proof, therefore dismisses the said petition; and having resumed consideration of the record, proof, and whole process, Finds, in point of fact, that the pursuer has failed to prove that the defender is the father of the child libelled: Therefore dismisses the summons, and assoilzies the defender from the whole conclusions thereof: Finds the defender entitled to expenses; allows an account thereof to be given in; and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns.

"*Note.*—The Sheriff, as requested, gave the pursuer an opportunity of showing 'very weighty reasons' why she should yet be allowed to lead further proof, and in particular still to examine her husband.

"Having heard parties, and carefully examined the petition, No. 15 of process, the Sheriff finds himself unable to hold that she has stated any such 'very weighty reasons' as to entitle her to lead further proof.

"It is not even said that she had endeavoured and failed to find her husband for examination before the proof was circumduced. It would rather seem that the pursuer did not in time perceive the importance of examining her husband, to entitle her to succeed in her action. The defender, while he denied the statements in the summons, averred that a number of men specified had had intercourse with the pursuer, but not a word is said as to her own husband having had such intercourse, and not a question is put to the pursuer when examined as to this; and it is only after the proof is concluded that the plea is raised, '*Pater est quem nuptiæ demonstrant*,' but nothing of this kind is alleged in the said petition. The statements in the petition, such as they are, seem to the Sheriff to be irrelevant. No reason is stated why her husband was not examined at the proof formerly taken by the Sheriff-Substitute.

"Then, on considering the proof as taken, the Sheriff finds that he cannot hold that the pursuer has proved her case. Her husband, it appears from the proof, has been living at Dundee, within a three hours' walk of Forfar, and within an hour by rail. For aught that appears, her husband may have come to Forfar every Saturday night, and returned to his work in Dundee every Monday morning. In short, there is nothing whatever in the proof, as led, to elide the presumption, '*Pater est quem nuptiæ demonstrant.*'"

The pursuer appealed to the First Division of the Court of Session.

JAMESON, for her, argued that it was not necessary to prove actual impossibility of access on the part of the husband, but that all that was required by law was proof that *de facto* there had been no access, and that by the law of Scotland it was competent to call the husband and the mother to rebut the presumption *pater est quem nuptiæ demonstrant.* —Bankton, 1, 2, 3; Craig, 2, 18, 17, 20; Erskine's Institutes, 1, 6, 49; Erskine's Principles, 1, 7, 36; Stair, 3, 3, 42; Decretals of Gregory, 2, 19, 10, and 4, 17, 3; *Mackay*, Feb. 24, 1855, 17 D. 494; *Jobson* v. *Reid*, May 31, 1832, 10 S. 594; *Beattie* v. *Baird*, Jan. 15, 1863, 1 Macph. 273; *Walker* v. *Walker*, Jan. 23, 1857, 19 D. 290; Dickson on Evidence, vol. ii, p. 999; *Sandilands* v. *Nimmo*, Feb. 14, 1855, 27 Scot. Jurist, 178; *Legge* v. *Edmonds*, 25 L. J. Chan. 125: *Morris* v. *D* , 5 Clark and Finelly; Weightman on Legitimacy and Divorce, p. 145-149; *Atchlay* v. *Sprigg*, March 5, 1864, 33 L. J. Chan. 345; *Gurney* v. *Gurney*, May 5, 1863, 32 L. J. Chan. N. S.,463; Taylor on Evidence, 838; *Rex* v. *Sourton*, 5 Ad. and Ellis, 180; *Plowes* v. *Bossey*, Feb. 25, 1862, 31 L. J. Chan. 681, 6.

FRASER, for the defender, argued that no weighty grounds had been submitted why additional proof should be allowed, and, that being the case, the Sheriff had no choice but to give weight to the presumption "*pater est quem nuptiæ demonstrant*," as the husband had all along been living near his wife, and had had all opportunity of seeing her. It was settled law in England that the evidence of the husband or wife in such a case as this was not admissible, and although in some cases similar evidence had been admitted in Scotland, yet it had only been admitted to prove facts which had occurred before the circumstances which gave rise to the action took place—*Legge* v. *Edmonds*, Nov. 20, 1855, 25 L. J. (Chancery) 125; *Rex* v. *Inhabitants of Sourton*, May 28, 1836, 5 Adolphus and Ellis, 180.

LORD PRESIDENT—It may be possible to rebut the presumption without the pursuer's adducing herself or her husband as witnesses. In that case it would be unnecessary for the Court to decide whether such evidence is admissible. The Court will therefore open up the proof and allow the pursuer to lead other witnesses—except herself and her husband—to show that there has been no access, reserving consideration whether these two witnesses can be admitted. The proof to be taken before Lord Ardmillan.

JAMESON submitted that, on account of the poverty of the pursuer, and the near approach of the vacation, it would be expedient for their Lordships to grant commission, under the 2d section of the Evidence Act 1866, 29 and 30 Vict. 112, to take the evidence at Dundee.

FRASER opposed the motion, on the ground that no special cause had been shown.

The Court, however, granted commission to the Sheriff-Substitute at Dundee to take the evidence.

Agents for the Pursuer—Macrae & Flett, W.S.
Agent for the Defender—John Galletly, S.S.C.

Thursday, July 18.

JAMES MELLIS, PETITIONER.

Inhibition—Recall—Service.

Circumstances in which the Court granted the prayer of a petition for recall of inhibitions, without service of the petition upon the inhibitors.

This was a petition presented by James Mellis, soap-boiler in Prestonpans, for recall of inhibitions. The petition proceeded on the following narrative. That in 1844 the petitioner carried on business along with Mr Wm. Thompson in Newcastle-upon-Tyne, and in Buenos Ayres and Monte Video, as merchants and commission agents, under the designation of Thompson, Mellis & Company. That the co-partnery so constituted became bankrupt, and that on 22d January 1844 a fiat was issued against them, directed to the District Court of Bankruptcy at Newcastle-upon-Tyne, and the said William Thompson and the petitioner were thereupon adjudged bankrupts. Thereafter, in pursuance of the Bankruptcy Statutes then in force in England, the petitioner surrendered, and made a full disclosure and discovery of his estate and

effects, and in all things conformed to the said statutes, and was found entitled to and received from the Commissioner of said District Court of Bankruptcy a certificate of conformity to the requirement of the bankruptcy laws. The said certificate is dated 30th August, and was allowed and confirmed by the Court of Review in Bankruptcy, on 28th September, and entered on record, pursuant to Act of Parliament, on 17th October, all in the year 1844.

The statute 5 and 6 Vict. c. 122, sec. 37, enacts, "That every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force at the time of issuing the fiat in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the fiat, in case he shall obtain a certificate of such conformity, so signed and allowed and subject to such provisions as hereinafter mentioned."

That certain inhibitions had been raised against the said Thompson, Mellis & Company—1*st*, an inhibition by William Henry Tilstone, merchant, London; and 2*d*, two inhibitions raised by Messrs Porter & Latimer, colliery owners, Newcastle-upon-Tyne, and that the debts for which these inhibitions were raised were debts incurred by the said Thompson, Mellis & Company, and the petitioner as a partner thereof, prior to the date of the certificate before referred to, and the petitioner is therefore discharged thereof. That the residence or place of business of the said William Henry Tilstone and Messrs Porter and Latimer are unknown to the petitioner, and they have no known agent in Scotland.

The prayer of the petition was—"May it therefore please your Lordships to grant warrant for serving this petition on the said William Henry Tilstone, and Messrs Porter & Latimer, and to ordain them to give in answers thereto within a short space, if so advised, and on resuming consideration of the petition, with or without answers, to recall the foresaid inhibitions in so far as the same affect the petitioner; and to grant warrant for marking the same as discharged in the record of inhibitions; or to do otherwise in the premises as to your Lordships shall seem proper."

ASHER for the petitioner.

LORD PRESIDENT said that since Mr Tilstone and Messrs Porter and Latimer had disappeared, the question came to be, whether, because it was impossible to serve the petition upon these gentlemen, the inhibitions should be allowed to stand until the debts expired. I do not feel inclined to go so far as this, but, on the contrary, I think we should grant the prayer of the petition.

The other Judges concurred.

Agents for Petitioner—Henry & Shiress, S.S.C.

Thursday, July 18.

JOHN C. FOULDS, PETITIONER.

Bankruptcy—Bankruptcy Act 1839—*Trustee—Creditors—Sederunt Book.*

Where a sequestration had not been proceeded with, there being no funds of the bankrupt available, and the sederunt-books and other papers had been lost, the trustee, on the bankrupt afterwards succeeding to property, petitioned the Court for powers to carry through the sequestration, notwithstanding the loss of the papers. The Court authorised a notice to be given to creditors to lodge claims; and, *quoad ultra*, superseded consideration of the petition.

This petition was presented by Mr John Christie Foulds, accountant, under the following circumstances:—

On 20th April 1855 the estates of James Cormie were sequestrated by the Lord Ordinary on the Bills, under the Act 2 and 3 Vict. c. 41; and on May 7, 1855, the petitioner was elected trustee on the estates, and was thereafter duly confirmed. The petitioner's intromissions under the sequestration were of trifling amount, the assets of the estate being so small as not to cover the expenses of the sequestration, much less to pay a dividend to the creditors. Shortly after the sequestration, the bankrupt left Scotland, and nothing was heard of him till last year, when it was learned that he had returned to this country, and was endeavouring to carry through a sale of a small property in Paisley to which he had succeeded through the death of his father, John Cormie, spirit-dealer in Anderston of Glasgow. The petitioner thereupon made the necessary application to the Lord Ordinary on the Bills, and, on November 1, 1871, obtained deliverance and warrant of his Lordship declaring the subjects in Paisley, as described in the application, to be vested in the petitioner, as trustee foresaid, at the date of the succession thereto, all in terms of the said Act. Then the petitioner convened a meeting of creditors, who elected commissioners in place of two of the original commissioners, who had died. Afterwards the petitioner sold the subjects, and thus obtained a sum of from £200 to £300 for division. But the difficulty arose that the Sederunt Book, claims of creditors, and whole other documents in the sequestration were lost, and could not be found. The petitioner had thus no list of the creditors who lodged claims, nor any means of getting such a list, and consequently he could not declare or pay a dividend, or otherwise proceed with the sequestration.

In these circumstances the trustee presented this petition, the prayer of which was as follows:—"May it therefore please your Lordships, after such intimation or service hereof (if any) as to your Lordships may seem necessary, to grant to the petitioner authority to proceed in the sequestration, and to take all necessary steps therein for the division of the funds, and otherwise, notwithstanding the loss of the Sederunt Book, claims, and other documents, and the petitioner's consequent inability to use or produce the same in terms and for the purposes of the statute; and to authorise the petitioner to insert a notice in the Edinburgh Gazette, North British Advertiser, and Glasgow Herald newspapers, addressed to the creditors on the estate, setting forth the date of the sequestration and the loss of the claims lodged by creditors, and requiring creditors, and representatives of creditors deceased, to lodge claims in the statutory form within the period of one month from the last date of notice, under certification that the assets of the estate shall be divided among such creditors, or representatives of creditors, only as shall lodge claims within the said period; the claims so lodged being always disposed of in accordance with the provisions of the said Act, and the further procedure in the sequestration, with a view to the