

seems to me that the Marquis of Bute acted on a sound view of his legal position when he signed the obligation in 1873, and has taken an erroneous view of it in bringing the present action. The substance of the provisions of the trust-disposition seems to me to be that a liferent right only is conferred upon him. We have nothing to do with the question how far such articles can or can not be entailed by the law of Scotland. The trustees are here directed to entail the jewels and other things on the heirs entitled to succeed to an English estate, and it is therefore a question of English conveyancing how that is to be done. I think there is no difficulty in the case, and that the Lord Ordinary's judgment is right.

The Court adhered.

Counsel for Pursuer (Reclaimer)—J. P. B. Robertson—Murray. Agents—J. & F. Anderson, W.S.

Counsel for Defenders, Lady Bute's Trustees (Respondents)—Muirhead—Darling. Agents—Bruce & Kerr, W.S.

Counsel for Defender, Lady M. C. Stuart (Respondent)—Low. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 4.

## SECOND DIVISION.

[Sheriff of Forfarshire.

### COOK V. RATTRAY.

*Parent and Child—Bastard—Filiation—Proof—Oath.*

The pursuer in an action of filiation deponed on oath that the defender was the father of a child which she had borne after a period of 305 days' gestation. *Held* on the evidence that she had proved her case.

This was an action of filiation and aliment brought up on appeal from the Sheriff Court of Forfarshire. The pursuer, who was formerly a domestic servant at Gask, and afterwards resided at Craichie, in the parish of Dunnichen, Forfarshire, averred in her summons that she was delivered of an illegitimate female child on the 19th August 1879, of which the defender was the father. In her condescendence she stated that the defender had sexual intercourse with her in the kitchen of the farm-house of Gask, and also in the byre of the farm-steading thereof, in the months of September, October, and November 1878, and that in consequence of the said intercourse she gave birth to the said illegitimate child on 19th August 1879. She further stated that the defender had admitted the paternity of the child at a meeting of the kirk-session of the parish of Dunnichen which they had both attended.

The defender denied the pursuer's allegations.

The Sheriff-Substitute (ROBERTSON) found in fact that the pursuer had failed to prove that the defender was the father of her illegitimate child; and found in law that he was not liable for the inlying expenses and aliment sued for; and therefore assoilzied the defender from the conclusions of the summons.

The Sheriff-Principal (MAITLAND HERIOT) re-

called the Sheriff-Substitute's interlocutor, and appended the following note, in which the import of the proof held in the case will sufficiently appear:—

“*Note.*—This, no doubt, is a narrow case, but on the whole it seems to the Sheriff that the balance is against the defender. David Rattray (the defender) and Edmund Kettles went to visit Mary Cook (the pursuer) and her fellow-servant Elizabeth Millar. These men arrived late at night. The two women say they arrived about eleven and remained till about twelve. Kettles says it was ‘fully’ ten when they arrived, and that they left ‘before twelve,’ while Rattray says they arrived ‘about ten’ and left ‘about eleven.’ However this may be, it was a late hour before they left, keeping in view that they had two or three miles to go and be up early to their work next morning. When the men arrived the young women were in bed. The men knocked for them, and they rose to entertain their visitors. The four, however, did not sit together and talk. They separated into two parties. Kettles and Millar went together into the kitchen, and Rattray and Cook retired into the byre. It was then quite dark, and yet they remained an hour together in the dark—*solus cum sola*. What were they doing all this time? It must be held that connection then took place. The Sheriff is at a loss to discover what other reason the defender had for his visit, and as to that part of the case there seems to be little or no difficulty.

“Any peculiarity there is in the case is as to the length of time that is said to have elapsed between the conception and the birth. There is no doubt some difference as to the exact date of the above visit. Kettles would place it so early as ‘six weeks and two days’ before Martinmas. Cook names it as ‘five weeks’ before Martinmas, Millar as ‘four or five weeks’ before Martinmas, and Rattray as ‘shortly before the term of Martinmas.’ There is no precise agreement between any of the parties as to this date. The Sheriff is inclined to think that Kettles is stretching a point in favour of his friend. If it were five weeks before Martinmas, it would be 305 days after conception; if four weeks 298 days; and if only shortly after Martinmas, it might be 287 days. Had it been even quite fixed that 305 days was the right period of gestation, the Sheriff is doubtful if he would have been entitled to go further than the Court of Session did in the case of *Boyd*, June 17, 1843, 5 D. 1213. But as it is not fixed that an interval of 305 days must have intervened, and which interval may have as few as 287 to 290 days, the Sheriff is of opinion that in the circumstances the pursuer is entitled to prevail.”

The defender appealed, and argued—It was doubtful on the evidence when the act of intercourse exactly took place. The pursuer herself fixed it at a period which protracted the period of gestation beyond its legal limit. The true date, however, was that given by Kettles, the defender's companion, on the occasion of the alleged visit, viz., “six weeks and two days” before the term of Martinmas of 1878—a date which protracted the period of gestation to the impossible period of 313 days.

Argued for respondent—The pursuer had deponed on oath to the fact that her intercourse with the defender took place “five weeks” before

Martinmas, and that the child born 305 days after was the fruit of that intercourse. Assuming that her oath was believed, then the *onus* lay with the defender of fixing a date which made it impossible that he could be the father of the child.

Authorities—*Boyd v. Kerr*, June 17, 1843, 5 D. 1213; *Gibson v. M'Fagan*, March 20, 1874, 1 R. 853; *Henderson v. Somers*, July 7, 1876, 3 R. 997.

At advising—

LORD JUSTICE-CLERK—The proof in this case has not been all that could be desired. The case is narrow on the facts, and I do not know what our judgment would have been had it come up to us from the first. But the Sheriff below has bestowed great pains on it, and on the fact whether the defender is right or not in saying that what took place was beyond the ten months preceding before the birth of the child. There is no question that if it was within that period he is the father of the child. Then there can be no doubt that the pursuer is entitled to give her oath on the matter, and if it appear sufficient she will be believed; but then her oath to be sufficient must be to the effect that the intercourse took place on a specified occasion which made it possible that he could be the father of her child, the fruit of that intercourse; and if the pursuer fails to give such evidence as will entitle her to be thus believed, she must fail in her case; so that the question is, Has she done so here? Now, no doubt, if the extreme case is taken, “six weeks and two days” before Martinmas, that brings the period to 313 days; “five weeks” brings it to 305 days; and “four weeks” brings it to a period on which there can be no question at all. On the whole matter, however, though it is a narrow case—and I cannot but think that the time of intercourse might have been cleared up more correctly—I see no reasons for disturbing the Sheriff's judgment.

LORD GIFFORD—I concur.

LORD YOUNG—I have come to be of the same opinion, but I confess not without some difficulty. Both parties have been examined here, and the opinions which your Lordships give, and in which I concur, involve this, that one of them, the defender, is not speaking the truth, and we therefore do not believe him. He says that he went with Edmund Kettles to the pursuer's house late one night, and induced the two girls to rise from their beds and admit him and his companion as visitors; and that while Kettles and Elizabeth Millar went to the kitchen, he went into the byre with the pursuer, but that although he remained with her about an hour nothing took place between them there. Now, this we do not believe, and this is the material feature in the case, because we do believe the pursuer when she swears that connection took place between them. Then the pursuer swears that from the intercourse which she then had with the defender she conceived the child which was born 19th August 1879. She knew if she did so, and swears to it; but then it is relevantly urged she is not to be believed, because it is impossible that a child born then could have been begotten at the meeting. Now, if this were so, either by absolute certainty or by such probability as to make it extremely unlikely, we would yield to it and give it weight against the evidence of the pursuer; her case would then break down, and her action be at an end. But

I am of opinion that this Court cannot (as matter of judicial cognisance) say it is either impossible or extremely unlikely that a child born on the 19th of August could not have been begotten on the date referred to by the pursuer, looking to the evidence of the point. I know of no Act of Parliament nor of any text which says that an intercourse which took place “five weeks” before Martinmas may not produce a child born 19th August following. The question is more properly one for a jury, or a question of fact for the Court, but I do not think that there is that certainty or strong likelihood which should induce us to reject the pursuer's evidence. I therefore agree with your Lordships that the Sheriff's judgment should be affirmed.

The Court therefore affirmed the judgment of the Court below.

Counsel for Appellant—Millie. Agents—Macrae, Flett. & Rennie, W.S.

Counsel for Respondent—Nevay—J. Gibson. Agent—W. N. Masterton, L.A.

Tuesday, December 7.

## SECOND DIVISION.

[Lord Adam, Ordinary.

M'LEOD & COMPANY v. HARRISON.

*Sale—Bankrupt—Stoppage in transitu.*

B. & Sons purchased from M. & Co. some goods to be shipped by P.'s first steamer from Leith to Riga, and to be delivered to them at Moscow. The bill of lading was made out in their name. On the insolvency of B. & Sons, M. & Co. stopped the goods *in transitu* at Riga, when in the hands of the Riga Dunaburg Railway Company, and raised an action against the manager of their sequestrated estate for the price of the goods. The Court *sustained* the action, holding that the goods were still *in transitu* when stopped by the pursuer.

*Process—Amendment of Record.*

Motion for leave to amend record *refused*, on the ground that the amendment proposed, even if relevant, involved a new issue.

On 27th March 1877 William Blews & Sons, who were bell and brass founders, with places of business at Birmingham, West Bromwich, and Moscow, purchased, by order of that date, a quantity of gas-piping from William M'Leod and Co., metal merchants in Oswald Street, Glasgow. The terms of the transaction were that the goods should be paid for by six months' bill from date of shipment and bill of lading, and that they were to be shipped by Messrs D. R. Macgregor and Co.'s (of Leith) “first steamer from Leith to Riga, to our orders.” By a second order of the same date Wm. Blews & Sons purchased another quantity of gas-piping on exactly similar terms, and they themselves corresponded with Messrs Macgregor & Co., and arranged with them as to the freight. On the 20th April 1877 the goods, in two parcels, were duly despatched by M'Leod & Co. to Messrs Macgregor & Co., and invoices being sent to William Blews & Sons, they granted their