tion, or right to attempt it." Lord Selborne did not think it necessary to decide whether the collateral agreement was enforceable, but had he thought that it affected the rights of parties he would have required to decide it.

Lord Blackburn puts it more distinctly still (p. 113 of 8 R.) It has been endeavoured to be argued that if there was here by the side of the contract of sale a collateral agreement that the ship should be only held as security, that would prevent the warrant of sale operating under the Mercantile Law Amendment Act so as to require no delivery to prevent any diligence of sequestration. I cannot agree with that argument at all (that is, he agreed with our judgment), and again he says—"It is not necessary to decide" as to the collateral agreement. But supposing there was this completed collateral contract, not only an honourable contract, which I have no doubt there was, but a binding, legal, and enforceable contract that this should be a security, I do not see the slightest ground for saying that that undoes the effect of the Mercantile Law Amendment Act.

Lord Watson, too, says—"The learned Judges in the Court below have indicated that in this case it is their view that a collateral contract was constituted of a nature which undoubtedly may co-exist with the contract of sale in question." So he is of opinion, too, that such a collateral agreement may co-exist with a contract of sale. He goes on—"I forbear to offer any opinion upon that point, because I cannot find any such case raised upon this record. But if the appellant has any such right, if he can instruct any such contract, I do not think his interest would be prejudiced by the form of judgment pronounced in the Court below."

On these points I am clearly of opinion that if there was no delivery here the case is indistinguishable from that of *M'Bain*.

But delivery was taken. In August the house was empty. The defender having the keys took possession of certain furniture. It is entirely immaterial that he was a house-agent and had that reason also for being in possession of the keys. He had a right, in my opinion, to take delivery. There was no infringement of any rule of bankrupt law, and none could be suggested. He was using the keys for one of the purposes for which he had them—for it is plain from the contract of sale that he had them for that purpose as well as any other. Suppose Pattison had handed over the furniture in August, the trustee could not have challenged that. He was not then bankrupt. We were told then that there were paraphernalia of Mrs Pattison's in one of the boxes. I am not speaking of them but of the subjects of sale of 28th June 1890.

On principle, and on the authorities, I think the defender is right, and that the judgment of the Lord Ordinary should be reversed.

LORD RUTHERFURD CLARK—I have felt much difficulty, but I have come to agree with Lord Trayner.

If I thought that the decision of the House of Lords in *M'Bain* ruled the case before us, I need hardly say that I would have followed that decision. But as I read the opinions of the noble Lords, they held that there was a true sale. Here the documents prove that there was no sale, but only the form of a sale. I do not think that the House of Lords intended to decide that by using the form of a sale a good security could be created over moveables *retenta possessione*. It is true that by such a form a good security may be created over land. But there is no analogy, for the infeftment of the creditor delivers to him the subject over which his debt is secured.

LORD TRAYNER—I desire to add that I think my judgment is not at all opposed to that in the case of *M'Bain*. If I had thought that that judgment ruled the case, or that this case fell under the principle of it, I would have felt bound to follow it. But I think this case falls within the case put by Lord Watson of an agreement which "in reality was one for a loan upon security, and not for a sale and purchase."

The Court adhered.

Counsel for the Pursuer — Dickson — Wilson. Agents — Skene, Edwards, & Bilton, W.S.

Counsel for the Defender — Young — Chree. Agent — Alexander Campbell, S.S.C.

Thursday, June 8.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

YOUNG AND ANOTHER *v.* NICOL.

Parent and Child — Paternity — Proof — Corroboration.

Evidence *held* sufficient to prove the paternity of an illegitimate child.

M'Bayne v. *Davidson*, February 10, 1860, 22 D. 738, *followed*.

Observations (*per* Lord Trayner) as to the rules of evidence applicable to actions of filiation.

Jane Young, daughter of Andrew Young, miner, Denend, with consent of her father, brought this action of affiliation and aliment against Andrew Nicol, Lochgelly. The pursuer alleged that she was in the habit of going to her work past the railway station at Cardenden, where the defender was engaged as a porter. About the New Year 1892 the defender had connection with her within the station premises, and about the same time of year he had connection with her on four other occasions. As the result of this intercourse a child was born on 5th September 1892. The result of the proof was to show that on several occasions the pursuer and defender had been seen talking together, by various persons, on different occasions, and in sus-

picious attitudes, at night, after the time at which the pursuer averred connection had taken place. The defender denied that he met or talked to the pursuer on these occasions. The pursuer's mother deponed that on pursuer's information she charged the defender with being the father of the child, and that he admitted the paternity. This the defender denied.

The defender swore that about New Year 1892 he, one morning, within the station premises, saw the pursuer having connection with one of the railway company's employees. The employee deponed that this statement was true. The pursuer denied it.

Upon 16th October 1892 the Sheriff-Substitute (GILLESPIE) found that the defender was the father of the pursuer's child, and gave decree for aliment, &c., in the usual terms.

"*Note.*— . . . The defender's agent said that if all that the witnesses, other than the pursuer, said were held as proved, it would not amount to suspicious circumstances. Perhaps not, though it must be kept in view that what would not amount to suspicious circumstances in the case of a person of average capacity, assume a somewhat different aspect where the girl is more or less weak in mind. The question naturally suggests itself, why should the defender have been seeking the pursuer's company at all. It could hardly have been on account of the attractions of her conversation. But the really important question is not whether the defender might perhaps have safely admitted all that is proved, but whether by his denial of material circumstances which did take place, and which he could not well have forgotten, his testimony has been seriously discredited.

"There is sufficient evidence, in the Sheriff-Substitute's opinion, to warrant the conclusion that contrary to the defender's statement he was often, about the period to which this inquiry relates, in the pursuer's company alone, not only in the one place where he admits standing with her, but in other places; that he came to her house one night and tapped at the window for her to come out; and lastly, that after the pursuer became pregnant he had the conversation with her mother to the effect stated by that witness, in which he promised to come to the house to settle.

"There remains the remarkable evidence for the defence given by George Doig. The pursuer's agent said what is unquestionably correct, that if the defender had connection with the pursuer at a time corresponding to the birth of the child, she would be entitled to decree against him even though Doig had connection with her about the same time. But if it were certain that Doig had connection with her, her denial of this would discredit her so fatally that her statements in regard to the defender could not be depended on. A story like that told by Doig and the defender is difficult to disprove, but the Sheriff-Substitute is sceptical about its truth. The story is obviously open to a good deal of observation. . . .

"On the whole, therefore, the Sheriff-Substitute thinks that the pursuer is entitled to decree."

Upon appeal the Sheriff (MACKAY) adhered.

"*Note.*—The opinion of the late Lord President, when Lord Justice-Clerk, which formed the ground of the decision in *M'Bayne* v. *Davidson*, 22 D. 738, states the rules which have been generally applied in Sheriff Courts as to the evidence necessary for the pursuer's success in filiation cases. It is constantly referred to, and frequently partially quoted, but I think it worth while to quote it fully, for I shall follow it until it is altered by a decision of greater authority. 'The evidence is to be dealt with as in other cases. The parties are the principal witnesses; they know the facts which lie at the bottom of the case, and what the Court has to consider is, on the whole evidence, on which side is the balance of credibility. Where the parties contradict each other, the Court are put in the position of a jury to decide on which side is the balance of credibility. Still, however, the defender is entitled to say that the pursuer must prove her case.' I was pressed in this case, as I and doubtless other Sheriffs have been in other cases of the same kind, with certain *dicta* of the present Lord Justice-Clerk and Lord Trayner, and an apparent conflict, at least on the face of the reports, between their opinions and that of Lord Young as to what corroboration of the pursuer is necessary. In *M'Kinven* v. *M'Millan*, June 13, 1892, 19 R. 369, the Lord Justice-Clerk is reported to have said, 'A pursuer of such an action must prove her case like any other pursuer, and she does not prove it unless she brings evidence truly corroborative of her evidence, such as would be held sufficient corroboration of the evidence of a party interested in the issue in any ordinary case;' and Lord Trayner, 'The rule applicable to filiation cases is now the same as that which applies to any other kind of case which depends on 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 alleged breach of contract, or other allegation on which the action is founded, is disputed.' Lord Young, on the other hand, who dissented from the judgment in favour of the defender, observed, 'In the present state of the law we take the whole evidence together, and if we think the woman's story true, we give decree. We require some corroboration. But little will do. If we think that he (*i.e.*, the defender) lies, that is a circumstance that we are entitled to act upon. It is not that his lie proves the case, but that his falsehood is a thing we are entitled to take account of in considering whether we may safely act upon the women's statement if we believe it.' In the more recent case of *Costley* v. *Little*, November 18, 1892, 30 S.L.R. 87, in which both Sheriffs and the Court decided in favour of the pursuer, holding a letter,

which the defender denied having written, but which was proved to be his, sufficient corroboration of the pursuer's oath, Lord Young made the following remarks—'I do not think the falsehood of either party to the case is ever altogether unimportant; it may be of more or less importance, according to circumstances. The proof of any number of falsehoods on the part of the defender unconnected with the case would not support the case of the pursuer; it would only discredit the testimony of the defender. But where the falsehood is on matters connected with the case, it may be of great importance, and, indeed, may be conclusive, taken in connection with other evidence which would not have been sufficient without it.' Lord Trayner, on the other hand, said—'If a defender in his evidence denies the pursuer's statement, that cannot, in any view of it, be regarded as a corroboration of the pursuer. For if the defender's denial is true, it is a contradiction of the pursuer; if it is false, or is believed to be false, it is not evidence to any effect, it is simply discarded as false. A false statement cannot afford any corroboration; it is not believed.'

"It is of considerable importance for the future guidance of the Sheriff Courts to ascertain which of these apparently conflicting views as to the evidence necessary in filiation cases ought to prevail, and I have found it necessary to consider this point in the present case. The two recent cases afford no light as precedents, for they merely show what was in the former case considered insufficient, and in the latter sufficient corroboration of the pursuer's oath, as it happened in each case, a letter by the defender. The solution of the difficulty, and the safest rule, is, I think, to found in the opinion of the late Lord President in *M'Bayne* v. *Davidson*. The question is a jury question or issue of fact, but of fact of which the two parties (unless in some quite exceptional case) alone have knowledge. If, when they contradict each other as to the fact (as they do in every contested case), there is notwithstanding an admission by either of acts, writings, or conduct which render the evidence of that party on the main issue unworthy of credit, or there is a denial by either of facts material to the case otherwise clearly proved by third parties, which (in like manner) render the evidence of that party unworthy of credit, while the evidence of the other party is not open to any observation against its credibility, and is supported by the circumstances of the case, such as the open relations of the parties, the terms of their written correspondence (if any), and their conduct towards each other, both before and after the birth of the child, the Court, as a jury, is entitled to act upon the testimony it believes. It appears to be this view of the matter which has led Lord Rutherfurd Clark and other Judges frequently to confine their judgments in such cases to a verdict of 'proven,' when that is, in their opinion, the result of the evidence as a whole, or of 'not proven' when the evidence leaves the case doubtful. A false statement cannot, of course, as Lord Trayner says, 'afford in itself any corroboration; it is not believed.' But when it is not believed only the opposite statement remains, which is believed, and is sufficient, if not by itself, at all events with the kind of corroboration which exists in nine out of ten filiation cases. I assume, of course, that the falsehood or falsehoods satisfy the Court that the party is not telling the truth on the main issue. Still, as the late Lord President expressed it, 'the pursuer must prove her case.' He does not add, like any ordinary case of contract, or breach of contract, and it is thought rightly, because filiation cases differ from such cases, not only because the two principal witnesses must be the parties (for this may happen in other cases), but also because the cardinal fact is concealed, so that there is almost invariably an absence of direct testimony, except as to circumstanees and incidents from which inferences may be drawn, but by which the main fact cannot be proved. I do not think the Lord Justice-Clerk or Lord Trayner really intended to differ from the late Lord President. Their judgment in *M'Kinven's* case was given because they thought the Sheriff-Substitute had gone too far in holding the pursuer's consistent story sufficient proof without other corroboration, which they held (contrary to Lord Young's view) the defender's letter did not amount to. Lord Trayner, no doubt, criticises Lord Benholme's language in *M'Bayne* v. *Davidson*, that 'the defender, by giving a false account of the matter, has afforded that corroboration which would be otherwise awanting,' and it is perhaps not quite accurate language, but what Lord Benholme meant, and what that case decides, is that the contradiction of the defender by a third party on a material point which leads the Court to disbelieve his evidence on the cardinal fact, leaves the pursuer's evidence (if unimpeachable) uncontradicted, and entitles the Court, if it believes her statement on the evidence as a whole, to decide in her favour. Applying therefore the rule applied in *M'Bayne* v. *Davidson* to the present case, I find that the Sheriff-Substitute, who saw the witnesses, believed the pursuer, and disbelieved the defender, both at first and after reconsideration of the proof. This is not conclusive, for if it were, appeal would be an idle form, but the impression of the Sheriff-Substitute as to the credibility of the witnesses is not a circumstance which the Sheriff can leave out of account.

"Applying to the evidence as a whole the test suggested in *M'Bayne's* case, the balance of credibility appears to be decidedly on the side of the pursuer, and I concur with the Sheriff-Substitute that she has proved her case according to the rules which have generally applied in such cases."

The defender appealed.

At advising—

LORD JUSTICE-CLERK—I think in this case the Sheriff has come to a right decision. The Sheriff-Substitute decided the case upon the ground that the principal witness was speaking the truth, and that there was sufficient corroboration to justify him in holding that the pursuer had proved her case. The Sheriff-Principal was of the same opinion, and after considering the evidence I see no reason for disturbing the decision of the Sheriffs.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I agree. There is here sufficient corroboration of the pursuer's evidence to warrant the conclusion at which the Sheriffs have arrived. I should have contented myself with merely expressing this concurrence with your Lordships had it not been for some remarks made by the Sheriff in his note regarding the rules of evidence applicable to cases of this kind. He appears to have felt some difficulty on that matter, on account of what he thinks is an apparent conflict between the opinion of some of the Judges of this Division as expressed on that subject in recent decisions. I think there is no such conflict. The rule laid down by the late Lord President in *M'Bayne* v. *Davidson*, which the Sheriff quotes and adopts, is, in my opinion, the sound rule, and I have never said anything to the contrary, nor has any Judge in recent times, to my knowledge. That rule stated in a sentence is that in cases of filiation "the evidence is to be dealt with as in other cases . . . the pursuer must prove her case." There is nothing in any recent opinion conflicting with this. There is apparently some difference between Lord Young and myself as to the effect to be given, or the importance to be attributed, to a defender's denial of facts which are otherwise proved. But the difference obviously is not great, and consists more in the form of expression than the principle expressed. I adhere to the views which I stated in the two cases cited by the Sheriff.

The Court adhered to the Sheriff's interlocutor.

Counsel for the Appellant—Salvesen—Kennedy. Agent—W. R. Mackersy, W.S.

Counsel for the Respondents—Clyde. Agent—James Skinner, S.S.C.

Thursday, June 8.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

INGRAM *v.* RUSSELL.

Reparation — Slander — Privilege — Averment of Malice.

A pursuer in an action of reparation for slander averred that a bank agent had in the bank office, and in presence of the bank clerks, repeatedly accused him of forgery, and set forth circumstances tending to show that the defender, in making and repeating the charges complained of, had acted without due inquiry, rashly, and without taking any precaution to secure secrecy.

Held (1) that the pursuer's record disclosed no case of privilege, and (2) that should a case of privilege emerge at the trial malice had been sufficiently averred.

In January 1893 A. C. M. Ingram, analytical chemist, Paisley, brought an action of reparation for slander against Robert Russell, agent for the Clydesdale Bank there, concluding for £1000.

The pursuer averred—In the month of December 1892 the pursuer had several meetings with the defender with reference to an overdraft which the pursuer was desirous of obtaining from the defender's bank for business purposes. After sundry communings the defender, at a meeting in the office of the said bank at Paisley, on or about 12th December 1892, suggested to the pursuer that he might get the pursuer's father-in-law, Mr Donald Sutherland, superintendent of the burgh police, Paisley, to accept a bill along with him, and the defender indicated that he would be prepared to discount such bill when presented. Following out this suggestion, the pursuer drew two bills, dated 16th December 1892, upon the said Donald Sutherland—one for £40 at three months' date, and the other for £50 at six months' date—and sent them to Mr Sutherland for acceptance. Mr Sutherland subscribed his name to the bills as acceptor, and returned them to the pursuer, who, about three o'clock in the afternoon of said 16th December, called at the bank and handed the bills across the counter to the accountant Mr Mackersie, to be discounted, explaining that he had arranged the matter with the defender.

About eleven o'clock in the forenoon of Saturday, 17th December 1892, the pursuer called at the bank to lodge some money to the credit of his account, and to see as to the discounting of the bills. He went into the defender's room for the purpose of giving any explanations the defender might wish regarding the bills. The defender, however, did not refer to the bills, but conversed in a general way, leading the pursuer to infer that he was satisfied. The parties went together into the public office of the bank, where the pursuer proceeded to write a "pay-in slip." Thereupon one of the bank clerks handed the said bills to the defender, and the defender, after scrutinising them, and passing a remark to the pursuer that he had got them accepted, to which the pursuer assented, intimated to the bank accountant Mr Mackersie that these were all right, meaning that the bills were to be accepted as good, and to be discounted, which was done, and the proceeds placed to the credit of the pursuer on current account, as appears from the entries in the books of the bank.

On the morning of Monday, 19th December 1892, the defender came into the