the proper procedure was to dismiss the complaint?

The appellant argued that there was no question of heritable title involved.

The respondent referred to the case of *Higgins* v. *Earl of Moray*, Sept. 9, 1884, 22 S.L.R. 8, 12 R. (J.C) 1.

At advising—

LORD YOUNG—[*After stating the facts*]—I do not think that there is any proper question of heritable title in this case. No claim is made against the proprietor by anyone except the alleged poacher. The burgh do not say that the land on which the alleged poacher was belongs to them. They make no claim, and decline when asked to make any claim. The Sheriff-Substitute seems to me to have acted erroneously in dismissing the complaint, and I propose to your Lordships to remit to him to try the case, and to find the appellant entitled to the expenses of this appeal.

LORDS CRAIGHILL and M'LAREN concurred.

The Court sustained the appeal, and remitted to the Sheriff-Substitute to try the case.

Counsel for Appellant — Guthrie. Agents—Cowan & Dalmahoy, W.S.

Counsel for Respondent — Comrie Thomson. Agent—D. Roberts, S.S.C.

Saturday, June 4.

(Before Lords Young, Craighill, and M'Laren.)

[Sheriff-Substitute, Edinburgh.

LINTON *v.* SHERRY.

Justiciary Cases—Public-House—9 Geo. IV. cap. 58, sec. 30—Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 17—*Shebeening—Modification of Penalty—Summary Jurisdiction (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 33), *sec.* 6—*Edinburgh Municipal and Police Act* 1879 (42 *and* 43 *Vict. cap. cxxxii.*) *sec.* 319.

The 319th section of the Edinburgh Municipal and Police Act 1879 deals with offences against the Acts 9 Geo. IV. cap. 58, and 25 and 26 Vict. cap 35, and provides that "Every such offence or breach shall be proceeded with, tried, and determined, and all penalties incurred shall be recovered and applied by the Judge of Police in the manner and subject to the conditions provided in the said Acts." By the Home Drummond Act (9 Geo. IV. c. 58, sec. 30), it is provided that a penalty of £7 shall be imposed for a first offence under that section; and a power of mitigating the statutory penalty to one-fourth is given to the Court. By the Public-Houses Acts Amendment (Scotland) Act 1862, sec. 17, the power of modification was taken away, and it is provided that for each conviction of the offence of shebeening the full penalties specified by sec. 30 of the Act 9 Geo. IV. cap. 58, shall be imposed. By the Summary Jurisdiction (Scotland) Act 1881, sec. 3, it is provided that the provisions of the Summary Jurisdiction (Scotland) Acts 1864 and 1881 shall apply to all summary proceedings as enumerated in the third section of the Summary Procedure Act 1864, . . . "Provided also that where there is a general or local Police Act in force it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms prescribed by the Summary Jurisdiction Acts." Section 6, subsection (*a*), of the said Act of 1881, provides that where the punishment of a penalty or fine is imposed, the Court may reduce the amount of said fine.

A public prosecutor proceeding under section 319 of the Edinburgh Municipal and Police Act 1879, obtained a conviction of the offence of shebeening. In the circumstances of the case the Judge of Police modified the statutory penalty of £7 to £1. *Held* that he had power to do so under sec. 6 of the Summary Jurisdiction (Scotland) Act 1881, and that the option given by the third section of the Summary Jurisdiction Act 1881 did not confer the right upon the public prosecutor of proceeding under the local Act, to the effect of founding upon all its provisions so as to exclude the discretionary power vested in the Judge of Police by section 6, sub-section (*a*), of the Summary Jurisdiction Act 1881.

Counsel for the Appellant—D. F. Mackintosh, Q.C.—Boyd. Agent—W. White Millar, S.S.C.

Counsel for the Respondent—Lyell. Agent—R. H. M'Donald, Solicitor.

COURT OF SESSION.

Saturday, June 4.

FIRST DIVISION.

VOST OR MACPHERSON, PETITIONER.

Parent and Child—Illegitimate Child—Custody—Agreement.

Held that the mother of an illegitimate infant child, in virtue of her absolute right to its custody, was entitled to cancel a temporary arrangement made with the father, by which the child was placed in his custody, for maintenance and education.

Opinions reserved upon the question whether the mother could have made a permanent arrangement so as to exclude her right.

This petition was presented by Mrs Jean Rollo Vost or Macpherson for custody of her infant illegitimate child under the following circumstances:—

On 13th November 1885 the petitioner, who was then Miss Jean Rollo Vost, and unmarried, gave birth to an illegitimate male child, of which Mr Septimus Leishman, C.E., Dollar, was the father. Miss Vost then raised an action of declarator of marriage against Mr Leishman, or otherwise for £3000 in name of damages and *solatium*, on the ground that the defender had seduced her. This action was settled, the pursuer receiving £1500, and consenting to the defender being assoilzied from the declaratory

conclusions of the summons. Thereafter Mr Leishman was called upon to pay inlying expenses and aliment for the child, and on 10th July 1886 his agents wrote to the agents for Miss Vost as follows—"Mr Leishman is prepared to relieve Miss Vost of all expenses for the child's maintenance and education, &c., provided she consents to Mr Leishman having the custody of the child; and should she agree to that, Mr Leishman will not only take care that it be placed in charge of some competent person, but will also arrange for Miss Vost seeing it at short and stated intervals in order that she may be satisfied that it is properly attended to." On 12th July Miss Vost's agents answered that letter thus—"We are in receipt of your letter of the 10th instant. Miss Vost is willing to hand over the child to Mr Leishman for maintenance and education; and so soon as a satisfactory place of residence has been procured by Mr Leishman for it, she will be prepared to give the child to any one whom he may send for it. . . . You will understand that this arrangement is made upon the assumption that Miss Vost is to have access to the child at short stated intervals in order that she may be satisfied that it is properly attended to." Thereafter the child was handed over to the custody of Mr Leishman, and was by him put under the charge of a respectable nurse.

On May 13, 1887, the petitioner, who had in the meantime been married to Mr Finlay Macpherson, presented this petition for custody of the child. She stated that Mr Leishman was at present in Australia, and had no home to take the child to, and that the petitioner believed and averred that her child was "seriously suffering in health from the want of due attention and nourishment, and that its life will be endangered if it is not delivered up to her without delay." She therefore craved the Court to find that she was entitled to the custody of her said illegitimate child, and to ordain the persons who had charge of the child to deliver it up to her.

Answers were lodged for Mr Septimus Leishman and Mr David Kier, his factor and commissioner, in which they founded on the arrangement come to in 1886. They stated that the child was in delicate health, and produced medical certificates to the effect that the child was being carefully attended to.

The petitioner argued—The mother has an absolute right to the custody of her illegitimate child so long at least as it is an infant, and to exclude that right it must be shown that the mother is unfit to take charge of her child. The petitioner's case is one of absolute right. It has been laid down that the father has no right to the custody of his illegitimate children. He must pay aliment for them, and when the child has attained a certain age he may claim to bring him up in his house, or decline to pay more, but that has nothing to do with custody. The mother cannot bargain to give up her rights—Erskine, i. 6, 56 (note); *Goodly*, July 7, 1815, F.C.; *Kidston* v. *Smith*, Dec. 16, 1773, 5 Br. Supp. 390; *Corrie* v. *Adair*, Feb. 24, 1860, 22 D. 897; *Weepers* v. *Heritors and Kirk-Session of Kennoway*, June 20, 1840, 6 D. 1166; *Buie* v. *Stiven*, Dec. 5, 1863, 2 Macph. 208 (Lord Justice-Clerk at p. 222); *Shearer* v. *Robertson*, Nov. 29, 1877, 5 R. 263; *Symington* v. *Symington*, March 18, 1875, 2 R. (H. of L.) 41. The observations of the Lord Chancellor in the last case were founded upon the operation of the Conjugal Rights Amendment Act, and so had no bearing here.

The respondent argued—Admitting that the mother's right to the custody of her infant illegitimate child is absolute, still here the mother had made an agreement with the father that the child was to be handed over to him for maintenance and education. The matter of custody was in the discretion of the Court. In this case the child, who was delicate, was being carefully brought up, and the father had made a settlement in his favour. If the mother had never parted with the custody of the child the case would have been different, but here she had done so, and there was no absolute rule in the law of Scotland that in such a case the child must be sent back to the custody of the mother to its own detriment. The precise case had never arisen in Scotland, but there was a case in England in which the question had been raised—*The King* v. *De Manneville*, May 12, 1884, 5 East's Reps. 224; *Rex* v. *Moseley*, 5 East, 224, note; Eversley on the Law of Domestic Relations, 622; *in re Crowe, an Infant*, Ir. L.T. Rep., 1883, p. 72.

At advising—

Lord President—The arrangement which was made in this case appears to me to have been a very judicious one—that the child should be handed over to the custody of the father for its maintenance and education—and one cannot help regretting that the petitioner is desirous of putting an end to it. But she has the right to do so if she wishes. The right of the mother to the custody of her infant illegitimate child is absolute, and in ordinary circumstances the right would be at once enforced. But the peculiarity in this case is that an arrangement was entered into by which the father bound himself to provide for the child, and relieve the mother of all expense in regard to it, when it was given over into his custody. I do not think, however, that this arrangement can be binding on the petitioner as a permanent one. Whether it would be binding on the putative father of the child or not is another question, which we have not got to deal with here, but it certainly cannot interfere with the legal right of the mother to the custody of her child. It is true that she consented to the arrangement by which the father took the custody of the child, but there is no provision in it for making that a permanent arrangement, and even if there had been, I doubt if the mother could effectually bind herself so as to give up the custody of her infant illegitimate child. I think we must grant the prayer of the petition.

Lord Mure—I am of the same opinion. The father of an illegitimate child has no right to its custody in the ordinary case, and the question here is, whether the mother could bind herself by an agreement by which she gave up the custody of her child? I think that she could not do so. I can come to no other conclusion, and must hold that the mother had a right to cancel this agreement whenever she so desired, and to resume the custody of the child.

Lord Shand—It is clear from the answers lodged that the petitioner had no ground for stating, as she does in the petition, that she "be-

lieves and avers that her said child is seriously suffering in health from the want of due attention and nourishment, and that its life will be endangered if it is not delivered up to her without delay." That was a rash and unwarranted statement, and it is clear that the child would be well left where it is. The case here was put entirely upon the legal right of the mother to the custody of her child, which springs from her natural right, and I have come to the conclusion that when the mother says that she desires to have the custody of the child she has a right to get it. But I would wish to qualify that statement by saying that I think that the putative father would have a right to come to the Court and say that he ought to get the custody of the child, if he could show that the child was suffering in its health or was in danger of its life, because I think that the paramount consideration must always be the interest of the child.

Lord Adam—It is not disputed that the right of the mother to the custody of her infant illegitimate child is absolute, and if the custody is in the mother, there is nothing averred here against the petitioner's character to make it improper for her to exercise that custody. The question is, whether this arrangement between the mother and the putative father as to the custody and maintenance of the child interferes with her right? Now, I do not know how the case might have been if the mother had absolutely bound herself to give up the custody of the child for all future time. Perhaps it would not have been good in that case either, but I think it is clear that the mother is entitled to set aside this temporary arrangement.

The child was delivered up to the petitioner, and the Court thereafter dismissed the petition.

Counsel for Petitioner — Graham Murray. Agents — Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for Respondent — M'Kechnie—MacWatt. Agent—William B. Glen, S.S.C.

Wednesday, June 7.

SECOND DIVISION.

[Sheriff of Caithness.

REID *v.* REID BROTHERS.

Proof — Parole — Competency — Anomalous and Unusual Contract between Consigner and Consignee.

In an action against the consigners of fish, at the instance of the consignee, to recover the amount of his advances upon the consignment, the defenders averred that by verbal agreement the pursuer had contracted to pay them certain fixed rates whatever prices the fish fetched in the market.

Question—Whether the alleged agreement could be proved otherwise than by writ or oath.

Opinions negative per Lord Justice-Clerk and Lord Young; *affirmative per* Lord Craighill and Lord Rutherfurd Clark.

William Reid, who was a herring-merchant at Stettin, and was in the habit of advancing cash to fish-curers in Scotland against consignments of herrings to be sold by him on commission, sued Messrs Reid Brothers, fish-curers, Keiss, Caithness, for the sum of £147, 12s. 4d. This sum he averred was the balance due to him in respect of certain advances to them on a consignment of 99 barrels crown branded herrings, and 718 barrels of other sorts, which had realised a sum of £368, 7s. 6d., which he had credited to account of the advances, under deduction of freight and the usual consignment charges. The defenders disputed liability, and averred that the pursuer had agreed to give at least a full price of 26s. per barrel of crown branded full herrings, and 12s. per barrel of other sorts. Under this agreement they averred that the pursuer was bound to credit them in account with £559, 10s. instead of the £368, 7s. 6d. with which he had credited them, and that the difference between these sums was more than the sum sued for. After a proof, in which the defenders adduced parole evidence in support of the agreement, the Sheriff-Substitute (Erskine Harper) assoilzied the defenders.

On appeal the Sheriff (Thoms) recalled the interlocutor and gave decree for the sum sued for.

The defenders appealed. On the question as to the competency of the parole evidence, the defenders relied on the following authorities:—Dickson on Evidence, sec. 599; Bell's Prins., sec. 286; *Stein's Assignees*, Nov. 21, 1828, 7 S. 47; *ex parte White in re Nevill*, Jan. 14, 1871, L.R. 6 Ch. App. 397; *Moscrip* v. *O'Hara, Spence, & Co.*, Oct. 23, 1880, 8 R. 36.

In reply, the pursuer, in support of his contention that proof by writ or oath was necessary in order to set up an agreement so unusual and anomalous as the present, cited Ersk. Inst. iv. 2, sec. 20; and *Edmonston* v. *Bruce & Edmonston*, June 7, 1861, 23 D. 995.

At advising—

Lord Justice-Clerk—The agreement alleged here is one of a somewhat eccentric and unusual kind, and one can only account for the pursuer's having entered into it, if he did so, by his desire to keep the fishing connection which the defenders could bring him from going to some one else in the market. The defenders attempt to prove it by parole evidence—[*His Lordship then proceeded to consider the evidence, and came to the conclusion that the parole evidence did not prove the alleged agreement. His Lordship then proceeded*]—But the question has arisen and has been argued to us, whether such an agreement can be proved by parole evidence? I have an impression that it cannot. I think the bargain was all on one side, and so repugnant to the nature of the original contract that it cannot be proved by parole. It falls therefore, I think, under the category of unusual and anomalous engagements which can only be proved by writ or oath. We must, I think, dismiss the appeal, and affirm the judgment of the Sheriff.

Lord Young—I am of the same opinion. The action is raised for a balance which the pursuer alleges is due to him on transactions between him and the defenders, by whom he was employed as agent to sell on commission herrings