

The Lord Ordinary on the same day issued the following interlocutor:—"Refuses the motion, and in respect of the decree of divorce in the action between the parties, dismisses this action and decerns: Finds the pursuer entitled to expenses, under deduction of the expenses already allowed," &c.

The pursuer reclaimed, and argued—There could be no doubt that the defender was bound to aliment the pursuer during the dependence of these actions, and that she was entitled to a larger amount in name of aliment than she had already received. Decree of divorce was pronounced during vacation and this motion was made at the earliest opportunity. The pursuer had been alimented by third parties, and this was the most convenient and least expensive way for them to obtain repayment. The only alternative was a new action against the defender, which would be a needless expense. It could not be maintained that the application was incompetent. This was not a demand for arrears of aliment, and so *M'Millan v. M'Millan*, July 20, 1871, 9 Macph. 1067, was not in point. In *Donald v. Donald*, May 26, 1860, 22 D. 1118, opinions were reserved as to what would have been the decision if debt had been incurred, as was the case here. If it were competent to grant the application, it was unquestionably expedient.

Argued for the defender—It was incompetent to grant this application after decree of divorce had been pronounced. An action for aliment alone was incompetent, and in this action the conclusion for separation having been superseded by the decree of divorce, the conclusion for aliment, which was necessarily ancillary to that for separation, could not now receive effect. An award of aliment on this motion would not be an answer to an action by creditors of the wife for necessaries supplied to her pending the actions. In any view, there was no hardship to the pursuer or her creditors, because, in consequence of the decree of divorce, she had got a substantial provision out of which to meet her debts.

At advising—

LORD JUSTICE-CLERK—This case is in rather a curious position. [*His Lordship then narrated the steps of procedure above detailed.*] Having given the case the best consideration I can, I have come to the conclusion that there is no ground for altering the Lord Ordinary's judgment. If, as we are informed, this lady received any necessary supplies during the litigation, the persons who supplied her necessities have means for recovering their outlay from the defender. But such persons are not entitled to be aided in recovering their advances by decree in an action which assumes as the essential condition of its competency that the pursuer and defender are married persons at a time when they have ceased to be married to one another.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer—Ure—Crabb Watt. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender—A. O. M. Mackenzie. Agent—John Mackay, S.S.C.

Thursday, June 11.

SECOND DIVISION.

[Sheriff of Aberdeen, &c.

MACPHERSON v. LARGUE.

Parent and Child—Illegitimate Child—Affiliation—Proof of Paternity.

The pursuer in an action of affiliation alleged that the defender had had connection with her on a certain occasion. Her statement was corroborated to this extent (by evidence which was accepted as true), that she had been seen alone in the defender's company at the time and place alleged, but not in circumstances in themselves suspicious. The defender denied that he had been with the pursuer on the occasion alleged.

Held that his denial gave a complexion to the incident, and was legitimately treated as evidence leading to the inference that connection had taken place on the occasion in question.

This was an action at the instance of Helen Taylor Macpherson, Muir of Turtory, Rothiemay, against James Largue, farm servant, Lochagan, Banff, brought in the Sheriff Court at Banff. The pursuer sought aliment for an illegitimate child of which she alleged that the defender was the father. The defender denied the paternity.

The pursuer, who up to the time when the child was born was a domestic servant and dairymaid, had been at school with the defender, but after going into service, did not see anything of him for several years, until November 1894, when she met him on the road. Shortly after that the defender called for the pursuer on a Sunday at the house where she was in service, and was with her for some little time. He called again for her twice. The child was born on 31st August 1895. So far the facts were not in dispute.

At the proof which was led on 15th January and 5th February 1896, the pursuer deposed that on the first occasion of the defender's visiting her they had a walk in the grounds together, but this was denied by the defender. With regard to the second visit she deposed—"He came back again on the first Sunday of December between five and six o'clock. He came to the door, and I went out with him after answering it. He did not come in to the house. I went out with him. We went out past the front door, round about the grounds, and down at the back of the laundry, where we sat down. He had connection with me there. He told me that he loved me, and professed

affection, and spoke about marrying me. He was scarcely an hour in my company that afternoon, then he left. . . . We were about half-an-hour together before we sat down. . . . That was the only occasion on which the defender had connection with me—that first Sunday in December. The connection took place outside on the grass at the back of the laundry. The laundry is not far from the house, on the top of a brae looking down on the water, not far from the kitchen—a pretty steep brae, but not very long down to the water. There are trees on that brae, between the laundry and the water, and between the laundry and the bridge. There are bushes growing besides trees.” With regard to this visit the defender deponed—“I visited her on another occasion at Turtory House, also on a Sunday, about five o’clock in the afternoon. I knocked at the kitchen door, and she was in. I did not go inside; she came out to the door. She did not leave the house, and we stood talking at the door again. I was not ten minutes with her, and the whole time at the door. I did not tell the girl that I loved her on that occasion. I did not take her on my knee or kiss her at that time, nor did I give her a walk through the grounds at that time. I do not know where the laundry is situated at Turtory. I know where the milk-house is. I did not accompany her to the milk-house on that day. I did not sit down on the grass beside her at the laundry door. It was stormy. I never sat down with her there. I never sat down with her outside in the grounds of Turtory House.”

George Greig, a fellow-servant of the pursuer’s, deponed—“The next time I saw him near Turtory House was when he was standing about the laundry with the pursuer. That was also on a Sunday, about the 1st December, five or six o’clock in the afternoon. I was upon the road, and I chanced to be on the bridge, and I saw them. They were apparently sitting on a bank at the back of the laundry—the pursuer and defender. I just saw them, but I did not watch them.”

The defender in his defences averred that this witness was the father of the child, but no evidence was led in support of this allegation.

The pursuer did not inform the defender of her condition, but she sent for him on the day on which the child was born. He went, along with James Douglas Largue, his cousin, to her grandfather’s house where she was. They saw the pursuer, and she said he was the father. The defender remained a considerable time, his cousin being present, endeavouring to get her to say that the child was not his, but she would not go back upon her first statement.

The Sheriff-Substitute (GRANT) on 11th February 1896 issued the following interlocutor:—“Finds, in fact, that the defender is the father of the child libelled, and in law that he is bound to contribute to its support; Therefore decerns against the defender as prayed for: Finds the pursuer entitled to expenses,” &c.

Note.—“In this action of affiliation and aliment the pursuer rests her whole case on a single act of connection on the first Sunday of December 1894.

“The criticisms of both parties at debate were mainly directed to diversities and discrepancies between the dates given in evidence on either side for the few meetings that undoubtedly took place between them.

“The exact dates are now matters of unaided memory, and do not strike me as material with regard to credibility merely. It is of course incumbent on the pursuer to prove connection within the period specified on record—*i.e.*, during December 1894 and January 1895.

“On consideration of the evidence, I am satisfied of the possibility of access during that period.

“The evidence that opportunity was taken advantage of is very meagre. We have the pursuer’s oath to start with, of course, but there is no other evidence of indecent familiarity. In the circumstances the defender’s actings throw light on the probabilities of the case. In the first place, he makes a most unwarranted imputation on a married fellow-servant of the pursuer, which he is unable to support by any evidence whatever. That appears to me rather as if, having to manufacture a defence, he has fallen into the vulgar error of trying to make it more conclusive than he need.

“There, again, we have the consistent action of the pursuer in immediately sending for the defender on the birth of her child. He came, but instead of accepting or denying the paternity outright, he remains by her bedside for about an hour, striving to obtain an admission from the pursuer favourable to himself. I need hardly say that the admissions of a woman only a few hours delivered would not in any case have told hardly against her; but it appears to me, from the defender’s own evidence, she told him not what he wanted certainly, but all he was entitled to, when she said that she had no-one else to put the child to. . . .

“On the whole, therefore, I think the pursuer has proved her case.”

The defender appealed to the Sheriff (CRAWFORD), who, by interlocutor dated 16th March 1896, affirmed the interlocutor appealed against, adding the following note.

Note.—“This is a somewhat narrow case, but in my opinion the pursuer is entitled to succeed. Mere opportunity would not by itself supply sufficient corroboration, but there was what may be described as a flirtation between the parties. They renewed an old friendship dating from childhood. The pursuer was knitting a pair of socks for the defender, and he began to pay her visits. It cannot well be believed that these were so short as he represents. The parties were on a footing which might be innocent enough, but it implied a certain degree of intimacy and of mutual attraction, and when it is followed by the birth of a child, and the pursuer’s oath as to its paternity, it must be taken into account. The pursuer has fixed a particular day as

the date of the sole act of connection, and the defender was entitled to argue that it does not tally with the evidence as to the dates of their previous meetings. I do not see that there is any inconsistency in the pursuer's own evidence, and with regard to that of the other witnesses, I agree with the Sheriff-Substitute's remarks on the subject, and I do not discover any material contradiction. It may be said that Greig, after the accusation made by the defender against him, which it would be natural for him to resent, cannot be taken as an impartial witness. If he were, his evidence affords exceedingly strong corroboration of that of the pursuer—probably conclusive in the face of the defender's denial. The Sheriff-Substitute has said nothing against his credibility. . . .

“On the supposition of the defender's innocence, his conduct in old Macpherson's house after the birth of the child is not easy to account for. His being sent for at all was of course notice that the girl charged him with the paternity. It is not easy to see what his motive was in torturing her with questions for more than an hour in the condition she was in. It looks as if he hoped to extract from her a withdrawal of the charge. But it appears to me rather to point to some unknown circumstance, such as a promise by the girl not to father the child upon him but upon someone else. It does not, in my view, point to the defender's innocence, but the contrary. Further, it is difficult to disbelieve the evidence that he falsely stated on that occasion that he had not met the pursuer till the previous Whitsunday.

“The circumstance in the case which is most unfavourable to the pursuer is that there is no evidence, and it is not alleged that she acquainted the defender with her condition and his responsibility till the birth of the child, but taken along with the other evidence, that is not sufficient to turn the scale against her.”

The defender appealed to the Court of Session, and argued—There was no corroboration of the pursuer's statement. The pursuer did not accuse the defender till after the birth. The only evidence in corroboration was that one witness said he saw them together behind the laundry. There was no corroboration whatever as to the essential fact of connection. Proof that they were seen sitting together on a bank was not proof that connection took place on that occasion. There was nothing in that inconsistent with an innocent flirtation. There was no evidence of indecent familiarities or of any familiarities at all. In cases where connection could only be inferred, such evidence had always been held necessary—*Scott v. Dawson*, February 2, 1884, 11 R. 518. The defender's denial of a fact held to be proved was not corroboration of anything—*M'Kinven v. M'Millan*, January 13, 1892, 19 R. 369, and *Young v. Nicol*, June 8, 1893, 20 R. 768.

Argued for the pursuer—A certain amount of familiarities and flirtation was proved. The pursuer's conduct after the

birth was not consistent with innocence. The pursuer's evidence as to the interview at which she alleged the connection took place was believed by the judge who saw the witnesses, and her statement was corroborated by the witness Greig as to material facts and circumstances. These facts and circumstances were denied by the pursuer, and if proved, his denial gave a clandestine character to the interview. This led to the inference that he had something to conceal, and that the pursuer's statement as to the essential fact was true—*M'Bayne v. Davidson*, February 10, 1860, 22 D. 733, was a narrower case than the present.

LORD JUSTICE-CLERK—No one can read the evidence in this case without seeing that it is a very narrow case indeed. But in such a case as this I should have extreme difficulty in altering the judgment of the judge who has seen and heard the witnesses. If the Sheriff-Substitute had seen the least ground for doubting the truthfulness of the pursuer and the witness Greig, that would have appeared from his note, but he having seen and heard them, has believed that they were speaking the truth. The evidence of these witnesses proves that a meeting took place between the pursuer and the defender on a certain night in December, behind the laundry, and that the pursuer and defender were alone together and were sitting side by side on a bank. The question is whether that meeting resulted in the defender having connection with the pursuer. It cannot be expected that there should be direct evidence of eyewitnesses to corroborate the pursuer's statement on this point, and indeed in cases where such evidence has been brought, it has been often regarded with considerable suspicion. But the defender gives evidence which contradicts statements of fact which are proved by the pursuer and Greig, witnesses whom the Sheriff-Substitute heard and believed. I agree that no corroboration can be derived from evidence of the defender, which shows he is not speaking the truth. If his evidence is not to be believed, it must be taken out of the case altogether, and the case must be treated as if he had not been examined. In that view we have the evidence of the pursuer and of Greig that the pursuer and the defender were together on a certain occasion in circumstances which might not in themselves be sufficient to imply that carnal intercourse took place as an absolute certainty. But if these facts were capable of leading to a certain inference, and if the defender made no answer when that inference was suggested, it is then that that absence of explanation by the defender's evidence would come to be of importance, and in the same way his denial of these facts, which are held to be proved, is significant, as it gives a complexion to them, which they might not otherwise bear if explained. I think we ought not to interfere with the judgments of the Sheriffs. I cannot say that there was not evidence before the Sheriff-Substitute to entitle him

to come to the conclusion at which he has arrived, and I am of opinion that that judgment, upheld as it was by the Sheriff, should not be altered by this Court.

LORD TRAYNER—It is important in this case to observe that both the Sheriff-Substitute and the Sheriff have decided in favour of the pursuer. That being so, we would not be justified in interfering with their judgments except upon clear and strong grounds. I agree that in this case there are not sufficient grounds for such a course. I adhere to all that I said in the case of *M'Kiven*, but applying the rule which I laid down there, not on my own authority, but on the authority of the late Lord President, I think that that rule has been satisfied in this case. In cases of this kind you cannot as a rule have direct independent evidence—that is, evidence by witnesses other than the parties themselves of the most material fact involved. But even in such cases the evidence of the pursuer by itself is not enough. It must be corroborated as regards one or more of the essential particulars of the case.

On the other hand, the denial by the defender of material facts or circumstances (although not believed) does not corroborate the pursuer's statement. A false statement, or a statement not believed, by whomsoever made, is not corroborative of anything else. But if the pursuer is corroborated as to material statements made by her, and as to which she is contradicted by the defender, his denial, if proved false, or not believed, may give a complexion to the whole evidence adverse to the defender different from what it would have borne had his denial not been disbelieved or shown to be false. Now, I think the pursuer is corroborated in what she says as to certain material circumstances. She says that she and the defender on a certain occasion sat down behind the laundry, on a certain bank, at a place partly surrounded by bushes, and that connection there took place. The defender says he was never there, and never sat down beside the pursuer. But the witness Greig, whose evidence was believed by the Sheriff-Substitute (and I see no reason for doubting it) says that he saw the pursuer and the defender sitting together on the bank, about the time to which the pursuer speaks. Greig's evidence agrees entirely with that of the pursuer. Now, as I have said, the defender denies all that, and when that denial is believed to be false, it tends to show that there was something about that meeting which the defender wishes to conceal, and that something was done then which he does not want disclosed. But even if that element had been absent in this case I should have regarded the evidence of Greig as sufficient corroboration of the pursuer's statement. I admit that the case is a very narrow one, but nevertheless I am of opinion that we have no grounds for altering the judgments appealed against.

LORD MONCREIFF—I am of the same opinion. The Sheriff-Substitute who saw and heard the witnesses believed the pursuer

and the witness Greig, and did not believe the defender. I think we have sufficient corroboration of the pursuer's statements to warrant us in finding in her favour. I concur in the reasons for that decision which have been stated by your Lordships.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“Affirm the interlocutors appealed against: Find that the pursuer has proved that the defender is the father of her illegitimate child born on or about 31st August 1895: Therefore of new decern against him in terms of the prayer of the petition: Find the pursuer entitled to expenses in this Court.”

Counsel for the Pursuer and Respondent—W. Thomson. Agent—Charles George, S.S.C.

Counsel for the Defender and Appellant—M'Clure. Agent—Alexander Morison, S.S.C.

Tuesday, June 16.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

GLADSTONE v. M'CALLUM.

Company—Voluntary Winding-Up—Petition for Delivery of Minute-Book—Companies Act 1862 (25 and 26 Vict. c. 89), secs. 100 and 138.

Held that a petition presented under sections 100 and 138 of the Companies Act 1862, by the liquidator of a company which was being voluntarily wound-up, craving the Court to ordain the secretary of the company to deliver up its minute-book, was competent.

Retention—Company—Minute-Book.

Held that the secretary of a company has no right of lien over its minute-book.

At a meeting of the shareholders of the Scottish West Australian Land and Exploration Syndicate, Limited, held in March 1896, it was resolved to wind up the company voluntarily, and Mr Andrew Gladstone was appointed liquidator.

A petition was presented by the liquidator against Mr William M'Callum, secretary of the company, craving the Court to ordain the respondent “to deliver forthwith to the petitioner as liquidator foresaid the minute-book” of the company, “without prejudice to any lien competent to him.” The application was presented under secs. 100 and 138 of the Companies Act 1862. Sec. 100 provides, *inter alia*—“The Court may at any time after making an order for winding up a company require any . . . agent or officer of the company to deliver forthwith, or within any such time as the Court directs, into the hands of the official