

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the two issues proposed by the pursuer.

Counsel for the Pursuer—Baxter. Agent—John Veitch, Solicitor.

Counsel for the Defender—A. S. D. Thomson. Agents—Gray & Handyside, S.S.C.

Wednesday, June 14.

SECOND DIVISION.

[Sheriff of Aberdeen.]

STOTT v. ALLAN.

Process—Proof—Motion to Examine Persons Precognosced but not Examined at Proof—A.S. 10th July 1839, sec. 83.

In an action of filiation a motion by the defender that the Court should open up the proof and allow him to lead the evidence of persons who had been precognosced on his behalf before the proof, but had not been examined at the proof, *refused*.

Margaret Allan, formerly domestic servant at the Douglas Hotel, Aberdeen, raised an action in the Sheriff Court at Aberdeen against John Stott, a son of the hotel-keeper, for aliment for her twin illegitimate children, of whom she averred that the defender was the father. The children were born on 27th July 1892.

The defender lodged defences denying the paternity, and averring that the father of the pursuer's children was D. Carr, who had gone to America.

A proof was led before the Sheriff-Substitute (DUNCAN ROBERTSON) on 28th February 1893.

After the proof was closed the defender presented a petition to the Sheriff-Substitute "to open up the proof, and to allow the defender to adduce Helen Johnston, domestic servant, Saltoun Arms Hotel, Fraserburgh, as a witness in the cause, in order to prove that on a Sunday evening in or about the month of April 1892, in the servants' bedroom within the Douglas Hotel, Aberdeen, the pursuer Margaret Allan stated to the witness that she did not believe she would ever see the father of her child again, and that she would have to bring it up herself; that the father of the child was D. Carr, who had gone or was going to America; and that the pursuer corresponded with D. Carr, receiving letters from him every fortnight or three weeks while she was in the Douglas Hotel."

In his condescence the defender averred—"(1) The proposed witness Helen Johnston was a housemaid in the Douglas Hotel, Aberdeen, from May 1891 to November 1892, and occupied the same bedroom with the pursuer Margaret Allan and the witnesses Ligertwood and Simpson. (2) The defender's agent examined her before the proof, but failed to get from her the

information which she has now volunteered to give. (3) On 28th February, the day of the proof, Jessie Stott, the sister of the defender John Stott, wrote to the proposed witness the letter herewith produced, making inquiry as to articles of clothing which had been missed from the hotel, and in reply received from her the letter dated 1st March, also herewith produced." This letter contained the following—"I don't think I told the lawyer of Maggie Allan saying to me that she did not believe she would ever see the father of her child again, and that she would have to bring it up herself. If it is of any use now I am ready to swear to it. I quite forgot about it at the time I saw him.—Yours, HELEN JOHNSTON."

The defender pleaded—"The defender having now discovered (which he was unable to do before) that the proposed witness Helen Johnston can give important testimony in the case, and her statements being material to the issue of the cause, the defender ought to be allowed to lead the further proof craved by him."

On 4th March 1893 the Sheriff-Substitute refused the prayer of the petition.

"*Note.*—I must say I think this is a very clear point. The proof has been closed, parties heard, and the case is at *avizandum*. The defender now asks to be allowed to examine another witness. The defender cannot say that this witness has come to his knowledge since the proof. On the contrary, he states that his agent precognosced her, no doubt upon this very point upon which he now says she is prepared to speak, but when precognosced apparently she could say nothing in favour of defender's case. To allow her now to be examined would, in my view, be a most dangerous proceeding, and one certainly not borne out or supported by any of the reported cases—*Brown v. Gordon*, January 27, 1870, 8 Macph. 432; *Mabon v. Cairns*, October 29, 1875, 3 R. 47."

The defender appealed to the Sheriff (GUTHRIE SMITH), who on 22nd March dismissed the appeal and affirmed the interlocutor appealed against.

On 8th April 1893 the Sheriff-Substitute found that the defender was the father of the pursuer's children, and gave decree against him. In his note the Sheriff-Substitute stated that the case was unquestionably a narrow one.

The defender appealed to the Second Division of the Court of Session.

When the appeal was called the defender renewed his motion that he should be allowed to adduce Helen Johnston as a witness in the cause, and also to examine as a witness another person who had been precognosced before the trial but had not been examined at the proof, in order to prove that the pursuer and D. Carr had been seen in Aberdeen together in October, November, and December 1891, and that on one occasion they had gone into a stable together and remained there twenty minutes.

Argued for the defender—The additional evidence should be allowed. The Sheriff-

Substitute had stated that the case was a narrow one, and it was always in the discretion of the Court to allow additional proof in special circumstances where justice would be done thereby to the parties to the cause—Mackay's Manual of Practice of the Court of Session, p. 335; Act of Sederunt July 10, 1839, section 83; *Brown v. Gordon*, January 27, 1870, 8 Macph. 432; *Mackie v. Pratt*, February 18, 1870, 42 Scot. Jur. 273.

Argued for the pursuer—The defender's motion ought to be refused. The Act of Sederunt said that "very weighty reasons" must be shown. No such reasons had been shown here. Both of the proposed witnesses had been precognosced and might have given evidence at the trial, and no case had been cited showing that the evidence of a person in this position had been allowed after the trial was ended.

At advising—

LORD JUSTICE-CLERK—It is always a serious matter to allow additional evidence after a proof is closed. It seems to me to be quite clear that no motion to allow such evidence should be granted where there has been no discovery of new evidence, but where it is merely proposed to lead the evidence of persons known and precognosced before the trial, these persons not having been put in the box at the trial. It would be very unsafe to allow additional evidence to be led after the close of a proof, except when the weightiest grounds can be shown for doing so, and considering the circumstances of this case, I do not think that this is a case in which further proof of the kind proposed should be allowed.

LORD RUTHERFURD CLARK—I do not want to lay down any general rule, and I do not say that it is not possible in certain cases to allow additional evidence after the proof has been closed. But I do not think it should be allowed in the present case.

LORD TRAYNER—I also think that no proof should be allowed. But I put my decision on the ground that no sufficient reason has been shown for allowing additional evidence on the points proposed here.

LORD YOUNG was absent.

The Court refused the motion of the defender for leave to lead the additional proof.

The Court heard counsel on the merits of the appeal as it stood, and thereafter recalled the interlocutor of the Sheriff-Substitute dated 9th April 1893, and assoilzied the defender.

Counsel for Pursuer and Respondent—Orr—A. S. D. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for Defender and Appellant—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, June 14.

FIRST DIVISION.

MYLES (LIPMAN & COMPANY'S TRUSTEE).

Bankruptcy—Sequestration—Bankruptcy Act 1856 (19 and 20 Vict. c. 79), secs. 5, 125, and 127—Computation of Periods of Time under Act—Error in Time of Inserting Notice in Gazette—New Advertisement Authorised.

Section 5 of the Bankruptcy Act provides that periods of time in that Act are to be reckoned exclusive of the day from which they are directed to run.

Section 125 provides that immediately on the expiration of four months from the date of the deliverance awarding sequestration, the trustee shall prepare a state of the bankrupt's estate, and that within fourteen days after the expiration of said four months the commissioners shall examine it.

By section 127 the trustee is directed within eight days after the expiration of such fourteen days to give notice in the *Gazette* published next after the expiration of such fourteen days, of the time and place of paying the dividend.

The four months in a sequestration expired at midnight on 25th May. The *Gazette* was published on 9th June. The trustee did not insert the notice required by section 127 until the next issue published on 12th June.

On the petition of the trustee, the Court, on the ground that an error appeared to have been committed, *authorised* insertion of the notice in the *Gazette* of 16th June.

Opinion by Lord M'Laren that it is not the meaning of the Act that a day should intervene between two consecutive periods, but that the later period begins on completion of the earlier.

Opinions of the Lord President, Lord Adam, and Lord Kinnear *reserved*.

Section 5 of the Bankruptcy Act provides that "Periods of time in this Act shall be reckoned exclusive of the day from which such period is directed to run." Section 125 provides—"Immediately on the expiration of four months from the date of the deliverance actually awarding sequestration, the trustee shall proceed to make up a state of the whole estate of the bankrupt, of the funds recovered by him, and of the property outstanding (specifying the cause why it has not been recovered), and also an account of his intrusions, and generally of his management; and within fourteen days after the expiration of the said four months the commissioners shall meet and examine such state and account, . . . and they shall declare whether any and what part of the nett produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors." Section 127 provides—"The trustee shall, within eight