approved of the issue as so varied, as the issue for the trial of the cause.

Counsel for the Defender and Reclaimer —Mackay, K.C.—Gilchrist. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Pursuer and Respondent —Aitchison, K.C.—King. Agents—Campbell & Smith, S.S.C.

Saturday, May 31.

FIRST DIVISION.

[Sheriff Court at Perth.

ROBBIE *v.* DAWES.

Expenses — Affiliation and Aliment—Constitution of Claim—Paternity Admitted and Aliment Paid Prior to Raising of Action.

The defender in an action of affiliation and aliment had admitted paternity before the action was raised, and had paid the inlying expenses and aliment as it became due at the rate concluded for, but had refused to bear the expense of a written agreement admitting paternity and undertaking to pay aliment. *Held* that the pursuer was entitled to decree of affiliation and aliment, but that as in the circumstances the action was merely one of constitution she was not entitled to expenses.

Rebecca Howe Laird Robbie, Perth, *pursuer*, brought an action in the Sheriff Court at Perth against Corporal F. C. Dawes, Army Pay Office, Perth, *defender*, in which she craved decree of affiliation and aliment in respect of a child which was born on 20th July 1923.

The averments of the parties were, *inter alia*—"(Cond. 4) Defender is the father of said child and has admitted paternity of said child, and has paid inlying expenses and aliment for one quarter at the rate sued for, to the extent of which sums so paid the pursuer restricts her claim. The defender has before and since the action was raised paid to the pursuer in all the sum of £9, 17s. in name of inlying expenses and aliment—(*Ans.* 4) Admitted that the defender admitted being the father of pursuer's child and paid the inlying expenses and first quarter's aliment previous to the action being raised. Explained that defender's agent wrote the pursuer's agent on 6th August 1923 enclosing £2, 18s. 6d., being the first quarter's aliment, the inlying expenses having been previously paid, and intimating that the future aliment would be paid through him. (Cond. 5) Pursuer desired defender to enter into a written extra-judicial agreement wherein he would admit paternity of said child and find and oblige himself to pay aliment at the rate claimed, and that he would bear the expense of said agreement, but defender refuses to enter into any such agreement—(*Ans.* 5) Admitted that the pursuer desired the defender to enter into a written extra-judicial agreement wherein he would admit paternity of said child and bind and oblige himself to pay aliment at the rate claimed, and that he would bear the expense of said agreement. *Quoad ultra* denied. Explained that on 6th September 1923 the defender's agent wrote the pursuer's agent that as the defender had 'admitted the paternity of pursuer's child, paid the inlying expenses, and will pay the future aliment through me, he does not see the necessity of incurring the expense of an agreement.' On 10th September 1923 the defender's agent wrote the pursuer's agent that if his client wished 'a written agreement or a decree of court she could have this at her own expense.' Again, on 27th September 1923 the defender's agent wrote the pursuer's agent that as his 'client had admitted the paternity he does not see the necessity of an agreement. If your client wishes same the expense must fall on her.' Pursuer is called upon to produce said letters. (Cond. 6) Defender is an Englishman at present on military service in Scotland, but amenable to the jurisdiction of the Scottish Courts. He may, however, at any time be removed on military service from Scotland, when pursuer would lose her remedy against him in the Scottish Courts. The pursuer believes and avers that defender in order to escape continued liability for and payment of the aliment due for said child contemplates leaving Scotland, and in consequence refused to enter into any extra-judicial agreement to aliment said child—(*Ans.* 6) Admitted that defender is an Englishman at present on military service in Scotland and subject to jurisdiction of the Scottish Courts. Explained there is no immediate prospect of defender being removed from Scotland. Pursuer's additional averments are denied."

The defender pleaded, *inter alia*—"1. The pursuer in respect of defender's admissions of paternity and payment of the inlying expenses and first quarter's aliment before the action was raised is bound to constitute her claim at her own expense."

On 16th January 1924 the Sheriff-Substitute (BOSWELL) decerned against the defender in terms of the crave of the initial writ and found the pursuer entitled to the expenses of bringing the action into Court, and to one guinea sterling of modified expenses in respect of subsequent procedure.

The defender appealed to the Sheriff (SANDEMAN), who on 25th February 1924 recalled the interlocutor of the Sheriff-Substitute, sustained the first plea-in-law for the defender, and dismissed the action, and found the pursuer liable to the defender in the expenses of the cause and of the appeal.

The pursuer appealed.

Counsel for the pursuer referred to the case of *Doyle* v. *Reilly*, 1919, 35 S.L.R. 271.

LORD PRESIDENT (CLYDE)—This is an action of affiliation and aliment which was brought in the Sheriff Court. The initial writ includes the usual declarator of paternity, a crave for a sum in name of inlying expenses, and for aliment for the child, and a further crave for expenses against the defender. On record, however, the pursuer

herself avers that the defender had admitted paternity, and paid the inlying expenses together with a quarter's aliment in advance at the rate sued for, and to the extent of the sums so paid she restricts her claim. The action is thus one of constitution only, since *ante litem motam* the defender had admitted that he was the father of the child, and owed nothing to the pursuer at the date when the action was instituted.

The defences are limited to the question of expenses. The defender pleads that if the pursuer wishes to constitute her claims, she must in the circumstances do so at her own expense, and that he is himself entitled to expenses. Some words have been accidentally omitted from the fifth plea, but it is obvious that the dismissal there asked is a dismissal *quoad* the pursuer's crave for expenses against the defender.

In this state of the pleadings the Sheriff-Substitute granted decree in terms of the crave of the initial writ, finding the pursuer entitled to the expenses of bringing the action into Court, and to a small sum of modified expenses in respect of the subsequent procedure. The Sheriff-Substitute states that in the matter of expenses he followed the case of *Doyle* v. *Reilly* (1919, 35 S.L. Rev.), decided in the Sheriff Court at Glasgow. But in that case there was no admission of paternity by the defender before the institution of proceedings—a most material distinction between that case and the present one.

The defender appealed to the Sheriff, who recalled the Sheriff-Substitute's interlocutor and sustained the defender's first plea-in-law. That plea, as I have already pointed out, related like the defender's remaining pleas solely to the question of expenses. The learned Sheriff, however, apparently upon the view that the pursuer was not justified in bringing the defender into Court at all, went on to dismiss the action. Some mistake seems to have occurred in this matter, for we were informed that at the hearing of the appeal before the Sheriff the defender (appellant) confined his argument entirely to the question of expenses and made no motion for dismissal of the action—a motion for which, indeed, his pleadings afforded no warrant whatever.

It is not doubtful that the mother of an illegitimate child is entitled (where the circumstances make it a reasonable course for the protection of her rights) to ask decree against the father notwithstanding a prior admission of paternity by him, and notwithstanding discharge by him of all his consequent liabilities to date. Thus in the present case the defender is an Englishman and a member of His Majesty's Forces, and as he may leave or be ordered to remove from the jurisdiction of the courts of Scotland at any time it is intelligible that the pursuer should have taken these proceedings for the protection of rights which she might otherwise find it possibly difficult to enforce at some future time in an English Court. I am therefore of opinion that the Sheriff-Substitute was right in granting the decree, on the merits, which the pursuer asked, and that the Sheriff-Principal erred in recalling this part of the Sheriff-Substitute's interlocutor.

But there is no ground whatever for throwing the expense of this precautionary measure on a defender who has already admitted his paternity and has discharged and is discharging his consequent liabilities. I think therefore the Sheriff-Substitute was wrong in giving the pursuer any expenses, and that the Sheriff-Principal was right in recalling that part of the Sheriff-Substitute's interlocutor which dealt with expenses. The defender was in no way responsible for the mistake of the Sheriff-Principal in dismissing the action, and in the whole circumstances, while I think the pursuer must have her decree (on the merits) restored, my opinion is that she is not entitled to any expenses in the Court below, and for the same reasons I think that there should be no expenses in the present appeal.

LORD SKERRINGTON, LORD CULLEN, and LORD SANDS concurred.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, decerned against the defender in terms of the crave of the initial writ, and found no expenses due to or by either party.

Counsel for the Pursuer and Appellant — Dykes. Agents — Cornillon, Craig, & Thomas, W.S.

For the Defender—Party.

Saturday, June 7.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

HENDRY AND ANOTHER *v.* WALKER.

Process — Appeal — Competency — Sheriff — Lease — Decree of Removing — Court of Session Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 44—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 78.

Lease — Removing — Sheriff — Appeal — Competency.

The Court of Session Act 1825 (The Judicature Act), section 44, enacts—"When any judgment shall be pronounced by an inferior court, ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply . . . by bill of advocation to be passed at once, but only by means of suspension. . . ."

The Court of Session Act 1868, section 78, enacts—"Where by any statute now in force the right of review by advocation to the Court of Session is excluded or restricted, such exclusion or restriction of review shall be deemed and taken to apply to review by appeal under this Act."

In an application by the proprietors of a farm for (1) a declarator that the tenant's lease had expired, and (2) a warrant for summary ejection, the