer cannot found on the previous acts of adultery alleged by him, in respect that such acts were condoned by him, and that such condonation is by law absolute: Therefore of new assoilzie the defender from the conclusions of the action for divorce: As regards the co-defender, find that in the circumstances of the case he is not liable in damages as concluded for: Find no expenses due to him: With regard to the conclusions of the summons as to the custody of the children of the pursuer and defender, find it unnecessary *in hoc statu*, to pronounce any deliverance, but reserve power to either party to make application to the Court with reference thereto in this process in the event of the pursuer and defender not again cohabiting as husband and wife, and decern."

The pursuer Mr Collins appealed to the House of Lords.

In the argument the appellant did not maintain it to be proved that the defender had committed adultery with the co-defender (Eayres) on 26th January 1882, or on other days in that month, and in the previous month, as maintained in the Court of Session, but argued (1) that the proof showed that he attached a condition to his forgiveness of the adultery committed in 1881, and discovered by him later in the same year, that condition being that the defender should never write or speak to the co-defender again; (2) that the meetings which admittedly took place between the defender and co-defender in December 1881 and January 1882 were a breach of that condition, and were for an immoral purpose, even though that purpose were foiled by their having been watched. The condition was reasonable, and the breach of it revived the condoned adultery, unless, as the Second Division held, (1) condonation of adultery was absolute in all cases at common law, and (2) it was impossible specially to make a condition as to it. Neither of these propositions was sound or supported by Scottish authority. They were against English authority.

At delivering judgment—

Lord Blackburn—The interlocutor appealed against does not pronounce any deliverance as to the custody of the children, but "reserves power to either party to make application to the Court with reference thereto in this process in the event of the pursuer and defender not again cohabiting as husband and wife." Should such an application be made, it may be necessary to inquire further as to a fact as to which the Lord Ordinary and the Lord Justice-Clerk are not agreed. If the object and intention with which the wife,