Counsel for Pursuer—Mr J. C. Smith. Agent—Mr J. B. W. Lee, S.S.C.

Counsel for Defender—Mr Dundas Grant. Agent—Mr James Barton, S.S.C.

This is an action of divorce at the instance of William Gordon Bathie, sometime a shoemaker in Dundee, against his wife Grace Lamb or Bathie. The ground of action is alleged adultery on the part of the wife, and the alleged paramour was called as a co-detender. Lord Mure held that, although the relative position of the defender and co-defender, as proved in evidence, was unquestionably attended with great suspicion, the adultery alleged was not proved. To-day the Court adhered.

The LORD PRESIDENT, who delivered the judgment of the Court, said—This is a very peculiar case. It appears that the parties were married in 1842. In 1858 they separated. They had been living in Dundee, where the husband was a shoemaker. While they lived together they had eight children. After the separation, the wife appears to have lived first in Clarence Street, Edinburgh, then in Hellisfield Cottage, Leith, and latterly in Springfield Place, Leith Walk. In all these places she lived under the name of Mrs Lamb, which was her maiden name. There does not seem to have been any intercourse or communication of any kind betwixt the pursuer and defender after 1858. In November 1863 this action was raised. The case has some remarkable features. The pursuer's case substantially is this: The co-defender, who is an auctioneer, and apparently an itinerant one, had lodged in the pursuer's house in Dundee before the separation. After the separation, he is found living in the same house as the defender, in Clarence Street, Hellisfield Cottage, and Springfield Place. It is said by the pursuer that they went by the names of Mr and Mrs Lamb. Further, the pursuer says the defender gave birth to a child after the separation. Some witnesses say that this child was called Emma White (being the co-defender's name); others say she was called Emma Lamb, but she was never called Emma Bathie. There is produced an extract from the register of births to the effect that on 4th April 1859 a child was born named Emma Grace White Lamb; that this child was illegitimate; that the mother's name was "Grace Lamb Lady," and the birth is said to have been registered on 8th April by the mother, who signed the register "Grace Lamb." Then the alleged paramour is called as a witness, and he avails himself of his privilege of declining answering questions. This declinature is not positive evidence either one way or the other. But it may have more or less significance in such cases as this according to circumstances. If the party is a friend of the pursuer of the divorce, I could not regard it as proving guilt on the part of the defender. If, on the other hand, he is a friend of the defender, the circumstance is suggestive, and may be one of those circumstances the aggregate of which constitutes circumstantial evidence. It was said in the debate that circumstantial evidence was always only suspicion. I don't agree with that. Circumstantial evidence is a series of suspicious circumstances which when woven together produce conviction. The defender has led no evidence, but says the pursuer has not proved his case. She says she did not separate voluntarily, but that the pursuer became drunken and ill-treated her, and that she had to fly from him. The pursuer, on the other hand, says that she deserted him. Neither party has led evidence as to this matter; but there are circumstances tending to support the defender's version. All the children seem to have gone with the mother. Then she says she had to keep lodgers to support them, and there is evidence that she did so. She had a larger house than was necessary for herself and children alone. She went by the name of Lamb, dropping the pursuer's name because, as she says, she did not wish to be persecuted by him or his creditors. It was not denied in argument that the child was born after the separation. How is that explained? In regard to the extract from the register, I do not feel inclined to give much weight to it. The statute no doubt makes an extract evidence, but that only means that it renders unnecessary the production of the register. Why was there no evidence that the defender made the entry in the register and signed it? I attach, therefore, no weight to the extract. Assuming, then, that a child was born in April 1859, it is said the child must be the co-defender's, as he was living in the house with the defender. We cannot hold that this child was not the pursuer's. The presumption of law is that the child was conceived before the separation. We must therefore hold the child to be the pursuer's. Then it is alleged that they lived as Mr and Mrs Lamb, but this is not sufficiently proved. The servants in the house, who had the best opportunity of observation did not regard them as husband and wife. Then there is no evidence of familiarities indicating impropriety except on one occasion, which is spoken to by only one witness, who is uncorroborated by anyone else. The child seems to have called the co-defender "papa," and he called her his little daughter, and so forth. I don't attach much importance to this circumstance. It only acquires importance if you assume the paternity. But if you suppose that the co-defender was a lodger who had befriended the defender and her children, it is not extraordinary; and one of the defender's sons deponed that the co-defender had acted as a father to them all. It is very strange that although the parties lived so long in the same houses there is no direct evidence of adultery. There is no evidence of their sleeping together. On the contrary, there is evidence that up to January last the defender slept with her eldest daughter. On the whole, therefore, whatever suspicions may attach, there is no sufficient proof to warrant our altering the Lord Ordinary's interlocutor.

ACCOUNTANT IN BANKRUPTCY *v.* A. B.

Bankruptcy—Trustee—Violation of Bankruptcy Act—A trustee on various sequestrated estates censured (on report of accountant) for not lodging money belonging to the estates in bank within the statutory period, and found liable in expenses.

Counsel for Accountant in Bankruptcy—The Lord Advocate and Mr H. J. Moncreiff. Agent—Mr A. Murray, W.S.

Counsel for Trustee—Mr Patton and Mr Scott. Agent—Mr John Walls, S.S.C.

This was a report to the Court under sections 159 and 161 of the Bankruptcy Act, in regard to the conduct of an accountant in Glasgow who was trustee on various sequestrated estates. The complaint against him was that, in contravention of the statute, he had retained the funds of the estate in his own hands, instead of lodging them in bank, for more than the statutory period, and that in one case he had failed to consign in bank a dividend due to a contingent creditor. The trustee admitted the irregularities complained of, and expressed his deep regret that they had occurred; but he explained that the practice was common in Glasgow. It was also explained that the trustee had resigned one of the trusteeships, and had arranged with the creditors on the others for the payment of penal interest.

The LORD PRESIDENT said that this was a violation of the statute which the Court could not refrain from expressing their strongest disapproval of, as it had been reported to them. It is said to be a practice. If so, the sooner it is condemned the better. The trustee seems to be now practically out of office, and it is unnecessary to do anything more than to find that there has been a most improper violation of the statute which would have warranted removal from office, and which the accountant in bankruptcy has quite properly brought under our no-

tice. Indeed, he would not have properly discharged his duty if he had not done so. The trustee was found liable in expenses.

OUTER HOUSE.

(Before Lord Barcaple.)

GUNN *v.* BREMNER.

Process—Default in Reporting Proof. Held (per Lord Barcaple) that after an interlocutor circumducing the time for reporting a proof had become final, the report of the proof could not be received—the opposite party not consenting.

Counsel for Pursuer—Mr J. M. Duncan.
Counsel for Defender—Mr W. A. Brown.

In this case parties were appointed to report a joint commission by the third sederunt day. The pursuer failed to lodge his proof by this date, and after the case had been several times on the roll, and dropped with the view of enabling the pursuer to proceed in the matter, the case was put to the roll by the defender, and, on his motion, decree of circumduction of the period for reporting the proof was pronounced by the Lord Ordinary. After expiry of the reclaiming days, within which a note might be boxed to the Inner House for reponement, the case was put to the roll by the pursuer, and the Lord Ordinary was moved to allow him to lodge proof which he had led in the cause. It was maintained for the pursuer that the interlocutor pronouncing circumduction of the period of reporting had been pronounced *per incuriam;* that the notice of motion sent to the agent, upon which it followed, was a notice of a motion to circumduce the term of proof; and that until the terms of the interlocutor were read by the clerk, his impression was that no other order had been taken. The defender refused to give his consent to the proof being received, and, the Lord Ordinary holding that he had no power to do otherwise, refused a motion for the pursuer, asking leave to lodge the proof within a week.

(Before Lord Kinloch.)

ANDERSON *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Process—Default in Lodging Issue—Act of Sederunt, July 12, 1865. Held (per Lord Kinloch) that an issue not having been lodged within the time appointed, it could not be received even of consent.

Counsel for Pursuer—Mr J. T. Anderson.
Counsel for Defender—Mr Donald Mackenzie.

The 12th section of the recent Act of Sederunt, July 12, 1865, enacts that all appointments for the lodging or adjustment of issues shall be peremptory. This case was on the motion roll of Thursday, for the purpose of moving his Lordship either to receive the pursuer's issue or to prorogate the time for lodging it. Although this had how expired, it had not done so at the date when the case was enrolled for prorogation, and both parties were willing to consent to the prorogation asked, or to the issues being lodged. But notwithstanding section 4 of the Court of Session Act (1850), which allows prorogation of the "time for lodging any paper by written consent of parties," his Lordship refused the motion, holding that the terms of the recent Act of Sederunt, were imperative.

Tuesday, Dec. 5.

(Before Lord Barcaple.)

MITCHELL *v.* BRAND AND DEAN.

Arbitration — Decreet-Arbitral — Reduction. Held (per Lord Barcaple) that an arbiter had not disposed of the subject-matter submitted to him, and had irregularly issued decrees-arbitral disposing of the claims of two of the parties without disposing of the claim of a third — Decrees therefore reduced.

Counsel for Pursuer—The Solicitor-General and Mr Burnet. Agent—Mr John Thomson, S.S.C.

Counsel for the Defender Brand—Mr Patton and Mr W. M. Thomson. Agent—Mr Alex. Morrison, S.S.C.

Counsel for the Defender Dean—Mr Adam. Agent—Mr J. C. Baxter, S.S.C.

The pursuer and defenders, and the late John Brebner, under the firm of Mitchell, Brebner, & Company, entered into a contract in 1855 with the Inverness and Aberdeen Junction Railway Company for the formation of a portion of their line of railway. The partners agreed among themselves that the work should be divided into four sections, of which each partner should execute one. The work was performed under this arrangement, the pursuer executing not only his own section but also, by arrangement, that of Mr Brebner, who died shortly after the contract was entered into. After the work was completed, the parties differed as to the true meaning of an agreement which they had made as to the payment of the expense of extra works. They accordingly entered into a submission to Mr Alexander Gibb, C.E., Aberdeen, and he issued an award in 1860, in which he decided what was the meaning of the agreement. After this they still differed as to the division of a sum of upwards of £5000, which remained over after dividing the greater part of the contract price which had been received from the railway company. The difference arose in consequence of disputes as to claims advanced by each partner for extra works. A second submission was accordingly entered into to Mr Gibb for the purpose of fixing the amounts of these claims. This submission fell by lapse of time, and in 1863 a third submission was entered into. Under it Mr Gibb issued one decreet-arbitral awarding a certain portion of the balance to the defender Brand, and another awarding a certain portion to the defender Dean. No decreet-arbitral was issued in favour of the pursuer, because, as the defenders explained, he had never called on the arbiter to pronounce such a decree. There had been a draft decreet-arbitral, in which a sum was proposed to be found due to all the parties; but this draft was admittedly never extended or executed.

The pursuer brought a reduction of the decrees pronounced in favour of the two defenders; and after a debate, the Lord Ordinary has pronounced an interlocutor, in which he "finds that the decreets-arbitral sought to be reduced are inconsistent with the terms of the submission and *ultra vires* of the arbiter, and ought to be set aside in respect that the arbiter has not disposed of the subject-matter referred to him, in so far as he has not by said decreets-arbitral, or by any previous award or finding in the submission, substantially fixed and determined the extent and amount of the claims of the parties to the submission respectively as individuals, and not as partners, for their shares of the company assets against the balance of money received by Messrs Mitchell, Brebner, & Company, from the Inverness and Aberdeen Junction Railway Company; and also in so far as the said decreets-arbitral only dispose of the interest of the defenders respectively in the said balance of money, while the arbiter has not pronounced any judgment upon the interests of the pursuer therein." His Lordship therefore reduces the said decreets-arbitral, and finds the defenders liable in expenses.

A note is appended to the interlocutor, from which we make the following extracts:—"Reduction of the decreets-arbitral is sought for on various grounds, some of which the Lord Ordinary thinks are not well founded. But he is of opinion that the arbiter has committed two fatal errors in the manner in which he has professed to give forth his award. It may be that these errors arose from ignorance as to the proper forms of procedure; but the Lord Ordinary is of opinion that the first of them, at least, essentially affects the justice of the case, as well as the validity of the alleged decrees.

"The pursuer and the two defenders are the surviving partners of Messrs Mitchell, Brebner, & Co.