What I chiefly fear, however, is the effect which she might have on his relations with his father. The upbringing, education, and settlement in life of the boy is a duty which the father has to perform, and it is of the utmost importance that he should have the respect and confidence of his son. I greatly fear that the petitioner's influence would almost inevitably be in an opposite direction, because it is evident that she has very bitter, perhaps vindictive, feelings against the respondent; and her history, and what may be gleaned of her character from the correspondence, suggest that she would not be likely to exercise a wise self-control. These considerations, especially in view of the law laid down in the cases of *Bowman* and *Handley*, satisfy me that the petition should be refused.

LORD ARDWALL—I agree with what has been said by your Lordships. I think there is nothing in these proceedings to show that it is for the welfare of the child that the relations between him and his mother, which several years ago were broken off with her full consent, should now be resumed. On the contrary, I think that it is better that he should see and know as little as possible of her in the circumstances. In the next place, with regard to the law of the matter, it is quite settled that a father is entitled to the custody of his child, it is for him to direct what shall be done with the child, and his wishes are paramount unless it can be shown that they are unreasonable or that there is some good and just cause for running counter to them.

The only doubt I have in this case has been raised by the conduct of the father as shown in his letters; they seem to me to show that he has treated most unfairly the grandmother of this child, who has behaved in a most proper and ladylike manner throughout, and who has a strong affection for the child; but this is not sufficient to affect out judgment, as the father, being responsible for the education and upbringing of the child, must just take his own course.

LORD JUSTICE-CLERK—If I thought that the decision of your Lordships was to be taken as meaning that a decision at a particular time on a question such as this was final, and could never be reviewed or modified by the Court at a later date, I should have great difficulty in concurring in what is proposed to be done. The question whether a parent is to be suffered to have access to a child is one which although decided to-day may be varied or altered at a later date if ground can be shown for it. What may be unfavourable to the interests of the child at one time may not be so at a later date. Therefore the judgment your Lordships propose is upon the present state of matters, and as your Lordships all hold that the present petition must be refused I do not dissent from that judgment. If cause can be shown at any later date why what is now done should be recalled or modified, the Court will be bound to consider the application. That being so, I am not placed in the position of holding that a mother can never, whatever the change of circumstances, be allowed to see her child during childhood, which would be a thing I could not assent to.

The Court refused the petition.

Counsel for the Petitioner—Cullen, K.C.—Hon. W. Watson. Agents—J. & A. F. Adam, W.S.

Counsel for the Respondent—Dickson, K.C.—Horne. Agent—A. C. D. Vert, S.S.C.

Friday, February 28.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

RENNIE *v.* JAMES.

Process—Suspension—Decree in Sheriff Court—Res Judicata—Competent and Omitted—Suspension of Charge on Decree in Sheriff Court Correct in Form—Agent-Disburser.

A brought a suspension of a charge on a Sheriff Court decree in favour of B as agent-disburser for the expenses of a litigation in that Court, upon the grounds (1) that no intimation of a motion for such decree had been made to him, nor had such motion ever been made, nor had he had an opportunity of being heard upon it; (2) that B was not agent-disburser, being merely a clerk in the office of the agents conducting the cause; and (3) that B, not having paid the stamp duty exigible from a practising law-agent, was not in a position to take or enforce such decree. The decree was correct in form, and the proof failed to establish any irregularity.

Held with regard to ground (1) that the maxim *omnia presumuntur rite et solemniter acta* applied; and with regard to grounds (2) and (3), that, following *Ewing* v. *Wallace*, August 13, 1832, 6 W. & S. 222, the defence competent and omitted was available, and suspension *refused*.

On 18th September 1906 R. A. Rennie, writer, 136 Wellington Street, Glasgow, brought a note of suspension and interdict against William James, solicitor, Greenock. In it he craved suspension of a charge on a decree for expenses pronounced in the Sheriff Court at Dunoon against him and in favour of the respondent as agent-disburser.

The complainer pleaded, *inter alia*—"2. The said pretended decree is incompetent and *ultra vires* of the Sheriff-Substitute, and the charge following thereon is inept in respect—(1) That there was no motion made to the Sheriff asking for decree in name of the respondent as agent-disburser;

(2) that the said decree is not in terms of the motion intimated to the complainer; (3) that the complainer was entitled to be heard before any decree was pronounced by the Sheriff, and his right in that regard was emphasised by the lodging of a caveat against such decree; (4) that the respondent was not agent-disburser in the said action; (5) (*added by amendment*) that the respondent was not at the time the said motion was made entitled under the Law Agents Acts 1873 and 1891 to act as agent in the cause or to recover costs therein."

The respondent pleaded, *inter alia*—"(2) The complainer's averments if and in so far as material being unfounded in fact, the note should be refused with expenses. (3) The prayer of the note should be refused, in respect that the interlocutor complained of is final, *et separatim*, is not reviewable. (5) The complainer is barred by the exception of competent and omitted from proposing the ground of suspension maintained in his minute of amendment."

A proof was allowed.

The nature of the *averments*, the *facts* established, and the character of the *evidence* are given in the *opinion* of the Lord Ordinary (MACKENZIE), who on 1st June 1907 refused suspension.

Opinion.—"This is a suspension of a charge on an extract decree, dated 19th and 21st July 1906, pronounced by the Sheriff-Substitute in the Sheriff Court of Argyllshire at Dunoon. The charge is to make payment of the expenses of an action of declarator and removing brought by the complainer, who is a writer in Glasgow, against a Mr Duncan.

"The terms of the interlocutor of 19th July are as follows:—'*Dunoon, 19th July 1906.—Act.* Rennie, *Alt.* James. The Sheriff-Substitute having heard parties on the objections to the Auditor's report on the defender's account of the expenses, and on the motion for the defender to allow the decree for expenses to go out and be extracted in name of Mr William James, solicitor, Greenock, the agent-disburser thereof, makes avizandum with the cause.—SCOTT MONCRIEFF PENNY.' By the interlocutor of 21st July the Sheriff-Substitute repelled the objections stated by the pursuer (the complainer in the present suspension) to the Auditor's report; approved of the report; found that the expenses due amounted to £43, 10s. 5½d., and for this sum, along with £1 of a debate fee, he granted decree against the pursuer and allowed 'said decree to go out in name of the defender's agent (Mr James) as agent-disburser.' The respondent in the present suspension is Mr James.

"The grounds on which suspension is sought are (first) that no motion was made to the Sheriff-Substitute asking for decree in name of the respondent as agent-disburser; (second) that the decree is not in terms of the motion intimated to the complainer; (third) that the complainer was not heard and had no opportunity of being heard upon the motion; (fourth) that Messrs M'Ilwraith & Walker, writers, Greenock, were the agents for Mr Duncan, the defender in the action; that Mr James was merely in their employment and was not the agent-disburser. A further plea was added after the discussion in the procedure roll, and after proof had been allowed, that the respondent was not at the time he made the motion for expenses entitled under the Law Agents Acts 1873 and 1891 to act as agent in the cause or to recover costs therein.

"The grounds of suspension originally stated disclosed objections of such a character that they appeared to go not merely to the regularity of the proceedings but to the justice of the case, and a proof by parole was accordingly allowed. The *onus* upon the suspender in such a case is of course heavy, because he requires to prove distinctly that the narrative of the interlocutor, which is the contemporaneous record of what passed in Court, is wrong, and that this has resulted in injustice being done. This as it appears to me is what the suspender has undertaken to do in the present case, and the question is whether he has succeeded.

"The procedure in the case was as follows:—An account of defender's expenses was lodged and taxed by the Auditor on 16th July 1906. On the same day the complainer lodged objections to the taxed account. A copy of these objections was sent the same day to Messrs M'Ilwraith & Walker, writers, Greenock, as agents for Mr Duncan. Mr James is a qualified law-agent in the employment of Messrs M'Ilwraith & Walker. On the 16th of July, in the Sheriff Clerk's office, the complainer tendered a caveat to secure that intimation should be given to him of any motion for decree for expenses in the agent's name. The clerk in the Sheriff Clerk's office explains that he arranged with the complainer that the caveat was not to be lodged if the agents had to appear personally and move for decree. The caveat was not taken in, and the explanation is contained in a letter dated 17th July 1906 from the complainer to the Sheriff Clerk, saying that he had that day got notice of the motion referred to in his caveat lodged the day before, and that the Sheriff Clerk need not therefore trouble sending him notice. The motion of which the complainer had received notice on the 17th was in these terms—'The defender respectfully moves the Court to approve of the Auditor's report on his account of expenses, and to allow the decree therefor to go out and be extracted in his name as agent-disburser thereof.—WM. JAMES, pror. for defender.' On 19th July both the complainer and respondent appeared in Court. There is some evidence as to a conversation between them before the case was called, but this seems to come to nothing. As regards what happened when the case was called, it is common ground that the complainer led in the discussion on his objections to the Auditor's report, that the respondent answered, and that the complainer replied to him. The conflict of evidence is in regard to what followed. The complainer's evidence is that the Sheriff-Substitute

then made avizandum, that he heard another case mentioned, and then left the Court. He states—'There was not a single word said in my presence or in my hearing about a decree in the name of Mr James or in the name of anybody else.' This is precise evidence to the effect that the interlocutor of 19th July was incorrect in stating (as I think it clearly does) that the Sheriff-Substitute had heard parties on the motion for the defender to allow the decree for expenses to go out and be extracted in name of Mr James, the agent-disburser. When, however, one turns to the account given by the respondent, he is explicit in his contradiction of what the complainer says. He says that after the complainer had replied to him, he (the respondent) asked the Sheriff-Substitute for a special debate fee for the discussion, and also asked him for approval of the Auditor's report and decree, in terms of the motion in process. He says both motions were made together. 'Mr Rennie was present in Court when I made the motion, because he objected to the first part, viz., the special fee. . . . (Q) Are you clear that Mr Rennie heard you make the motion?—(A) Yes. (Q) For approval of the Auditor's report and decree, in terms of the motion?—(A) Yes.' In cross-examination he states he never heard the Sheriff-Substitute saying 'avizandum,' and that the complainer said nothing against his motion for decree in the agent's name, and that 'silence means consent.' The respondent says he mentioned the motion a second time, but that it is quite possible the complainer did not hear him then.

"It is difficult to understand how in view of the fact that the complainer appeared anxious to be heard against such a motion, as is evidenced by his tendering the caveat, he should, when the motion was made in his presence, have refrained from opposing. This is the way the matter struck Mr Blue, the clerk, who says he was surprised when he did not hear Mr Rennie replying to the motion when it was made by Mr James. Even Mr Blue, however, cannot say positively that Mr Rennie was not in Court when the motion was made. He first states that Mr Rennie was not, so far as he could remember, in the Court, and that he was not sitting at the agents' bench. But the conclusion of his evidence is that he cannot say whether the complainer was in Court or not. The person who wrote the interlocutor of 19th July was the Sheriff Clerk Depute, Mr Campbell. His evidence is that the interlocutor was written and signed immediately after the discussion. 'I thought at the time it was written out that it was a correct record of the procedure which took place on that date.' His original opinion was that Mr Rennie was present when the interlocutor was written out, and it was not until Mr Rennie spoke to him in the month of September that he began to have doubts about the matter. He says that when he was thinking over it again he could not recollect that Mr Rennie was present. 'As to whether the motion was made in presence of Mr Rennie, I cannot say one way or the other.'

"It appears clear from the evidence of the Sheriff-Substitute, and also from that of the Sheriff Clerk, that there was no discussion on the motion for decree in the name of the agent-disburser. From the evidence of the Sheriff-Substitute, and from a letter he wrote, dated 21st February 1907, his impression seems to be that Mr Rennie had left the Court before Mr James made his motion, and that he understood that the motion was granted as a matter of course, there being no opposition. Here again, however, the evidence does not amount to a positive statement to the contrary effect of what the interlocutor of 19th July bears. As the Sheriff-Substitute puts it, if a witness says that Mr Rennie was in the Court at the time when the motion was made he cannot contradict him. The Sheriff-Substitute does not state at what stage of the proceedings he announced that he made avizandum. His view is expressed in the letter of 21st February 1907 to the complainer, and is that the motion was certainly made before he left the bench, and that if Mr Rennie wished to oppose it he should have remained in Court. The question whether the Sheriff-Substitute had made avizandum before the complainer left the Court is certainly important, and I do not think this is clearly proved. The only other witness is Mr Disselduff, the Auditor of Court, who was in Court on 19th July, and who says that he heard no motion made of any kind whatever. He admits that a motion might have been made for decree in name of the agent-disburser without his hearing it. He did not hear the Sheriff make avizandum. There is some evidence as to what passed as to the order in which the cases set down for the 19th should be taken, but I do not consider it necessary to go into this.

"The decision in the case, in my opinion, depends on whether it is proved to demonstration that the statement in the interlocutor is wrong, and that there was such irregularity in the procedure as to lead to a denial of justice. It is obviously highly inexpedient that anything short of the clearest evidence should be considered sufficient to contradict what is contained in a judicial record. Upon the best consideration of the evidence led I have been unable to reach the conclusion that it is sufficient to negative the terms of the interlocutor of 19th July. The result of this is that I must hold that the complainer had on the 19th of July such an opportunity of being heard as to warrant the statement in the interlocutor that parties had been heard on the motion.

"The complainer argued as a reason for suspension that the decree granted is not in terms of the motion intimated. It is plain that the motion is not properly drawn, but I think that the words 'agent-disburser' were sufficient warning to the complainer that the decree was not to go in the name of the client, Mr Duncan. The Sheriff-Substitute added the word 'agent's' so as

to make the notice run 'and be extracted in his agent's name.' Even though the complainer knew nothing of this, I do not see how he was prejudiced. The interlocutor granting decree was pronounced on 21st July. The respondent says that on the 24th of July he wrote a letter explaining that the Sheriff-Substitute had issued a decree for expenses in the following terms, viz.—'the Sheriff-Substitute has issued decree for expenses, fixing same at £43, 10s. 5d. with £1 for debate, in all £44, 10s. 5d., in my name as agent-disburser, and if it is to be unnecessary that I extract the decree, I shall be glad to have your cheque in course.' The complainer denies that he ever received this letter, and I am bound to say that the evidence for the respondent was unsatisfactory, as he did not bring anyone who could prove the posting of the letter. The correspondence which is admitted commenced on 7th August, and the complainer says that the first suspicion he had that the decree was in Mr James' name was conveyed in a letter of 3rd September. I think it is of importance to notice the position then taken up by the complainer in his letter of 4th September. This is his first challenge of the decree. In it he admits that he does not dispute that Mr Duncan, the client, was entitled as a matter of course to decree for expenses. He says that the only motion as to a decree for expenses brought under his notice was the motion of which the copy had been sent him. He says he never opposed this motion, and never intended to take any objections to a decree following on it. In this letter he maintains that before taking decree in his own name Mr James was bound (1) to lodge and intimate a motion at his own personal instance; (2) expressly crave in the motion for decree in his own name; and (3) to have the motion called and moved in open Court. As regards (1) and (2) the opinion already expressed is that the terms of the motion lodged were a sufficient warrant for the decree granted, and as regards (3) that the motion was called and moved in Court.

"The letter of 4th September raises the question whether, even assuming there was any irregularity in the procedure, the complainer has led any evidence in the present proof to show that he has an interest to object to a decree in the terms granted. In my view, in order to succeed in the present suspension, he must not only show that there was irregularity in the procedure, but also that, in consequence thereof, injustice has been done. Upon averment he does disclose what in my opinion would have been a sufficient interest. His averment is—'Had decree gone forth in name of Mr Duncan, the complainer would have set off against it a decree in his own favour for £14, 18s. 3d., and another liquid claim, both otherwise quite irrecoverable.' The answer to this is 'Denied.' No evidence whatever has been led in support of this averment of the complainer, and in the absence of proof it is impossible to hold that the interest of the complainer has been established. The complainer explains in his evidence the points that he would have maintained if decree had been asked in the name of Mr Walker as agent-disburser. But if he had been successful in these, even then, on the evidence as it stands in the present case, he would just have had to pay the expenses to Mr Duncan, and would have been no better off.

"I have left to the end two points which were strongly urged on behalf of the complainer. The first is that Mr James was not 'the procurator who conducted the suit' within the meaning of section 106 of the Act of Sederunt of 1839. It was maintained that the 'procurator who conducted the suit' meant the same thing as the agent-disburser, and that it was Mr Walker and not Mr James who disbursed all the expenses in connection with the case. The second point is contained in an amendment, viz., that the respondent is not, and was not at the time he obtained the decree, a certificated enrolled law agent, or at least that he had not paid the duties for the period then current entitling him to act as a law-agent, and that accordingly he was not entitled under the Law Agents Acts 1873 and 1891 to act as agent in the cause or to recover costs therein. I do not consider it necessary to express an opinion upon the merits of either of these pleas. I consider that the complainer is barred by the exception of competent and omitted from maintaining either of them as a reason for the present suspension. The decision in the case of *Ewing* v. *Wallace*, 6 W. & S. 222, seems to me a sufficient authority to cover both pleas.

"I am accordingly of opinion that the reasons for suspension should be repelled and the note refused, with expenses."

The complainer reclaimed, and argued—The procedure in the Sheriff Court has been so irregular as to amount to a denial of justice. The complainer had got no notice that decree was to be moved for in the name of the respondent. He was not given any opportunity of stating his objections to a decree in name of the agent-disburser being pronounced, and further to its being pronounced in the respondent's name. James was not the agent in the case, and he had disbursed nothing. To be entitled to decree as agent-disburser an agent must be (1) the agent actually employed; and (2) an actual disburser—Bell's Com. ii, pp. 36-38; *Rennie and Playfair* v. *Aitken*, June 8, 1811, F.C. The respondent was merely a clerk in his firm's employment, and he was not a disburser, for he had incurred no outlays. Moreover, he was not a duly qualified law agent, as he had not paid the stamp duty payable by agents under the Stamp Act 1891 (54 and 55 Vict. c. 39), secs. 43, 47. The A. S. of July 10, 1839, in providing (sec. 106) that the Sheriff might grant decree in name of the "procurator conducting the suit" did not confer any exceptional privilege on those practising in the Sheriff Court—"procurator" meant a duly qualified law agent. *Esto*

that the complainer knew that decree in the name of the agent-disburser was to be moved for, he was not aware that James was the agent referred to. That being so, there was no bar to his stating now the personal objections against him above referred to. The defence of "competent and omitted" put forward by the respondent could not be pleaded where, as here, the complainer had no opportunity of being heard. In any event, that plea was not applicable *quoad* inferior court decrees—Ersk. Inst. iv, 3, 7; Act 1672, c. 16, sec. 19. The case of *Ewing* v. *Wallace*, August 13, 1832, 6 W. and S. 222, relied on by the respondent, did not apply to a case where, as here, the complainer was not aware of the motion that was to be made.

Argued for respondent—The complainer had got notice of the motion in question, for he had lodged a caveat. The interlocutor bore that he had been heard on the motion, and he had failed to prove that the interlocutor was not a correct recital of what happened; if he had failed to state all his objections to the motion made, *sibi imputet*. The objections came too late. He was barred from stating them now by the exception of "competent and omitted"—*Ewing* v. *Wallace* (*cit. supra*). The complainer might have appealed to the Sheriff, and not having done so, had lost his remedy. As to the objection founded on the Stamp Act, this was clearly an afterthought. Moreover, the duty was not exigible for persons in the employment of a duly certificated law agent—Grierson on Stamp Duties (2nd ed.), p. 110, note to sec. 43 of Stamp Act 1891 (*cit. supra*). In any event, if the duty were exigible the respondent was ready to pay it, and should be given an opportunity to do so.

At advising—

LORD PRESIDENT—This is a case where a gentleman being in possession of a decree proceeds to make it good by charging, and this is a suspension of the charge on that decree. Now, I need scarcely say that a decree cannot be opened up unless there is something clearly wrong about it. What is said to be wrong with this decree is this. It is a decree which was issued for a sum of expenses in the name of an agent-disburser. The party against whom the decree is sought to be enforced says that the decree is truly a mistake, because no motion was ever properly made in the case to allow the decree to go out in the name of the agent-disburser; and then he says it is bad for two other reasons—firstly, that the gentleman who holds it was not in fact the agent-disburser; and secondly, that he could not enforce it because he had not paid certain stamp duties which he ought to have paid in order to have a licence to practise as an agent. I do not say that it would be impossible to suspend a decree upon averments that it had never been moved for, and that no decree had ever been in truth pronounced. If you could suppose a case where it could be clearly proved that the judge had never really pronounced any decree at all, and that the so-called decree was what might be called a figment of the clerk's imagination, and not authorised by any pronouncement of the judge, I think in such a case the decree could be suspended. But certainly if ever there is a case where the maxim *omnia præsumuntur rite et solemniter acta esse* should apply, the proceedings of a court of law supply such a case, and it would require to my mind the most clear evidence to allow your Lordships to set aside a decree on such grounds. I do not propose to go through the evidence in detail, but I say without hesitation that so far from it being clear that the motion for expenses was not made, there is, on the contrary, a great deal of evidence to the opposite effect. The complainer may be in good faith in saying that he did not hear the motion made, but that does not show that a motion was not made, and at anyrate I think it is quite enough for the purposes of this case to hold, as the Lord Ordinary has held after proof, that the complainer has failed to prove his case. So much for the first objection. As regards the other two points, it seems to me that the objection comes too late.

I agree with the Lord Ordinary that the case of *Ewing* v. *Wallace*, 1832, 6 W. & S. 222, really covers both points here. It directly covers the point about the gentleman not having paid his proper dues. I think it covers the other point *pari ratione*. It was quite apparent when this decree was pronounced that the person who was asking for it as agent-disburser was the procurator who had conducted the case, as he was the only person who had been in Court. Well, we are told, and I will assume truly, that that procurator although he conducted the case, really only conducted it as the hand of another agent and was not a licensed procurator, and we are told that the actual disbursements came out of the pocket of this other gentleman, and not out of that of the procurator. That is as it may be, but I am quite sure that if the objection was to be taken that the man who was conducting the case was not the agent-disburser, that is an objection which ought to have been taken at once, and it is far too late to take it afterwards by way of suspension. On the whole, therefore, I am of opinion that the Lord Ordinary has decided the matter rightly, and that we should adhere to his judgment.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court adhered.

Counsel for Complainer (Reclaimer)—Munro—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondent—A. M. Anderson. Agent—Alex. Ramsay, S.S.C.