examined, that the pursuers' design was or could be registered for any of the purposes authorised by the statute except its shape or configuration, attended as that shape is with useful results. A person alleged to be an infringer is quite entitled to demand of the person complaining that he shall state for what purpose or purposes under the statute the design was registered, and if he be dissatisfied with the answer he may under legal proceedings have such an inquiry as has taken place on that question in this case with reference to the pursuers' design. He may in that inquiry be able to show that the complainer is seeking to use the certificate of registration of the design for a purpose and to an effect which is not warranted by the design either as self-interpreting or as interpreted by the evidence where there is a question, and in that case he may succeed in his defence. I do not think it is possible to read the enactment of the statute, which leaves matters, and obviously designedly leaves matters, without special provisions on this subject, in any other way. For the only other reading would result in this, that where any design had a special or peculiar shape with some ornament, however slight, and was consequently registered on account of the shape, an infringer would be enabled to defeat the copyright by merely alleging that the design registered for shape was protected only as regards the ornament, or that the object of registration was doubtful, and so the registration was ineffectual, and that evidence could not be admitted on the subject. Such an interpretation of the statute would lead to the result that in the great majority of designs for which the statute obviously is intended to give protection no such protection could be given. This view of the statute does not recommend itself, and is not in my opinion to be adopted. It seems to me that in order to give reasonable effect to the statute the claim or representation of the pursuer in such cases not only may be the subject of evidence such as we have in this case, but may further be solved by an easy and certain test. The statute (section 47, subsection 3) provides that the application for registration "must contain a statement of the nature of the design" as well as of the class or classes of goods in which the applicant desires that the design be registered. This infers that the applicant shall state the purpose or object for which the design is to be registered, pattern, shape, or ornament, and accordingly in the Board of Trade rules issued in virtue of the statute it is provided by rule 9 that the application "shall, in describing the nature of the design, state whether it is applicable for the pattern, or for the shape or configuration of the design." I see no reason to doubt that when a controversy on this subject arises in judicial proceedings for alleged infringements of the design, and it becomes necessary to determine whether protection was given to the design for its pattern, shape, or ornament, "or for any two or more of such purposes," either party may refer to the application for registration for a definition or description of the purpose of the registration, and the Court will, where necessary, order the evidence on this subject to be produced, and such evidence should go far to decide the controversy. In the present case it is proved that the application was for a design for a "range fire-door with moulding on top, moulding forming front of range. Shape to be registered." This piece of evidence by itself, and even more strongly if regard be had to the other evidence in the case, makes it clear that the pursuers' design was registered not for any mere matter of ornament in connection with the form of hinges of the door or otherwise, but, without reference to ornament, solely for its shape in connection especially with the moulding on the top which has material advantages.

I am of opinion that the pursuers' design was novel, that the design was registered for its shape or configuration, that it was a proper subject for registration and certificate under the statute, and as the design was clearly copied by the defenders the alleged infringement has been made out. On these grounds, though differing in some respects from the views of the Lord Ordinary, I am of opinion that his Lordship's judgment should be affirmed.

The Court adhered.

Counsel for the Complainers—D.-F. Mackintosh—Ure. Agents—Auld & Macdonald, W.S.

Counsel for the Respondents—Balfour, Q.C.—Wilson. Agents—J. & J. Ross, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STEEDMAN *v.* STEEDMAN.

Husband and Wife—Divorce—Adultery—Pater est quem nuptiæ demonstrant.

A husband and wife separated voluntarily in 1865, six weeks after the marriage, and thereafter lived in separate houses in the same town. The husband, however, subsequently visited and had connection with his wife, who bore one child in 1866, and another in 1869. In 1885 the wife bore another child, in consequence of which the husband raised an action of divorce on the ground that the child was the result of adulterous intercourse. *Held*, upon the evidence, that the presumption *pater est quem nuptiæ demonstrant* had been rebutted, and decree of divorce *granted*.

Observations upon *Montgomery* v. *Montgomery*, January 21, 1881, 8 R. 403.

William Steedman, quarryman, Lochgelly, was married to Magdalene Brown on 27th November 1865. For about six weeks after their marriage the spouses lived together in Park Street, Lochgelly, when they quarrelled and separated, Steedman returning to live in his father's house, which was next door to that which his wife continued to occupy. He continued to visit her up to June 1868, when he began to suspect her of improper conduct with other men. In October 1869 Mrs Steedman removed to a house in High Street, Lochgelly. There were then two children of the marriage—Magdalene, born 3d April 1866, and Margaret, born July 29th 1869. Mrs Steedman then brought an action for aliment against her husband, which was settled by a minute of agree-

ment in February 1870. Up to 30th October 1885 Steedman paid his wife aliment at the rate of 6s. a-week. During this period both parties resided in Lochgelly.

In October 1885 Mrs Steedman bore a male child, and in consequence thereof her husband raised this action of divorce, on the ground that the child was the result of adulterous intercourse with some person or persons unknown.

The pursuer's case was that since a month previous to the birth of the second child in 1869 he had not cohabited nor had sexual intercourse with the defender, nor been in her house, nor spoken to her, except on two occasions in the summer of the year 1869, when he called to arrange with her the terms of the agreement for payment of aliment to her.

The defender averred that "after the birth of the second child the pursuer continued to visit the defender in the evenings up to November 1869, and he again commenced visiting the defender in the beginning of October 1884, and continued these visits down to the beginning of March 1885. These visits were generally in the evenings, between seven and nine o'clock, but he never remained all night with the defender. In consequence of the intercourse with the pursuer the defender was again delivered of a third child on 4th October 1885."

At the proof the defender deponed—"The statement in the answers to this case that pursuer continued to visit me till November 1869, and that he again commenced visiting me in October 1884, is not correct. Between 1869 and 1884 he wanted me to leave for a foreign country. I did not tell that to my agent. I neglected it. It was in the evening between eight and ten o'clock that my husband visited me. He did not come on any particular day of the week—towards the end of the week. He did not visit me in the summer, only in winter, when it was dark. He always came at night, for fear any person would see him. I suppose he was afraid of his sisters and brother. He did not see anyone in my house when he visited me. My daughter was often at the singing when he came. She is seventeen years of age." The defender's statement was entirely uncorroborated. No one spoke to having seen the parties together on the occasions mentioned by the defender in her answers. On the other hand, there was no evidence of the defender's adultery or even of her intimacy with other men. The import of the proof in other respects appears sufficiently from the opinions of the Judges.

On 17th November 1886 the Lord Ordinary (M'Laren) found that the pursuer had committed adultery with some person unknown, and granted decree of divorce.

"*Opinion.*—This is a narrow case, but after taking time to consider the evidence I have come to the conclusion that the pursuer is not the father of the child to which the defender gave birth on 4th October 1885, and therefore that the charge of adultery is proved.

"The parties were married in November 1865, and about six weeks after the marriage they separated, in consequence apparently of differences about money matters. The wife (defender) continued for a time to reside in the married home, and the husband went to live with his father, brother, and sister in the same street of Lochgelly in which his wife resided. About three years later the defender brought an action for aliment against her husband, which in February 1870 was settled by a minute of agreement. Since then the parties have continued to live apart in Lochgelly in different quarters of the town.

"The case of the defender is that her husband during the period of the separation made clandestine visits at her house in the evenings, and that he is the father of the child. The pursuer admits that he occasionally visited the defender during the first three years after the marriage, but he states that since 1870 he has never seen his wife, giving as his reason that he suspected her of improper intimacy with men.

"So far as the case depends on direct evidence we have nothing but the statement of the husband contradicted by that of the wife. The wife is entitled to have it remembered in her favour that she has borne a good character, has brought up her children respectably, and is not proved to have been unduly intimate with other men.

"It appears to me, however, that the wife's story is intrinsically incredible. I can understand that she should receive visits from her husband after their separation, but such visits would not naturally be of a clandestine character; and if they were continued, as the wife says they were, I think it is quite certain that the fact must have come to be known to some person or persons other than the defender herself. Further, when the defender became pregnant, if her story were true, she certainly would have informed her husband of the fact, and would probably, for the sake of her own reputation, have mentioned the circumstance of her husband's visits to her family and friends. She admits that she did not inform the pursuer of her pregnancy, and she is unable to bring forward any witness to prove that her husband had been seen visiting her house since the separation. I may add that none of the husband's family profess to have any knowledge of the alleged visits.

"A very remarkable, and to my mind conclusive, piece of circumstantial evidence has now to be noticed. Since the separation of the parties a large tumour or wen has appeared on the pursuer's forehead. It is, I need hardly say, a very noticeable feature of the pursuer's face, and one which could not fail to attract his wife's attention if she had ever seen him after it appeared; yet when under examination she was unable to say that any change had taken place in her husband's face since she knew him, and she seemed very much surprised when her husband entered the Court-room, and with the growth on his face was presented to her for identification.

"In all the circumstances I shall find the adultery proved, and grant decree of divorce."

The defender reclaimed, and argued that the presumption *pater est*, &c., had not been rebutted—Stair, iii. 3, 42; Bankton, i. 2, 3, and 4—iii. 3, 98; Ersk. i. 6, 49, and 50; Bell's Prin. sec. 1626; *Routledge* v. *Carruthers*, May 19, 1812, F.C.; *Innes* v. *Innes*, July 7, 1835, 7 Scot. Jur. 470; and Feb. 20, 1837, 2 S. & M'L. 417; *Sandy* v. *Sandy*, July 4, 1823, 2 S. 453; *Jobson* v. *Reid*, Jan. 19, 1830, 8 S. 343; *Mackay* v. *Mackay*, Feb. 24, 1855, 17 D. 494; *Walker* v. *Walker*, Jan. 23, 1857, 19 D. 290; *Tulloh* v. *Tulloh*, Feb. 28, 1861, 23 D. 639; *Brodie* v. *Dyce*, Nov. 29, 1872, 11 Macph. 142: *Gardner* v. *Gardner*, May

30, 1876, 3 R. 695; and May 17, 1877, 14 R. 56; *Reid* v. *Milne*, Feb. 8, 1879, 6 R. 659; *Montgomery* v. *Montgomery*, Jan 21, 1881, 8 R. 403.

Respondent's Authorities—*Morris* v. *Davies*, 1837, 5 Cl. & Fin. 242; Tait on Evidence, 490.

At advising—

Lord Mure—This is a somewhat special and, as the Lord Ordinary has remarked, narrow case. It is an action of divorce by a husband who has been living separate from his wife for a great many years, but in the same town, and who alleges that since the end of 1869 he has never been in the same house with the defender, or had intercourse or communication of any kind with her, and the action is rested on the ground that the defender committed adultery in the years 1884-85 with some person or persons unknown to the pursuer which resulted in her giving birth to an illegitimate child in October 1885, of which the pursuer was not the father.

The fact of the birth of this child is not disputed, but the adultery is denied, and it is alleged that the pursuer is himself the father of the child, having, as the defender alleges, visited and had intercourse with her occasionally in 1884 and 1885, and one peculiarity of the case is that the parties, after their separation in 1865, had intercourse with each other in the defender's house, which resulted in the birth of their second child; and the defender's allegation on record in this case is that this clandestine kind of intercourse was renewed and continued for some time in the year 1884. Upon the admitted facts of the case as set out in the record it is clear that there was no intercourse of any kind between the parties for fifteen years prior to the alleged visits in 1884.

In that state of matters, your Lordships have to decide whether the present pursuer can be held to have established his case, especially looking to the circumstances that he and his wife lived near each other and in the same village. The state of the law does not admit of any dispute. In the last case which came before this Division on this branch of the law I appear to have given the opinion of the Court, and to have said this (*Montgomery*, 8 R. 403)—"Whatever difficulty there may have been some years ago in laying down the law relative to the application of the rule *pater est quem nuptiæ demonstrant*, in circumstances such as those which here occur it may, I apprehend, be held as now authoritatively settled both in this country and in England that the rule may be met by direct or even circumstantial evidence sufficent to negative the presumption, and that in dealing with such a case the question to be disposed of is one of fact, viz., whether the circumstances disclosed in evidence are such as to satisfy the Court that no sexual intercourse took place between the parties at the period when it is alleged that it occurred." And then I refer to the case of *Patterson*, 11 Macph. 142, and to the opinions expressed by Lords Lyndhurst and Cottenham in the English case of *Morris* v. *Davies*, 5 Clark and Fin. 242, as corroborating the view I had expressed.

That being the law upon the subject, I have to say that after anxious consideration I have come to the same conclusion as the Lord Ordinary. I think the child is not the result of intercourse between the pursuer and defender There is no evidence in the case to show that they have ever met during the last fifteen years, or that the pursuer has ever seen the defender during that time. The pursuer's evidence is quite distinct, and completely negatives the allegation that he was in the defender's house in 1884. It is, further, of the greatest importance in the case that the parties admittedly lived separate for fifteen years, and that the pursuer is not proved to have been seen with the defender or at her house during that period. These facts are strongly confirmatory of the pursuer's case that he never was there, and taken along with the other fact of the birth of the child, they go a long way to shake the presumption of law to which I have referred. But that would not be sufficient if the defender's story was a credible one.

The question accordingly turns upon the relative credibility of the pursuer and defender. I see nothing which leads me to doubt the truth of what the pursuer says, and, as I have mentioned, what he says is confirmed by the other evidence. But the defender is in this position—that while she alleges on record that the pursuer continued to visit her till November 1869, and that he did not again visit her till October 1884, when she is examined she gives a different account, for she states that he visited her frequently during the interval, and that he wanted her to go to a foreign country. This evidence is directly contradictory of her admissions on record. But in addition I agree with the Lord Ordinary that it is impossible to suppose the pursuer could not have been seen by some one if he had been coming about her house between October 1884 and March 1885. Then there was, further, a total concealment on the defender's part of the fact that the pursuer was coming about her, and also that she was with child. One woman is examined who seems to have taxed her with being in the family way, but she did not say that the pursuer was the father. Indeed she never seems to have even hinted that to any of her friends.

These are all very remarkable circumstances, and I see nothing in the defender's case which at all shakes the credibility of the pursuer. His case is clear and consistent throughout, and is confirmed by the other evidence. I therefore agree with the Lord Ordinary in thinking that we can come to no other conclusion than that the pursuer was not the father of this child.

The Lord Ordinary has referred to a circumstance which struck him as a remarkable feature in the case. A wen has grown on the pursuer's forehead during recent years, and the Lord Ordinary thinks it would be impossible for the defender to have been visited by the pursuer, as she says she was, during 1884-85 without seeing this. I am of the same opinion.

The case is a narrow one, but looking to all the circumstances, and to the fact that the weight attaching to the maxim *pater est quem nuptiæ demonstrant* may under recent decisions be held to be somewhat less strong than it once was, I am of opinion that we may grant decree of divorce.

Lord Shand—I have given very careful and very anxious consideration to the evidence in this case, with the result that I concur with Lord Mure in the view which he has taken. There is undoubtedly a very heavy *onus* upon a pursuer

who raises an action of divorce in circumstances like the present—as heavy an *onus* as I can conceive in a question where the law of evidence is involved. Where a husband and wife are living in the same village and near one another, and the wife becomes the mother of a child, the law will presume that the husband is the father, and in order to rebut the presumption he must bring evidence such as will satisfy the Court that no connection did take place between them such as might have led to the birth. But taking the case in that light, I am satisfied that no such connection took place.

It appears that shortly after their marriage the pursuer and defender separated, and it is a curious feature that notwithstanding the separation the pursuer did continue to visit his wife for about three years afterwards, and that a second child—a daughter—was born in 1869. But he states that from a certain date in 1869 he has never again visited his wife, and the reason he gives is, that shortly before the birth of their daughter, on two different occasions when he was in his wife's house he heard knocks at the door which created a suspicion in his mind. In addition, a ladder was found against her window on a third occasion in very suspicious circumstances, and there is corroborative testimony to that effect, and that the man who is presumed to have used it was caught near the spot. The pursuer never returned after these events took place. The village is one with comparatively few inhabitants, but it is not said that there is anyone who can contradict the pursuer's statement that he did not visit his wife for fifteen years. If he had visited her there would surely be some-one who would be able to speak to it. Further, the defender admits that no one ever saw the pursuer in her house during these years, and that she never told anyone he had been there. There is also another fact which provides most material corroboration of the pursuer's story, and satisfies me that it is true. A grown-up daughter, who was living with the mother in her house, says she never saw her father there. The evidence in support of the pursuer's case is therefore overwhelming unless there is something on the other side to displace it.

But when we turn to the evidence for the defender, I think we find very strong corroboration of the pursuer's case. She says that the pursuer's visits were frequent in winter, and that he was in the constant practice of coming clandestinely. If that had been the case I do not think it possible that he would not have been seen. To be added to that there is the extraordinary circumstance that she gives no explanation of her husband's absence from her, and of his coming at night when he did come. She indeed accounts for it by saying that she supposes he was afraid of his sisters and brother, but there is nothing to support that statement, and no such explanation was ever vouchsafed to anyone—she never even mentioned to the daughter that her father was there. She further tells a different story in the witness-box to what she stated on record. There is also the fact that he has a growth on his forehead which she had failed to remark, and which truly might have escaped notice once or twice, but could not have done so oftener.

On the whole matter I am satisfied that the *onus* of proof has been discharged, and that we must give decree in the pursuer's favour.

Lord Adam—I think the *onus* which a pursuer undertakes in a case of this kind is very well stated in the case of *Mackay*, 17 D. 494. It is this, that there must be "such clear evidence as completely satisfies the tribunal which has to decide the question, that *de facto* a husband is not the father of his wife's child." That being the question of law, I am not disposed to differ from the result at which your Lordships have arrived.

Lord President—This, like every other case affecting *status* or legitimacy, is of importance, and I think it right to state my opinion regarding the effect of the presumption *pater est quem nuptiæ demonstrant*, and how far the pursuer of such an action as the present is under the *onus* of completely establishing a negative.

The pursuer's wife was delivered of a child in October 1885, and the presumption is that the pursuer was the father. If no evidence can be adduced to show that the child was begotten in adultery, and that the husband was certainly not the father, then the law holds that the pursuer must be presumed to be so. He is pursuing this action of divorce on the ground of adultery, and as he founds on the birth of the child he must undertake to prove that he is not the father. There have been a good many cases lately in which the strength of the presumption has been weakened, and I agree with Lord Adam in thinking that the rule as laid down in *Mackay's* case (17 D. 494) may be taken as truly representing the state of the law regarding the matter.

That being so, I was at first a good deal startled when I saw that the Lord Ordinary said in his note that this was a narrow case. I think it is a case the evidence in which requires severe scrutiny and care. Accordingly I have taken great pains to see whether the proposition that the husband is not the father of this child has been established.

Reference has been made to the case of *Montgomery*, 8 R. 403. The report is rather misleading, because we are not told what the circumstances were. I have examined them, and I find there was very strong proof of the defender's adultery with three different men. This is a very different case, and I have had great difficulty in reaching the conclusion to which Lord Mure and your Lordships have arrived. But I do not dissent, and I only wish to say that we are doing nothing to shake the strength of the presumption as settled in recent decisions, and particularly as laid down in the case of *Mackay*.

The Court adhered.

Counsel for Pursuer and Respondent—Dickson—Forsyth. Agent—A. B. Constable, W.S.

Counsel for Defender and Reclaimer—Hay. Agent—James Skinner, S.S.C.