torial cases it is the practice for the Lord Ordinary to deal with questions of relevancy irrespective of the pleadings of the parties. I think that seems to have been what was done here. I rather think there was a miscarriage in pronouncing that interlocutor, because proof of the maltreatment averred would have removed the only difficulty I have in this case. The only answer to my difficulty is that suggested by your Lordship in the chair, that to entitle a husband to get a divorce for desertion he must aver more than simple desertion—namely, that it is malicious. But I am not sure that that is a complete answer, and I would very much have preferred that your Lordships had still allowed an inquiry. I have therefore very great difficulty in concurring.

LORD ARDMILLAN—This is a case of very great interest in both its branches. On the point as to the competency of the remedy of separation, I do not understand there is any difference of opinion or doubt. I am satisfied that the injured wife has a choice of two remedies, and that the selection of the remedy does not rest with the wrongdoer. In the next place, I have no doubt that if separation is competent, it is appropriate that in this case we should award aliment also. The only remaining question, and the only one on which I understand there is any difference, is whether the wife's absence for ten years is of itself a sufficient reason for barring her from obtaining separation and aliment. I think it is not. I do not think that the fact of a wife living with her own parents should of itself, and without any evidence of the circumstances, raise a presumption that she has been guilty of wilful desertion. I cannot presume that a father will aid his daughter in deserting her husband; and I don't think that a wife wilfully deserting her husband will take refuge in her father's house. What does the defender allege? Simple desertion. He could not have got a divorce without alleging malicious desertion; and as he has neither made that allegation, nor led any proof of malicious desertion, I am not inclined to build any presumption on the absence. The pursuer made averments which, rightly or wrongly, the Lord Ordinary held to be irrelevant; but if one-half of these averments are true, the pursuer was entitled to remain absent from the defender.

Reclaiming note refused.

Agents for Pursuer—Menzies & Coventry, W.S.

Agents for Defender—White-Millar & Robson, S.S.C.

M'KIE *v* WHITE AND OTHERS.

Parochial and Burgh Schoolmasters (Scotland) Act, 1861. A sentence of the Sheriff under the 14th section of the 24th and 25th Vic., c. 107, is final, unless the Sheriff has exceeded his jurisdiction.

This was a note of suspension of a sentence pronounced by the Sheriff-Substitute of Dumfriesshire on 12th February 1866, whereby the complainer, who had been parochial schoolmaster of the united parishes of Applegarth and Sibbaldbie, was deprived of his office. That sentence was pronounced in a complaint to the Sheriff at the instance of the respondents, who were respectively clerk to the Presbytery of the bounds and heritors of the said parishes. It was also proposed to interdict the respondents from proceeding to elect another than the complainer to the office of schoolmaster.

The complaint to the Sheriff was founded upon the 14th section of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861 (24 and 25 Vict. cap. 107), whereby it is provided as follows:—"So much of the 21st section of the said recited Act" (the Act of 43 George III., cap. 54), "as provides that the Presbytery shall take cognisance of, and, if they see cause, proceed by libel against any schoolmaster in respect of any complaint charging him with immoral conduct, or cruel or improper treatment of the scholars under his charge, is hereby repealed, and in lieu thereof, it is hereby enacted, that it shall be lawful to the heritors and ministers, or the clerk of the Presbytery of the bounds, by the authority of the said Presbytery, given on the application of the heritors and minister, or of any six heads of families in the parish whose children are attending the school, to make a complaint in writing to the Sheriff of the county in which the school is situate, charging the schoolmaster with immoral conduct, or cruel and improper treatment of the scholars under his charge, and specifying in such complaint the particular acts in respect of which the complaint is made, and a copy of such complaint shall be served upon the schoolmaster, who shall be required, on an *induciæ* of fourteen days, to appear before the Sheriff, by himself or his agent, to answer to the said complaint; and the schoolmaster accused shall, if he deny the charge, if he think fit, answer the particulars of the complaint, such answer to be in writing, and to be lodged within the said fourteen days, or may, when the cause comes to be tried, state his plea to be not guilty, and the Sheriff shall thereafter proceed to the trial of the complaint, and take the evidence in the same way as and under the same rules as those which are in force in the Sheriff Court in regard to process in civil causes, and in the event that he shall find such complaint, or any material or relevant part thereof, to be proved, the Sheriff shall give judgment accordingly, and shall pass such sentence of censure, suspension, or deprivation, as in his opinion the case requires, which sentence shall be final, and not subject to review, and shall have all the effects consequent before the passing of this Act, on any similar sentence of any Presbytery under the provisions of the last recited section of the said Act, and no sentence of censure, suspension, or deprivation, otherwise pronounced on such charges, shall be valid or effectual."

The complaint charged the complainer, the said Robert M'Kie, with immoral conduct, unbecoming his situation as parochial schoolmaster, in respect that he had committed antenuptial fornication with Isabella Wilson White, now M'Kie, his wife; and more particularly, that "The said Robert M'Kie, previous to his marriage with the said Isabella Wilson White, now M'Kie, which was celebrated according to the forms of the Church of Scotland, on or about the 21st day of March 1865, had illicit sexual intercourse with her, in consequence whereof the said Isabella Wilson White, now M'Kie, bore a child on or about the 30th day of May 1865, being only two months and nine days after their marriage, of which child the said Robert M'Kie is, and has admitted himself to be, the father."

The complaint having been served upon the complainer, he lodged written answers thereto, in which he stated various objections to the relevancy and competency of the proceedings, and denied the charge made against him. Along with his answers he produced the following documents, which he contended proved that he had been married prior to the date of the alleged offence charged against him; and he offered to instruct

the correctness of the dates which these writings bear :—

"Applegarth School-house, 26th March 1864.—My dearest Isabella,—You do not know how much your distant coldness last evening has pained me. You did not look like yourself at all, so shy and independent. I must own that you have some apparent cause for displeasure, but I could not act very well otherwise than I have done. It was my real and honest intention when I made you the promise that you should come to Sandyholm next Whitsunday, but on second thoughts I thought it best to put off a little longer. Our house must be in a great measure refurnished; that will take a good deal, and we must not commence housekeeping without a something to fall back upon. But what signifies a little delay. Do not distrust me, for as sure as there is a God above us, I will faithfully fulfil my promises to you. I have called you my wife, and such you are, my dearest Isabella, and if you insist upon it, I will give you marriage lines to make everything sure, but I beg of you not to allow distrust of my intentions for a moment to enter your mind. Mrs Wilson must now of course remain in the house for another year, but at the end of that time you shall get your rights. I shall call over again privately next Tuesday evening, when I earnestly hope you will receive my visit, and that everything will be again *smooth* between us.—I am, dearest Isabella, your ever loving,

(Signed) "ROBERT M'KIE."

"Annanhill, 4th October 1864.—We, the undersigned, having entered into a contract of marriage by our mutual agreement and consent, as permitted by the law of Scotland, hereby acknowledge and declare ourselves husband and wife. Witness our hands this fourth day of October, eighteen hundred and sixty-four years,

(Signed) "ROBERT M'KIE. ISABELLA W. WHITE."

Parties having been heard upon the complaint and defences, the Sheriff-Substitute at Dumfries, before answer, allowed each of them a proof of their respective allegations, and also a conjunct probation. It was stated that the complainer and his wife had been examined in the course of the proof which was afterwards taken in the cause, and that they had given evidence to the effect that the writings above quoted had passed between them of the dates they bear.

The Sheriff-Substitute, however, on 12th February 1866, after hearing parties on the concluded proof and whole case, found the charge proven, and passed sentence of deprivation upon the complainer.

The complainer thereupon brought the present note of suspension and interdict, which having come to depend before Lord Benholme, Ordinary officiating on the bills, was refused by him. Against his Lordship's judgment the complainer now reclaimed.

M'KIE, for the complainer (with him ALEX. MONCRIEFF), submitted various considerations upon which the note should be passed to try the question. These were that the offence charged was not an offence under the Act; that the libel was defective in specification; and that evidence had been improperly admitted upon the law and discipline of the Church of Scotland in regard to antenuptial fornication.

SOLICITOR-GENERAL and COOK, for the respondents, were not called upon.

The COURT was unanimously of opinion that the Sheriff's judgment was final, unless he had exceeded his jurisdiction. None of the reasons stated for the complainer, except the first, involved an excess of jurisdiction. The Court was not prepared to hold that antenuptial fornication was not immoral conduct in the sense of the Act. It was not alleged that the Sheriff had proceeded upon the evidence as to the views of the Church in this matter. It was not enough to justify interference with his sentence that he had committed error in judgment. That was not exceeding his jurisdiction. The Court therefore adhered to the Lord Ordinary's interlocutor, and found the complainer liable in additional expenses.

Agent for the Complainer—Robert Finlay, S.S.C.
Agent for the Respondents—James Steuart, W.S.

Thursday, May 24.

NOTE—MARY BONAR FOR POOR'S ROLL.

Poor's Roll—The reporters on the *probabilis causa* being equally divided in opinion, the Court admitted the applicant to the roll.

In this application for the benefit of the poor's roll, the reporters on the *probabilis causa litigandi* of applicants were equally divided in opinion, and they reported to the Court to that effect.

DONALD CRAWFORD for the applicant submitted that in these circumstances she was entitled to admission. The action she was about to institute involved a jury question, and the difference of opinion among the reporters proved that there was a *probabilis causa.*

The Court admitted the applicant to the roll.

Friday, May 25.

EDMOND *v.* ROBERTSON.

Bankruptcy—Proof. (1) A trustee on a sequestrated estate may produce the bankrupt's books in evidence after a record is closed in a question betwixt him and a creditor. (2) Circumstances in which a party allowed to lead evidence in replication.

Question—Whether, when a Sheriff sustains an objection taken in the course of a proof, he pronounces a deliverance in the sense of sec. 270 of the Bankruptcy Act.

This was an appeal presented by James Edmond, advocate in Aberdeen, trustee on the sequestrated estates of Grant & Donald, druggists in Aberdeen, against two interlocutors of the Sheriff-Substitute of Aberdeenshire.

Alexander Robertson residing at Kepplestone, near Aberdeen, claimed to be ranked as a creditor on the bankrupt's estate in respect of a bill for £368, drawn by him upon and accepted by them. The trustee rejected the claim, and Robertson appealed to the Sheriff.

The Sheriff-Substitute appointed the parties to lodge minutes in terms of the Act. The fifth statement made by the trustee was in these terms:—

"5. Grant & Donald never received any money or value in consideration of either of the said bills or the said note. Whatever may have been the transaction, the firm had no concern or interest in it. It was one of Grant's alone, and known to the claimant to be his, and dealt with by him as such."

This statement was denied by Robertson.

On 17th November 1865 the Sheriff-Substitute pronounced the following interlocutor :—

"Having heard parties' procurators, allows the respondent a proof of the fifth article of his revised minute, and the appellant a cross proof; grants warrants for letters of diligence at both parties'