discipline of the Church. It is prescribed by the Church, the object is the discipline of the parish, but devolves on the session. In itself it is a matter indifferent, and the Legislature might no doubt regulate it, but there is no doubt it was enacted by the Church for purposes of discipline. The First Book of Discipline makes that clear, and it was followed by a complete series of Acts of Assembly down to 1784.

As to the Act 1661, I think it is the strongest attestation we could have of the importance attached to this part of the powers and censures of the Church; and the penalties therein specified are expressly declared not to be prejudicial to or derogate from the orders and censures of the kirks to be inflicted against the delinquents. For these reasons I think we ought to recall the interlocutor of the Lord Ordinary.

LORD ARDMILLAN—I have felt this case to be interesting, and attended with some, but not much, difficulty. The question is one which, in regard to the *quoad sacra* parish of Moneydie, I was called on to decide when Sheriff of Perthshire in 1852, and I have now arrived at the same conclusion as I did then — a conclusion in accordance with your Lordships' opinion. Marriage is undoubtedly a civil contract. But the constitution of the contract of marriage is distinct from the procedure by which the sanction of religion is given to the contract. That added religious sanction is appropriate, important, and becoming. But, though necessary to the regularity, it is not essential to the validity of the marriage, which remains, as Protestant Reformers have always strenuously proclaimed it, a civil contract.

Now, the proclamation of banns is a step of orderly procedure in the celebration of marriage by which religious sanction is given to the contract. It is intended to promote and secure the prior notice of intended marriage, and the becoming regularity of the celebration of marriage; but it does not affect its validity. It is not, I think, a step of civil procedure in the constitution of the marriage, but a step of discipline—a step in the orderly ecclesiastical procedure by which the Church gives sanction, seriousness, and solemnity, to marriage as the most important and abiding of human contracts. If this view of the proclamation of banns is correct, the result is that the banns may be lawfully and validly proclaimed in the *quoad sacra* Church at Wishaw, and the interlocutor of the Lord Ordinary should be recalled and the interdict refused.

I shall not presume to add anything more; as I concur in the opinion of your Lordship in the chair and of the Lord Justice-Clerk.

The other Judges concurred.

The Court pronounced the following interlocutor—

"The Lords of the Second Division having, along with three Judges of the First Division, heard counsel on the reclaiming note against Lord Mackenzie's interlocutor of 30th January 1875; in conformity with the unanimous opinion of the seven Judges, Recal the interlocutor complained of; sustain the defences; assoilzie the defenders from the whole conclusions of the summons, and find them entitled to expenses, and decern; and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Ronald, Ritchie & Ellis, W.S.

Counsel for Defender—Solicitor-General (Watson), and Gloag. Agents—W. & J. Burness, W.S.

Thursday, July 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

APPEAL—TAIT *v.* M'MILLAN.

Affiliation—Onus probandi.

Circumstances in which *held* that the evidence for the pursuer had failed to fix upon the defender the paternity of her illegitimate child.

The circumstances of this case, which came up on appeal from an interlocutor of the Sheriff of Lanarkshire (DICKSON), reversing one pronounced by the Sheriff-Substitute (CLARK), are sufficiently set forth in the following opinions:—

LORD JUSTICE-CLERK—This is an important and rather an unusual case, and one to which the learned Sheriffs in the Court below have addressed themselves with great attention; but they have differed as to the result at which they arrived. The case has come up to this Court on appeal, and your Lordships have given it very great attention. The summons proceeds at the instance of the pursuer, Elizabeth M'Millan, for damages for seduction, and for the aliment of an illegitimate child, of whom it is alleged the defender Tait is the father. Statements have been made on record which are of very considerable importance, but the substance of these statements is to the effect that the parties met on the Saturday previous to the autumnal Sacrament in September 1872, by mere accident; that on that occasion the defender went with the pursuer to Kelvingrove Park, and there had intercourse with her; and that he afterwards induced her to take a house for herself without the leave or knowledge of her mother, at 70 Robertson Street, where he had frequent carnal connection with her from 26th October 1872 until April 1873. The defender denies these statements, and on record he avers that he is an elder in the Reformed Presbyterian Church, and is in the habit of visiting to a large extent among the poorer portions of the population; and that all that took place between him and the pursuer was in pursuance of his general occupations in that direction.

Voluminous evidence was taken during a period extending over the large portion of a year, and I regret to see this, because it is manifest from the evidence itself that it has not tended to the furtherance of the ends of justice that this protracted period should have been allowed to intervene before the record was closed in the action. In regard to the principles of law applicable to the case, it is certain that since the Act of Parliament under which parties have become competent witnesses in their own cases, the law as to the effect of *semi-plena probatio* no longer has the same force—it has now become a question of ordinary evidence; and the pursuer may now be examined not merely upon the question of paternity, but may cause herself to be examined as to the whole surroundings of the case. But it does not follow that more evi-

dence is required now than formerly to establish the fact of paternity, but that which would have been *semiplena probatio* in supplement to the oath of the pursuer under the old law, is now, as before, sufficient ground on which the Court may find in the affirmative of the question raised. Moreover, it is not a question of evidence in these two respects —(1) where a woman is the pursuer she must examine herself, at all events, in an ordinary case; and (2) where the oath of the pursuer this emitted is credible and corroborated sufficiently by the surrounding circumstances, it is sufficiently conclusive. Two results follow from that. First, if the woman's evidence may be taken upon the surrounding circumstances, her evidence, along with corroboration, may be sufficient of itself although the corroborating facts would not have amounted to *semiplena probatio* at all. Second, if a woman's oath is not credible upon the subject-matter on which her evidence was given in regard to the surrounding circumstances, as well as to the fact of paternity, it may be disregarded in respect of the want of credibility; and this although there may have been other circumstances in the evidence which, if the oath had been credible, would have been conclusive. My Lords, it is a noticeable fact that the circumstances at the commencement of this improper intimacy were very unusual. I do not say that the reputation, standing, and character of the defender make the account in itself improbable, and I am far from saying that the station or position of the defender is very material in judging of the evidence of the pursuer. But what has occurred to me as remarkable at the commencement of this intimacy is the suddenness with which the defender is alleged to have made use of improper language. I cannot say that this is impossible, but unquestionably it is improbable. Whatever may have been the temptation to the defender, or whatever his disposition to fall into it, there is something in the suddenness of that alleged fall which to a considerable extent is not consistent with the other surroundings of the case. [His Lordship then dealt with the evidence of the pursuer, observing that the termination of the intimacy was as remarkable as the commencement, because after six months the pursuer admitted that she had heard nothing of the defender until she communicated with him by telegraph at Scarborough.] It is stated on record that after the pursuer went to her Kennedy Street house the defender did not call so often because the days were growing longer, whereas in her own evidence she states that the defender did not even visit her there at all. How that statement found its way into the record I do not know. [His Lordship proceeded to point out other inconsistencies in the pursuer's evidence, and said there were matters to be explained on both sides which were not explained.] My Lords, these features of the case make it one in which the evidence of the principal party, the pursuer, requires unquestionably to be corroborated. And the case is peculiar in respect of corroboration, because apart from the evidence of the defender there is substantially no corroboration at all. No one saw these two persons together, and of course there is nothing in evidence to tell of familiarities or things of that kind. But, my Lords, the evidence of the defender is beyond all doubt the most singular part of the case. The defender corroborates some of the most important portions of the evidence of the pursuer, only with this qualification, that no intercourse such as is alleged by the pursuer took place on any of these occasions, and that he interfered solely from motives of philanthropy. Now I cannot say that this was by any means a satisfactory account or explanation. It contains some elements which I have found it difficult to reconcile with the general view of the defence. I should not, my Lords, be disposed to say that, looking to the position in which the defender stood, there might not be reasonably enough consciousness of innocence on his part such as to render him indifferent to public opinion or public appearances. I have no doubt there are many clergymen, many missionaries, and many persons in the position in which Mr Tait stands, namely elders doing parish work, who attend not merely to the spiritual interests of those within their bounds, but also to temporal welfare and advancement, and this in the conduct of any charity of which they may be taking charge, yet suspicion may never rest upon them in consequence. I can also imagine a person with considerable confidence in himself, and a sense of the importance of the work that he was doing, from want of sense, or caution, or knowledge of the world, or of the circle outside that in which he was moving, bringing upon himself suspicions entirely unfounded. I have given all weight to such feelings and such explanations, and I do not think that they are inconsistent with the general nature of the case. That this man was an acting elder in this parish, and that he exerted himself in order to help persons in embarrassed circumstances, is certain. But there were things about this case which are irreconcilable with this position, because one essential principle on which persons in that position vindicate their conduct is, that they have no consciousness in the cause of their actions—no desire to conceal their actings, and no consciousness that what they may be doing is open to suspicion or remark. In this case such considerations weigh all the more strongly with me, because the defender manifests a desire in his letters not only to conceal this matter from the mother of the pursuer, but from all others, and that is borne out by the strongest of all testimony—namely, that he never mentioned to any one his communications with the pursuer. He took no steps to have her under pastoral superintendence, and, particularly, he took no steps to have her looked after by one of her own sex.

My Lords, I cannot too strongly express the difficulty and pain which that view of the evidence causes me, and I do not hesitate to say that if that evidence stood by itself, and if the oath of the pursuer had been credible, it would not have been possible for the defender to escape the necessary conclusion. But this leads me to the third question to be settled, and that is the most serious part of the case; because it is quite possible that, although the defender may have been to the last degree not only imprudent but culpable in the proceedings which he adopted in this matter, the question still remains, whether the pursuer is a credible witness. [His Lordship referred to the statements made by the pursuer as to the intercourse alleged to have taken place in the Robertson Street house, and to pursuer's denial of having any intercourse with her former paramour Mackie, and pointed out that her statements on many parts of the case were manifestly false.] Upon the whole matter, and after having considered the

evidence of the defender and pursuer, and given full weight to what the Sheriff Principal has put very strongly—namely, the inference to be drawn from the defender's conduct—I have come to be of opinion that the pursuer's evidence is not trustworthy, that she was not speaking the truth in the whole of it, and that therefore it will not be safe to come to an adverse conclusion against the defender upon testimony such as that. Upon the whole, I have come to the conclusion that the Sheriff-Substitute who heard the evidence in this case came to the right result, and therefore I propose that your Lordships should return to his interlocutor and assoilzie the defender. I do not think that we are here bound, and I should not for one be able to go beyond the proposition that the pursuer has failed to establish the truth of the allegations she has made.

Lord Neaves concurred.

Lord Ormidale—This case, although very extraordinary in its circumstances, merely raises a question of fact, depending for its solution not upon any disputed principle of law, but exclusively on the view that may be taken of the evidence, the record of which is very voluminous.

The pursuer was bound to establish her case, and in order to do so she has herself been examined. Without entering into any particular analysis of her testimony in connection with the other evidence in the case, I think it is clear that while she attributes the paternity of her child to the defender, she has made so many false statements as to render it difficult to believe her in anything. Not only so, but although she avers on the record that the illicit intercourse between her and the defender on which she chiefly founds took place in a house which she occupied in Robertson Street, Glasgow, she does not in giving her evidence say that any such intercourse occurred in that house at all, and it is not otherwise proved that it did.

Had the disputed question, therefore, depended upon the testimony of the pursuer herself and her witnesses, other than the defender, I should have had little difficulty in finding that she had failed to prove her case.

But the pursuer adduced the defender as her first witness, and having regard to his statements and admissions, taken in connection with the writings he is examined upon, and which are produced, the case assumes a very different aspect, and becomes one, to say the least of it, of the most pregnant suspicion against him. I refer in particular—(1) to his own account of how his acquaintance with the pursuer originated; to his statement that he, a married man and occupying a respectable position in Glasgow, picked up the pursuer, an entire stranger to him, standing at night in one of the streets of that town, and then, after insisting, as he says, upon knowing whether she had an illegitimate child, giving her his company for a considerable part of the evening, in the course of which he acknowledges that they visited together a drinking house where they were for sometime alone in one of the apartments; (2) to his admission that he thereafter continued in a clandestine manner for several months to visit the pursuer and accompany her to houses of questionable character; (3) that he from time to time gave her various sums of money; (4) that some of his meetings with the pursuer appear to have been solicited through anonymous notes sent to her by himself; and (5) that after the birth of the pursuer's child the defender, when he gave her the last sum of money he appears to have paid her, took from her a formally tested acknowledgment, written to his own dictation, containing a declaration for the purpose, as the writing bears, of protecting him in reference to her, and that he was "in no way concerned in my guilt in connection with my two illegitimate children, who are my present care."

Having regard to these, the leading features of the defender's own testimony, I should certainly have had no hesitation in deciding against him had the pursuer, while she ascribed the paternity of her child to him, not gone on to indulge in so many and very serious falsehoods as to render it extremely difficult to assent to any of her statements. Still, as the defender's acts and conduct have been such, on his own shewing, and as proved by the writings and other unimpeachable evidence in the case, as to be irreconcileable with his innocence on any opinion I can form of the springs and motives of human action, I should, I believe, if I had been supported by any of your Lordships, have been disposed to affirm the Sheriff Principal's judgment. As it is, however, and keeping in view that the *onus probandi* lay upon the pursuer, that the Sheriff-Substitute who had the advantage, which neither we nor the Sheriff-Principal have had, of hearing the witnesses examined and observing their demeanour when under examination, has decided in favour of the defender, I have considered it right—influenced by that deference which is fairly and properly due to the conclusion arrived at not only by him, but as I understand by all your Lordships, on a question depending upon the import and effect of evidence—not to divide the Court.

I have only farther to add that I have abstained from entering into any particular review or analysis of the proof in this case, because that has been done by both the learned Sheriffs not only with signal ability, but also, although differing in their views and in the result, I think with great accuracy and fairness.

Lord Gifford—I agree in the result at which the majority of your Lordships (indeed all your Lordships, for Lord Ormidale scarcely dissents) have arrived in this very peculiar and very painful case, and I concur in the reasons explained by your Lordship in the chair and by Lord Neaves. I have very little to add.

It is one of the striking peculiarities of this case that its decision depends exclusively upon the evidence of the parties themselves, the pursuer on the one hand and the defender on the other. No third party—no independent witness—can throw the slightest light on the question at issue. The only ultimate question really is which of the two parties are we to believe, the pursuer or the defender. We cannot believe both—one or other of the parties must, I fear, be held as perjured, and it is always a painful duty in such cases, although in this respect the case is not uncommon, that we have practically to say which of the parties we believe, and which of them we hold forsworn.

The case against the defender is really founded solely on his own evidence and on his own admissions. He had placed himself, on his own admission in circumstances and in a position so equivocal, so suspicious, so unusual for an innocent person—in a

position and in circumstances so pregnant with unfavourable inferences—that if there had been on his part the slightest prevarication, the slightest evasion, the slightest attempt to withhold or disguise the real truth, then I should have felt compelled to disregard his protestations of innocence, and to draw the inferences which in such cases conduct like his generally warrants.

But where innocence is possible, presumptions and inferences, however strongly founded, must yield to fact. Now, on the whole, though with very great difficulty, I prefer the evidence of the defender and appellant, and I do not believe the story and the statement of the pursuer. I think the pursuer has been shown to be entirely unworthy of credit, and I don't think the candour and truthfulness of the defender has been successfully impugned. Of his folly and imprudence there cannot be two opinions, but that is a different matter from finding proved against him actual guilt.

I abstain from entering into any details. According to her own account the pursuer at her very first meeting with the defender acted as only the most degraded prostitute could, and her subsequent evidence only deepens the distrust with which the statements of such a person must be received.

Very great care and attention has been bestowed upon the case, and deservedly so, by both the Sheriffs, and I myself have seldom felt more anxiety in deciding any case. But I prefer—and the repernsal and the reconsideration of the whole proof only confirm me in preferring—the judgment of the Sheriff-Substitute, and I cannot help adding that where the whole question absolutely depends, as it does here, upon the relative credibility of the two principal or the two only witnesses, I attach the greatest weight and importance to the opinion of the judge who saw and examined those witnesses, who observed their respective demeanour and bearing, who had the means of detecting those slight and sometimes apparently trifling and evanescent indications of truth and sincerity which so seldom can be forged or successfully imitated, but which it is impossible to convey in a bare record of the verbal testimony. So much weight do I give to this circumstance that in doubtful cases where the evidence seems to hang *inequilibrio* it almost always with me turns the balance, and this whether the evidence was taken before a Lord Ordinary or a Sheriff, or whether, as sometimes happens, we have to consider upon the facts the verdict of a jury.

On the whole, therefore, I think that the pursuer has failed to prove her case, and upon this alone I would base my judgment.

The Court recalled the interlocutor of the Sheriff-Depute, and assoilzied the defender from the conclusions of the summons.

Counsel for the Pursuer and Respondent—Solicitor-General (Watson) and Macdonald. Agents—Wright & Johnston, L.A.

Counsel for the Defender and Appellant—Dean of Faculty (Clark), Q.C., and Balfour. Agents—J. W. & J. Mackenzie, W.S.

Friday, July 9.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

THE CALEDONIAN RAILWAY COMPANY *v.* WATT AND OTHERS.

Superior and Vassal—Irritancy of Feu—Personal Claim—Bankrupt—Trustee.

The trustee on the bankrupt estate of the proprietor of a heritable property which had been injured by the construction of a railway did not oppose the superior's obtaining decree of irritancy *ob non solutum canonem*, and further gratuitously assigned to the superior all claims for compensation competent to the bankrupt against the Railway Company for damage done to the said property. *Held* (1) that such claims for compensation, being personal to the bankrupt, were not carried to the superior by the decree of irritancy; and (2) that it was *ultra vires* of the trustee gratuitously to assign the said claims.

This was a note of suspension and interdict brought by the Caledonian Railway Company against Thomas Watt and others, to stop proceedings in an arbitration instituted to settle certain claims made by Mr Watt against the Railway Company.

The following narrative is taken from the Note of the Lord Ordinary:—

"The respondent Thomas Watt claims compensation to the amount of £7500, in terms of the Railway and Lands Clauses Consolidation Acts, 1845, in respect that the property now belonging to him, which is described in the Closed Record, has been injuriously affected by the construction of the Dundee and Perth Railway, under the provisions of 'The Dundee and Perth Railway Act, 1845.' Having, on 26th December 1873, given notice of his claim to the complainers, who are now in right of the Dundee and Perth Railway Company, and having afterwards nominated an arbiter for the purpose of determining the amount of compensation to which he is entitled, the present Note of Suspension and Interdict has been presented for the purpose of obtaining suspension and interdict of all proceedings under the arbitration so instituted.

"The Dundee and Perth Railway was completed and opened for traffic in 1847. Part of that railway was constructed upon an embankment formed on the bed of the Tay between two points on the north shore. In this embankment there were constructed openings or arches so as to admit of the water ebbing and flowing every tide within that part of the Tay situated to the north of the railway embankment. The property now belonging to the respondent Thomas Watt is situated on the north shore of the Tay so cut off by the railway embankment. In 1847 that property belonged to John Calman, shipbuilder in Dundee, who had acquired it under a feu-contract from the respondent's predecessor at the yearly feu-duty of £150. By this feu-contract John Calman was taken bound to erect houses or embankments, or slips or other buildings of a permanent nature, equal in value to at least £1000, as a security for the feu-duty. The respondent Thomas Watt avers that Calman converted the subjects, which had a frontage to