having the case tried by a jury, I think we are bound to give effect to it. There can be no doubt that if a question of this kind was set down to be tried on Circuit with reference to a local right-of-way, and it was objected that owing to local feeling upon the matter it was impossible to have the question fairly tried, the Court would in these circumstances appoint the case to be tried at Edinburgh, and upon that principle I think with your Lordships that we ought to remit this case to the Lord Ordinary to be tried without a jury.

The Court recalled the Lord Ordinary's interlocutor, and remitted the case to him to be tried without a jury, reserving all questions of expenses.

Counsel for Pursuer—Sol.-Gen. Asher, Q.C.—Mackintosh—W. C. Smith. Agent — Andrew Newlands, S.S.C.

Counsel for Defender—Trayner—Thorburn—Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Saturday, February 2.

SECOND DIVISION.

[Sheriff of Fife.

SCOTT *v.* DAWSON.

Parent and Child—Filiation—Proof—Evidence—Admissibility of Proof of Intercourse subsequent to Birth of Child—Notice on Record.

In an action of filiation of a child born in 1879, which action was raised in 1883, the pursuer, in order to show her relation with the defender and to contradict his evidence, led evidence, without notice on record, of familiarity and of acts of intercourse in 1882. *Held* that the evidence was *admissible*, but observed that there ought to have been notice of it on record.

In this action of filiation and aliment the pursuer averred on record that in January and February 1879, when she was in the service of a Mrs Harrow, at Wemyss, the defender, who was a carter in Wemyss, had sexual intercourse with her in the kitchen and in a court belonging to her mistress, the result of which was that she gave birth to a male child on the 5th October 1879, that after the birth of the child the defender frequently called at the pursuer's house, and in December 1882 called and paid a sum of 3s. to account of her inlying expenses, but had made no further payments. The defender denied these averments. The action was raised in August 1883.

A proof was led, in which the pursuer deponed to the truth of her averment of connection in January and February 1879. This the defender denied. There was some slight evidence to corroborate the pursuer, which is not material to be here narrated.

The pursuer also led evidence of a visit to the house in which she lived in 1881, and of familiarities and several acts of sexual intercourse with the defender in 1882, of none of which was there notice on record. She herself deponed to them, and was corroborated in her deposition on this point by several witnesses. The defender denied them.

The Sheriff-Substitute (Gillespie) found in fact that the pursuer gave birth to an illegitimate male child on 5th October 1879, and that the defender was the father thereof; found in law that he was liable in inlying expenses and aliment as craved.

"*Note.* — This is in some respects a narrow case. The delay in bringing the action is a circumstance unfavourable to the pursuer, and while, on the whole, her statements, when they can be tested by neutral evidence, are fairly supported, there are some discrepancies.

[*After examining the evidence, and referring to that part of it on which he held that the defender's denial of any familiarity in* 1882 *was disproved*]—

"Reference may be made to the often-cited case of *M'Bayne* v. *Davidson*, February 10, 1860, 22 D. 739, not as a precedent, because every filiation case is so eminently one of circumstances that it is hardly possible that one case should be on all fours with another, but as an illustration that when the defender is discredited no great amount of corroboration may be required to establish the pursuer's case. The opinions of the Judges are instructive, as showing the radical changes which the Evidence Act made in the way in which filiation cases must be dealt with, and some of their Lordships' observations are very applicable to the present case.

"The Sheriff-Substitute wishes to observe that it would have been more in accordance with correct and fair pleading if the pursuer had given notice in the record that she was to prove acts of connection in 1882. The correct rule humbly appears to him to be, that while evidence may be given of familiarities as part of the proof without notice on record, the pursuer ought to set forth concisely in her condescendence the place, and, as near as possible, the date of each act of connection on which she is to lead specific evidence, even though some of these acts of connection may have taken place long before or long after the time that the child must have been conceived. Where this is not done the defender may justly object to the evidence being led of such acts of connection on the ground of surprise. In the present case, however, it would not affect the Sheriff-Substitute's opinion on the case if the passages in the evidence to the effect that the defender had connection with the pursuer in 1882 were thrown out of consideration."

On appeal the Sheriff (Crichton) (after allowing an additional witness to be examined, who gave evidence tending to corroborate the pursuer as to her relations with defender in 1879) adhered.

"*Note.* — This is very narrow case, but on consideration of the evidence the Sheriff has come to agree with the Sheriff-Substitute that it is sufficient to entitle the pursuer to decree."

The defender appealed, and argued—There was no sufficient evidence of familiarities and intercourse during the period of conception to prove that he was the father of the pursuer's child. The only other evidence adduced was evidence of such acts of intercourse from October 1882 and onwards, which was a period long after the date of the conception of the child. Now, this evidence was incompetent, as no notice of it had been given on record. Such notice should have been given, according to the rules of pleading.

The evidence, then, ought not to be entertained either as proving the defender's relations with the pursuer at the time of conception, or as shaking his credit in consequence of his denial of proved facts.

At advising—

Lord Young—I think there is not sufficient ground for interfering with the judgments of both Sheriffs here. The case is a peculiar one, but I think the evidence is reasonably sufficient to support the judgment, and when this is the case we never interfere. I say the case is a peculiar one, its most remarkable feature being that the child was born in the end of 1879, and the action was not raised till 1883, four years after the birth of the child. That is unprecedented so far as my memory serves. There is no prescription, however, and notwithstanding the delay the action is quite competent. The evidence consists, first, of the pursuer's own testimony, which is quite distinct, that the defender is the father of her child, but that is not sufficient unless it is corroborated. —[*His Lordship here reviewed the facts adduced in the proof*]. The Sheriff-Substitute, who heard her story and the corroborative evidence, was quite satisfied, and I should be loth in consequence to call in question his judgment. But then the case developes, and this is attributable to the peculiarity (which I have noticed) that the action was not brought till the child was three years old. The pursuer maintains the child, and goes into service again, and the defender again carries on his sweethearting with her, for we have two witnesses who swear that they saw him having connection with her in 1882. Now, I cannot say that this evidence is not admissible, although I concur with the Sheriff-Substitute in thinking that it would have been fairer and better if notice of it had been given. It is just evidence of facts going to confirm the ground of action which alone the record was meant to settle, and certainly affects my mind on the credibility of the pursuer's story. It is evidence in support of a renewal of the old intercourse which resulted in the birth of the child. In my opinion, then, the Sheriff-Substitute was right in proceeding on this evidence, and on the whole matter I agree with him that the paternity of the child has been established against the defender.

Lord Craighill—I concur with your Lordship in thinking that this evidence of intercourse in 1882 is quite admissible. No doubt there should have been, in strict pleading, averments with reference to it on record, but in my opinion it is nevertheless admissible as helping to establish the relations of the parties at the date of the conception of the child. But even without it, I am of opinion there is reasonable evidence to support the Sheriffs' judgment.

Lord Rutherfurd Clark—I go further than the Sheriff-Principal, and think that this is a very very narrow case, but I do not dissent.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find it proved that the defender is the father of the pursuer's child libelled: Therefore dismiss the appeal; affirm the judgment of the Sheriff-Substitute and of the Sheriff appealed against; and of new decern against the defender in terms of the conclusions of the petition," &c.

Counsel for Pursuer (Respondent)—Dickson. Agent—J. Young Guthrie, S.S.C.

Counsel for Defender (Appellant)—Rutherfurd Clark. Agent—Robert Broatch, L.A.

Tuesday, February 5.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BLACKIE AND OTHERS *v.* THE MAGISTRATES OF EDINBURGH.

Burgh—Market Administration—Dedication of Market-House to Special Purpose—Power of Magistrates to Let for other Purposes and Exclude Frequenters—Statutes 23 *and* 24 *Vict. c. clix.*, 29 *and* 30 *Vict. c. cclxvi.*, 37 *and* 38 *Vict c. lxxxv—Process—Title to Sue.*

In 1823 a public fruit and vegetable market was constructed and enclosed on ground under the North Bridge of Edinburgh.

In 1860 an Act was passed authorising the North British Railway Company to acquire this site, provided they constructed and made over to the corporation another market-place. By this Act it was provided "that the new or substituted market to be constructed. . . shall not be formed or held upon any open street or area, but in some secure place, enclosed by substantial walls and gates, with equal accommodation to the present fruit and vegetable markets."

In 1865 an agreement was entered into between the corporation and the railway company, sanctioned by Act of Parliament in the same year, which provided that the railway company "before appropriating, using, or interfering with the lands on which the fruit and vegetable market to be provided under article third hereof shall be held, or any of the accesses thereto. . . shall be bound to provide. . . a new and substituted market, which shall in every respect fulfil the conditions prescribed by the said North British Railway (Stations) Act of 1860 with reference to the new and substituted market therein specified." Under this agreement the new Waverley Market was constructed, enclosed, and given over to the corporation in 1869. Subsequently another Act was passed in 1874, which provided that the corporation might cover in the fruit and vegetable market-place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public. It was further provided that "the ground floor only of such market-place shall be used for such fruit and vegetable market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant or unlet stands, stalls, or shops in or on such market-place may be let or used