certain of the witnesses. I have already said that I cannot trust the evidence of Mrs Gardner. From whatever motives, and with whatever excuses, she has undoubtedly given different accounts of the matter at different times, and it is almost fatal to the whole case if she is not to be implicitly relied on. I cannot help thinking that the pursuer also has to some extent been seriously attacked as to his accuracy and credibility. If Mr Kay's evidence is to be trusted, and there is nothing to impugn it, the pursuer made admissions and confessions totally inconsistent with the case, which as a witness he maintained. Mr Kay could hardly be mistaken as to the pursuer's statements and admissions to which he depones, and no prepossession in favour of the defender would account for such statements as mere mistakes or misapprehensions. They very seriously tell against the pursuer's credibility. The evidence of Laidlaw I feel myself compelled almost altogether to lay out of view. It is plain he is a person upon whose testimony no reliance whatever can be placed, and although the statements and implications in his letters might well be held evidence against himself if he were the defendant in or a party to an action, I think it would be unsafe to read them when coupled with his oral testimony as evidence against the present defender. The evidence of the defender herself I am also unable implicitly to rely on, but the case stands quite clear of her testimony. Of course she cannot know anything of the material facts and circumstances on which the case depends, and although I lay out of view her account of her mother's statements, this does not materially affect the real issue.

The result is, that I have come to be of opinion, though with difficulty and not without hesitation, especially considering that the Lord Ordinary reached an opposite conclusion, that the pursuer has not adduced evidence strong enough or cogent enough to overcome the weighty and it appears to me the concurrent presumptions which arise from the whole history of the case, and which compel me to hold in law, whatever may be the state of the occult fact which I cannot reach, that the pursuer must be held to be the father of the defender. This leads to decree of absolvitor from the whole conclusions of the action.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Mary Gardner against Lord Craighill's interlocutor of 15th November 1875, Recal said interlocutor: Find that the pursuer (respondent) has failed to prove that he is not the father of the defender (reclaimer) Mary Gardner: Therefore assoilzie the defender from the conclusions of the summons, and decern: Find the defender entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for the Pursuer (Respondent)—Macdonald—Darling. Agents—Gillespie & Paterson, W.S.

Counsel for the Defender (Reclaimer)—Trayner—Jameson. Agents—Lindsay, Paterson, & Co., W.S.

Tuesday, May 30.

SECOND DIVISION.

[Lord Craighill, Ordinary.

JAMES KERR *v.* MRS EMILIA M'MILLAN KERR OR MOODY AND HUSBAND.

Bankruptcy — Discharge — Claim — Intimation to Creditors—Guardian and Ward.

A undertook the upbringing and education of his deceased brother's children till they attained majority, when they ceased to live in family with him. Thereafter he became bankrupt, and was sequestrated, but obtained his discharge on payment of a small composition.—*Held* that a claim made by the discharged bankrupt for sums expended on the said children could not be maintained by him, he having failed to include the same as an asset at his sequestration.

In this case James Kerr, residing at 48 Shellgate Road, Clapham Junction, sued Mrs Emilia M'Millan Kerr or Moody, and her husband James Moody, teacher at Dumfries, for payment of the sum of £154, 17s. 3½d. sterling, with interest from 6th March 1868 till payment.

The circumstances in which the claim was made were as follows:—The late Archibald Kerr, brother of the pursuer, who was a merchant in Lisbon, Portugal, died there on 9th October 1857. His wife also died there on 21st October of the same year. They were survived by six children, of whom the female defender was the eldest.

The pursuer went to Lisbon on his brother's death to look after and assist the children, and to attend to their interests. He was appointed by the courts at Lisbon their curator and guardian, with full powers to administer their father's estate, and a family council was appointed to consult and advise with him in that capacity. The deceased's estate was realised, and invested in securities in Lisbon. It did not exceed £1500 sterling, according to the pursuer's averment. The pursuer brought his brother's children home to Scotland with him, and they lived in family with him at Glasgow for several years. The pursuer averred that the income derived from his brother's estate was insufficient for the proper education and maintenance of the children. The amount sued for was the sums paid by the pursuer on behalf of the defender in excess of her share of the income of her father's estate received by him, and a sum of £60, 6s. advanced to her in 1868 to procure a marriage outfit. The pursuer further states that all the children, with the exception of the defender, had settled with him for his advances on their behalf.

The defenders denied that those sums were due. They averred that Mrs Brodie's share of income was sufficient to meet all the expenses incurred by the pursuer on her account, that it was never contemplated that a claim was afterwards to be made for alleged advances, and that no intimation of such a claim had been made till shortly before the raising of the action. In particular, they averred that a sum of £295 had

been received by the pursuer from the deceased's estate, which he had invested for himself in business, and for which he had failed to account, and that if that sum were charged to the pursuer's debit in his account with the family, there would, on a proper accounting, be found to be a balance due from him to the defenders. The pursuer in answer to this averment admitted having received the sum of £295 in 1859, and in deducting the defender's share thereof from the sum sued for, he restricted his claim to £105, 13s. 9½d. He further offered, under reservation of his pleas, to accept the sum of £50 in full of all his claims against the defenders.

In March 1870 the pursuer's estates were sequestrated, and in September of that year he was discharged on a composition of 1s. 6d. per pound. In the state of affairs given up by him under the Bankruptcy Act he did not include as an asset any claim for his alleged outlays or expenditure upon the children.

The Lord Ordinary, after proof, pronounced the following interlocutor, dated 10th December 1875:—

"Finds it not proved that the income of the property belonging to the defender Mrs Moody and the other children of her father, the late Archibald Kerr, was insufficient for her and their maintenance and education while under the guardianship of the pursuer, or that the pursuer advanced from his own monies sums which were required for educating and maintaining and setting out in life the said defender: Therefore sustains the defences, assoilzies the defenders, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given, and remits that account when lodged to the Auditor for his taxation and report.

"*Note.*—The pursuer is the uncle of the defender Mrs Moody, who is one of six children of his brother, the late Archibald Kerr, who were left orphans in Lisbon at his death in October 1857. The pursuer went to Lisbon on hearing of his brother's death, assisted in realising the estate, and in the course of the following year he brought all the children to this country. From the first the defender and one of her sisters lived with the pursuer; the other children lived for a time with their grandfather and grandmother at Kilfinnan, but ultimately all came to him, and it is abundantly proved that he shewed all of them all kindness, and brought them up in every way as well as if they had been his own children. The Lord Ordinary thinks that a little more consideration for what he did for his brother's family would not have been unnatural, and had that been shewn the present action never would have been instituted.

"But the decision of this case cannot be influenced by sentiment. The result has been put to the test of law, and accordingly by law must the question in issue be determined.

"The income of the family was not over £120, which in these days seems a small sum for boarding, clothing, and educating six children. But that it was not much, if at all, under what was required, is shewn by the fact that the pursuer was willing to take £50 for what he says he had advanced on the defender's account during the period of more than four years she resided with him. Has any insufficiency been proved, as was necessary? This is the question on which the Lord Ordinary has given judgment.

"There are no vouchers, no accounts were kept; opinions of what witnesses thought reasonable or requisite are all that have been brought forward. This, in any circumstances, would have been unsatisfactory evidence; but when it is proved, as it was to-day, that the pursuer in 1870 deponed in the course of his examination as a sequestrated bankrupt that nothing was due to him by his brother's family, and that the income derived from their property was sufficient for their support, there is, so far as the Lord Ordinary can see, no escape from the conclusion that the alleged debt sued for cannot be held to be established."

The pursuer reclaimed.

At advising—

Lord Justice-Clerk—I am disposed in this case to adhere to the interlocutor of the Lord Ordinary, on this simple ground:—The pursuer undertook the care of his brother's children after his death, and they lived in family with him during their minority. In 1870 he became bankrupt. If he had a claim upon any of his brother's children, he ought then to have intimated it, and given it up to his creditors. He made no mention of such a claim at the time of his sequestration, and that being so, I think he is excluded from maintaining it now. On this ground alone I think the interlocutor of the Lord Ordinary ought to be sustained.

Lord Neaves—I am of the same opinion. I think it is quite sufficient for the decision of this case that when the pursuer became bankrupt he gave no intimation of this claim. He was bound to put his creditors in possession of all the knowledge which he himself possessed. He must have known of the claim then if it existed, but he keeps it back from his creditors, and gets a discharge on the miserable composition of 1s. 6d. per pound. He now comes forward and states a claim which, if due, would have enabled him to pay in full. I think we cannot listen to such a claim.

Lord Ormidale—I concur. I do not think the pursuer is guilty of any fraud in concealing this claim from his creditors, because I believe that till recently he did not intend to make any claim. It was no great affair when he undertook the care of his brother's children that he should have kept them in family with him, and given them the advantages and comforts of his home. He was their natural protector. The defender Mrs Moody lived with him from the time she was eleven or twelve years old. If he ever intended to claim he should have made it known to her, but from the circumstance that he kept no account of what he expended out of his own means on her behalf, I feel sure that till lately he did not contemplate making any claim. I think that the Lord Ordinary has done right in assoilzieing the defenders.

Lord Gifford—I agree with your Lordships. It is a very strong circumstance that the pursuer should have reserved a claim of £600 from his creditors at the time of his bankruptcy, but there

is the additional consideration that this is a claim against a person who, during nearly the whole time that the debt is said to have been incurred, was *minor pubes*. There should be full evidence of such a debt. She should have been made to choose curators if it was necessary to encroach upon her capital. I think there can have been no intention on the part of the pursuer till recently to make the claim, and that any extras paid by him for the defender must have been given *ex pietate*.

The Court adhered.

Counsel for Reclaimer and Pursuer — Thoms. Agents—Philip, Laing, & Munro, W.S.

Counsel for Respondents and Defenders—Burnet — Millie. Agent — Neil M. Campbell, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, May 31.

APPEAL—GRANT *v.* WRIGHT.

(Before the Lord Justice-Clerk, Lord Young, and Lord Craighill.)

Crime—Salmon Fisheries Act 1844 (*7 and* 8 *Vict. c.* 95)—*Contravention.*

A fisherman set lines, as he averred for flounders, in an estuary frequented both by flounders and sea trout, and fish of the latter species having taken the hook he retained them. In a charge against him under the Salmon Fisheries Act 1844, sec. 1, the Sheriff on the evidence acquitted him of the charge, on the ground that wilful taking had not been proved. In an appeal under the Summary Prosecutions Appeals Act 1875—*held* that the question raised was entirely one of fact, upon which the judgment of the Sheriff was final.

Observations—per Lord Justice-Clerk and Lord Young—as to the meaning of the words "wilful taking" under the Act.

This was an appeal taken under the Summary Appeals Act 1875, and the question of law submitted to the Court was, Whether a person fishing professedly for flounders, and in a manner adapted for that purpose, in the estuary of the river Findhorn, who found upon his line, and kept, sea trout, being fish of the salmon kind, committed thereby an offence under sec. 1 of the Salmon Fisheries Act 1844. The respondent was charged by the appellant, a solicitor in Forres, acting on behalf of the Findhorn Salmon Fishery Board, before the Sheriff-Substitute (SMITH) at Elgin, under the Summary Procedure Act 1864, with having been guilty of an offence under the Salmon Fisheries Act, 7 and 8 Vict. cap. 95, in respect while, on his own statement, fishing in the estuary for flounders, and admittedly with lines for that purpose, he received upon his lines, and took, several sea trout, being fish of the salmon kind. Some of the witnesses for the complainer (appellant) stated that the place in which the respondent fished was a more likely place to fish for sea trout than flounders, but in point of fact both sea trout and flounders were found there. The Sheriff-Substitute found Wright not guilty of the offence charged.

Section 1 of the Salmon Fisheries Act 1844 provides—"That if any person not having a legal right or permission from the proprietor of the salmon fishing, shall, from and after the passing of this Act, wilfully take, fish for, or attempt to take, or aid and assist in taking, fishing for, or attempting to take, in or from any river, stream, lake, water, estuary, firth, sea, loch, creek, bay, or shore of the sea, or in or from any part of the sea within one mile to low water mark, in Scotland, any salmon, grilse, sea trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay," &c.

Argued for the appellant—"Wilfully taking" under the Act would apply to a case in which the salmon or sea trout were retained after being caught, though there might not have been any intention to catch.

Authority—*Anderson*, 25th November 1867, 5 Irv. 499.

Counsel for the respondent was not called upon.

At advising—

LORD YOUNG—I do not think any reply is needed in this case. The question was put to Mr Balfour at an early period in his argument as to what was the error in law he pretended the Sheriff-Substitute had committed, and to that question I cannot say there was any satisfactory answer given. The offence constituted by the statute is where any persons wilfully take or wilfully fish for fish of the salmon kind. Now, whether in any given circumstances the act has been done wilfully or not is primarily a question of fact, to be determined by the magistrate on the evidence adduced. This Court will not determine such a question upon a narrative of what occurred, much in the way in which a person would ask his friend's opinion, and inquire whether under such and such circumstances he would say the man was guilty or not. In dealing with facts there may be an error in law, but that to give an appeal must be an error apart from the questions raised by the evidence adduced, and arriving at erroneous conclusions thereon. I think it is not impossible (although the question is not one for your Lordships' determination) that we might have on the evidence arrived at a conclusion different from that of the Sheriff-Substitute, and found the accused guilty; but that would be an opinion upon the facts, quite a different matter from holding that the Sheriff-Substitute was wrong in point of law, and proceeded upon erroneous views as to the meaning of wilful taking of salmon or fish of the salmon kind.

Now, the Sheriff-Substitute was the judge of the evidence, and we cannot tell now whether he judged that evidence rightly or not. I do not think that in this the Sheriff-Substitute was wrong, namely, in holding that to subject the person to the statutory penalty the act must have been wilful. If the fisherman did not take the fish wilfully, I do not think it signifies whether he sent it afterwards to the owner of the salmon-fishing or not. If he did take it wilfully he was guilty in any way, and there could be no atonement for his statutory guilt in his sending it to any one. The question