may have been, was committed in the course of his employment by them. I entirely concur with your Lordships that if that is so, the direction which the learned Judge was asked to give was not proper. But apart altogether from the question of fact, I think the direction itself would have been altogether misleading. The language in which it is expressed would not have been sufficient explanation to the jury what was the true legal formula upon which the Judge refused to give that direction.

LORD LOW—I take the same view of this case as that which has been stated by Lord Adam.

LORD M'LAREN was absent.

The Court disallowed the exception, discharged the rule, and refused to grant a new trial.

Counsel for the Pursuer—Comrie Thomson—Abel. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—Jameson—Wilton. Agent—John Rhind, S.S.C.

Wednesday, December 20.

FIRST DIVISION.

EDGAR, PETITIONER.

(*Ante*, p. 76.)

Tutor—Factor loco tutoris.

An aunt and her pupil niece were the only beneficiaries in a trust-estate. The aunt being one of the trustees, and under the trust-deed the sole tutor and curator of her niece *quoad* said estate, removed the child out of the jurisdiction of the Court, and failed to comply with an order of Court to appear personally at the bar. Her estates were thereupon sequestrated, and a judicial factor appointed.

In a petition at the instance of the child's father to have the aunt removed from the office of testamentary tutor and curator, and a factor *loco tutoris* appointed, or to have the child's interest committed to himself as her tutor curator, and administrator-in-law, the Court *appointed* the judicial factor on the aunt's estate to be factor *loco tutoris* to the child

Sequel to case reported *supra*, November 10, p. 76.

Upon 28th November 1893 James Edgar presented a petition setting forth that the trustees under Mr and Mrs Foster's trust-disposition and settlement were thereby appointed tutors and curators to such of the beneficiaries under the settlement as might be in pupillarity or minority, and that Miss Margaret Brown Fisher, as the only survivor of the original trustees, was sole tutor of the petitioner's daughter *quoad* all interest which she had in said trust-estate, and praying the Court in the circumstances "to remove the said Margaret Brown Fisher from the office conferred upon her by the said mutual trust-disposition and settlement of the said George Fisher and Mrs Everina Burns or Fisher, dated and recorded as aforesaid, of testamentary tutor and curator to the said Everina Burns Edgar, and, in the discretion of your Lordships, either to appoint such fit person as your Lordships may select to be factor *loco tutoris* of the said Everina Burns Edgar, with the usual powers, but only in so far as concerns her share and interest in the said trust-estate, he always finding caution before extract; or otherwise to abstain from making such appointment and to commit the care of the child's share and interest in said estate to the guardianship of the petitioner, her father, as her tutor, curator, and administrator-in-law."

No answers were lodged by Miss Fisher, but the other trustees lodged answers submitting that the petition was unnecessary, and respectfully urging that if an appointment were made it should be conferred on Mr Macleod, the judicial factor upon Miss Fisher's estate.

Upon 20th December 1883 the Court pronounced the following interlocutor:—

"Appoint Mr John M. Macleod, chartered accountant in Glasgow, to be factor *loco tutoris* to Everina Burns Edgar, mentioned in the petition, with the usual powers, including power to uplift and discharge all sums and estate due or to become due to her, he always finding caution before extract; and decern."

Counsel for Petitioner — Dickson — Christie. Agents—Simpson & Marwick, W.S.

Counsel for Trustees—Lees. Agents—Macpherson & Mackay, W.S.

Thursday, December 21.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HUNT *v.* HUNT.

Process—Expenses—Husband and Wife—Wife's Expenses of Reclaiming-Note Refused.

In an action of divorce by a husband against a wife, where the wife reclaimed against decree of divorce pronounced by the Lord Ordinary, and the Court adhered to the interlocutor without calling upon pursuer's counsel for a reply — *held* that the wife was not entitled to the expenses of the reclaiming-note.

Husband and Wife—Condonation by Husband of Adultery by Wife—Proof of Condonation—Cohabitation.

Opinion (*per* Lord Stormonth Darling) that condonation by a husband of his wife's adultery could not be in-

ferred from any act short of cohabitation.

George John Hunt raised an action concluding for decree of divorce against his wife Mrs Hester Black or Hunt on account of her adultery with John Campbell Mackenzie, and also for damages against the co-defender.

Both defender and co-defender lodged defences denying their guilt.

The defender also pleaded—"(3) The pursuer having on 16th or 17th February 1893 condoned the conduct of the defender and resumed cohabitation with her, cannot obtain decree of divorce on facts and circumstances alleged to have taken place prior to these dates."

On 18th July 1893 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor—"Finds facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery with the co-defender: Finds the defender guilty of adultery with the co-defender accordingly: Therefore divorces and separates the defender from the pursuer and from his society, fellowship, and company: Finds, decerns, and declares in terms of the conclusions of the summons for divorce: . . . Decerns against the co-defender for payment to the pursuer of the sum of £50 sterling in name of damages, with interest thereon as concluded for: Finds the co-defender liable to the pursuer in expenses as well for those incurred by the pursuer himself as for those for which the pursuer may be liable in respect of the expenses of the defender: Further, finds that the pursuer is liable to pay the expenses incurred by the defender," &c.

"*Note.*—. . . I therefore think that on the night of 16th February he was in a state of mind which made it very likely that he would condone his wife's offence, but I do not think it is proved that he ever actually did.

"That being so, it is unnecessary for me to come to any conclusion on a question which has never been conclusively settled in our law, whether there can be condonation without cohabitation. The canon law says there can, the law of England says there cannot. The opinion of the Judges who decided the case of *Ralston*, 8 R. 371, are rather in favour of the English view though the point was left open, and Lord Watson, in the case of *Collins*, 11 R. (H.L.) 39, 9 App. Ca. 205 (p. 257), speaks as if the resumption of cohabitation were necessary to constitute *plena condonatio* according to the law of Scotland. I should not like to say that condonation might not be constitututed in certain circumstances by a distinct and deliberate declaration of forgiveness though no cohabitation followed. But I am clearly of opinion that, to have the effect of remitting the injury, the declaration of forgiveness would require to be very deliberate and quite unequivocal. I do not think it could be inferred from any act short of cohabitation. In the present case I think there is no sufficient evidence of express condonation, and there is admittedly no cohabitation from which it can be inferred." . . .

The defender reclaimed, but on 21st December 1893 the Court adhered to the interlocutor of the Lord Ordinary without calling on the pursuer's counsel.

The defender thereafter moved that the pursuer should be found liable for the expenses incurred by her since the date of the Lord Ordinary's interlobutor. The defence raised a difficult question concerning the law of condonation which the defender was entitled to submit to the review of the Court—*Donald* v. *Donald*, March 30, 1863, 1 Macph. 141; *Hoey* v. *Hoey*, June 6, 1884, 11 R. 905.

Argued for the pursuer—He should not be found liable to pay the expenses of his wife since the date of the Lord Ordinary's interlocutor. No reclaiming-note should have been brought, and the case was so plainly made out that the Court had adhered to the Lord Ordinary's interlocutor without calling for a reply—*Montgomery* v. *Montgomery*, January 21, 1881, 8 R. 404.

At advising—

LORD YOUNG—We think no expenses in connection with this reclaiming-note ought to be allowed to the wife. That is the opinion of the Court.

The other Judges present were Lord Rutherfurd Clark and Lord Trayner.

Counsel for the Pursuer—Jameson—Maclennan. Agent—Snody & Asher, S.S.C.

Counsel for the Defender—Younger—Lyon Mackenzie. Agent—P. J. Purves, S.S.C.

Counsel for the Co-Defender—Grainger Stewart. Agents—Dalgleish, Gray, & Dobbie, W.S.

Friday, December 22.

FIRST DIVISION.

[Sheriff of Orkney and Shetland.

SMITH *v.* HUTCHEON (HARRISON & COMPANY'S TRUSTEE).

Bankruptcy—Trust-Deed for Creditors—Compensation—Balancing Accounts in Bankruptcy—Landlord and Tenant.

A tenant who had erected certain buildings on ground leased to him became bankrupt and granted a trust-deed for behoof of his creditors while the lease had still some years to run. The buildings erected were of the nature of tenant's fixtures, removable by the tenant at the expiry of the lease. After the bankruptcy it was agreed between the landlord and the tenant's trustee that the latter should renounce the lease, and that the former should take over the buildings, the loss of rent sustained by the landlord and the value of the buildings being ascertained by valuators mutually chosen. The agreement was silent as to whether the loss