the Sheriff-Substitute is right, and ought to be affirmed.

Lord Young—I am of the same opinion. But I would be prepared to go a step further. I think that not only was the action laid upon fault, but it does not occur to me that it could have been laid upon anything else. If we look at the ninth condescendence we find that it sets forth the grounds of the pursuer's case—[*His Lordship read the article*]. I should have thought that the colt's eye was hurt by coming in contact with a projection or nail in the fence, a chance to which all cattle in a field are exposed, though the chances are very considerable in favour of their not hurting themselves in that way. I think the probability is that the animal's eye was hurt in the second of the ways indicated in the article of the condescendence which I have read. If it had been proved that the field was enclosed in a dangerous manner, in a way which no person who engages to take care of other people's cattle was entitled to have his field enclosed, the only question would have been whether such a case was supported by the evidence. It is admitted, and very properly admitted, by Mr Lorimer for the pursuer, that there is no evidence of anyone's having struck the colt, or of its naving been injured owing to the dangerous state in which the fence was kept. So it came to this, that the pursuer said, "I don't know how this injury happened, but by law the person who takes charge of an animal under such circumstances is liable, unless he can show it was not his fault." I am quite prepared to negative that, and to say that that is not the law of Scotland, but that the law is, that the risk of accident is not with the custodier but with the owner. The custodier is liable for neglect or any actionable fault, but not for accident without fault. I think that that was what happened here. There was an accident which happened without anyone being to blame for it. That was just a risk—an infinitesimal risk—to which the colt was exposed. I think it will be sufficient in pronouncing our interlocutor to negative the statements of fact on which the pursuer's case rests, to find that in fact there was no fault, and that in point of law there was consequently no liability.

Lord Trayner concurred.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact that the pursuer has failed to prove that the accident to the colt in question, belonging to the pursuer, was caused through the fault or negligence of the defender: Find in law that the defender is not liable in damages to the pursuer; Therefore assoilzie her from the conclusions of the action, and decern: Find her entitled to expenses in this and in the inferior Court, &c.

Counsel for the Pursuer and Appellant—Lorimer. Agent—William Black, S.S.C.

Counsel for the Defender and Respondent—J. J. Cook. Agents—George Inglis & Orr, S.S.C.

Wednesday, June 10.

OUTER HOUSE.

[Lord Kyllachy.

WATSON *v.* WATSON.

(*Ante*, p. 150, and 23 R. 219.)

Parent and Child—Aliment—Measure of Liability of Father for Aliment to his Sons.

The measure of the liability of a father for aliment to his children is that he is bound, so far as he has the means, to provide such a sum as will with economy educate and maintain them suitably to his own condition in life.

A wife obtained decree in an action of divorce, with the custody of the two sons of the marriage (then in pupillarity) and aliment at the rate of £75 per annum for each until they respectively attained minority. When the two sons were aged respectively 20 and 18, and were engaged in study for the medical profession, they raised an action for aliment against their father, who, though possessed of considerable means at the time of his marriage, had at the date of the action no resources except a capital sum of £2500. *Held* (*per* Lord Kyllachy, Ordinary) that he was bound to aliment each son to the extent of £50 per annum, these allowances to continue (unless and until the Court should order otherwise in the process) in the case of each pursuer for four years.

Andrew Gordon Watson and John Liddell Watson brought the present action against their father Hugh Watson, under circumstances which are fully detailed in the former report and in the opinion of the Lord Ordinary. The action concluded for the payment of the annual sum of £75 to each of the pursuers as aliment in terms of a marriage-contract under which Hugh Watson bound himself to aliment, maintain, and educate any children of his marriage in a manner suitable to their station in life, or alternatively for payment to each of the yearly sum of £40 in name of aliment and expense of education, or such other sum less or more as might appear reasonable in the situation of the parties.

On 10th June 1896 the Lord Ordinary (Kyllachy) pronounced an interlocutor finding the defender liable to each of the pursuers in aliment at the rate of £50 per annum, these allowances to continue (unless and until the Court should order otherwise in this process) in the case of each pursuer for four years.

Opinion.—"The circumstances of this case are somewhat unusual, and they involve the consideration of questions in the law of parent and child which are undoubtedly delicate. I wish very much that the parties had seen their way to deal with the case otherwise than on the principles of strict law, and had been able to come to terms which would have avoided litigation, and would probably in the end have been beneficial to both parties. But the defender insists that his legal obligations shall be determined, and of course he is within his right in so requiring.

"The pursuers are the two sons, aged respectively 18 and 20, of a gentleman who at the time of his marriage in 1875 was possessed of a considerable fortune, and who, five years afterwards, when he was divorced by his wife, appears to have had still an income from property and invested funds of over £1000 a-year. He is now reduced, from causes into which I need not enter, to the ownership of a capital fund of about £2500, and to the reversion, after his wife's death, of an annuity which she enjoys under their marriage-contract, secured as I gather upon certain feu-duties forming part of the defender's original property. He is not in any employment, or earning any income from his own exertions, and he states that he is in delicate health, and is at present in a condition of indigence. It is certain, however, that once the question raised in the present case is determined, he will or may put himself in possession of the fund of about £2500 to which I have referred, that fund having been put in trust at the time of the divorce to secure the aliment allowed to their mother for the present pursuers, and being now, it is admitted, set free for the defender's use, subject to the performance of his obligations towards the pursuers as these may be defined under this action.

"The position of the two pursuers on the other hand is this:—They were at the time of the divorce in 1880 in pupillarity. and by the decree of divorce their mother was awarded for their aliment a sum of £150, being £75 for each. That aliment, which was secured by a trust voluntarily constituted at the time, was continued after the two boys attained puberty, if not with the consent of the defender, at least without any interpellation of the trustees, or any objection on his part. In this way the two pursuers have hitherto been brought up, and having both resolved to enter the medical profession, their education has hitherto been directed towards that object, the elder having already entered on his medical curriculum, and the younger being, it appears, just about to do so. They have not accordingly been apprenticed to any trade or other profession, and whoever may be responsible for the circumstance, it is certain that neither of them is, or can for some years be, in a position to earn his own livelihood. I by no means suggest that they have been brought up otherwise than suitable to their station in life, but even if it were thought differently the fact remains that brought up and educated as they have been, no occupation or calling is at present open to them by which for some years to come they could support themselves.

"The first question therefore is, whether being so circumstanced they have a claim for aliment against their father. I am of opinion that they have. They are unable at present to support themselves, and that is enough. The law of Scotland does not hold that a father's obligation to aliment his children ceases when they attain puberty, or even when they attain majority. He is bound to maintain and educate them until they are able to support themselves, and even if after they are set out in the world they become indigent, he is still bound to support them so far as his means allow. And indigence may be constituted not merely by disease of physical incapacity, but by inability to obtain employment suitable in itself and affording a suitable maintenance. It is hardly necessary on this point to cite authorities. They will be found collected in Lord Fraser's work on Parent and Child, page 101.

"The next question is, what is the measure of aliment for which the defender is liable. The principle, I think, is that he is liable so far as he has the means to provide such aliment as is necessary with strict economy to maintain and educate the children suitably to his condition in life. In the present case the defender is bound by the marriage-contract to 'make payment of certain provisions to the pursuers at his death amounting to £4000, and until the said provisions should be paid or become payable, or until the pursuers should be otherwise provided for, to aliment, maintain, and educate the pursuers in a manner suitable to their station in life.' But as I read the authorities the rule of the common law is the same. The station in society—the position in life of the parent and the child are to be considered. A pauper's allowance is not the rule. Nor is the allowance claimable by the child of a labourer the measure of that claimable by the child of a man of fortune. The leading case is that of *Maule* v. *Maule*, 1 W. and S. 266, followed by *Mackenzie* v. *Mackenzie*, 3 Macph. 177, and other cases mentioned in Lord Fraser's book, page 88.

"This being so, what is the lowest sum upon which the pursuers can during the next year or two live, completing their education or otherwise, preparing themselves for the business of life, and how far is the defender able to afford that sum?

"I do not see my way to allowing a sum sufficient in the case of either pursuer to pursue to its close a medical curriculum. That would, I think it is plain, involve a scale of expenditure larger than the defender (who was not consulted as to the pursuer's choice of a profession) could reasonably afford. Neither can I take the Lord Ordinary's figure in the action of divorce (£75 a-year) as conclusive under existing circumstances. I wish to keep strictly within the limits defined by law, and, on the whole, I think each pursuer should have £50 a-year—these allowances

to continue (unless and until the Court shall otherwise order in this process) in the case of each pursuer for four years. These allowances being provided for, will leave the defender with a fund of at least £2000, which, if properly invested, will produce at least sufficient for his comfortable maintenance.

"I propose therefore to pronounce an interlocutor to this effect, and I may add that I have not thought it necessary to reduce the sum awarded by reason of the contingent interest which, it appears, the pursuers have in certain funds and subjects of small amount mentioned in the minute which the pursuers lately lodged. Neither have I thought it necessary to allow a proof as to this and some other matters as to which the parties are not at one on the record. There was no dispute at the debate as to the material facts, and I am very unwilling for any reason in point of form to put the parties to any unnecessary expense."

Counsel for the Pursuers—Cook. Agents—Pringle & Clay, W.S.

Counsel for the Defenders—W. Campbell. Agent—James Allan, Solicitor.

HIGH COURT OF JUSTICIARY.

Thursday, July 16.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.)

GACHIE AND ANOTHER *v.* AULD.

Justiciary Cases — Suspension — Irregularity in Record of Procedure—Entry of Witness who was Not Examined—Wrong Person Appearing as Witness.

The record of a conviction set forth, among the witnesses examined for the prosecution, the name of A B. It was admitted that A B had not in fact been examined, and that C D, who had entered the witness-box under the name of A B, but whose name did not appear on the record, had given evidence. In a suspension the conviction was *quashed*, on the ground that the record was defective (*a*) in setting forth as a witness a person who had not been examined, and (*b*) in failing to set forth the name of a witness who had been examined.

John Gachie or M'Gachy, groom, residing in Johnston, and Daniel Inglis, warehouseman, Houston, were convicted before the Justice of the Peace Court at Greenock, on a complaint at the instance of the Procurator Fiscal, under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, charging them with having committed a breach of the peace. On conviction they were each fined twenty shillings, with the alternative of fourteen days' imprisonment.

The record of proceedings (so far as material to the present question) was as follows—"At Greenock, the 21st day of May 1896 years, in presence of John Anderson and John Maconie, Esquires, two of Her Majesty's Justices of Peace for the county of Renfrew, appeared John M'Gachy and Daniel Inglis, complained against, and the complaint being read over to them, they answer that they are not guilty. The witnesses after mentioned were examined in support of the complaint, viz.—James Forrest, clerk, residing at Clunebraehead, Port Glasgow; Thomas Robertson, gardener, Clunebraehead, Port Glasgow; Bridget Rowan or Macdonald, residing at Clunebraehead, Port Glasgow; and the following witnesses were examined in exculpation:—Agnes Macpherson or Inglis, residing in North Street, Houston; Janet Inglis, residing at North Street, Houston."

It was alleged for Gachie and Inglis, and admitted by the prosecutor, that Bridget Rowan or Macdonald had not in fact given evidence, and that when her name was called as a witness a woman named Sarah M'Graw or M'Ardle, residing in Port Glasgow, had stepped into the witness-box, stated that she was Bridget Rowan or Macdonald, and given evidence in that name. It was explained that another complaint against the accused for a different offence was pending on the same day, and that Sarah M'Graw or M'Ardle was in attendance as a witness in this other charge.

Gachie and Inglis brought a suspension and pleaded—"(1) The warrant or sentence complained of ought to be suspended, in respect that it proceeded on the pretended evidence of a witness who was not examined, and the complainers ought to be found entitled to expenses. (2) The warrant or sentence complained of ought to be suspended, in respect that the minute of evidence omits the name of Sarah M'Graw or M'Ardle, who gave pretended evidence in support of the complaint. (3) The warrant or sentence complained of, ought to be suspended, in respect that it proceeded partly on the hearsay evidence of the witness M'Ardle."

Counsel for the respondent was called on to show why the conviction should not be suspended.

He argued—The irregularity here was unimportant. This was a complaint under the Summary Jurisdiction Acts, under which there is no obligation to furnish the accused with the name of the witnesses. It did not therefore matter by what name the witness gave evidence. Nor could any injustice be done, for, assuming that a person who was not the witness appeared in the box, all she could do, short of committing perjury, was to say that she knew nothing about the matter.

At advising—

LORD TRAYNER—I think that this conviction cannot possibly be sustained. The record is inaccurate in two respects. It sets forth that Bridget Rowan or Macdonald was examined as a witness, when as a matter of fact it is admitted that no such