Counsel for H. M. Advocate—R. V. Campbell, A.-D.—Donaldson. Agent—W. Morrison, P.-F.

Counsel for the Panel—C. N. Johnstone. Agent—Davidson, Cupar-Fife.

At Aberdeen, on 13th April, Francis Gove, aged thirty-two, was charged with murder, in so far as in a field in the parish of Laurencekirk he had attacked his father Francis Gove with a spade, and struck him with a spade upon the head, fracturing his skull, and causing death. The panel pleaded not guilty, and a special defence was lodged in these terms—"That the accused is not guilty, and was at the time of the offence insane, or labouring under mental delusions or maniacal paroxysms, which inspired an uncontrollable impulse, and deprived him of his senses." The facts of the case were spoken to by eye-witnesses, and no attempt was made to contest them. A brother of the panel said he was "queer," but he could not say he was "daft." And two labouring men, companions of the panel, said they had never seen anything insane about him. He was said by these witnesses to be a good and steady workman, and on the day on which the crime was committed they had observed nothing peculiar about him. A niece of the panel's said she thought him "queer." Dr Ogston, of Aberdeen, said—"My impression is that he was a man of somewhat weak understanding. I had very imperfect opportunities for forming an opinion. Lord Deas—What kind a man is he?—I think he is a man of good enough intellect. (Q) That he was not insane?—(A) I did not see any sign of insanity. (Q) Is that all you have got to say about him?—(A) Yes, that is all." Dr Beveridge, of Aberdeen, said the panel was morose, and very suspicious, fancying that everyone about him was an enemy, and was an "aggravated egotist." He said that from what he had seen of him he would have granted a certificate of lunacy. Dr Banks, of Aberdeen, had examined the panel six times, and would grant a certificate of lunacy.

Lord Deas, after reviewing the evidence, and reminding the jury that the evidence of medical men in questions of this kind was no more valuable than the common-sense judgment of the associates and friends of the panel, went on to say that what Dr Ogston said, that although there were no signs of insanity he was a man of weak understanding, was a matter which deserved their consideration. They had repeated instances, and he had himself told a jury, that although a prisoner might not be proved to be mad nor insane, if there was a certain degree of weakness of mind about him it was within their power to take that into account to the extent of returning a verdict of culpable homicide when otherwise they would return a verdict of murder. His Lordship then referred to the case of *Dingwall*, tried on a charge of murder, where this was done. The view taken in that case, his Lordship said, was now the recognised law of the land. There might be men of habits of mind who should not be punished with the capital sentence of death as they would have been if in full possession of all their faculties. He thought the prisoner's act was very like the act of somebody not free from some infirmity of mind.

The jury found the panel guilty of culpable homicide.

Lord Deas sentenced the prisoner to undergo penal servitude for fourteen years.

Counsel for H. M. Advocate—R. V. Campbell, A.-D.—Donaldson. Agent—G. S. Caird, P.-F.

Counsel for Panel—Hay. Agent—Crockatt, Stonehaven.

COURT OF SESSION.

Saturday, May 13.

FIRST DIVISION.

BLOE *v.* BLOE.

Parent and Child—Father's Right to Custody of Infant Child.

A wife living apart from her husband is not entitled to retain the custody of a child of the marriage; and averments of cruelty which would be relevant in an action of separation and aliment are not a relevant answer by her to a petition by the husband for custody of the child.

This was a petition by Alfred Henry Bloe, residing in Dundee, for custody of the child of the marriage between him and Mrs Margaret Ross or Bloe. The marriage took place in July 1880, and the child of which the petitioner here asked the custody was born in June 1881. The petitioner and his wife lived together till October 1881, when Mrs Bloe left her husband's house, taking the child with her, in consequence, as the petitioner alleged, of petty differences which had arisen between the spouses. The petitioner produced copies of various letters which he had written to her after the separation, and in which he begged her in affectionate terms to return. In these letters the petitioner admitted that he had treated his wife with some unkindness, for which he begged her forgiveness. Mrs Bloe did not answer these letters. The petitioner thereupon consulted a law-agent, and after certain correspondence between him and an agent acting on behalf of Mrs Bloe, this petition was presented on 31st January 1882, the child being then seven months old. The petitioner averred that he had a suitable home to which to take the child, that his mother would take care of it, and that a nurse would be provided. Mrs Bloe lodged answers, in which she averred that the petitioner had treated her with great cruelty both before and after the birth of the child, and in particular had struck her on various occasions with his fist, that he had called his child a great nuisance, and had said that he wished to get quit of it, and that finally he had insisted on her leaving the house, and on her doing so had acquiesced in her taking the child with her. She averred that at the date of the answers (11th Feb. 1882) the child was not yet weaned, and produced a medical certificate to the effect that its removal at that time would be dangerous to its health. She submitted that the respondent was not a fit person to have the custody of the child, and averred that it was his intention to remove to England and deprive her of all access to it.

The petition was allowed to stand over till the Summer Session.

The petitioner argued that his right as father to the custody of his child was clear, unless the respondent took steps to obtain a judicial separation with right of custody of the child.

The respondent moved for a proof of the statements in the answers, which, if true, would show that the petitioner was not a fit person to have the custody of the child.

At advising—

Lord President—I think that the law and practice in this matter are well settled, and I do not see how we can refuse the prayer of this petition, subject of course to proper conditions as to the wife's access to the child. The wife is living in separation without the consent of the husband, and, indeed, against his protest. She has taken no means to get a judicial separation, and, in short, no means to justify the position she has taken up. In these circumstances the custody must be given to the father, unless the mother shows that the health or morals of the child would be placed in peril by its being in the custody of the father. Here we are bound to grant the father's petition subject to proper conditions as to the mother's access.

Lord Deas—I am of the same opinion. We have no choice in the matter. The petitioner admits he has been to blame in the way he has treated his wife, but that will not lead to the conclusion that without a separation the wife can demand the custody of the child. If her complaints are to be seriously persisted in there is no way for her but a process of separation.

Lord Mure—I am of the same opinion. I think that however relevant the wife's statement would be in a process of separation, they are not relevant in such a petition as the present.

Lord Shand—If this case had been disposed of at the date of presenting the petition in January or February last, I think the petitioner could not then have succeeded, for the child was not then weaned, and it might have been injurious to its health to remove it from the mother. But as the case now stands, I think it is ruled by the authorities cited at the bar that the husband, though not entitled to have the petition granted at the date at which he presented it, is entitled to have it granted now.

Lord Deas—I agree with Lord Shand in thinking the question would have been different as at the date of the presenting of the petition.

Guthrie, for respondent, moved for expenses.

Rhind, for the petitioner, objected to expenses being granted. It was not matter of course that a husband should in a petition for custody of children have to pay the expenses of the wife—Fraser on Husband and Wife; *Lang* v. *Lang*, January 30, 1869, 7 Macph. 445; *Symington* v. *Symington*, July 16, 1875, 2 R. 974.

Lord President—In this particular case we think the wife should have expenses. The husband's petition was premature.

The parties being agreed as to the access to be afforded to the mother, the Court found the petitioner entitled to the custody of the child, subject to its being sent to the mother's residence one day in each week from 11 to 6, and to her being entitled to visit it at the petitioner's residence at such times as she might choose.

Counsel for Petitioner—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—Guthrie. Agents—Henderson & Clark, W.S.

Tuesday, May 16.

SECOND DIVISION.

[Lord Fraser, Ordinary.

COLLINS *v.* COLLINS AND EAYRES.

Husband and Wife—Divorce—Condonation—Competency of Proof of Prior Acts of Adultery.

Held, in an action of divorce by a husband on the ground of adultery, alleged to have been committed subsequently to certain other alleged acts of adultery which were admitted to have been condoned by him, that though the acts condoned could never be made the sole ground of divorce, the husband was not to be excluded by his condonation from leading evidence as to these prior acts of adultery in order to throw light on the subsequent conduct of the parties.

Question as to the effect of proof of the alleged adultery prior to condonation.

The pursuer in this case, Alexander Glen Collins, was married to the defender in Glasgow in June 1872, and the parties thereafter cohabited there as man and wife. In February 1882 the present action of divorce on the ground of adultery was raised by the husband against his wife, and against the co-defender Eayres, a fiddler, for damages. The pursuer alleged that in July 1881 he, for the first time, became aware of a guilty intimacy between his wife and the co-defender, and libelled several specific acts of adultery in that year; averring also that his wife had admitted to him her misconduct, but that he had, however, for the sake of his children, of whom there were four born of the marriage, condoned his wife's misconduct on the express condition, undertaken by her at the time, that she should never again speak or write to the co-defender. He further averred that in the months of December 1881 and January 1882 the defender had renewed her intimacy with the co-defender, who had then come from London, where he usually resided, to fulfil a musical engagement in Glasgow; that they had been in the habit of meeting and walking together alone; that on or about the 26th of January they had committed a specific act of adultery; and that he had in consequence since withdrawn from his wife's society.

The defender denied adultery, and averred that the pursuer, in belief of the prior intimacy alleged by him in May and June, and in knowledge of the meetings with the co-defender in December and January, which she admitted, had continued his cohabitation up to the 2d of February. The co-defender also denied adultery, but admitted having on one or two occasions met and spoken to the defender.