that if it can be shown, for example, that a husband has employed his wife and paid her wages, which she has kept separate, that that part of the section might not apply, but there is no case of that kind here. This seems to me just the ordinary case of a wife assisting her husband in the management of his business, and that the pursuer's claim therefore fails.

LORD M'LAREN—It appears to me that the general object of the Married Women's Property Act is to place women who have married without entering into a marriage-contract in as favourable a position as those who have married with a contract securing a separate estate to the wife. It is difficult to see how the Legislature could accomplish more than this. The Act of 1877 is not limited in its application to the case of a woman living separate from her husband, but applies also to the case of a woman living with her husband but having a separate business of her own, it may be as a shopkeeper or in the exercise of some literary or artistic occupation. In such a case a voluntary contract made before marriage to the effect that the earnings of such business should belong to the wife as separate estate would be effectual under the common law, and this separation of estates is accomplished by the operation of the Act of Parliament in cases where there is no antenuptial contract. In the present case there was no separate trade carried on by the wife in her own name. The husband and wife together continued to carry on the business of fish-hawking, which had prior to the marriage been carried on by the wife alone. There was no separation either of the capital or profits of the business, and no distinctive use of the wife's name in the business came on after marriage. The case, therefore, does not fall within either the principle or the words of the Act. One can see that there would be extreme inconvenience in practice, and that questions very difficult to solve might arise, if the intention of the Legislature were that there should be separate interests in a business carried on jointly by the husband and wife. It is difficult to see how in such a case the legitimate interests of creditors could be safeguarded, and I am not surprised therefore that the operation of the Act is limited to the case of a business carried on by the wife alone and in her own name.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers — Guthrie — Galbraith Miller. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender — Salvesen — Younger. Agents — Sturrock & Graham, W.S.

Wednesday, July 6.

SECOND DIVISION.

[Sheriff of Forfar.

KEILLER *v.* MACKENZIE.

Parent and Child—Action for Custody of Bastard Child—Custody of Children Act 1891 (54 *and* 55 *Vict. cap.* 3)—*Sheriff Court —Appeal.*

A mother had allowed her bastard child to remain for six years after its birth in the custody of another person, she contributing a certain amount of aliment. At the end of that time she raised an action in the Sheriff Court for the custody of her child against the person to whose care it had been committed. The Sheriff granted the application "until a permanent arrangement is made by a competent Court."

The defender appealed. Upon a remit by the Court, the Sheriff-Substitute of the county reported that in the absence of any legal difficulty the child was in better hands than if she was with her mother. The Court *dismissed* the petition.

The Custody of Children Act 1891 (54 and 55 Vict. cap. 3), sec. 1, provides—"Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order." Sec. 3. "Where a parent has (*a*) abandoned or deserted his child, or (*b*) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor law union, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."

In November 1891 Mary Mackenzie, residing in Brechin, raised an action in the Sheriff Court at Forfar against Alexander Keiller, bleachfield worker, Friockheim, concluding that the defender should be ordained to deliver up to the pursuer the illegitimate female child Jane Mackenzie, of which she was delivered on 7th March 1885, and also for interdict against the defender interfering with the pursuer's possession and custody of the child.

The pursuer averred that some weeks after the birth of the child she placed it in the custody of the defender and his wife, and that they had maintained it from that time, but having been for some years anxious to regain possession of her child, she had required the defender to deliver her up, but that he had refused.

The defender averred that in April 1885 the pursuer had given the child into his custody, and stated she would have nothing more to do with her; that the defender and his wife had maintained the child on the understanding that the pursuer had given up all her claim; that she was not in a position to keep properly the child, who had been well kept and cared for, and would suffer greatly from being removed. The defender also averred that he had expended in clothing and maintaining the pursuer's child from April 1885 to September 1891 the sum of £96, 16s., and had received from the mother only £48, 0s. 6d., leaving a balance of £48, 15s. 6d. due to him.

The defender pleaded—"(3) The pursuer having allowed her child to be brought up by the defender, and having been unmindful of her parental duties, she is not entitled to have the custody of the child. (4) The action is not competent in the Sheriff Court, and ought to be dismissed, with expenses."

Upon 28th December 1891 the Sheriff-Substitute (ROBERTSON) found that the petition "being one for the permanent custody of a bastard, is incompetent in the Sheriff Court."

"*Note.*—This is the first petition of its kind I have seen in the Sheriff Court. In Fraser's book on Parent and Child, p. 81, I find the following remarks on the custody of children—'The Court to which application should in Scotland be made is the Court of Session, as the supreme court of equity of the country. The Sheriff has no power to deal with the matter of permanent custody, but in cases of emergency the judge ordinary of the bounds can, on a summary petition, regulate the interim custody of the children—a jurisdiction which is often asserted.' The Sheriff Court case of *Sharp* v *Jack*, 3 Scot. Law Jour. 78, is referred to.

"In the present case a permanent custody of the child is asked for; not merely an interim custody until further investigation. And what is important also, I am am asked to take the child away from the parties to whom the petitioner herself gave it, and with whom it has remained for years with her express approval.

"Now, I cannot doubt the power of a mother to put an end to an arrangement of this sort, a power which when exercised may, it is true, cause great distress to those who have brought the child up, and have become attached to the child; a power also which may be productive of immense harm to the child itself. But still it is a power which is inherent in the natural instinct of a mother, and which is of irresistible force.

"This has led to legislation in order to mitigate the distress this power sometimes gives rise to. Last March an Act was passed to amend the law relating to the custody of children, and to restrain a mother's power of demanding under all circumstances the custody of her child. The first clause begins thus—'When the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of a child.' Why is no notice taken of the Sheriff Court? Clearly because such a writ or order is incompetent there, and this omission corroborates the view I take of the present petition, namely, that I have no power to entertain it.

"Had this child been taken by some person from the mother's custody, possibly an interim application for its return pending investigation would be competent in the Sheriff Court, and the cases I have been able to trace are of this nature. Restitution may be asked for, but not permanent custody. In *Speid* v. *Webster*, December 18, 1821, 1 S. 221, the Sheriff accordingly refused to interfere.

"I may also refer to Fraser on Parent and Child, p. 131. He says—'The protection and guardianship of infants is the peculiar province of the Court of Session, and to that Court must application be made in regard to all questions as to the custody of bastards.'

"While therefore I hold that this petition is incompetent, it may be proper to point out that a contrary view was taken in the Sheriff Court case *Herd* v *Ellis*, August 20, 1864, 3 Scots Law Mag. 143."

Upon 26th January 1892 the Sheriff (COMRIE THOMSON), on appeal, pronounced this interlocutor:—"Recals the interlocutor appealed from, repels the defender's fourth plea-in-law, and decerns.

"*Note.*—The application by the mother of an illegitimate child for delivery of it to her custody is *prima facie* a just and legal demand, and one which can competently be entertained in the Sheriff Court—*Brand* v. *Shaws*, 15 R. 449. The Sheriff has no power to regulate the permanent custody of a child where an appeal is made to his discretion. Such discretion can only be exercised by the Supreme Court. The power of the Sheriff is limited to giving effect to the undoubted legal title of the mother, or, in a case of emergency, to make temporary orders as to the custody."

Upon 5th February the Sheriff-Substitute refused the motion for proof, and granted the prayer of the petition "until a permanent arrangement is made by a competent court."

The defender appealed, and argued—Under the Custody of Children Act 1891 application for the custody of a child must be made to the Court of Session. The Sheriff has no power to deal with the question. In all these matters the principal thing that the Court would look to was the permanent good of the child. Here it was averred that the mother had deserted her child and allowed her to be brought up by other persons; that was a reason under the Act for refusing to give the parent the custody of the child she had deserted when she afterwards applied for it. It was further averred that the mother was not a proper person to have charge of a child, and no order should be made until proof had been taken on that question.

The respondent argued—The Act did not apply, although as the case had now come into the Court of Session it might be considered as if it had been originally begun

there. The right of a mother to have the custody of an illegitimate child could not be destroyed unless the putative father claimed to have the custody and support of the child, and in the ordinary exercise of his discretion the Sheriff of the county was the proper person to apply to for an order for custody. The Court would not use its undoubted discretion to refuse the custody unless it appeared that the result would be injury to the health of the child. Here there was no reason to suppose such a thing, as the father was paying the aliment he was found liable in, and the mother was working and earning wages. This case did not fall under the Act, as the mother had not deserted her child, nor had she allowed her to be brought up at the expense of another person as she had contributed to her support more than the aliment paid by the father.

The Court remitted to the Sheriff-Substitute of Forfarshire to examine into the matter and report.

In his report Mr Robertson stated that he had visited the parties, and also had a conversation with the child herself. The report provided — "The mother Mary Mackenzie is a factory worker in Brechin; she is unmarried and has had three illegitimate children. I did not make out from her to what church denomination, if any, she belonged. The child is a sweet looking timid girl, well educated, and evidently much attached to the Keillers. She is quite happy with them, and has no wish to be with her mother. Indeed, when I mentioned the mother's name, the child only cried. I also visited the Keillers at their house in Friockheim. I first called on Mr Nicoll, Free Church clergyman there, who kindly went with me. He gave me a most satisfactory account of them. This was corroborated by all I said during my visit, which was quite a surprise visit. So that apart from any legal difficulty I have no doubt the child is better where she is than with the mother."

At advising—

LORD JUSTICE-CLERK—On the last occasion when the case was before us we heard a very full argument, and at that time the petitioner was not able to give us such information as could aid us.

We find that state of matters still exists. We have got none of the information pointed at in the Act of Parliament which ought to have been ready. She now admits that she allowed the child to be brought up at another person's expense, and by the Act it is declared in section 3 that in such circumstances the Court shall not make an order unless satisfied that having regard to the welfare of the child the appellant is a fit person to have its custody.

We of consent made a remit to the Sheriff-Substitute. He saw the parties, and his account of the petitioner is not satisfactory. He is unable to say whether the mother belongs to or attends any church, and he reports that she has had three illegitimate children, that the child cries whenever her mother's name is mentioned, and is quite happy where she is. The petitioner's counsel was unable to inform the Court of any facts which were favourable to his client although the case has been repeatedly delayed.

In these circumstances I think we must hold that the case of this mother falls within section 3, sub-section (b), of the Custody of Children Act 1891, and that accordingly we ought not to make an order for the child's delivery unless the petitioner satisfies us that she is a fit person. I hold she is not, and therefore I am for recalling the Sheriff-Substitute's judgment and for dismissing the petition.

LORD YOUNG—I think it is best to dismiss the petition, and that without reference to the statute.

My opinion is, that it is applicable notwithstanding that the application originated in the Sheriff Court and came to us by way of appeal.

But apart from that, at common law the Court has always power to do what is best for the child. It is a matter in the discretion of the Court, and the cases are numerous in which there appear strong predominating reasons to withhold the custody of a child from its parent.

Now, the parent asking the custody here is a woman of immoral character, and we know nothing about her home or wages, and she has allowed the child to remain in the custody of another person for more than six years.

Irrespective of any statute I think it is in the discretion of the Court to refuse an order for delivery.

Putting the matter, then, not on the statute or on the common law, but generally, I think we should recall the judgment.

LORD RUTHERFURD CLARK—It is a question whether the statute applies to a petition raised in the Sheriff Court when it is brought here on appeal. The pursuer maintains that it does not apply, and I am willing to dispose of the case on that footing.

I am of opinion that the pursuer cannot by raising her petition in the Sheriff Court obtain more than she could obtain on an application to this Court. I think, therefore, that the petition must be dismissed. For the question—if there be a question—must be tried in a petition to this Court. As the question has been fully argued, I may say that if such a petition had been presented, in my opinion, it must have been refused.

LORD TRAYNER—If the Act is applicable I should have no hesitation in refusing the pursuer's application.

But if it is not, I reach the same conclusion, on the ground that pursuer has not satisfied us that she is entitled to the custody. I think, therefore, we should recall the judgment of the Sheriff-Substitute and dismiss the petition.

LORD JUSTICE-CLERK—I should like to add that I agree with Lord Young in thinking that the Act does apply, but I

think we should simply dismiss the petition.

The Court recalled the interlocutor appealed against, and dismissed the petition.

Counsel for Appellant—A. S. D. Thomson. Agents—Hutton & Jack, Solicitors.

Counsel for Respondent—Burnet. Agents—Henry & Scott, S.S.C.

Saturday, July 9.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROBB AND OTHERS *v.* BULLOCH, LADE, & COMPANY.

Reparation — Injury — Fencing — Factory and Workshop Act 1878 (41 *Vict. cap.* 16).

The Factory and Workshop Act 1878 provides—"5. With respect to the fencing of machinery in a factory the following provisions shall have effect: (3) Every part of the mill gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if securely fenced."

The mash-tun in a distillery had a piece of machinery connected with a horizontal shaft from the centre of the mash-tun, and worked by steam power, which travelled round the edge of the mash-tun on a pinion wheel and set certain revolving rakes in motion in the interior of the mash-tun to stir up and mix the mash. Running round the outside mouth of the mash-tun a strong iron guard-rod had been placed which did not run the whole length of the mash-tun. The mash came into the mash-tun through a spout which was fixed in the wall of an adjoining compartment. The duty of a workman was to clean out the spout. To do this he had to stand upon a box or stool at the side of the mash-tun. He had frequently performed this operation before. There was no protecting rod at the place he stood to clear the spout. While so engaged, the stool on which he stood slipped and the revolving machinery caught and fatally injured him. His widow brought an action against his employers on the ground that the mash-tun had not been properly fenced in terms of the provisions of the Factory and Workshop Act 1878.

Held (1) that it was not compulsory under the Act for the employers to fence this piece of machinery, (2) that on the pursuers' averments it was plain that the accident occurred from the accidental slipping of the stool, for which the defenders were not liable, and the action *dismissed* as irrelevant.

Upon 15th June 1891, William Robb, an engineman and fireman in the employment of Bulloch, Lade, & Company, distillers, Loch Katrine Distillery, Glasgow was killed while engaged in his employment at the defenders' distillery.

His widow and children raised an action against his employers for damages on account of his death. It appeared that Robb, who was a man of about 48 years of age at the time of his injury, was fireman and engineman in the defenders' service, and that in his spare time he gave assistance in the mash-house of the distillery; he had been engaged in the same employment for some years.

The pursuers averred that the deceased "was engaged clearing the spout through which the mash passes from the mashing-box in an adjoining compartment into the mash-tun in the mash-house, which spout had become choked or obstructed. The spout is fixed in and comes through the wall between the mashing-box and mash-house, and extends about two feet or so over the mouth of the mash-tun, which is circular in form, so as to run the mash into it. To enable him to clear the spout, he had to stand upon a wooden box or stool and lean or reach over the mouth of the mash-tun to get a wooden shovel or spoon used for the purpose into the spout to clear away the choking or obstruction. A carriage or piece of machinery connected with a horizontal shaft from the centre of the mash-tun, and worked by steam power, travels along the top of the mash-tun on a pinion wheel, and sets certain revolving rakes in motion in the interior of the mash-tun to stir up and mix the mash. The said carriage or machinery comprises a cast-iron sole plate, carried on two wheels (the one a pinion and the other a roller), running on a rack and plain rail forming the top of the mash-tun, and is set in motion by said wheels,—which wheels are duplicated and fitted with a clutch to enable the carriage to be run in either direction, and they are moved by said shaft coming from the centre of the mash-tun, which in its turn receives its motion from a vertical shaft driven by a steam engine. There are in all four pinion wheels and two roller wheels in said carriage or machinery. Running round the outside mouth of the mash-tun a strong iron rod has been placed, so as to fence the said carriage or machinery, and protect the workmen employed in the mash-house from being injured by it. This iron rod does not extend the whole length of the mash-tun. There was no protecting rod or fence of any description at the place where the said deceased William Robb required to work when he was employed in clearing the said spout. While he was leaning or reaching over the top of the mash-tun and clearing the said spout, the said carriage or machinery came round on the opposite side of the spout and caught and jammed and crushed him against the end of the iron rod where it stopped short. . . . . The said carriage or machinery which travelled round the top of the mash-tun was part of the mill-gearing used in the