The trustee appealed against these deliverances.

TRAYNER, for him, cited *Mackersy* v. *Mackenzie*, March 1, 1823, 2 S. 256, 21 F.C. 193; *Sawers* v. *Balgarnie*, Dec. 17, 1858, 21 D. 153.

SCOTT, for the respondent, argued that all that was allowed by the statute was an examination relative to the estate of the bankrupt, and that the questions objected to had nothing whatever to do with the estate.

At advising—

LORD PRESIDENT—This is an appeal against the ruling of the Sheriff in an examination under the 90th section of the Bankruptcy Act. In the course of this examination a witness, Mr Officer, was asked —"When did you see the bankrupt last?—Depones, I saw him about the beginning of June current. Interrogated, Where?—Depones, In London. Interrogated, Do you know where he is now?—Depones, I decline to answer that question on the ground of confidentiality, unless directed to do so by the Sheriff." Then the Sheriff-Substitute "sustains the declinature, in respect the question has no reference to the bankrupt's affairs." Now, I think that the Sheriff did quite right in sustaining the declinature, and that he assigned the true reason. The 90th section empowers the trustee to apply to the Sheriff to order an examination on oath of the bankrupt's wife and family, clerks, servants, factors, and others, who can give information relative to his estate, and issue warrant requiring such persons to appear, and if they refuse to appear the Sheriff may issue a warrant to apprehend the person so failing to appear; then the 91st section enacts that the "bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of account, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same, or copies thereof, to be delivered to the trustee." Now, a very stringent scrutiny is here permitted, and persons are compelled to answer questions in which they have no interest, but the statute confines the subject of examination to the estate and affairs of the bankrupt, and a person who cannot give any information on these subjects cannot be questioned in reference to other matters. Here the question was, where is the bankrupt?—that is not a question about the estate, it is a question about the whereabouts of the bankrupt himself, and however important it might be to the trustee to get an answer to that question, he could not competently ask it under the 90th section of the statute, and the Sheriff was quite right in disallowing the question.

But the examination goes on—"Have you any letters from the bankrupt relative to his affairs?—Depones, No. Interrogated, Have you received any letters from the bankrupt since he left Edinburgh?—The witness stated that he had received no letters from the bankrupt relative to his affairs, and declined to answer the question upon that ground, and also on the ground of confidentiality." Here again the Sheriff-Substitute sustained the objection. Now, if the witness had said that he had letters from the bankrupt, but that they contained nothing relative to the estate or affairs of the bankrupt, I do not think that he could be allowed to be sole judge whether the letters really contained matters about the affairs of the bankrupt or not, but that the Sheriff-Substitute would have a right to look at the letters and satisfy himself. But it was not alleged here that the witness had letters containing any such information, so I think that the Sheriff was again right in sustaining the objection. I am therefore of opinion that the appeal should be dismissed.

The other Judges concurred.

Agents for Appellant — Lindsay, Paterson, & Hall, W.S.

Wednesday, July 17.

BRODIE *v.* DYCE.

Proof—Competency—Filiation.

Circumstances in which, after proof had been closed in the Sheriff-court, in an action of filiation and aliment, the Court allowed the pursuer, who was a married woman, to lead evidence—that of herself and her husband excepted—to prove that there had been no access, and to rebut the presumption *pater est quem nuptiæ demonstrant.*

Question, Whether the evidence of the pursuer and her husband could have been admitted?

Betsy Paterson or Brodie, Dundee Road, Forfar, raised an action of filiation and aliment in the Sheriff-court of Forfar against James Dyce, farmer, Spittalburn, near Forfar.

On 2d November 1871 the Sheriff-Substitute (ROBERTSON) pronounced the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators, and having made avizandum with the proof and whole process, finds, in point of fact, that the defender is the father of the pursuer's illegitimate child, born in May 1871; finds, in point of law, that he is liable in inlying expenses and aliment, therefore decerns against him, conform to the conclusions of the summons; finds him liable in expenses; allows an account of these to be lodged by the pursuer, and remits the account, when lodged, to the Auditor to tax and report, and decerns.

"*Note.*—This is a somewhat obscure case. If the defender is not really the father of this child, he has at least, by his own imprudent conduct, placed himself in such suspicious circumstances as to warrant the Sheriff-Substitute in giving the presumption against him.

"The pursuer is a young woman of somewhat attractive appearance, and the defender is a middle-aged married man, with a grown-up family. The character of the pursuer is perhaps as bad, morally, as it could well be; she is married, and has already since her marriage had an illegitimate child to another married man, besides having had an illegitimate child before marriage. No doubt her bad moral character is against her speaking the truth, but it tells against the defender also. The Sherff-Substitute cannot believe that the defender was wholly ignorant of the pursuer's character and antecedents at the time he visited her lodgings and treated her to drink at public-houses, as comes out in evidence. She had been living for years apart from her husband; she had had a child by a married farmer in the defender's neighbourhood—a circumstance that most likely would attract attention, because the case was made public by an action in Court. She was intimate with Robb and Rough, friends of the defender, who are said by him to have had improper dealings with her; and, above all, the defender never mentioned his acquaintance with the pursuer to his wife or family.

"The first intimation Mrs Dyce got of the acquaintance was a letter from the pursuer accusing her husband.

"The Sheriff-Substitute thinks this is very suspicious; for the defender had often met this woman, had visited her, had slept in her house, and afterwards had missed money and other articles from his pockets, about which his wife had questioned him. He had arranged an interview with the woman, in company with a female friend, after the pursuer had demanded money, and yet Mrs Dyce, his wife, knew nothing of all this. But one conclusion can be drawn, namely, that improper intimacy existed, of which he was afraid to speak.

"If the Sheriff-Substitute is right in this assumption—an assumption which is also supported by the evidence of Ann Boyle, a woman who saw the defender one night go to the door with the pursuer in her night-clothes, and remain outside with her for twenty minutes—if he is right in this, then it is proved beyond a doubt that the defender was in the pursuer's house for an improper purpose one night exactly eleven months before the birth. That he was there that night, and alone with the pursuer until about four in the morning, he himself admits.

"The question then arises, Has he been there since? He denies it; she affirms it. The Sheriff-Substitute is here constrained to accept the evidence of the boy Spence, who says he saw the defender in the house at Dundee Road twice; and if this is true, the defender must have been there since the night eleven months before the birth. The exact date is unknown, but it comes sufficiently near the time of conception to fix the paternity. Nothing is more probable than that the defender did visit the house about this time. He had to pass the door on his way home of an evening, as usual; and having once found his way there, and slept there some hours, he may very easily have again availed himself of the opportunity. His habits of intemperance would make him an easier prey.

"The Sheriff-Substitute has not overlooked the fact that the pursuer in many instances is contradicted; he also sees the possibility that the boy Spence may have been tutored, and that the witness Boyle may have been tampered with; but, even with all these difficulties in the case, he thinks the defender must take the consequences of his own indiscretion."

The defender appealed to the Sheriff.

The Sheriff (HERIOT) pronounced the following interlocutor:—

"*December 30th*, 1871.—"The Sheriff having considered the appeal for the defender against the interlocutor of 2d November last, and made avizandum, and having considered the record, proof, and whole process, recalls, *in hoc statu*, the interlocutor appealed against; recalls also the interlocutor of 18th October last, circumducing the term for proving; and appoints the pursuer, within ten days after intimation hereof, to lodge a petition, in terms of sec. 83 of Act of Sederunt 10th July 1839, stating the facts, and the witnesses by whom they are to be proved, as proposed by her procurator at the debate before the Sheriff; and appoints the defender to answer said minute within eight days after the said petition is lodged, and remits the case back to the Sheriff-Substitute to dispose of said petition, and do further, as may be just, and decerns.

"*Note.*—This is a very exceptional case. It seems to the Sheriff to be almost impossible to consider this case unless the pursuer's husband be examined. The pursuer's procurator stated that they would endeavour to discover him, and examine him. It seems that justice cannot be done between the two parties to this case unless the pursuer's husband be examined. See case of *Scott*, Nov. 25, 1864, 37 Jur. 64."

In accordance with this interlocutor the pursuer lodged a petition setting forth the following averments:—

First, the petitioner, who has been twice married, avered that the person to whom she was married the second time, on 12th November 1866, deserted her and her three children immediately after the ceremony of marriage was performed, and had not cohabited with her since the marriage. He gave his name as James Brodie, belonging to Lochee, in the parish of Liff and Benvie, and is believed to be an Irishman.

Second, the petitioner narrated how she came upon the parish after her husband's desertion, and how, although the inspector made diligent search for Brodie, he could not find him.

In the *third*, *fourth*, *fifth*, and *sixth* heads of the petition the petitioner narrated that after a long and diligent search for her husband she had at last found him suffering from typhus fever in the Royal Infirmary of Dundee.

Seventh, the petitioner averred that she informed the Registrar of the parish of Forfar that the child in question was illegitimate when she called to get the birth registered, but as the Registrar knew she was a married woman he refused so to register it.

Under the *eighth* and *ninth* heads the petitioner stated that it was untrue that her husband had refused his consent to the action, and that she had not seen him for three or four years.

On 22d January 1872 the Sheriff-Substitute pronounced the following interlocutor upon the above petition:—"The Sheriff-Substitute having considered the interlocutor of the Sheriff, of date 30th December 1871, and having made avizandum with the petition, No. 15 of process, together with the answers to said petition, No. 32 of process, on payment by the petitioner to the respondent James Dyce, of the sum of £3, 3s. of modified expenses, allows the petitioner a proof of the averments contained in the petition, and to the respondent James Dyce a conjunct probation; and appoints the case to be enrolled, to fix a diet of proof *quam primum*."

"*Note.*—The Sheriff thinks the petitioner's husband should be examined. It appears that at present he is an inmate of the Dundee Infirmary. His evidence can be taken on commission if he is too weak to attend the Court; and as he appears to be liable to criminal prosecution for deserting his wife, it may be as well to secure his evidence before his convalescence, in case he should abscond."

Both petitioner and respondent appealed to the Sheriff—the latter only against the finding for expenses.

The Sheriff pronounced this interlocutor:—

"*February* 29, 1872.—The Sheriff having considered the appeals for the parties against this interlocutor of 22d January last, and made avizandum, and having considered the petition, No. 15 of process, and answers, No. 32 of process, sustains the said appeals: Finds that the pursuer has not in said petition stated or shown any such 'very weighty reasons' as to entitle her to any further

proof, therefore dismisses the said petition; and having resumed consideration of the record, proof, and whole process, Finds, in point of fact, that the pursuer has failed to prove that the defender is the father of the child libelled: Therefore dismisses the summons, and assoilzies the defender from the whole conclusions thereof: Finds the defender entitled to expenses; allows an account thereof to be given in; and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns.

"*Note.*—The Sheriff, as requested, gave the pursuer an opportunity of showing 'very weighty reasons' why she should yet be allowed to lead further proof, and in particular still to examine her husband.

"Having heard parties, and carefully examined the petition, No. 15 of process, the Sheriff finds himself unable to hold that she has stated any such 'very weighty reasons' as to entitle her to lead further proof.

"It is not even said that she had endeavoured and failed to find her husband for examination before the proof was circumduced. It would rather seem that the pursuer did not in time perceive the importance of examining her husband, to entitle her to succeed in her action. The defender, while he denied the statements in the summons, averred that a number of men specified had had intercourse with the pursuer, but not a word is said as to her own husband having had such intercourse, and not a question is put to the pursuer when examined as to this; and it is only after the proof is concluded that the plea is raised, '*Pater est quem nuptiæ demonstrant*,' but nothing of this kind is alleged in the said petition. The statements in the petition, such as they are, seem to the Sheriff to be irrelevant. No reason is stated why her husband was not examined at the proof formerly taken by the Sheriff-Substitute.

"Then, on considering the proof as taken, the Sheriff finds that he cannot hold that the pursuer has proved her case. Her husband, it appears from the proof, has been living at Dundee, within a three hours' walk of Forfar, and within an hour by rail. For aught that appears, her husband may have come to Forfar every Saturday night, and returned to his work in Dundee every Monday morning. In short, there is nothing whatever in the proof, as led, to elide the presumption, '*Pater est quem nuptiæ demonstrant.*'"

The pursuer appealed to the First Division of the Court of Session.

JAMESON, for her, argued that it was not necessary to prove actual impossibility of access on the part of the husband, but that all that was required by law was proof that *de facto* there had been no access, and that by the law of Scotland it was competent to call the husband and the mother to rebut the presumption *pater est quem nuptiæ demonstrant.* —Bankton, 1, 2, 3; Craig, 2, 18, 17, 20; Erskine's Institutes, 1, 6, 49; Erskine's Principles, 1, 7, 36; Stair, 3, 3, 42; Decretals of Gregory, 2, 19, 10, and 4, 17, 3; *Mackay*, Feb. 24, 1855, 17 D. 494; *Jobson* v. *Reid*, May 31, 1832, 10 S. 594; *Beattie* v. *Baird*, Jan. 15, 1863, 1 Macph. 273; *Walker* v. *Walker*, Jan. 23, 1857, 19 D. 290; Dickson on Evidence, vol. ii, p. 999; *Sandilands* v. *Nimmo*, Feb. 14, 1855, 27 Scot. Jurist, 178; *Legge* v. *Edmonds*, 25 L. J. Chan. 125: *Morris* v. *D* , 5 Clark and Finelly; Weightman on Legitimacy and Divorce, p. 145-149; *Atchlay* v. *Sprigg*, March 5, 1864, 33 L. J. Chan. 345; *Gurney* v. *Gurney*, May 5, 1863, 32 L. J. Chan. N. S.,463; Taylor on Evidence, 838; *Rex* v. *Sourton*, 5 Ad. and Ellis, 180; *Plowes* v. *Bossey*, Feb. 25, 1862, 31 L. J. Chan. 681, 6.

FRASER, for the defender, argued that no weighty grounds had been submitted why additional proof should be allowed, and, that being the case, the Sheriff had no choice but to give weight to the presumption "*pater est quem nuptiæ demonstrant*," as the husband had all along been living near his wife, and had had all opportunity of seeing her. It was settled law in England that the evidence of the husband or wife in such a case as this was not admissible, and although in some cases similar evidence had been admitted in Scotland, yet it had only been admitted to prove facts which had occurred before the circumstances which gave rise to the action took place—*Legge* v. *Edmonds*, Nov. 20, 1855, 25 L. J. (Chancery) 125; *Rex* v. *Inhabitants of Sourton*, May 28, 1836, 5 Adolphus and Ellis, 180.

LORD PRESIDENT—It may be possible to rebut the presumption without the pursuer's adducing herself or her husband as witnesses. In that case it would be unnecessary for the Court to decide whether such evidence is admissible. The Court will therefore open up the proof and allow the pursuer to lead other witnesses—except herself and her husband—to show that there has been no access, reserving consideration whether these two witnesses can be admitted. The proof to be taken before Lord Ardmillan.

JAMESON submitted that, on account of the poverty of the pursuer, and the near approach of the vacation, it would be expedient for their Lordships to grant commission, under the 2d section of the Evidence Act 1866, 29 and 30 Vict. 112, to take the evidence at Dundee.

FRASER opposed the motion, on the ground that no special cause had been shown.

The Court, however, granted commission to the Sheriff-Substitute at Dundee to take the evidence.

Agents for the Pursuer—Macrae & Flett, W.S.
Agent for the Defender—John Galletly, S.S.C.

Thursday, July 18.

JAMES MELLIS, PETITIONER.

Inhibition—Recall—Service.

Circumstances in which the Court granted the prayer of a petition for recall of inhibitions, without service of the petition upon the inhibitors.

This was a petition presented by James Mellis, soap-boiler in Prestonpans, for recall of inhibitions. The petition proceeded on the following narrative. That in 1844 the petitioner carried on business along with Mr Wm. Thompson in Newcastle-upon-Tyne, and in Buenos Ayres and Monte Video, as merchants and commission agents, under the designation of Thompson, Mellis & Company. That the co-partnery so constituted became bankrupt, and that on 22d January 1844 a fiat was issued against them, directed to the District Court of Bankruptcy at Newcastle-upon-Tyne, and the said William Thompson and the petitioner were thereupon adjudged bankrupts. Thereafter, in pursuance of the Bankruptcy Statutes then in force in England, the petitioner surrendered, and made a full disclosure and discovery of his estate and