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

ordinary course, the Sheriff would have had first of all to hear parties on this plea and then dispose of it. From the interlocutor it appears that the parties agreed that the facts should first be ascertained by way of proof before this plea was determined. The present appeal is intended to upset this arrangement, for the pursuer now asks us to settle an issue and send the case to a jury. I do not see how the defender could be allowed to appeal (as is sometimes done under the 40th section) in order to have the action thrown out on relevancy without a breach of the arrangement that the evidence should be led before this question was determined, and both parties must be free, or neither.

I hope I have made it plain that my judgment rests on the words in the interlocutor, "of consent, before answer." I am for dismissing the appeal.

LORD ADAM—I concur.

LORD M'LAREN—My first impression was that no apparent distinction could be taken between an interlocutor proceeding upon a consent and an interlocutor proceeding merely upon the motion of one of the parties. But your Lordship's opinion is clear to the effect which has been stated, and as this is merely a question of practice, I have not such confidence in my opinion as to lead me to dissent.

LORD KINNEAR — I concur with your Lordship in the chair.

The Court dismissed the appeal with expenses.

Counsel for the Pursuer—T. B. Morison. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defenders—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Thursday, May 21.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

TAYLOR AND OTHERS *v.* M'GAVIGAN AND ANOTHER.

Process—Reclaiming-Note—Competency—Court of Session Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 11—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.

Held (following *Baird* v. *Barton*, June 22, 1882, 9 R. 970, and *Crellin's Trustee* v. *Muirhead's Judicial Factor*, October 21, 1893, 21 R. 21) that an interlocutor decerning for and modifying expenses, pronounced after an interlocutor disposing of the cause otherwise, and reserving the question of expenses, may be reclaimed against at any time within twenty-one days from its date.

In this action the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor on 20th January 1896, in the following terms:—"Having resumed consideration of the cause . . . assoilzies the defenders from the whole conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits it when lodged to the Auditor of Court to tax and to report: Reserving as to modification."

On 7th March 1896 the Lord Ordinary pronounced the following interlocutor:—"Approves of the Auditor's report: . . . Finds that the taxed amount thereof is £77, 15s. 9d., and having heard counsel on the question of modification, modifies the taxed amount to the sum of £67, 5s. 9d., and decerns against the pursuers for payment to the defenders of that amount accordingly."

On 20th March, being the thirteenth day after the date of this interlocutor, the pursuers presented a reclaiming-note, which was objected to by the defenders as incompetent.

Argued for the defenders—Under the Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 11, this was an interlocutor which could only be reclaimed against within ten days, and it had been so expressly decided in *Cowper* v. *Callender*, Jan. 19, 1872, 10 Macph. 353. No doubt a reclaiming-note against an interlocutor dealing with expenses brought the previous interlocutors under review (*Crellin's Trustee* v. *Muirhead's Judicial Factor*, Oct. 21, 1893, 21 R. 21), but that reclaiming-note must be presented within the statutory time, and *Crellin* had decided nothing to the contrary.

Argued for the pursuers—The reclaiming-note was competent. *Crellin's Trustee* (*ut sup.*) had decided that an interlocutor such as this was not merely executorial, but was a final interlocutor disposing of the merits of the case, and could therefore be reclaimed against to the effect of submitting the whole case to review.—*Baird* v. *Barton*, June 22, 1882, 9 R. 970, had settled that such an interlocutor might be reclaimed against within twenty-one days. *Cowper* could not stand against *Baird*, especially as it had been decided purely on a construction of the Court of Session Act 1850, sec. 11. The ruling statutory provision here was the 53rd section of the Court of Session Act 1868.

At advising—

LORD PRESIDENT—In my opinion this case is ruled by *Baird* v. *Barton* and *Crellin's Trustee* v. *Muirhead's Judicial Factor*. The reclaiming-note is therefore competent.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sent the reclaiming-note to the roll.

Counsel for the Pursuers and Reclaimers—M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Defenders and Respondents—Younger. Agents—Carmichael & Miller, W.S.