

quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now if that is so, where does the question of accident come in here? There is no evidence, as your Lordship pointed out, that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently a most unfortunate and unexpected result happened—the man's death.

On these grounds I agree with your Lordship that there is nothing violent in the sense of the policy to account for this man's death. But I must confess that on reading the doctors' evidence I was surprised to find that they did not ask Mr Clidero for any further account of what took place upon that morning,—whether it was caused by any accident, such as a fall forward or backward when in the act of pulling on his stockings. None of the doctors say that; they are perfectly contented; and taking the facts upon which they go, viz., that everything was going on as usual—that it was simply a result arising from a stout man stooping forward in the ordinary act of putting on his stockings—I cannot think that that falls within the description in this policy, that death resulted from violent, accidental, external, and visible means.

LORD M'LAREN—I agree with all that your Lordship has said in your statement of the case. As we are proposing to alter the Lord Ordinary's interlocutor, it may be right that I should briefly indicate the ground of judgment, as it presents itself to my own mind.

The question, as your Lordships have pointed out, is really one, in the first place, of construction of the clause containing the conditions of the insurance. This peculiar kind of insurance defines the condition of liability as applicable to death resulting from violent, accidental, external, and visible means. Now, while in this case it appears that the immediate cause of death was stoppage of the heart, caused by the displacement of the bowel, what we have to look to is the external cause, whatever it was, which contributed towards that result. I consider that a policy of this kind is quite capable of covering the case of injuries that are self-inflicted. It is not necessary as a condition to a claim that the external cause should be either pure accident, or should result from the negligence or agency in some form of another person. But it rather appears to me that the criterion of responsibility must be that the injury has resulted from some involuntary movement on the part of the deceased. I agree with an observation made by the Dean of Faculty in his speech, that where the injury which is the cause of death is the consequence of a voluntary act, taking effect in a way that

was intended, and only in that way, then that does not satisfy the condition of the policy. Such an act cannot be described as violent as well as external. The kind of self-inflicted injuries which are covered by such a word embraces such cases for instance as where a person using a tool, accidentally makes a slip and severs an artery, or where a person intending to open a window loses his balance and is thrown to the ground. In either of these illustrations, in addition to the voluntary act which the person intended to perform, there is a movement which he never intended to make, and which results from some unexplained and involuntary cause. But in this case the man's own evidence, which we have through the medium of his wife and two medical men, is, I think, quite consistent with the supposition that the internal injury which he received was the result—so far, I mean, as external means are concerned—merely of the position in which he voluntarily put his body in the act of pulling on his stocking. Now, if in consequence of the strained position which he voluntarily assumed, there occurred internal displacement from some disturbance of the equilibrium of the internal affairs of the body, that would not, in my opinion, come within the scope of this policy, and it lies with the pursuers to shew that there was some movement of an involuntary kind which may be described in a large sense as violent and accidental.

My opinion is with your Lordships that no such involuntary action as the Lord Ordinary describes in his judgment has been proved, and therefore that the ground of judgment fails, and that the defenders ought to be assoilzied.

LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders from the conclusions of the action.

Counsel for Pursuers—Guthrie Smith—Daniell. Agents—A. P. Purves & Aitken, W.S.

Counsel for Defenders—D. F. Balfour, Q.C.—Jameson—Crole. Agents—J. & R. A. Robertson, S.S.C.

Wednesday, January 13.

SECOND DIVISION.

[Sheriff of Argyllshire.

M'KINVEN v. M'MILLAN.

Affiliation—Proof—Corroboration of Pursuer's Evidence—Semiplena probatio.

In an action of affiliation, in which the pursuer's evidence was consistent and uncontradicted, in which witnesses spoke to seeing the pursuer and defender together, but not in suspicious circumstances, and in which the defender had written a curiously expressed letter denying the paternity of the child, the Sheriff-Substitute

granted decree in favour of the pursuer. The Court (Lord Young *diss.*) recalled the judgment, on the ground that the pursuer had failed to prove her case.

Observed by Lord Trayner, that corroboration of the pursuer's evidence was as necessary in an action of affiliation as in any other action, and that the old doctrine of *semiplena probatio* was entirely obsolete.

Case of *M'Bayne v. Davidson*, February 10, 1860, 22 D. 738, referred to.

Jessie M'Kinven, residing at Glenbarr, near Campbeltown, brought an action of affiliation in the Sheriff Court at Campbeltown against Matthew M'Millan, residing at Glencardoch farm, Barr, near Campbeltown, for aliment for an illegitimate child to which she had given birth upon 17th December 1890, of which she averred that the defender was the father. It was stated in her consendence that "for several years the pursuer and defender have been very intimate, and the defender was courting the pursuer. The defender has had connection with the pursuer from time to time since the year 1885. In particular, the defender had connection with the pursuer on or about the 7th day of February 1890, and on or about the 16th day of March 1890 in or near a field on the farm of Upper Barr." The defender denied these averments *simpliciter*.

A proof was allowed. The import of the oral testimony sufficiently appears from the Sheriff-Substitute's note and from the opinions of the Judges. The following letter written by the defender to the pursuer was produced—"Greenock, 14th August 1890.—Dear Jessie,—I was paralysed by the contents of your letter. If you are with child it is certainly not by me. Before my God and my own conscience I am prepared to swear that, and under no circumstances will I admit the paternity of it. Were I not absolutely certain of it, I would not say that, but I have said it conscientiously and will stick to it to the bitter end. I am very sorry for you.—Yours, &c., MATTHEW M'MILLAN."

Upon 29th September 1891 the Sheriff-Substitute (RUSSELL BELL) pronounced decree in favour of the pursuer.

"Note.—This is rather a narrow case, but I think the pursuer must prevail. The witnesses—M'Quilkan, M'Gougan, and Taylor—all speak to the defender frequently visiting the house of M'Quilkan, where she resided. M'Quilkan and Taylor both speak to the parties being out *solus cum sola* late at night—the former to an occasion a year or two previous to the specific dates of connection libelled, and the latter in particular to its having occurred on the night of the first date libelled, 7th February 1890, the day of the thrashing at Rosehill. Taylor also says the pursuer told her the defender was courting her, and that she spoke to her of her condition, and attributed it to the defender. The pursuer's story is a consistent one, and she is not contradicted by any neutral witness. Unless the witnesses

named are to be disbelieved, her case is raised by their testimony to a height of probability which with her own evidence satisfies, I think, the rule applied to such cases. It is also of importance that she wrote to the defender himself during her pregnancy attributing it to him. His letter to her in answer does not strike me as that of an innocent man, but the reverse. If he had had nothing to do with the girl he had no need to be 'paralysed' by her announcement. It impresses me as that of a man conscious of the truth of the impeachment, but who is taking refuge in denial for the inconvenient consequences of his indulgence, and his explanation of it in his examination for the pursuer—that he 'did not know what she was writing about'—is not satisfactory. The language of his letter is that of one who has quite appreciated the force of the communication to which it is an answer. If the case is narrow, it is at least a broader one than *M'Bayne v. Davidson*, February 10, 1860, 22 D. 738, where the paternity was held proved."

The defender appealed to the Court of Session.

At advising—

LORD JUSTICE-CLERK—This is a case in which the pursuer seeks to have decree for the aliment of an illegitimate child, and the Sheriff-Substitute has found her entitled to succeed. Upon reading the oral evidence I came to be satisfied that there was not evidence upon which it would be safe to rely, sufficient to entitle us to hold that the pursuer had proved her case.

The Sheriff-Substitute points out that on some occasions for a year or two previous to the time in question the defender and pursuer were *solus cum sola*. But if because a young man and a young woman are sometimes seen together on a road in the country they are also held to be suspect, no young man would be safe to speak to any young woman. There is nothing in the evidence to indicate any familiarities whatever. M'Quilkan, the owner of the house in which the pursuer lived, says that the defender sometimes came, but no one had any suspicion that he came to court the pursuer, or that he and she were in the habit of leaving together. I think we should hold the case has not been made out. But there is another circumstance to which I should refer, and that is the terms of the letter written by the defender in answer to the charge made against him. I must say that that letter made a strong impression upon me at first, and that I thought it required very careful consideration. It is undoubtedly not a satisfactory letter, but I am not satisfied that there is anything in its terms amounting to an admission of connection. If that is not to be gathered from the letter, it does not help the pursuer's case at all. Persons sitting down to write a letter are apt to fall into a somewhat stilted form, and this letter is a distinct denial of the paternity of this child, although certainly in rather peculiar terms—[*His Lordship read the letter*]. Now, if that is to be taken as a falsehood,

there is an end of the matter, but it may be taken as a denial of the paternity, because the writer had never had connection with the pursuer. On the whole matter I am of opinion that the pursuer has failed to establish her case.

The Sheriff-Substitute by his note shows that he proceeded in rather a curious way in pronouncing decree in favour of the pursuer. He says—"The pursuer's story is a consistent one, and she is not contradicted by any neutral witness." That is equivalent to saying that unless the defender can disprove the story of the pursuer she must be believed. That is not the way to look at the matter at all. The pursuer's evidence is not enough unless it is corroborated as in any other case.

I think the judgment of the Sheriff-Substitute should be recalled.

LORD YOUNG—I cannot find fault with the view of the Sheriff-Substitute, or with anything he has said in support of it. The facts are known with absolute certainty to the parties themselves. If the woman has told the truth, the defender has perjured himself; and if the man has told the truth, the pursuer has perjured herself, and has charged the wrong man. The pursuer is perfectly distinct in her evidence, and I do not sympathise with your Lordship's remarks upon the Sheriff-Substitute's observations as to her consistency and as to there being no evidence contradicting her story. Such observations are no doubt commonplace, and may hardly be worth making, but they are almost invariably made in these cases. The real question is always whether there is anything to support the pursuer's evidence. If it is clear, consistent, and not contradicted, and if the Sheriff believes it, very little in the way of corroboration will do. It must be very little, unless the parties are detected in doing what they would seek to conceal. Where eyewitnesses of the act have been brought forward, it is generally suggested that they have perjured themselves. Now, are we to say that no case can succeed, however clear and consistent the statement of the woman, unless discreditable familiarities are proved, or at least familiarities whether discreditable or not. An important element is whether the parties have been keeping company, which can only be proved by the general evidence of people who saw them. Here we have the evidence of an uncle (M'Quilkau), who it is not suggested has sought unduly to help the pursuer, and he says they were carrying on together. The man denies all that. That the man has lied does not prove the case, but if he tells a falsehood with regard to circumstances relative to the case, that is a circumstance to be taken into account entitling you to act upon the woman's testimony if you believe it.

As regards the letter, your Lordship seemed to suggest that it was consistent with no undue acquaintance between the writer and the pursuer. I should not have thought it would have occurred to anyone that that was the letter of an innocent

man. Would an innocent man who had never been unduly familiar with the pursuer, write—"Dear Jessie,— . . . If you are with child it is certainly not by me. . . . Were I not absolutely certain of it, I would not say that, but I have said it conscientiously, and will stick to it to the bitter end?" I am not saying that that is an admission, such as we should regard as an admission if in an answer to an article in a condescence, but it does produce in my mind the impression that it was not written by an innocent man, and it does lead me to believe the woman rather than the man who writes thus to a woman who is trumping up a case against him.

I think the Sheriff-Substitute is right, but further, I think that if there is reasonable evidence in support of his view, which there is, his judgment should not be disturbed.

LORD RUTHERFURD CLARK—The conclusion I have arrived at is that the case for the pursuer has not been proved.

LORD TRAYNER—I agree in thinking that the pursuer has entirely failed to prove her case; there is no evidence in support of it but her own. The evidence of her grand-uncle does not, in my opinion, afford the slightest corroboration of the pursuer's statement. He speaks to a circumstance which he says excited his suspicion as to the relations existing between the pursuer and defender, but that circumstance occurred three or four years before the child in question was born, and cannot therefore have, in my opinion, any bearing upon the question before us. Besides, this witness's suspicions are not evidence of fact.

I think the Sheriff-Substitute has reached the conclusion given effect to in his judgment upon an erroneous idea of the law applicable to cases like the present. Your Lordship in the chair has already referred to the passage in the Sheriff-Substitute's note where he says—"The pursuer's story is a consistent one, and she is not contradicted by any neutral witness." Upon that I observe that the pursuer's story, consistent and uncontradicted as it may be, is still the pursuer's story, and nothing more. It is not sufficient to prove the pursuer's case unless it be corroborated. The absence of contradiction does not afford corroboration. But what I more especially allude to is the sentence which follows what I have just quoted. The Sheriff-Substitute adds—"Unless the witnesses named are to be disbelieved, her case is raised by their testimony to a height of probability which with her own evidence satisfies, I think, the rule applied to such cases." The rule to which the Sheriff-Substitute refers is, I suppose, the old rule which allowed the pursuer of an action of filiation who had adduced a *semiplena probatio*, to supplement that evidence by her own oath, and thereupon to obtain decree. A *semiplena probatio* was just such a proof as the Sheriff-Substitute describes, namely, such an amount of evidence as created a strong probability that the pur-

suer's case was well founded. But the Sheriff-Substitute seems to have forgotten that that rule no longer exists. It ceased when the law was altered to the effect of allowing the parties to a cause to be examined as witnesses in the cause. I am surprised the Sheriff-Substitute should have forgotten this, for it is plainly laid down in the case which he cites—*M'Bayne v. Davidson*. The rule applicable in filiation cases is now the same as that which applies to any other kind of case which depends upon the ascertainment of disputed fact. The pursuer must prove her averments in an action of filiation just as she would require to prove her averments in an action on a contract where the alleged contract, or the alleged breach of contract or other allegation on which the action is founded, is disputed.

I would like to add one word about the defender's letter, which the Sheriff-Substitute thinks is not the letter of "an innocent man." It is at all events a distinct denial of the paternity of the pursuer's child. It does not strike me as suggesting any doubt of the defender's innocence. But is it any proof of the defender's guilt? That is the light in which it should be regarded; and I have no hesitation in answering that question in the negative.

The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defender.

Counsel for the Pursuer and Respondent—M'Clure. Agent—A. Stewart Gray, W.S.
Counsel for the Defender and Appellant—Strachan—Baxter. Agent—John Veitch, Solicitor.

Wednesday, January 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ALLAN AND OTHERS v. JOHNSTONE.

Ship—Charter-Party—Bill of Lading—Construction—Lay-Days—Part of Day—Demurrage.

The charter-party of a steamship provided, "the cargo to be brought and taken from alongside the steamer at freighter's expense and risk . . . Eleven running-days (Sundays excepted) are to be allowed the said freighters for loading and unloading . . . The 1885 bill of lading to be used under this charter, and its terms to be considered part thereof."

Five and a-half days were occupied in loading the ship.

The bill of lading was headed "Bill of Lading 1885," and provided—"All conditions as per charter-party . . . *Five and a-half* (5½) laying-days remain for discharging the whole cargo." It was a printed document with blanks, and the words in italics were filled in by the master.

The steamship arrived at her port of delivery on the 26th December, and on the same day the agents for the owners at that port wrote to the consignee, the indorsee of the bill of lading, in these terms—"As advised, s.s. 'Archdruid' is now lying at foot of M'Alpine Street, where she will be ready to commence discharging at 6 a.m. to-morrow morning, and lay-days will commence then." Discharging commenced at 7 a.m. on the 27th December, and ended at 2 a.m. on the 6th January. Sundays were excepted by the charter-party; Thursday, January 1st, was of consent treated as a non-working day; and during a certain portion of the time one of the steamer's winches broke down.

The owners brought an action against the consignee for three days' demurrage from 12 p.m. on the 2nd January.

Held (1) that the defender had five and a-half days for unloading, as by the charter-party the owners had directly empowered the master to fix the number; (2) that in terms of the letter written by the agents for the ship-owners, these fell to be reckoned as periods of twenty-four hours from 6 a.m. on 27th December; (3) that an allowance of one day fell to be made for the breakdown of the winch, which extended the laying-days into Monday the 5th, and that only one day's demurrage was due.

This was an action by William Allan and others, owners of the steamship "Archdruid," against William Johnstone, grain merchant in Glasgow, and consignee of the cargo of the "Archdruid," for payment of £93, 3s. as demurrage for three days in discharging the ship at Glasgow at the rate of £31, 1s. per day.

By charter-party dated 20th October 1890 it was agreed that the "Archdruid" being in good condition should proceed to Kustendjie and "there load a full and complete cargo of wheat, seed, or grain . . . and being so loaded shall therewith proceed to a safe port in the United Kingdom . . . The cargo to be brought and taken from alongside the steamer at freighters' expense and risk . . . Eleven running-days, Sundays excepted, are to be allowed the said freighters (if the steamer be not sooner dispatched) for loading and unloading, and ten days on demurrage over and above the said lay-days at 6d. per ton on the steamer's gross register tonnage per running-day . . . The 1885 bill of lading to be used under this charter and its terms to be considered part thereof."

The "Archdruid" arrived at Kustendjie on 30th November 1890, commenced loading on 1st December at 7:30 a.m., and finished at 11 a.m. on the 6th. She sailed that day and arrived at Glasgow at 1:30 p.m. on the 26th.

The bill of lading was dated 6th December 1890, and was in the following terms—"Mediterranean, Black Sea, and Baltic Grain Cargo Steamer. Bill of Lading 1885.