the possession of Jones & Company, the appellant at the date of Jones & Company's failure had no right to obtain possession of them or to retain their price when sold by his orders. I am therefore of opinion that the Sheriff-Substitute's judgment is right and should be affirmed.

The Court pronounced this interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Therefore of new repel the defences and decern against the defender for payment to the pursuer of the sum of £25 sterling, with interest as concluded for: Find the defender liable in expenses in this Court," &c.

Counsel for the Pursuer and Respondent — Salvesen, K.C. — Younger. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defender and Appellant—Ure, K.C.—Hunter. Agent—William Croft Gray, S.S.C.

Saturday, December 21.

FIRST DIVISION.

WELSBACH INCANDESCENT GAS LIGHT COMPANY, LIMITED *v.* M'MANN.

Process—Breach of Interdict—Petition and Complaint — Failure of Respondent to Appear—Procedure—Form of Interlocutor.

Procedure and form of interlocutor pronounced in a petition and complaint for breach of interdict where the respondent, although represented by counsel, failed to appear personally, and having been ordered to attend failed to obtemper the order.

On 12th June 1901 the Welsbach Incandescent Gas Light Company, Limited, presented a petition and complaint against David M'Mann, 241 George Street, Aberdeen, in which they alleged that he had been guilty of breach of interdict.

Answers were lodged by the respondent in which he denied having committed breach of interdict.

A proof was taken before Lord Adam on 20th July 1901.

When the case came on for hearing upon the evidence before the First Division, the respondent was represented by counsel, but failed to appear personally, and the case was continued for a week to give him an opportunity of appearing. He again failed to appear, and the Court on 14th December 1901, on the motion of the petitioners, pronounced the following interlocutor:—"Appoint the respondent to appear personally at the bar of this Court on Saturday next the 21st instant at ten o'clock a.m., under certification that if he do not obtemper this order warrant for his apprehension will be issued."

The respondent failed to obtemper this order, and on 21st December 1901 the Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition and complaint, and heard counsel for the complainers, in respect that the respondent David M'Mann has failed to appear at the bar of this Court in obedience to the order contained in the interlocutor dated 14th December current, on the motion of the complainers grant warrant to macers of Court and messengers-at-arms, or other officers of the law, to search for, take, and apprehend the person of the said David M'Mann, now or lately carrying on business as the Incandescent Fittings Company at No. 241 George Street, Aberdeen, and residing at No. 88 Great Northern Road, Kittybrewster, Aberdeen, respondent, and if so apprehended during session to incarcerate him in the jail of Edinburgh or other jail in Scotland, and thereafter with all convenient speed to bring the person of the said David M'Mann to the bar of this Court on any sederunt-day during session to answer in the matter of the said petition and complaint, and if so apprehended during vacation to incarcerate the said David M'Mann in the jail of Edinburgh or other jail in Scotland, therein to remain till the first sederunt-day of the ensuing session, and on that day to bring the person of the said David M'Mann to the bar of this Court to answer in the matter of the said petition and complaint, and if necessary for the purpose of so apprehending the person of the said David M'Mann grant warrant to open shut and lockfast places; as also grant warrant to magistrates and keepers of prisons to receive and detain the said David M'Mann as aforesaid: Further, authorise execution hereof to pass on a copy hereof certified by the Clerk of Court, and decern *ad interim.*"

Counsel for the Petitioners — W. J. Robertson. Agents—Davidson & Syme, W.S.

Counsel for the Respondent—D. Anderson. Agent—C. M'Laren, Solicitor.

Saturday, December 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

KERR *v.* DARROCH.

Process — Proof — Witness — Filiation and Aliment—Calling Defender as Pursuer's First Witness.

Opinions per Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff — that a pursuer in an affiliation case is entitled to call the defender as her first witness; that as she is only exercising her legal right there is not anything improper

or deserving of adverse comment in her doing so, provided the questions put are pertinent and the examination is fairly conducted; and that by so examining her opponent the pursuer is not barred from contradicting his evidence by the testimony of her other witnesses, or from maintaining that his evidence is false.

Observations on the origin of and reasons for the practice.

Opinions of the Judges of the First Division in *M'Arthur* v. *M'Queen*, June 27, 1901, 3 F. 1010, 38 S.L.R. 732, *commented on* and *disapproved.*

Mary Walls or Darroch, widow, Dennistoun, Glasgow, brought an action of filiation and aliment in the Sheriff Court at Glasgow against Henry Kerr, wholesale and retail wine and spirit merchant, Glasgow.

Proof was led. The defender was called and examined as the first witness for the pursuer, and afterwards gave evidence on his own behalf.

The Sheriff-Substitute (BALFOUR) found that the defender was the father of the pursuer's child, and decerned against him as craved.

The defender appealed to the Court of Session. In the course of his argument counsel for the defender called attention to the fact that the pursuer had called the defender as her first witness, and argued (1) that this was improper and had put the defender at an unfair disadvantage; and (2) that the defender having thus been made one of the witnesses for the pursuer his testimony discredited the pursuer's averments—*M'Arthur* v. *M'Queen*, June 27, 1901, 38 S.L.R. 732. The practice of calling the defender as the first witness on behalf of the pursuer had been strongly condemned by the Judges of the First Division in that case.

Counsel for the pursuer and respondent were not called on.

At advising—

LORD TRAYNER—[*After stating his opinion that the appeal should be dismissed*]—In the course of his argument in support of this appeal Mr Hunter adverted to the fact that the defender had been called and examined as the first witness for the pursuer, which he said had been unfair to the defender, had been to his disadvantage, and was contrary to sound practice, and in support of this view he referred to the opinions delivered by their Lordships of the First Division in the case of *M'Arthur* v. *M'Queen*. As this is a matter of importance which may seriously affect practice (chiefly in the inferior courts), I think it right to say, with the greatest respect for the authority of their Lordships who expressed the opinions referred to, that I am unable to concur therein.

The practice of examining the defender in actions of filiation before any other witness was adduced, and even before the pursuer had been allowed a proof, is of ancient standing. In M'Glashan's work on the practice of the Sheriff Courts (edited by Barclay, and published in 1854) I find the following passage—"It was almost an invariable practice in actions of filiation and aliment, in which there is an obvious interest in the defender as much as possible to conceal the facts, to ordain him to undergo judicial examination." What follows (which I need not quote) shows that such judicial examination took place before any proof was adduced or even allowed. It will be observed that in this passage it is stated that the practice *was* almost invariable, for the practice of course ceased when, by the statute of 1853 parties to a cause were made competent as witnesses. But the reasons given in the passage I have referred to, but not quoted at length, for ordering the judicial examination of a defender in an action of filiation *in limine* are exactly the reasons which at this day induce a pursuer's adviser to begin his proof by examining the defender. I do not defend the practice merely on the ground of its antiquity, nor on the ground of the probable benefits resulting from it in the interests of justice (neither of which considerations, however, are to be lightly set aside), but on the ground that it is the absolute right of a pursuer to call his witnesses in what order he pleases—in the order which he thinks most advantageous to his case. The defender in a filiation case is not entitled to any special consideration, and he, like any other defender, may be called as a witness by his adversary just when that adversary thinks right to do so. The reports of the filiation cases to be found in our books show how often such examinations of the defender enable the Court to reach the justice of the case, which would or might be defeated if the defender, allowed to be present and hear the evidence of the pursuer's other witnesses, could then suit his evidence to the exigencies of his case.

Now, what are the objections to the practice? It is said to be an "improper practice." But I cannot characterise as "improper" a practice which is the exercise of a legal right. It is said further that the defender is put into the witness-box to try to get him to perjure himself on some more or less irrelevant and collateral point, and then to contradict him by independent witnesses. If the point is irrelevant the question may be objected to, and would I suppose be disallowed. But the purpose for which the defender is put into the box is not to get him to perjure himself; it is to get the truth out of him. If he tells the truth he need not fear the examination nor contradiction by independent witnesses if the latter also tell the truth, as *ex hypothesi* they would. If the defender tells what is not true of course he must take the consequences, as he deserves them.

Another view is that the pursuer by calling a witness (including his opponent) offers him as a person of credit, whom he cannot afterwards be allowed to discredit or contradict. But that view cannot be maintained so broadly in the face of the

Act 15 and 16 Vict. cap. 27, sec. 3, which authorises the contradiction of a witness, and this privilege is not confined to the case of an opponent's witness (*Gall*, 9 Macph. 177). Even before the passing of the Act I have referred to, a hostile or adverse witness might be discredited (Dickson on Evidence, sec. 1627, and cases there cited). The old rule (now I think quite obsolete) that a party calling a witness could not discredit or contradict him was never applicable to the case of a party calling his opponent. The opponent is always, in the legal sense, a "hostile" witness, and both here and in England it is quite settled that such a witness, party or not, may be discredited and contradicted by the party who calls him. I repeat, however, that the principal ground on which I dissent from the opinions expressed in the case of *M'Arthur* is that a pursuer calling a defender as his first witness is exercising his legal right with which the Court should not interfere.

LORD MONCREIFF—[*After dealing with the facts*]—The defender's counsel objected that the defender was prejudiced by being put in the box as the pursuer's first witness and treated as hostile; and he referred to the case of *M'Arthur* v. *M'Queen*, decided by the First Division, June 27, 1901, 38 S.L.R. 732, in which he said strong disapprobation of the practice was expressed by the Lord President and other Judges. The report is short, but it is clear from the opinions that the examination of the defender, which is not given, must have been conducted in such a way as to constitute an abuse and operate injustice to the defender. I do not gather that it was intended to lay down any general rule on the subject for the guidance of inferior courts; but individual opinions adverse to the practice were expressed, and as the judgment may be so interpreted, I think that we are bound to express our own views on what is an important point of practice.

I agree generally in the views expressed by Lord Trayner as to the competency of the practice and the power of the Court in regard to it; and I shall only add a few words. I preface what I have to say by remarking that my observations have special reference to the class of cases, viz., filiation cases, with which we are now dealing, in which there is usually *penuria testium*, and the witness is a party to the cause, although they may not be inapplicable to other cases. As far as I know the practice in filiation cases is almost inveterate, owing its origin no doubt to the practice which obtained before the defender was a competent witness, of subjecting him to judicial examination. The same reason which led to judicial examination leads under the new system to the pursuer in an action of filiation often examining the defender as her first witness. The pursuer and the defender are usually the only persons in full knowledge of the facts, and it is usual for the defender to shelter himself under a bare denial of the pursuer's averments, leaving the pursuer in ignorance of his line of defence. The practice is partly due to this, partly to the fear (not unfounded) that if the corroboration of the pursuer's story seems insufficient, the defender will not himself go into the box, and partly perhaps to the pursuer's desire to discredit the defender if he does not answer truthfully.

Now, no doubt the examination of the defender in such circumstances is liable to abuse, but so is cross-examination; and it is the duty of the judge, and he has the power in the one case as in the other, to disallow irrelevant questions and to protect the witness if he thinks that he is being unduly pressed. I do not doubt that for those purposes it is in the discretion of the judge to disallow particular questions or a particular line of examination; but if the questions are pertinent, and if the examination is properly conducted, the judge cannot in my opinion disallow it.

It is said that a party adducing a witness represents him as worthy of credit, and that it is inconsistent with this to subject him to a hostile examination. But it sometimes happens that a hostile witness is the only person who is in possession of the truth, and the pursuer is entitled to extract that evidence by all competent and legitimate means and at any stage of the proof that he thinks best. And if the hostile witness in the course of his examination makes material statements which the pursuer is in a position to contradict by independent evidence, why should he not be allowed to do so although the effect is to discredit the witness whom he has adduced, and from whom he has not succeeded in eliciting the truth? Indeed, this is expressly permitted by statute, 15 and 16 Vict. c. 27, section 3. In the case of *Gall* v. *Gall*, 9 Macph. 177, to which Lord Trayner referred, the Lord President concisely says—"A party is often obliged from the exigencies of his case to adduce a witness whom he cannot expect to be favourable to him, and he is, I think, in such circumstances entitled to treat the witness as a hostile witness whom he is examining in chief; and I hold that the provisions of the Act apply to this case just as much as to the cross-examination of a witness brought forward by the opposite party."

I have already said that the practice may be abused, and it may be that in the interests of procedure and of the parties themselves it should not be adopted unless the exigencies of the case require it. It is attended with certain disadvantages to the defender, and I am aware that before the case of *M'Arthur* some judges have expressed disapproval of it. But assuming it to be objectionable, there is great practical difficulty in finding an alternative; and if the present practice is condemned the judges in the inferior courts must be given definite instructions as to their powers and duties. I understand that in England the law (partly statutory and partly judge made) is that a party to a suit may not treat the opposite party or other witness adduced by himself as hostile without con-

sent of the judge, and that upon that matter the decision of the judge is final—17 and 18 Vict. c. 125, section 22; and *Price* v. *Manning*, 42 Chan. Div. (L.R.) 372. But according to our present law and practice a judge cannot, in my opinion, control a pursuer's discretion in the conduct of her case except in the way which I have indicated, and if that law and practice is to be altered I think it must be done by legislation. I doubt whether such legislation would be beneficial, because it might lead to practice fluctuating according to the views of each individual judge upon a much debated question; and besides, it would be difficult for a judge to decide before he had heard any of the evidence whether the case was one in which it was proper that the defender should be examined as a witness for the pursuer.

As to the effect to be given to the evidence of a defender taken in such fashion, and the weight to be given to it as against evidence brought to contradict it, the judge will no doubt give full effect to the disadvantages under which the defender laboured in not being allowed to tell his story in his own way. But, on the whole matter, I think that in such cases substantial justice will be done if the judge exercises the powers which he already possesses and firmly excludes irrelevant questions or evidence, and if necessary protects the witness from being unfairly handled by his opponent, an event which fortunately in our Courts seldom occurs.

LORD JUSTICE-CLERK—On the question as to whether it is sound practice for the defender to be called as the first witness for the pursuer, it is important to notice that the point does not arise on any decision on the matter as a definite point of practice, but merely on observations made by some of the Judges of the First Division. There is no doubt that in affiliation cases it is a usual, indeed almost an invariable practice, for the pursuer to put the defender into the box as her first witness, he being allowed to reserve himhimself for examination as a witness on his own side after the close of the pursuer's proof. And this practice is not confined to affiliation cases only. I have seen it done in other cases, such as the reduction of wills on the ground of improper influence or fraud. Although it is recognised that it is a practice which should only be resorted to in special circumstances, I have never until now heard it contended that there was anything illegal or objectionable in the practice itself. The object of the practice is to prevent the defender from giving evidence to suit his own side of the case after he has heard the statements made by the pursuer's witnesses. Where the practice is followed, the pursuer has, of course, to face the difficulty of the defender's evidence being unfavourable, but to say that the pursuer should never adopt the practice cannot I think be supported on any satisfactory ground.

I think the opinions quoted to us by Mr Hunter might tend to hamper justice in the inferior courts, and might lead the judges in these courts to prevent the pursuer in cases like the present putting the defender into the box as her first witness. I am of opinion that judges have no such power. Whatever observations may be made on the practice, I think that the pursuer's right to follow it is absolute, and that it would be much to be regretted if in filiation cases the right was taken from the pursuer.

LORD YOUNG was absent.

The Court refused the appeal.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Appellant—Watt, K.C.—Hunter. Agent—Walter C. B. Christie, W.S.

HIGH COURT OF JUSTICIARY.

Monday, November 25.

(Before the Lord Justice-Clerk, Lord Low, and Lord Pearson.)

CAMERON *v.* DEANS.

Justiciary Cases—Review—Conviction and Sentence—Warrant to Imprison—Warrant to Imprison Bearing to Proceed on a Sentence which had not been Signed by the Magistrate—Conviction and Sentence not Signed by Magistrate until after Prisoner Removed from Bar.

Held in a suspension that a conviction and sentence upon a summary complaint in a police court fell to be quashed where it appeared that the warrant for imprisonment had been issued, and the prisoner removed under it, before the formal judgment in the record of proceedings following upon the oral pronouncement of the sentence had been signed by the magistrate.

Alexander Cameron, carter, Newton Street, Renfrew, was charged along with two other persons on a summary complaint in the Police Court, Renfrew, at the instance of Gilbert Deans, the Procurator-Fiscal, with committing a breach of the peace.

On September 16, 1901, Cameron pleaded not guilty, but after evidence had been led was convicted and sentenced to thirty days' imprisonment.

Cameron brought a suspension.

In his statement of facts the complainer stated as follows:—"(Stat. 4) The complainer was conveyed to prison at Glasgow by the train leaving Renfrew at 1·8 p.m. on said 16th September. The police official who conveyed him presented what purported to be an extract of said conviction to the prison authorities at Glasgow bearing to be signed by the presiding Magistrate. The complainer believes and avers that in point of fact the original conviction