claim for a dividend from any funds of the bankrupt which may be available to his creditors.

The Court adhered.

Counsel for the Reclaimers — Dean of Faculty (Campbell, K.C.) — Constable. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Respondent—M'Lennan, K.C. — C. D. Murray. Agents — Murray Lawson & Darling, S.S.C.

Wednesday, February 27.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BROWN *v.* HARVEY.

Reparation—Seduction—Relevancy of Averments.

Averments *held relevant* to go to proof before answer in an action of damages for seduction brought by a barmaid against her recent employer.

Gray v. *Miller*, December 17, 1901, 39 S.L.R. 256, *approved.*

On 10th November 1906 Annie Brown, 27 Castle Street, Edinburgh, brought an action against Edward Harvey, Lochgelly, in which she sought to recover (1) £500 as damages for seduction, (2) £3, 3s. as inlying expenses, and (3) £12 a-year for fourteen years from 14th October 1906, as aliment for an illegitimate child.

The defender was a publican. The pursuer, a barmaid, entered his service on 20th January 1906 to act as barmaid, and as his housekeeper in the house of which the bar formed part. She left his service at the end of February, and gave birth to a female illegitimate child on 14th October 1906.

The pursuer averred—"(Cond. 1) . . . The pursuer . . . is twenty years old. She is an orphan, and has neither brother nor sister nor other near relative. (Cond. 3) . . . She found, contrary to what defender had led her to understand, that she was, after the bar was shut, to be the sole occupant of the house with defender, and she was accommodated with a bedroom in the attic of the house, which has two storeys. The defender's bedroom was on the ground floor in a small room, where the parties also took their meals. (Cond. 4) On the night of 20th January 1906, after the pursuer had retired, the defender called her downstairs on the pretence of giving her the key of her room. On her going to his room she found him in bed, and he asked her to come near him and give him a kiss. The pursuer refused, but on her approaching him to get the key he seized her and tried to pull her into the bed. The pursuer was disgusted, pulled herself free, and told him she would leave his service, upon which he informed her that the key was on the top of a chest of drawers. The pursuer then went to her room and locked herself in it. (Cond. 5) On the next night, and on every night of the week that followed ,defender attempted to kiss pursuer and to embrace her, and made lewd and improper suggestions to her with the object of corrupting her, but the pursuer always refused to allow him to be familiar with her. The pursuer was afraid of defender, who was a tall, strongly-built, masterful, and domineering man of about forty, and when he attempted familiarities in this way she was accustomed to retire upstairs out of his way. . . . (Cond. 6) On the 9th of February 1906 the defender went to a dance, and when he went out he ordered pursuer to sleep downstairs in his bed in order that she might be able to hear him on his return and to let him in without delay. As the door had neither knocker nor bell she did as he ordered, and went to bed partially undressed. He came home at six next morning, and pursuer, having put on some additional clothing, let him in. As soon as he came in he told her to fetch him some claret hot from the bar, which pursuer did. When pursuer returned to his room with the claret he was in bed, and on her approaching him he seized her and drew her into bed with him. She struggled with him, but found that she could not free herself from his hold. (Cond. 7) He then entreated her to allow him to have connection with her, and at the same time used indecent familiarities to her. The pursuer asked him to let her go. He then, in order to pacify her and to obtain his object, told her that anything he might do would not harm her, and that she need not be afraid. The pursuer eventually gave way to the defender's solicitations, and she herself being entirely innocent, and believing what defender said, allowed him to have connection with her. (Cond. 8) The pursuer was very much distressed at and ashamed of the defender's conduct. She told defender so, and that she would leave his service, but at his request, entreaty, and promises of good behaviour she stayed on. He, however, on the morning of the 17th of February following, called her to his room, and on pretence of giving her an order caught hold of her, laid her on his bed, and then by persuasions and promises similar to those narrated in the previous article, again overcame her and had intercourse with her. (Cond. 9) . . . The pursuer believes and avers that the defender is a man of loose and immoral character, and that he is the father of several illegitimate children which former employees had to him. In particular, a Miss Margaret Fraser, a former employee, in September last raised an action against him in the Sheriff Court of Fife at Kirkcaldy, concluding for damages for seduction and aliment of an illegitimate child. The defender admitted in that process that he 'was the father of two illegitimate children borne him by two of his former employees several years ago.' (Cond. 10) The pursuer was seduced by defender in consequence of the persuasions and promises above set forth, and the fact that he used his position of employer, and the ascendancy and influence he had over pursuer as his servant, and the dependent relation in which the

pursuer stood to him, in order to corrupt her mind, and to obtain possession of her person, which he succeeded by these means in doing. She was afraid to offend him. He used his position as her master to get her into his power, but when he repeatedly assured her as he did that she was running no risk in complying with his request to have connection with her he won the pursuer's confidence, and it was only with very great reluctance, on his earnest entreaty, that she surrendered herself to his will. The defender took advantage of the pursuer's youth and guilelessness to seduce her as condescended on. (Cond. 11) The pursuer, as a result of the foresaid acts of connection, became pregnant, and on 14th October last gave birth to a female child, of which the defender is the father. . . ."

The defender, *inter alia*, pleaded—"(1) The averments of the pursuer being, in so far as relating to the conclusion for damages, irrelevant and insufficient in law to support said conclusion, the action ought to be dismissed."

On 22nd January 1907 the Lord Ordinary (SALVESEN) dispensed with the adjustment of issues, and, before answer, allowed a proof.

Opinion.—"This is an action of damages for seduction, and there are also conclusions for aliment of a child which is said to be the result of intercourse between the pursuer and defender. The pursuer at first tabled an issue for the trial of the cause, but ultimately agreed to my allowing a proof before answer. The defender maintained that I should dispose of the relevancy of the averments of seduction, although he did not dispute the relevancy of the action otherwise, and did not maintain that an action to ascertain the paternity of a child (although generally more appropriate to the Sheriff Court) is incompetent in the Court of Session.

"Prior to the decision in the case of *Gray* v. *Miller*, 39 S.L.R. 256, the pursuer's averments of seduction would have been open to serious question, but I do not think the averments in that case are really distinguishable from those which occur in the present. Even if they were, and the question of relevancy were more doubtful, the convenient course is obviously that which the pursuer suggests, for the facts relating to the alleged seduction are exactly the same as would have to be investigated in settling the paternity of the child. I think therefore it would be inexpedient in the interests of both parties that a decision should be given on the question of relevancy, which, whatever the ultimate result, would not avoid or materially lessen the expense of the inquiry that must necessarily take place. Without therefore deciding any question of relevancy, I shall meanwhile dispense with the adjustment of issues and allow a proof before answer."

The defender reclaimed, and argued—The averments so far as intended to support the conclusion for damages for seduction were irrelevant and that conclusion of the summons should be dismissed. Deceit, art, or guile were necessary elements of seduction in the legal sense, and must be averred—*Cathcart* v. *Brown*, July 12, 1905, 7 F. 951, 42 S.L.R. 718. There were no averments here of anything of the nature of deceit, art, or guile. If the supposed ascendancy of a master over his servant was to be relied on, the extent of such ascendancy must be fully set forth. That had been decided in the case of the master's son—*Cathcart* v. *Brown*, *cit. sup.* — and must equally apply in the case of the master himself. It was not set forth here, and it had to be remembered that the pursuer had stayed on in the service. *Gray* v. *Miller*, December 17, 1901, 39 S.L.R. 256, relied on by the Lord Ordinary, did not depend solely upon the master's ascendancy, and did not consider how far that must, if relied on, be set forth.

Argued for the pursuer and respondent—The case was on all fours with *Gray* v. *Miller*, *ut sup.* The pursuer was plied with promises and entreaties. The corrupting of pursuer's mind was relevantly averred on record, and such averments were sufficient to base an action of seduction—*Linning* v. *Hamilton*, December 14, 1748, M. 13,909; *Stewart* v. *Menzies*, June 27, 1837, 15 S. 1198, Lord Ordinary Jeffrey at p. 1199. Solicitation only was averred in *Buchanan* v. *Macnab*, F.C., June 16, 1785.

LORD PRESIDENT—In this case I am of opinion that the Lord Ordinary has taken the right course in allowing proof before answer. It is inexpedient at the present stage to attempt to lay down with too much precision what amount of ascendancy on the part of the master, and what arts and persuasion, are necessary to make what is seduction in the popular sense into seduction in the legal sense. I only make one observation, that I do not think the case of *Gray* v. *Miller*, 1901, 39 S.L.R. 256, is touched by *Cathcart* v. *Brown*, 1905, 7 F. 951, on the question of relevancy. On the form of issue to be allowed, *Cathcart* v. *Brown* is certainly now the authority, but the question of the form of issue was not discussed in *Gray* v. *Miller*.

LORD M'LAREN—I am of the same opinion. It is not expedient at this stage to attempt an exhaustive definition of what amounts to a relevant averment in an action of damages for seduction. I agree that there are in this case averments as specific as are usual or necessary in such cases.

LORD PEARSON—I am of the same opinion. The Lord Ordinary is clearly right in not holding the averments of seduction in this case irrelevant.

LORD KINNEAR was absent.

The Court adhered to the interlocutor of Lord Salvesen, and refused the reclaiming note.

Counsel for the Pursuer (Respondent) — Watt, K.C. — Ingram. Agents — Langlands & Mackay, W.S.

Counsel for the Defender (Reclaimer)—Orr, K.C. — Mitchell. Agents — Clark & Macdonald, S.S.C.