licence was required by the said Act, without having a proper licence under the said Act, whereby the said Alexander Cowan is liable to forfeit the penalty of twenty pounds provided by the said Act."

On 3rd February 1896 the Justices of the Peace for the county of Inverness at Petty Sessions assoilzied the respondent from the complaint.

The Inland Revenue appealed to the next General Quarter Sessions, at which, on 3rd March, the Justices resolved, before pronouncing judgment, to state a case for the opinion and direction of the Court of Exchequer in terms of the Act 7 and 8 Geo. IV. cap. 53, sec. 84.

The facts stated were as follows:—"On 6th December 1895, at Union Street aforesaid, the respondent wore and used a signet ring on which there was a shield charged with a lion rampant surmounted by a crown or coronet or other ensign. At the base or bottom of the shield there was a bar or other cutting. There was no wreath. An enlarged sketch of the device on the ring is herewith submitted. The respondent had not an Excise licence in force authorising him to wear or use armorial bearings."

The questions of law submitted for the opinion of the Court were these—"(1) Whether the device on the ring is an armorial bearing, crest, or ensign within the definition of 'armorial bearings' contained in sub-section 13 of section 19 of 32 and 33 Vict. cap. 14? (2) Whether, upon the facts stated, the respondent contravened the statute and is liable as charged in the complaint?"

By the Customs and Inland Revenue Duties Act 1869 (32 and 33 Vict. cap. 14), sec. 19, sub-sec. 13, the expression "armorial bearings" is declared to mean and include "any armorial bearing, crest, or ensign by whatever name the same shall be called, and whether such armorial bearing, crest, or ensign shall be registered in the College of Arms or not."

Section 27 of the same statute enacts that any person wearing or using any armorial bearings "without having a proper licence under this Act . . . shall forfeit the penalty of twenty pounds."

Argued for the appellant—The questions should be answered in the affirmative. The device in question was plainly an armorial bearing within the meaning of the Act—Assessed Tax Cases (Scotland), Nos. 482 and 1098, referred to.

The respondent did not appear.

LORD PRESIDENT—My opinion is that both questions should be answered in the affirmative.

LORD ADAM—I am of the same opinion. My view is that this is an armorial bearing. It is an ordinary heraldic lion on a shield. I do not know what else constitutes an armorial bearing.

LORD M'LAREN—If the question were whether this is such a bearing as anyone was entitled to use in accordance with the rules of the Heralds College, one would like to be better informed as to the laws of heraldry before deciding it, for there are rules of a highly artificial character with regard to the bearing of shields and like matters. But on inspection of the statute it appears to me that it is not required of an armorial bearing before it becomes subject to duty that it should be regular; so that even though the person making use of the sign was not entitled to use it, still if it is used by that person as an armorial bearing, that would be sufficient to subject it to duty. We have here a shield with a well-known heraldic cognisance, and I cannot doubt that it subjects its owner to duty.

LORD KINNEAR—I agree with all that your Lordships have said.

The Court answered both questions in the affirmative.

Counsel for the Board of Inland Revenue—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Tuesday, May 19.

SECOND DIVISION.

[Sheriff of Galloway.

BROWN *v.* HALBERT.

Parent and Child—Illegitimate Child—Aliment—Offer by Father to Aliment in his Own Home.

Although as a general rule the father of an illegitimate son is not bound to pay aliment to the mother after the child has attained the age of seven years if he then makes a *bona fide* offer to receive the child into his home and to support him there, the rule does not apply if it is proved that it would be detrimental to the child's health and welfare to remove him from the mother's custody.

Question, whether a difference in the religious beliefs of the father and mother should be taken into consideration in deciding the question.

Mrs Charlotte M'Cormick or Brown, widow, Glenluce, raised an action in the Sheriff-Court at Wigtown against Bernard Halbert, miller, Wigtown, for aliment at the rate of £6 per annum for her illegitimate male child, until the child attained the age of fourteen years, viz., until 11th March 1902.

After a proof the Sheriff-Substitute (WATSON) on 11th February 1896 pronounced the following interlocutor:—"Finds in fact—(1) That the defender admits that he is the father of the pursuer's male child, which was born on 7th March 1888; (2) That the defender has paid aliment for the said child down to 7th March 1895, when the child reached the age of seven years, but that he now refuses to pay further aliment, offering instead to take the child into his own custody and keeping;

(3) That the pursuer is a Protestant, and is anxious to bring up the child in the Protestant faith, whereas the defender is a Roman Catholic; (4) That apart from the question of religion, for reasons which are mentioned in the subjoined note, it would be detrimental to the child's welfare that he should be transferred to the guardianship of the defender: Finds in law that the pursuer is entitled to retain the custody of the child, and that in the circumstances of this case the defender is not freed from liability to contribute to the aliment of the child by the offer which he has made to take him into his own custody: Therefore repels the defences, decerns and ordains the defender to make payment to the pursuer of the sum of £6 yearly as aliment for the said child, until the said child attain the age of ten years complete, viz., on 7th March 1898.

Note.—"The child having reached the age of seven years, the defender refuses to pay further aliment, and offers to keep the child himself. The pursuer is not in any case bound to part with her child, but if she keeps him she cannot claim aliment any longer from the defender unless she has proved that the child's welfare would be injuriously affected by his being transferred to the defender's custody. A proof has been led in regard to the circumstances of the parties as affecting the question of the child's welfare. The result, in the opinion of the Sheriff-Substitute, is to show that it would be detrimental to the child's welfare that he should now be removed from his mother, and live henceforth with the defender. In the first place, the pursuer is a Protestant, and has brought up her child in the Protestant faith, whereas the defender is a Roman Catholic. In the case of an illegitimate child, it is the mother's right by the law of Scotland to direct the religious upbringing of her child; and this right has always been carefully guarded by the courts. See *Brand* v. *Shaws*, 16 R. 315. The Sheriff-Substitute refers to the note appended to his previous interlocutor in this case of date 15th May 1894, where a judgment of Lord Craighill is cited (*M'Carroll* v. *Kerr*, 15 S.L.R. 106) to the effect that such a difference in religious creed as here exists, is sufficient to entitle the mother to retain her child without losing her claim against the putative father for aliment. Following this judgment the Sheriff-Substitute is of opinion that the difference in religious faith is of itself a good ground for deciding against the defender. That the difference exists appears clearly enough from the record itself; and the Sheriff-Substitute does not think it worth while to examine the evidence on this matter. . . .

"Apart from the question of religious creed, other considerations combine to show that it would be injurious to the child's welfare to be transferred to the custody of the defender. The child is attached to his mother, and extremely averse to the proposal that he should live with the defender. He is of nervous temperament, and the change would probably involve some risk to his health. The pursuer is generally reputed to be leading a respectable life, though of course her moral character has been destroyed by the defender, to whom she has borne two children. She had four children to her deceased husband, all of whom are living; and at one time her circumstances were straitened enough. Since 1892, however, she has received no parochial relief; her family have been well cared for, and the older children are now able to contribute aid towards the household expenses. The evidence supplies no foundation for the apprehension by which the defender professes to have been actuated, and which he says is his 'only objection to the pursuer having the custody of her child,' viz., that 'she hungered her own children.' The defender's own establishment, on the other hand, would be an eminently unsuitable and unwholesome home for a boy of seven years to be reared in. The defender is a bachelor, his house is at present kept by a young niece who is out all day working, and there is another female servant. For some years the defender has had a constant succession of new housekeepers and servants. The witness Agnes Milligan, who served in the house for some months in 1893 and 1894, deponed that immoral relations had subsisted between her and the defender during that period, and that she had sued him for aliment in respect of two children. Since the evidence was taken in this case, proof has been led in Milligan's actions, and the Sheriff-Substitute has found that while in the case of the elder of the two children, there was no evidence to corroborate her charge against the defender, in the case of the younger child, which was born in July 1895, the defender's paternity was established by evidence of immorality within the house.

"On these combined grounds the Sheriff-Substitute is of opinion that the defender's offer does not exonerate him from liability to pay aliment, and that the pursuer is entitled to decree."

The defender appealed to the Sheriff, and on the 14th March 1896 the Sheriff (VARY CAMPBELL) adhered.

Note.—"The defender desires to discharge a pecuniary claim for the aliment of this child in the manner least burdensome to himself. He has no right to the custody of the child, but he has the privilege of meeting this claim for further payments by offering to take the child into his own house and under his own charge. The benefit of the child must be the chief consideration. Here the child is being brought up as a Protestant by the mother, who has the legal right to the custody and to determine the religion of the child—a right not always to be affected by agreement—*Macpherson*, 14 R. 780; *Brand*, 16 R. 315. The health of the child is good, though it is of a nervous temperament, and the mother evidently attends well to its comfort and has secured its affection. The defender accompanies his proposal to take the child in future into his own hands, with the announced condition that he will have the child brought up

as a Roman Catholic—that is, that he will change its religion. I do not think that he is entitled to discharge his obligations to contribute to this child's aliment under any such condition, contrary to the lawful wish and determination of the mother as to the boy's religion and training. Moreover, the defender, from the evidence, is not quite the man to be entrusted with the guidance and training of this boy. I adopt and follow the opinion of Lord Craighill in the case of *M'Carroll*, 15 S.L.R. 106."

Against this judgment the defender appealed, and argued—In the case of a male bastard the mother was entitled to the custody, and aliment from the father till it was seven years of age. Thereafter the father, if he was to continue to support the child, was entitled to make his own arrangements for it. If the father made a *bona fide* offer to receive the child into his own house, and the mother refused this offer, she was not entitled to aliment—Bell's Prin., sec. 2062; *Corrie* v. *Adair*, February 24, 1860, 22 D. 897. The Sheriffs had approached the question from a wrong point of view. They seemed to think that the defender had attempted to show that the pursuer was not a proper person to have the custody. He did not take up this position. His argument was that if this child of over seven years of age would be as well taken care of by the father as by the mother, the father's offer to take the child into his own custody must be accepted or his liability for aliment cease.

Counsel for pursuer were not called on.

LORD YOUNG—This is an ordinary action of filiation and aliment by the mother of an illegitimate child againt the father. The latter acknowledges the paternity and his liability, but he pleads that while it was right that the mother should have the custody of the child and receive aliment from him until the child reached the age of seven, he, the father, is now entitled to substitute for his liability for aliment a *bona fide* offer to take the child into his own custody.

The common case where the father takes up this position is where his circumstances are such as to make it hard upon him to pay £6 or £7 per annum to the mother, when he can at less expense to himself support the child in his own house. But this is not the position of the defender. He is in easy circumstances—a miller keeping servants, and having an apparently prosperous business. The want of money is therefore not the reason of his asking for the custody of the child.

The mother, on the other hand, has led evidence to show that the child is well kept by her, that its comfort is well attended to, that its education is taken care of, and that the father's house would not be a suitable home for it.

I am of opinion that the child should be left with the mother, and that the father should pay aliment to her till the child reaches the age of ten. Both the Sheriff and the Sheriff-Substitute have arrived at the conclusion that it would be better for the child's welfare that it should remain with its mother until it is ten, and that the father's house is an unsuitable home for it, and they have ordained the defender to pay aliment until the child has attained the age of ten. The child will attain that age in a year and eight or nine months. The question therefore comes to be whether there is any ground for interfering with the judgment of both the Sheriffs. It would require very satisfactory arguments to induce me in a case of this kind to interfere with a judgment pronounced by both Sheriffs, and no such arguments have been adduced here.

I must confess, looking to the defender's circumstances, that his conduct in limiting his contribution for the maintenance of his child till it arrived at the age of seven to £4 per annum is not very satisfactory. I think it would have been more becoming on his part if he had been more liberal.

As regards the difference in the religious denomination of the father and the mother I may say that that consideration does not influence my judgment in the case.

On the whole matter I am of opinion that the evidence does not supply us with any good reason for interfering with the judgment of the Sheriffs, and that it ought to be affirmed with expenses.

LORD TRAYNER—I agree. There is a settled general rule that the father of an illegitimate son is not bound to pay aliment to the mother after the child has attained the age of seven years if he then makes a *bona fide* offer to receive the child into his home and to support him there. But there are exceptions to the rule, and the most forcible exception occurs where it is certain that such a change of circumstances would be detrimental to the child's health.

The first question in this case is, what is the best course to follow in the interests of this child, and I am of opinion that the result of the proof is that it would be detrimental to the child's health and welfare generally to remove it from its mother's care. The Sheriffs are agreed on this point, and in my opinion the evidence substantially supports their view.

For my part I am not moved by the consideration that the father proposed to bring up the child according to a different faith from that professed by the mother. Such a consideration I regard as hardly relevant to the question whether the custody of the child should be with the father.

LORD MONCREIFF—I agree with the opinions expressed by your Lordships on the question of the defender's right to the custody of this child. The defender is only entitled to the custody of the child as a discharge of his obligation to contribute to his support, but this abstract right to discharge his obligation is qualified by the condition that his charge of the child shall not be detrimental to his (the child's) health. On this latter point proof was led, and it appears to me that the result is to disclose sufficient grounds for the belief that the removal of the child from his mother's house would be injurious to him.

I think that three elements contribute to that result. First, there would be a change in the religious teaching of the child; second, his health would probably suffer; and third, the defender's establishment does not appear to offer a very desirable home and training for a child.

I do not think it is necessary to consider whether any one of these elements taken separately would be sufficient, for I am of opinion that taken together they form a sufficient ground of decision. Especially with regard to the first, I desire to reserve my opinion whether it would by itself form a sufficient ground for refusing to the reputed father the custody of an illegitimate child.

LORD JUSTICE-CLERK—I concur. I go entirely upon the fact, which I think is proved, that it would be detrimental to the child at its present age to be removed from the custody of the mother.

The Court dismissed the appeal, found in fact and in law in terms of the interlocutor of the Sheriff-Substitute dated 11th February 1896, and of new ordained the defender to pay to the defender £6 yearly as aliment for the child in question until 7th March 1898.

Counsel for Pursuer—M'Lennan—Munro. Agent—Robert Broatch, L.A.

Counsel for Defender—W. Campbell—A. S. D. Thomson. Agents—Adair & Fenwick, S.S.C.

Thursday, May 21.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

PATERSON *v.* KIDD AND ANOTHER.

Process — Appeal — Competency — Judicature Act (6 George IV. cap. 120), sec. 40— Interlocutor of Sheriff Allowing Proof "of Consent."

In an action of damages raised in the Sheriff Court in which the defender pleaded that the pursuer's averments were irrelevant, the Sheriff "of consent before answer" allowed a proof.

An appeal by the pursuer to the Court of Session for jury trial under the Judicature Act (6 George IV. cap. 120), sec. 40, *dismissed* as incompetent (*dub.* Lord M'Laren), in respect that the interlocutor appealed against, being pronounced "of consent, before answer," set forth a contract between the parties as to the procedure to be followed in the litigation by which both were bound.

Alexander S. Paterson, plumber, Musselburgh, raised an action in the Sheriff Court of the Lothians and Peebles against Alexander Kidd and John Alexander Morris Amour, trustees of the late William Kidd, sometime farmer at Pinkiehill Farm, concluding for payment of £500 as damages for injuries caused to the pursuer through the fault or negligence of the defenders.

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

On 27th March 1896 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—"The Sheriff-Substitute closes the record on the petition and defences: Of consent, before answer, allows the pursuer a proof of his averments on record, and to the defenders a conjunct probation," &c.

The pursuer appealed to the Court of Session for jury trial.

The Judicature Act (6 George IV. cap. 120), sec. 40, provides "that in all cases originating in the inferior courts in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which shall be passed at once without discussion and without caution."

On the pursuer moving the Court to order issues, the defender opposed the motion, and argued—The appeal was incompetent in respect the interlocutor allowing a proof before answer was pronounced of consent. The pursuer and the defenders had agreed to have the facts investigated by the Sheriff before the question of relevancy was discussed, and the pursuer was not now entitled to withdraw from that contract. The pursuer was as much bound as if he himself had moved for a proof—See the Evidence Act 1866 (29 and 30 Vict. cap. 112), sec. 4; and *Cadzow* v. *Lockhart*, July 10, 1875, 2 R. 928. [*Per curiam*—But how could a pursuer ever appeal a case to the Court of Session for jury trial on your showing? Is not the Sheriff's interlocutor allowing a proof necessarily pronounced on the pursuer's motion?] No; for by the Sheriff Courts Act 1876 (39 and 40 Vict. cap. 70), sec. 23, the Sheriff is directed to appoint a diet of proof on his own initiative when probation is not renounced, and "when proof seems necessary."

Argued for pursuer — The appeal was competent. The mere fact of consenting did not bar the pursuer from claiming issues, nor in any way take the case out of the provisions of the Judicature Act.

At advising—

LORD PRESIDENT—There does not appear to be any reason why the interlocutor appealed from should not be construed according to its natural and legal import. So read, it sets forth a contract between the parties to the litigation as to the procedure to be followed. This becomes more clear when we attend to the state of the pleadings when the interlocutor was pronounced. The defenders had on record a plea to relevancy, and according to the