*Thursday, March* 18.

(Before Lord Chancellor Cairns, Lords O'Hagan and Selborne.)

ANDREW J. SYMINGTON *v.* MRS SYMINGTON.

(*Ante*, vol. xi. p. 369. March 19, 1874, 1 R. 871.)

*Conjugal Rights (Scotland) Act,* 24 *and* 25 *Vict. c.* 86, § 9—*Husband and Wife—Custody of Children.*

It having been proved in an action of separation and aliment raised by a wife against her husband that he had committed adultery with the nurse of his children, and also had falsely accused his wife of intemperance.—*Held* (aff. judgment of the Court of Session with a variation) that the custody of the girls should be entrusted to the mother, and that of the boys to the father, there being no good reasons for apprehending that the father's conduct would affect the moral interest of his sons.

*Observations* upon the custody of children where parents have been proved guilty of immoral conduct.

The question was whether the respondent was entitled to a decree of separation and aliment against her husband, and also to the custody of the five children of the marriage. The Lord Ordinary (SHAND) assoilzied the defender, but the First Division reversed this interlocutor, and held the wife entitled likewise to the custody of the children.

Mr Symington appealed.

At delivering judgment—

The LORD CHANCELLOR—My Lords, it is seldom that there comes before your Lordships for decision a case so intensely painful in all its details as the present—painful to read and painful to speak of—and, my Lords, although the material which is before your Lordships, both of evidence, of witnesses, and of correspondence, is extremely ample, it has been so recently under your Lordships' eyes, and the particulars of it are such as one would so naturally avoid to enter upon, that I think I shall be excused by your Lordships from doing more than referring in the most moderate compass, and only so far as is necessary to explain the opinion I am about to give, to those materials.

My Lords, the action in the Court of Session was an action for divorce, or, as we should rather term it in this country, for judicial separation; and the pursuer (the lady) in the Court below, having stated in the 8th article of the condescendence, that she was, "under the circumstances, entitled to have a judicial separation from her husband," and to have aliment as concluded for; the answer to that, after denying the grounds of separation set out, explained that "the pursuer has for some years past indulged to excess in narcotics and alcoholic liquors. This led to a disagreement between the defender and her relatives. In the course of these the pursuer made imputations against the defender of unfaithfulness; but upon the 31st of October 1871 she, in an agreement executed by her and the defender, relating *inter alia* to arrangements for the conduct of their affairs, formally declared herself satisfied that the said imputations were wholly groundless, and expressed her sorrow for having made them." Thereupon, the article of condescendence being amended, stated—"The statements in answer, that the pursuer has for some years past indulged to excess in narcotics and alcoholic liquors, and that this led to a disagreement between the defender and her relatives, are denied; and with reference to the declaration referred to in the answer, it is explained that the pursuer, while in the defender's power, and without aid or advice, was forced by him and another person to make it; that what it contains is not according to the fact, and that the pursuer repudiated it as soon as she got out of the defender's power." From this reference to the pleadings, your Lordships will see, or will infer, that the foundation for the divorce alleged by the wife was adultery on the part of the husband; and that, on the other hand, there was made a suggestion or a statement that the wife had been for some years past in the habit of indulging in excess in narcotics and alcoholic liquors. Of course it is obvious that this suggestion could not have been made by way of defence to, or recrimination upon, the charge of adultery. It was obviously made for the ulterior purpose of founding upon it against a claim on the part of the wife to have the custody of the children in the event of the adultery being proved and a divorce granted.

The case thus launched went on to proof and to trial in the ordinary way, and a large mass of oral and of documentary evidence was laid before the Court. My Lords, as regards the issue as to adultery, having considered with great care and attention the evidence upon that head, I am bound to say that it leaves no doubt whatever upon my mind that the charge of adultery was established; and indeed, your Lordships upon this point did not call upon the counsel for the respondent to address you. The adultery established is adultery taking the form of seduction in the conjugal mansion of a young girl of the age of 17 or 18, who was acting at the time as the nurse or caretaker of the children of the appellant, and it was adultery committed at times; and having regard especially to the presence of some of the younger children (certainly those of the most tender years), under circumstances which could not have failed to excite in the minds of your Lordships the gravest feelings both of reprehension and disgust.

My Lords, the question arose in the case whether this adultery was proved merely by the evidence of the girl to whom I refer, or whether her evidence was corroborated by any further testimony. As regards the evidence of the girl, although the Lord Ordinary did not think it right to grant a decree for a divorce, he nevertheless stated, after having had the advantage of hearing and observing the demeanour of the girl, that she gave her evidence with modesty and propriety, and, as I infer from his words, in a manner which convinced him that she was not departing from truth in the evidence which she gave; and further, with regard to her general character, your Lordships will remember that we have had what may be termed, perhaps, undesigned testimony from another witness in the case, whose general intervention in the matter was such as to identify her to a great extent with the appellant. I mean Miss Walker, who, writing to the grandmother of the girl after the pregnancy of the girl had been observed, and upon the occasion of her being sent to her grandmother, said this:—"Your granddaughter Lizzie, who has lived with us for four years, and who during that time has conducted herself with rectitude and propriety, and awakened in all our hearts a tender and

sincere interest in her happiness and welfare, has, in some way unknown to herself, fallen in the sad position of being about soon to become a mother." My Lords, we have therefore, both from the Lord Ordinary and from the main witness for the appellant, the strongest testimony to the general character of this girl.

But, my Lords, is it the case that there is any want of corroboration of story or history which this girl has told, clearly, distinctly, and consistently, so far as the story itself is concerned? My Lords, I think there is the strongest corroboration, and that of a kind always the most satisfactory, arising from the conduct of the appellant himself. But before I refer to the corroboration arising from his conduct, let me remind your Lordships that there is also this further corroboration: There is not, indeed, an impossibility, but there is the strongest improbability, that any person but the appellant could have been the father of the child of this girl. There was no male person but himself residing in the house at Nyeholm, where the husband and wife lived. The girl does not appear to have been in the habit of associating with any male acquaintance out of doors, and although there appears to have been the greatest anxiety to trace her in all her movements during the time that her pregnancy would have occurred, those who so traced her appear to have utterly failed to suggest any single person, through association, with whom the event of her pregnancy could have occurred, other, of course, than her master.

My Lords, further than that, I will remind your Lordships, without going into detail in regard to it, of the conduct of the appellant when the pregnancy of this girl was discovered. He became immediately most anxious to obtain—and if he did not himself suggest the obtaining, he immediately upon its being suggested strongly advocated it—a letter from the girl, which, upon the face of it, should declare that no person at Nyeholm was the father of the child. The girl appears, in the first instance, to have demurred to making a statement of the kind; but she was urged to do so both by him and also by Miss Walker, acting on his behalf, and finally, under circumstances which your Lordships will not fail to remember, after she had passed from Scotland into Ireland, and was on the point of being placed with her grandmother, she wrote a letter, in the terms which were read to your Lordships, at a railway station, under the eye and at the instance of Miss Walker, and at the same time wrote it in a form and gave it to Miss Walker in a way which would lead any person observing it to imagine that it had been written voluntarily by her when she was at a distance from Miss Walker, and sent by her from Ireland to Scotland to Miss Walker. And your Lordships will remember that most remarkable statement in the evidence of Miss Walker, that the moment she received this letter she handed it to the appellant, for the purpose of the appellant handing it to his professional agent, his lawyer, before a word of accusation had been said against the appellant, in order that he might be armed with this letter to answer the accusation which he clearly expected would be made against him.

Your Lordships will also remember with regard to the conduct of Miss Walker, who for this purpose must be identified with the appellant, the manner in which she wrote several letters to the grandmother of this girl while the girl was in Ireland with her. Your Lordships will remember the tone of those letters was this:—Miss Walker urged from time to time that the grandmother and the relatives of the girl should extract from her a statement as to who was the father of the child. My Lords, that was a matter which ought to have been a thing of complete indifference to Miss Walker and also to the appellant, if the appellant was innocent. The girl having returned to her friends, whether she made an avowal or did not make an avowal as to who was the father of her child ought to have been, I repeat, a matter of indifference to her former master. But the tone of those letters throughout was this:—If the girl can be got to name some person as the father of the child she may reckon upon assistance from us, but if she will not do so she cannot look for assistance being granted.

Your Lordships will next remember that most remarkable occurrence which took place on the 31st October 1871, which was referred to in the passage in the condescendence which I read, when, as the condescendence alleges, there was an agreement executed between the wife and the husband relating to arrangements for the conduct of their affairs, in which the wife formally declared herself satisfied that the imputations of unchastity against her husband were wholly groundless, and expressed her sorrow for having made them. My Lords, you will recollect that in this agreement of the 31st October 1871 the passage upon this subject was this:—"In reference to imputations or suspicions that she may have expressed regarding his relations with other women, she" (the wife) "declare herself satisfied that these were wholly groundless, and she expresses her sorrow for having made such statements." What were the imputations which were there referred to? Your Lordships have them explained by Mr Leckie, a minister, who was present on the occasion of this agreement being signed, and during those four or five hours which passed on the evening of the 31st of October before the agreement could be put in a form which the parties would agree to sign. Mr Leckie's evidence is this:—"Was there anything said at that meeting about the defender having been unfaithful?—(A.) Yes. (Q.) Who brought that up first?—(A.) Defender said—'But you also made charges against me in reference to women.' I thereupon turned to pursuer and said—'Surely you cannot mean to adhere to any of those charges?' She said she did not know about that—that certainly in reference to one or two of the persons mentioned she had no doubt as to withdrawing or explaining away anything that had been said, but that in reference to Ellie, the girl, she had not the same feeling. She said she had difficulty about withdrawing what she had said about Ellie. I said—'Are you perfectly serious in making such statements about Mr Symington and Ellie? You surely cannot think these to be true?' She then looked towards defender, and said—'Well, I do not 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 that 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. (Q.) Did he appear to hesitate?—(A.) I would not say that he hesitated."

Now, your Lordships will bear in mind that some months previous to this 31st October, the lady, under circumstances which I shall refer to, had left her husband's house to reside with her own brother. On this 31st October she had met her husband for the purpose, if possible, of arranging terms by which she might resume her residence in the house. At the time she had left the house there had been no suspicion of any pregnancy of this girl, or indeed of anything actually wrong having occurred between the girl and her husband. All that had occurred subsequently. Very shortly before this 31st October, a doctor, after an examination of the girl, had reported her to be pregnant, and thereupon steps were taken for passing her over to her own relatives, who lived in the north of Ireland. All this had been done just about a week before this 31st October. The girl had been the nurse in charge of the children of the wife. At this meeting, which occurred on the 31st October, the subject of some vague and floating suspicions, which had existed months before in the mind of the wife with reference to this girl, was broached, and according to this evidence was spoken of between the parties. But the husband absolutely concealed from the wife any mention or any knowledge of that most important event which had occurred in his own household a week before, the result of which was that the children of the wife had lost the person under whose care she had left them, and that the person whose name they were mentioning, and about whose conduct with reference to the husband they were speaking, had left the house and had been sent back to her own friends in the state which I have described. My Lords, is there any theory on which this reticence, this concealment on the part of the husband, can be accounted for except the theory of conscious guilt? Is it not a matter of surprise that after these facts, to which I have in the most general way referred, the pleading of the husband should have been allowed to take the form of alleging that on this occasion, the 31st October 1871, there had been an instrument signed by the wife formally declaring herself satisfied that the imputations against the husband were groundless, when the occurrence which of all others would have shown those imputations to be well founded had been absolutely concealed by the husband in order to obtain this agreement.

My Lords, is there nothing more which is a corroboration of the story told by the girl? I will now refer your Lordships to the further evidence which is given by Mr Leckie. Mr Leckie, on the 31st of October, was entirely ignorant of the fact that the girl had been sent from the house, and also of her pregnancy. He continues thus:—"I remember hearing that Ellie had gone to Ireland. I did not know of it till defender told me. He said that her friends had written for her from Ireland, and that he had allowed her to go as she was not of much use. I understood him to mean that as a servant she was not satisfactory, that her friends had written for her, and that he had consented to her going because she was of no great consequence in the family as a servant. 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. This conversation with defender must have taken place within a few days after the meeting on the 31st October. At the same time that he told me about Ellie going away he said Miss Walker was unwell. I cannot say what led him to tell me that. I cannot give the precise date of this conversation, but I should say that it was not more than a week after the meeting on the 31st October. My impression is that it was within two or three days. I afterwards heard that Ellie had had a child. I heard rumours about defender with reference to that, but not at first from him. I did not speak to him about them; he spoke to me on the subject. This must have been two or three weeks after I heard of them. That would be about a month after the birth of the child. (Q.) What did he say to you?—(A.) He said—'You will have heard of the rumours about Ellie?' 'Yes,' I said, 'Mrs Leckie told me of an interview you had with her.' He said—'It is a very distressing affair.' I said—'Of course it is.' That was all that was said on the subject on that occasion. At a subsequent interview, probably two or three weeks afterwards, he said that the statement was altogether false. It was he himself who began the conversation about it. I never did so. He also said 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 did not ask it. He said he stayed on the other side of the water."

My Lords, I pause there for the purpose of saying that the appellant, who had the fullest opportunity of leading any proof which it was within his power to lead, has not been able to suggest through the medium of any witness whatever that there was any cousin of this girl a married man, or that there was any person, either a cousin or not, who had frequently seen her home when she was out in the evening—or indeed that there was any person at all who could have acted in the way which he thus describes. Therefore I think it must be taken that this observation of his was wholly without foundation.

Mr Leckie's evidence continues thus:—"Did he at any time speak strongly against his wife when speaking about this rumour?—(A) Yes, he spoke very strongly against her, and I remonstrated. (Q) When you did so did he make any remark as to a comparison between himself and his wife?—(A) I remember a remark he made which 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 hers and a single fault: we know that David fell. (Q) Was that said in any conversation at which the matter about Ellie was discussed?—(A) No. Not so far as I recollect. It was not said in that connection. It was said when speaking of his wife's conduct, and denouncing it very strongly, and while I was deprecating the use of such strong language. (Q) What did you understand to be his allusion to "David?"—He replies by referring to a well known incident in the life of David.

Now, my Lords, I refer you to that conversation for the purpose of asking your Lordships whether it is possible to account upon any theory except that of conscious guilt for the fact that from Mr Leckie, who had been the confidential friend of the husband and wife throughout, the appellant should, in the first place, have entirely concealed the circumstance that the girl had left his house, and, in the second place, when he did tell him of it, after the 31st of October, that he should have assigned a reason for it which was entirely groundless,—namely, that she had been unsatisfactory or useless as a servant.

My Lords, that is not all, because your Lordships will remember that there being in Glasgow relatives of this girl, who certainly were (one at least of them was) considerably older than herself, who might have been informed of the circumstances which had made it necessary to send her away from the house in which she was in service, and as to whom it would have been the natural course to have taken under such circumstances that they should have been informed; and, moreover, there being in Glasgow Mrs Slimon, the head of the institution from which the girl had come, in the first instance, as a servant, and where she had been brought up—none of those relatives were informed; nor was Mrs Slimon informed of the circumstance of her being sent away from the house to relations with whom she had never been before. Nay, more, when subsequently Mrs Slimon from some circumstance appears to have come into contract with Miss Walker, and to have enquired, or to have been informed, about the girl, she was then told, as Mrs Leckie had been told before, that she had left, not in consequence of her being in the condition to which I have referred, but for some trivial fault, or for some want of efficiency as a servant.

My Lords, I have referred in general terms to these various circumstances, which appear to me to amount to corroboration of the strongest kind of the story told by the girl. I will dwell no longer upon that part of the case than for the purpose of saying that I am unable to understand how any other conclusion upon these facts could be arrived at than that the charge of adultery had been established.

But now, my Lords, I turn to a very difficult and hardly less painful part of the case. A decree of divorce or separation being a decree which ought to be made, the question arises next with regard to the custody of the children—five in number—of the marriage; and your Lordships will remember that here the Conjugal Rights (Scotland) Act becomes material to be considered. In the 9th section of that Act there is a provision very analogous to the provision in the English Act upon the same subject, viz., "In any action for separation *a mensa et thoro*, or for divorce, the Court may from time to time make such interim orders, and may in the final decree make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates."

There was some argument at your Lordships' bar, during which reference was made to authorities both in England and in Scotland, and it was suggested that, certainly in England, the analogous provision to that which I have read had been acted upon in this way, that where a wife established her title either to a divorce or to a separation, it was either matter of course, or almost matter of course, that that should carry with it for her the custody of the children; and that having shown good cause for severing the conjugal tie, she, not being in fault herself, should not be amerced or punished by being deprived of the custody of her children. My Lords, I should greatly regret that any general rule, so sweeping, and, as it appears to me, so inconvenient in its working, should be laid down on a subject of this description. It appears to me that the Act of Parliament has given the Court the widest and the most general discretion, and has purposely done so. It appears to me that it must be the duty of the Court in every case to consider the whole of the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt, the circumstances of the general character of the father, the circumstances of the general character of the mother, and, above all, it should be the duty of the Court to look to the interest of the children, and carefully to weigh, as regards the interests of the children, the comparative advantages or disadvantages of leaving the custody of all or of any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down. Certainly I should prefer to ask your Lordships in this case to act not upon any general rule, but upon the circumstances of the case which is now before us.

Now, my Lords, turning to those circumstances, it appears to me that your Lordships have, in the first place, the somewhat disagreeable duty of considering the charge made against the lady in this case, for the purpose of showing that, at all events, she, from her character and habits, is not entitled to have the custody of the children, for such I understand to be the meaning of the charge in the condescendence. But before observing upon the view which was taken upon this part of the case by the Court of Session, I will state as shortly as I can to your Lordships what appears to me to be the conclusion to be drawn from the materials before us upon this point.

My Lords, the husband and wife, Mr and Mrs Symington, in this case appear to have lived so far as the outside world could observe in great happiness from the time of their marriage, which I think was about the year 1860, up to the year 1870, and during these ten years, the five children whom I have spoken of, and another child who is dead were born. In the year 1870 it appears clear that the health of Mrs Symington—possibly from the many illnesses to which, as the mother of a family, she had been subject—was considerably impaired. It appears further, that whether from her state of health and the natural consequences of it, or from some other reason, there arose in the mind of her husband, as between him and his wife, some want of that complete harmony and agreement which had prevailed up to that time; and we find the husband making suggestions in communications with his wife's family—in the first place, that the state of her health had more or less affected the state of her mind. We find that afterwards these statements by the husband assumed a different shape, and he suggested, or more than suggested—broadly stated—to the family of his wife that she had been in the habit of indulging to excess in narcotics and in the use of stimulants. I pass over a lengthened correspondence which arose upon that subject, in which the family of the wife appears to have commented mainly upon the statements made

by the husband, and to have had no other knowledge upon the subject.

As time went on these charges appear to have been made by the husband broadly to the wife herself, and to have been persevered in by him with an obstinacy, and I must say a harshness, and perhaps coarseness, which cannot but strike the mind with feelings of the gravest reprehension. The wife, in the first place, denied the charges; but it appears that in the early part of the year 1871, at the house of Mr Leckie, whose name I have already mentioned, she made a very vague and brief verbal statement, which was said to be, and was from that time forward called by her husband, a confession of the charges which he had made. She stated afterwards that what she had said she had said under the pressure of constraint, and in the hope that it might satisfy her husband, and that he might not persevere in an arrangement which he had been proposing, that she would live for some time with her friends—that is to say, her family. However, the statements she made had not that effect, and she went for some months to reside with her friends. At the end of that residence came the agreement I have already referred to, of the 31st October 1871. It is an agreement in writing, and it was signed at the house of Mr Leckie, after considerable discussion and remonstrance on both sides, which had lasted for several hours. I do not stop to read it over, but your Lordships will remember that it carries upon the face of it expressions which certainly are not a repudiation, but are in a qualified way open to the construction of entertaining and reasoning upon the charges made by the husband against the wife in this respect. That agreement, again, the wife asserts, so far as it has the bearing which I have mentioned, was obtained from her under pressure, and when she had no assistance which would have enabled her to resist the pressure brought to bear upon her.

My Lords, I have adverted to this part of the case dealing with the admissions or confessions said to have been made by the wife, for the purpose of adding that if those were out of the case I feel bound to say that in the evidence before your Lordships I find no evidence whatever which would justify any charge of habits such as are alleged against the wife. And your Lordships have to consider this, that there has been given to the husband in this case the fullest and the most ample opportunity of adducing any evidence which he was able to adduce upon this subject. He appears to have spared no pains for that purpose. The wife was scrupulously and jealously watched in her own house by eyes which certainly were not friendly to her. If these things were done by her they could hardly have in that house been done in a corner. If these habits were habits to which she was addicted, the means of supplying the indulgence of those habits could not have been possessed by her without traces being left, which traces could easily have been exhibited in evidence before your Lordships. But I repeat, looking at the whole of the evidence in the case, not forgetting the evidence of Dr or Mr Stark, and of Dr Smith, there is, it appears to me, no evidence whatever which for a moment could be taken as establishing as a matter of fact the charges made upon this head against the wife. And therefore your Lordships have merely, as a justification for these charges ever having been made, so far, I repeat, as evidence is concerned, the qualified admissions made under the circumstances which I have mentioned, by the wife, and her conduct in not having at all times repudiated and refused to entertain in any way the accusations made by the husband against her.

My Lords, I cannot, under all the circumstances of the case take that conduct of the wife as an admission of the charges made against her. It appears to me that the conduct of the husband in making these charges was that of an obstinate, overbearing, tyrannical man, drawing conclusions from insufficient premises, and blindly refusing to be undeceived in ideas which he had once entertained. I speak not—for it is not, my Lords, my province to speak of—the harshness, and, I might say, the cruelty—even supposing there had been foundation for the charges—with which he treated a wife whom, upon that hypothesis, he ought, with tenderness and care to have endeavoured to reclaim. I pass that by; but I say that, looking at the evidence in the case, I find nothing which can satisfy my mind that these charges against the wife are capable of being supported.

But, my Lords, I must pause there for the purpose of saying that I am unable to follow the conclusions to which upon this point I understand the Court of Session have come. I will not delay your Lordships by reading the judgments, which are of some length, but I understand the learned Judges of the Court of Session to have arrived at this conclusion, not merely that adultery was committed on the one hand, and that the charges on the other hand were groundless, but also that the husband, in making the charges knew or believed that they were groundless, and made them for the sinister and most wicked purpose of so discrediting his wife in the eyes of the world that he might be left free to pursue that course of conduct which, according to this theory, he had proposed to himself—namely, the seduction of the girl Elizabeth Heron. My Lords, I am unable to arrive at that conclusion. The conduct of the husband was in all truth bad enough, but I am unable to say under this evidence that it was as bad as that which the Court of Session have in this respect imputed to him. Although he was perverse and obstinate enough to believe with insufficient foundation the charges which he made, yet, while I find no evidence for the charges, at the same time I find nothing which satisfies my mind that the husband did not believe that the charges were well founded.

My Lords, the result of the view which I take of the case up to this point is this, that there in nothing, in dealing with the custody of the children, established against the wife which can disentitle her to be considered a person who ought to have the custody of the children if on other considerations it is proper to assign that custody to her. That, of course, is a different and a separate question. I have entered upon a consideration of the charges made against her entirely for the purpose of ascertaining whether after weighing these charges she can be said to stand *recta in curiâ*, for the purpose of proceeding with the further question to whom, as between the husband and wife, is the custody of these children to be assigned. The children are five in number, and the three elder are boys. The boys were born in the years 1863, 1864, and 1866, and they are now, as we understand, boarders at school. The two younger children are girls; they were born in the years 1868 and 1870. The husband is engaged in business which

appears to be not otherwise than profitable. He is in middle life, and it is proved that he is affectionately attached to his children, and has always been so. My Lords, I must say also that although deploring, and, as a judge should do, gravely and severely reprehending the conduct established and the crime proved against the husband in this case, it is also at the same time to be borne in mind that until the commission of that offence he bore, and apparently justly bore, a high character for uprightness and morality in the world. And it is some consolation to observe that grave as the offence proved in this case was, there appears to have been no continuance of immorality, and I trust that I am not saying too much when I say there is reason to hope for a return on the part of the husband to the paths of morality and propriety of life.

The Court of Session have removed the custody of the whole of the children from the husband and given it to the wife. With regard to the boys I cannot for my own part perceive that an order which should take their custody from their father and hand it over to their mother would be an order which would be conducive, so far as we can judge, to the future welfare of the children. It is a very different matter with regard to the girls. I think their mother, not being proved to be in any way disqualified from having the custody and care of the girls, is the natural person to have that custody and care. On both sides there ought, as it appears to me, to be a full and careful opportunity of access, so that none of the children may grow up without as full knowledge and full intercourse as the case will admit of with both parents. I do not forget what weighed very much with the Court of Session, viz., an expression in one of the letters of the husband, which I trust fell from him in a moment of irritation, and which we have been led by the statement made by his counsel to believe he already much regrets—an expression declaring that the children would as they grew up, so far as he could bring that about, be led to look upon their mother as open to the charges he made against her. My Lords, I trust that nothing of the kind will occur, and that painful as are the circumstances which have arisen between this husband and wife, wherever the custody of the children may be, before the children at all events a curtain of oblivion (I was about to say forgetfulnes, but I hope forgetfulness will not be necessary) will be drawn over all that has occurred.

My Lords, the order which I should suggest to your Lordships as the proper one to make in this case would be an order which would not interfere with the interlocutor of the 20th of March 1874 so far as it finds adultery proved, and so far as it orders separation, and orders the payment of aliment, but it would take up the interlocutor at page 17, below letter F, and would continue as a variation of the interlocutor in this way;—"Finds the pursuer entitled to the custody of the two youngest children (Agnes and Margaret) of the marriage so long as no other or different order may be made by the Court with regard to them, but with such direction for access of the defender as the Court shall think reasonable, and subject to the obligation of not removing them from the jurisdiction of the Court; and decree and order the defender forthwith to deliver over the said two 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 days already fixed by the interlocutor, namely, 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 year immediately following, and so on half-yearly thereafter, at the two terms of Martinmas and Whitsunday, 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; Find the defender entitled to the custody of the other children of the marriage during their respective pupilarities, so long as no other or different order may be made by the Court with regard to them or any of them, subject to the obligation of not removing the said children or any of them from out of the jurisdiction of the Court, and also to the burden of providing for the maintenance and education of the said children, according to such directions as shall from time to time be given by the Court for that purpose, and also subject to such regulations for securing the access of the pursuer to the said children, or the occasional residence of the said children with the pursuer, as the Court may consider reasonable: reserving to both parties respectively liberty, in the event of any difficulty, dispute, or change of circumstances, to apply to the Court for such variation on the foresaid terms of aliment, or the foresaid directions as to custody, education, and access as the Court may consider reasonable.

If your Lordships should concur in the variation of the interlocutor which I now propose, I think, having regard to the fact that, upon the main question in the suit your Lordships agree with the Court below, and also having regard to the fact that the respondent could not be made to bear costs as against her husband, the costs of this appeal should be awarded to the respondent.

Lord O'Hagan—My Lords, in this lamentable case there are two questions—a question of fact, and a question of discretion. We are required to determine whether the adultery of the appellant has been sufficiently established, and if it has been, to what custody his children should be committed.

On the first question your Lordships have already intimated that it should be answered in the affirmative, and for my own part, after a full review of the evidence and a careful perusal of the judgments delivered by the Lord Ordinary and the learned Judges of the Court of Session, I see no reason for reversing the decision with which we have to deal. There has been a conflict of judicial opinion, and on some points contradictory testimony creates doubt and difficulty, but on the whole it seems to me that the Appellate Court had reason for the conclusion at which it arrived, and we are not at liberty to disturb a ruling made undoubtedly after most laborious and conscientious consideration, unless we see clear grounds for pronouncing it erroneous. I do not think such grounds are to be discovered in this case.

We have been fairly pressed by the argument that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity

from their demeanour and conduct before himself, which was not enjoyed by the Judges of the Court of Session, should not have his decision lightly set aside. And undoubtedly the value of *viva voce* testimony can be much better ascertained by those who hear it than by those who know it only from report. But there is this peculiarity in the present case, that the Lord Ordinary has put us somewhat in his own position, and enabled us, so to speak, to see with his own eyes, when he states the impression produced on him by the principal witness, and describes her as "a girl of modest appearance, who gave her testimony generally with an air of truthfulness;" and he favourably speaks of her aunt, another witness whose part in the transaction is of great importance. Besides, we are concerned directly, not with the judgment of the Lord Ordinary, but with that which over-ruled it, and the latter we ought to affirm unless we are satisfied of its error.

And how can we be so satisfied? It would be very idle to discuss again the details of the testimony, after the ample dissection of them by my noble and learned friend on the woolsack. But the principal matter in controversy being whether Elizabeth Heron has been corroborated, can we doubt that they furnish sufficient ground for holding, with the Court of Session, that she has been? Direct corroboration by eye-witnesses of the guilt of the appellant there is not, and in cases of this kind it can rarely exist; but the corroboration supplied by his own subsequent conduct seems strong and persuasive. Such corroboration may be of the most satisfactory character, and is every day accepted as conclusive in cases of life and death. It is very difficult, indeed, to reconcile with a presumption of conscious innocence the sending of the girl to Ireland in the companionship of Miss Walker; the repeated attempts to obtain from her a declaration exonerating from the blame of her seduction the inmates of Nyeholm, in which the appellant was the only male resident; the falsehoods patent on the face of that letter, which were not certainly the emanations of her own mind; the unworthy trick of posting it in Ireland addressed to Miss Walker at Glasgow, with the purpose of establishing another falsehood that it was not written in Miss Walker's presence or under her influence; the further falsehood that it was not shown by Miss Walker to any one, although she had on her arrival in Scotland given it to the appellant, who handed it to his lawyer, to be used, manifestly, if the precise charge we are investigating be made against him. In some of these transactions Miss Walker acted whilst the appellant was absent; but it is clear that they were begun with his full knowledge and assent; that they were carried through by his agent; that he took advantage of their result, and therefore he can scarcely complain if he be held responsible for the consequences.

Do not all these circumstances exhibit a course of conduct most difficult of reconcilement with the notion that it was not dictated by a sense of guilt and a desire to evade the penalties of a wrong which he had done? Is it according to the common experience of the world that a man of good position, and therefore high character, feeling himself wholly blameless, should so have dealt with a common servant debauched in his employment? And is not the force of these facts intensified when we find the departure of the girl concealed from his friend and pastor, the Rev. Mr Leckie, and after it becomes known explained by other gross falsehoods to him and to Mrs Slimon, from whose orphanage she had been taken, and who had a kindly interest in her, and might have helped her in her unhappy state? And this at a time when he had driven his wife from her home and was pursuing her with implacable harshness on the pretence that she was given to untruthfulness. —I say under the pretence, for when he was challenged by the present action to prove this and other charges, which he alleged could be established by fifty witnesses, and when he had the amplest opportunity of making the proof, he utterly failed to show that she was culpable in any serious sense. If conduct can corroborate, it is hard to say that the learned Judges were wrong in holding these things to amount to corroboration.

To only one other circumstance I shall particularly advert, because it is of singular significance with reference to the question of corroboration. The Rev. Mr Leckie was examined as to a conversation with the appellant, and the report of his evidence runs thus:—"Did he make any remark as to a comparison between himself and his wife?—(A) I remember a remark he made which 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 hers and a single fall We know that David fell. (Q) Was that said in any conversation at which the matter about Ellie was discussed?—(A) Not so far as I recollect. It was not said in that connection; it was said when speaking of his wife's conduct, and denouncing it very strongly, and while I was deprecating the use of such strong language. (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." If the matter rested there, such a statement of the appellant's reference to the story of David and the effect it produced on Mr Leckie's mind would not be unworthy of consideration. But the testimony of the girl gives it far more importance. When she is describing the fact of the seduction, a portion of her examination is this—"(Q) When you remonstrated with him, did he refer to his own character?—(A) Yes. He said he had his own character to think about as well as mine. (Q) Did he quote any example to you when you remonstrated?—(A) I remember him once saying something about David. (Q) What David?—(A) David in the Scriptures. He said that David had sinned, or something like that; but I cannot remember exactly the words. This was when I said to him that I thought it was not right." The devil can quote Scripture for his own purpose; and if the self-same story of the royal Psalmist which Elizabeth Heron alleges to have been used by her seducer to lead her on to infamy and ruin, was employed by him in his conversation with the Rev. Mr Leckie to lessen the comparative heinousness of the crime of the adulterer, does not that conversation cast back a lurid light on his former conduct, and give probability to the evidence that he prostituted his familiarity with the Scriptures to the service of his own unholy passion? Do not the pieces of proof hang together in such a way as

to attach something of the indisputable credit belonging to the one to the other also, and unless we accept the ingenious hypothesis of the Solicitor-General, which rests on no particle of evidence, that the statement of Mr Leckie may have been communicated to the girl, and may have suggested this portion of her story, can we fail to be impressed by a sense of the improbability, ranging to the bounds of the impossible, that so strange a perjury should have been the concoction of her own brain?

I shall not further refer to the incidents relied on in the elaborate judgment of the Court of Session, but I have thought it right in this most serious case to point to some of those which make me unable to concur in a reversal of the decision, notwithstanding the fulness and force of the argument for the appellant.

We have been much and properly pressed by the very strong evidence as to character given by gentlemen of position and high intelligence; and we have been asked to remember the maxim which experience sustains—"*Nemo repente fuit fur pessimus.*" Unquestionably such evidence is, and ought to be, persuasive, and an accused man should have the benefit of the presumption of integrity which arises from the virtue of a lifetime. But it is open to the observation that in cases of this peculiar kind general good character is of less value than in others. It must often be accepted as a doubtful answer to such charges of moral aberration as affect the appellant when positive proof encounters the presumption. And I confess that the adverse impression manifestly made on the Rev. Mr Leckie—of whose congregation the appellant was a member, who seems to have been in constant intercourse with him, a confidential friend of his family, and with no predisposition to judge him hardly,—quite outbalances in my estimation the testimony of Sir Noel Paton and the other respectable persons who speak of his reputation for exceptional uprightness.

On the question of fact, therefore, I am obliged to concur with my noble and learned friend; and on the question of discretion I also concur with him. The jurisdiction as to the custody and education of children committed to the English and Scotch Courts by the Conjugal Rights Act and the Divorce Act is identical and very extensive, and involves great responsibility for its judicious exercise. We are bound in considering a case like this to have regard not to any mere technicalities or hard and fast rules of practice, but to the real interests of all the parties whom our decision may affect, and to do for all what may seem best and wisest. The father's right to the guardianship of his child is high and sacred. Our law holds it in much reverence, and it should not be taken from him without gross misconduct on his own part, and danger of injury to the health or morals of the child. His proved adultery may, under certain circumstances, make the withdrawal of it inevitable; but, *per se*, bad as the offence may be, it may not necessarily involve the infliction of such injury, and there may be considerations of convenience and advantage to the children which, if that infliction be not probable, should forbid their withdrawal from the father's care.

In the case with which we are dealing the crime imputed to the appellant was in itself and its circumstances very grievous, and if he only were concerned would make him entitled to small consideration. But we are reasonably asked to remember that his adultery was secret, that he did not lead an openly immoral life, or do any acts which *coram populo* could deprive him of the character he had acquired as a religious and upright man; and that in his general dealings with his household he acted with strict propriety. Upon the evidence, he is entitled to say that neither before nor after the one seduction has anything of immorality been proved against him. It is not likely that the bitter experience he has had of the consequences of a departure from the line of duty will induce him to a change of conduct calculated to justify the accusations he has so strenuously denied, and there is therefore apparently reason for expecting more careful avoidance at least of any open misconduct or ill example in the future than in the past. Then he seems to have a genuine love for his children, and to have exhibited a watchful care of them.

Considering these things, there does not seem any reasonable ground for anticipating that the male children will be injured morally or otherwise if their custody be continued with their father, especially as they are of sufficient age to be kept at school. And he will be subject at all times to the vigilant observation of their mother, who will have full access to them, and the continual supervision, and, if it should be necessary, the prompt intervention, of the Court for their protection from any evil. And if this be so, there are, on the other hand, patent considerations affecting the interests of the children and their prospects in the world which make it undesirable that the connection with their father should be broken off, leaving them in lifelong isolation, and depriving them of the material benefits which they may anticipate at his hands. The words of Lord Neaves in *Lang* v. *Lang* (7 Macph. 447), to which we have been referred, are sensible and just—"If we take a man's children from him we leave him a solitary being, and deprive him of the most powerful inducement to amendment of life. It is not that he has committed faults, but that he teaches or is likely to teach evil to them, and to corrupt their morals, that can alone entitle us to interfere." And, in addition, I am affected by the consideration that an absolute separation of the appellant from all his children might not only deprive them of important advantages to be derived from him hereafter, but would also destroy the possibility of that reunion of the husband and wife which, notwithstanding all that has occurred, and the hopelessness of such an event expressed by the Lord Ordinary, may yet, I trust,—and perhaps through their intercourse with the children, to whom they are bound by a common affection,—be happily accomplished.

I am bound to say that I fully concur with the Lord Chancellor as to the failure of proof of the charges against Mrs Symington; and I concur with him further in his condemnation of the excessive harshness and severity with which she was treated, and which, in my opinion, would have had no adequate justification even if every one of those charges had been clearly established.

Agreeing on both the questions in the case with my noble and learned friend, I fully approve of the advice he has given your Lordships.

Lord Selborne—My Lords, entirely agreeing as I do with the explanation which my noble and learned friend on the woolsack has given to your

Lordships of the grounds for adhering to the decision of the Court of Session in this case, so far as relates to the painful subject of adultery, I do not propose to say one word more on that part of the case.

With respect to the more difficult and not less anxious portion of the case as to the custody of the children, I will take the liberty of making a few, and only a few, observations. As to the girls, I do not think it necessary to add anything to the reasons stated, which are obvious for leaving them under the mother's charge. The difficulty in my mind has had relation to the boys alone. My Lords, I do not think that as to the boys the right of the father or the right of the mother stands in a position which can make it otherwise than proper for your Lordships to turn the balance, by having regard to the interest of the children. The interest of those children, of course, is to be regarded in two points of view. Their material interest obviously is not in the direction of complete separation from their father, from whom their means of support in life apparently are entirely derived. No doubt, my Lords, the moral interest is in cases of this kind of even greater importance than the material, and looking to the moral interests of these boys I am not satisfied that it will be compromised by leaving them in care of him who is *prima facie* their natural and legal guardian, and on whom their material interest must mainly depend. The offence, aggravated as it is, of the father's, was, as my noble and learned friends have rightly said, neither preceded nor followed by any generally vicious course of life. On the contrary, but for the painful proof of which we have of that offence, and of the circumstances accompanying it, —to which I should perhaps add that harshness to the wife, of which mention has been justly made—but for those things, the character of this gentleman would stand in a very favourable light, if tried by all the tests that could be applied to it.

No doubt, my Lords, that fact in itself suggested the possibility of a painful interpretation. It may be said—and of course that is the worst view which can be suggested of this gentleman's character—that his whole life was false, and that all the profession of good made by him is now discovered to be entirely hypocritical. It must be admitted, and I say it with great pain, that when we bring those high professions into direct contact and proximity with deliberate acts of gross vice, no other judgment can be formed of them than that at that time and on those occasions the vice was aggravated by hypocrisy. But, my Lords, I do not think it necessary or charitable to adopt that hypothesis as applicable to the whole life of the man. All who have experience of human nature know that there is in all men a constant inward struggle between the principles of good and evil; and because a man has grossly fallen, and, at the time of his fall added the guilt of hypocrisy to that of immorality, it is not necessary therefore to believe that his whole life has been false, or that all the good which he ever professed was insincere or unreal. I will hope better things of this gentleman, and therefore, not relying upon that which nevertheless is true, that even hypocrisy is, as it has been stated to be, a tribute paid by vice to virtue, and that a man whose mind is in that condition is perhaps not likely grossly and openly to have used his opportunities of influence over the children whom he loves for their moral perversion. Not relying upon that, I am willing to believe that before these unhappy events the appellant was a man sincere in his profession, and desiring to do what was right, and that it is not beyond hope that he may afterwards live in accordance with his profession.

My Lords, in these circumstances, unless we are to be guided by that which seems to have exercised influence over the mind of the Court of Session —namely, the belief that his whole conduct towards his wife, all the imputations made upon her, and all the harshness exhibited towards her, were parts of a concerted scheme for the indulgence of his vicious passion towards a servant maid—Unless we are to believe that—I do not see that the grounds exist upon which these boys—contrary to what, in other respects, is their own apparent interest—should be taken from the custody of the father. The Court of Session seems to have relied mainly upon that aggravated view to which I have adverted, of the motive and the purposes of the imputations upon the wife and the conduct pursued towards her, and I am not prepared to say, my Lords, that if they had been right in that there would not have been such an exhibition of deep and deliberate depravity on the part of this gentleman, as, coupled with the rest of the case, might have justified the conclusion arrived at by the Court of Session. But, my Lords, entirely concurring in what has been said as to the absence of any evidence to justify the imputations upon the wife; also entirely concurring in what has been said as to absence of any justification of the husband's conduct even upon the hypothesis that he fully believed those imputations to be true—still I am bound to say that I cannot come to the conclusion that those imputations originated in any deliberate purpose of injustice to the wife, much less in any purpose to cover, by means of that injustice, the further wrong.

My Lords, there is one fact in the case which alone has completely satisfied my mind that that portion of the view adopted in the Court of Session is not correct, and that is this—Dr Stark, a witness not impeached, on whose own impressions as to the condition of the wife on two occasions when he saw her I do not rely, because I think it may be probable that he may have misinterpreted the symptoms from which he drew his conclusions, distinctly proves that in the year 1866—I think four years or more before these unhappy events, and when the husband and wife were living on terms of apparently uninterrupted affection — the husband consulted him on the same subject, being even then under the impression that the wife was injuring her health by the use of stimulants, and that stimulants were on that account forbidden. Dr Stark himself, though, as I believe, erroneously, did himself from the appearance and manner of the wife on two latter occasions draw a similar conclusion to that which the husband—I doubt not upon equally insufficient grounds—seems to have drawn. Those facts convince me that in the state of health of this lady, or in her habits of body connected with that state of health, there were circumstances which misled the husband at an early period, and afterwards in part misled even her medical attendants, into the belief which now proves to have rested upon insufficient foundation, that she did use (probably for medical reasons, in the first instance) stimulants or narcotics, which had an injurious effect upon her health. Now, the lady has been since placed in circumstances which

have enabled her other friends to bring those views to the test, and I am happy to say the result has been to exonerate her from that construction of all or any of the appearances. But, my Lords, I cannot but believe Dr Stark, who, if he is to be believed, distinctly proves that these ideas in the husband's mind originated at a time and under circumstances which are absolutely inconsistent with the hypothesis of his motives which the Court of Session thought it right to adopt.

My Lords, in that state of things, I do not think that the conduct of this gentleman, bad as in many respects it has been, has been such as to give your Lordships good reasons for apprehending that the moral, any more than the material, interest of the boys will suffer if they are, upon the terms and under the safeguards which have been recommended to your Lordships, left under their father's care.

Interlocutor of 20th March 1874 affirmed, subject to a variation.

Counsel for the Appellant — The Solicitor-General (Sir John Stolker) and Dr Spinks, Q.C. Agents—William Robertson, Westminster, and J. Galletly, S.S.C.

Counsel for the Respondent—Mr Cotton, Q.C., and the Hon. Mr Thesiger, Q.C. Agents—Grahames & Wardlaw, Westminster, and J. & R. D. Ross, W.S.

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*Monday, May 3.*

(Before Lord Chancellor Cairns, Lords Hatherley and O'Hagan.)

LEARMONTH AND OTHERS *v.* MILLER.

(*Ante*, vol. ix, p. 95.)

*Husband and Wife—Postnuptial Contract—Interest—Retention—Bankruptcy—Conjugal Rights Act.*

In 1852 a husband and wife executed a postnuptial contract whereby they conveyed to trustees £2600, being the amount of legitim to which the wife was entitled from the estate of her deceased father. The husband, on the other hand, bound himself to pay on or before 1862, £1999 to the trustees for the trust purposes, and to open and keep up policies of insurance, or to grant security over his heritable estate in their favour for that sum. He also renounced his *jus mariti* over the whole means and estate of his wife, declaring the same to be unaffectable by his creditors or by his debts or deeds. The second purpose of the trust was "for payment of the free yearly proceeds of the trust-estate to the said husband during his life, for his liferent use allenarly." It was declared that these provisions "shall be nowise attachable for debt, but the same shall be considered alimentary." The husband did not implement his obligation by granting security or otherwise, and he became bankrupt in 1860.

In a question between the marriage-contract trustees and the trustee on the husband's sequestrated estate—*Held* (1), that the husband's right to the annual proceeds of the £2600 was vested in the trustee on his sequestrated estate; (2) that the marriage-contract trustees were not entitled to retain the income on the ground that the husband had failed to implement his obligation, and (3), that the provisions of the Conjugal Rights Act 1861 did not apply to the case.

This was an appeal against the judgment of the Second Division in an action of declarator and payment at the instance of John Miller, trustee on the sequestrated estate of Mr Finlay, against Mr and Mrs Finlay's marriage-contract trustees. The following were the circumstances of the case—

On 28th February 1852 Mr and Mrs Finlay executed a postnuptial contract, whereby they conveyed to the defenders, as trustees, the whole estates, both heritable and moveable, belonging or which might thereafter belong to Mrs Finlay, and particularly, "all right, title, and interest which she, or the said John Finlay, her husband, now have or may hereafter have in the succession or estates" of her deceased father. Mr Finlay, on the other hand, bound himself to pay on or before 1st January 1862, £1999, to the trustees for the trust purposes therein mentioned, and to open and keep up policies of insurance, or to grant security over his heritable estate in their favor for that sum. He also renounced his *jus mariti* over the whole means and estate of his wife, declaring the same to be unaffectable by his creditors or by his debts or deeds. The second purpose of the trust was "for payment of the free yearly proceeds of the trust-estate to the said John Finlay during his life, for his liferent use allenarly." It was also expressly declared by the contract that the whole provisions therein contained "shall be nowise attachable for debt, but the same shall be considered alimentary.'

In an action raised in 1863 the House of Lords decided that the trustees under the postnuptial contract were entitled to recover and receive the sum of 2600, being the amount of legitim due to Mrs Finlay from the estate of her father, with interest from 15th December 1851, and to hold and administer the same for the purposes of the trust declared in said deed—all questions in reference to the right to the interest or annual proceeds of the said legitim fund from that date being reserved entire.

The present action was raised for the purpose of having it found and declared that Mr Finlay had right to the whole annual proceeds of the said sum of £2600 from 15th December 1851, and so long as the sequestration shall subsist during Mr Finlay's life, and of obtaining decree against the postnuptial contract trustees, ordaining them to make payment of the same to him accordingly.

The Lord Ordinary (MACKENZIE) pronounced an interlocutor finding in the pursuer's favour on the declaratory conclusions of the summons, and the Second Division on a reclaiming-note adhered.

The defenders appealed to the House of Lords, and argued that, regard being had to the nature of the postnuptial settlement, and the reasonable amount of provision for the benefit of the wife, husband, and children of the marriage, Mr Finlay being in a perfectly solvent state at the date of the deed, it was a contract for valuable consideration, and being purely alimentary could not, contrary to the express declaration of the deed, be held to be subject to his debts.

Counsel for the respondent were not called on.

At delivering judgment—

LORD CHANCELLOR—The case now brought before your Lordships on appeal has already pro-