does not make this clear, but I am of opinion that the deed sufficiently indicates that the fee was to be divided into equal parts, one of which went to John and the other to his children. The fact that the interest of one-half was to be paid to each is an indication of the extent of their respective rights in the capital. It was said that the direction to the trustees to expend the capital, if necessary, on behalf of John and his children was against this view. But I think otherwise. If the trustees were authorised to expend the whole capital for the benefit of the children (which was an argument used in support of the view that they alone were fiars), they were equally authorised to expend the whole capital for behoof of John, the result of which (on the argument I have referred to) would be to confer the whole fee on John. This was not however the testator's intention. She did not, I think, authorise the whole capital to be expended for behoof of the children, for that would have deprived John of the interest of the half, which was carefully guarded for him. In like manner the trustee could not expend the whole capital for behoof of John which would have deprived the children of the interest of one half, as carefully guarded for them. But the trustees could expend the capital destined to John for his behoof, and equally expend the one half of the capital destined to the children for their behoof. That I take to be the meaning and intention of the testator, and on no other interpretation of her deed does it appear to me that her whole directions can be carried out. I think therefore that the second and fourth questions should be answered in the affirmative.

LORD MONCREIFF—I am also clearly of opinion that the one-half of a sixth share of the residue which the trustees were directed to hold for behoof of John Hodge junior vested in him *a morte testatoris*, and that the other half of the said sixth share vested at the same date in the children of the marriage between him and his first wife Elizabeth M'Laren. The scheme of that clause in the deed which deals with the one-sixth share in question makes it clear that the trustees were to hold one half exclusively for the benefit of John Hodge junior. The interest of it was to be paid to him, and the trustees were empowered to expend so much of the capital of said half share for his behoof as they thought fit. I do not think that his children had any interest in that half, or that he had any interest in the half destined to them. Accordingly it would not have been in the power of the trustees to apply any part of the capital of John Hodge junior's half for behoof of his children, or *vice versa*.

It is true that there is no direct gift of the capital to John Hodge junior; but this is one of the class of cases in which a gift of the interest coupled with a power to the trustees to make advances of capital is sufficient to indicate a gift of the capital to the beneficiary. John Hodge junior was a residuary legatee. There was no ulterior destination and no survivorship clause, because the survivorship clause, which was relied on strongly by Mr Vary Campbell, relates solely to the date of division of the residue which is directed to take place on the death of the survivor of the two annuitants. At that date the truster directs her trustees to divide the residue into seven equal parts or shares, and pay the same to or hold them for the beneficiaries as therein directed. That is "the division of the said residue" which is referred to in the deed.

I am therefore clearly of opinion that the second alternative question and the fourth alternative question should be answered in the affirmative; and the first and third in the negative.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court answered the second and fourth questions in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First and Fourth Parties — Vary Campbell — Craigie. Agents — Coutts & Palfrey, S.S.C.

Counsel for the Second and Third Parties —Wilson, Q.C.—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

---

*Saturday, December 8.*

## SECOND DIVISION.

[Sheriff of Fife.

## BUCHANAN *v.* FINLAYSON.

*Parent and Child—Bastard—Filiation—Proof—Presumption Arising from Admission by Defender of Connection after Time of Conception.*

*Evidence* in an action of filiation and aliment where the defender admitted that he had had connection with the pursuer on a date subsequent to the time of conception, upon which *held* (*diss.* Lord Moncreiff) that the pursuer had failed to prove that the defender was the father of her child.

*Observations* (*per* the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff) as to the effect to be attached to such an admission in actions of filiation and aliment.

*Lawson* v. *Eddie*, May 24, 1861, 23 D. 876; and *Ross* v. *Fraser*, May 13, 1863, 1 Macph. 783, *commented on*.

Jessie Buchanan, Chapel Hill, Kincardine, brought an action of affiliation and aliment in the Sheriff Court of Fife at Dunfermline against John Finlayson, butcher, Kincardine, in which she claimed aliment for an illegitimate child to which she had given birth upon 13th February 1900, and of which she averred that the defender was the father.

The pursuer averred that the defender and she had known one another for many years, and that in December 1898 they began to "keep company." She averred that connection between them first took place in that month on returning from a ball to which the defender had taken her, and that it was frequently repeated thereafter. In particular she averred—"(Cond. 3) This connection was kept up during the months of May, June, July, and August 1899. In particular, on or about the 22nd day of May 1899, the pursuer was at her sister's house in Paradise Square, Kincardine, and when she was going home in the evening the defender met her about the Parish Church, and had connection with her in the Burngreen field opposite said church."

The defender denied that he had had connection with the pursuer except upon one occasion on 11th August 1899, and averred that in or about the month of May 1899 she had had connection with two men, Robert M'Nee and John Campbell.

The following letter addressed by the pursuer to the defender was produced:—*Mugdock, Sunday*, 8 *Jan.* 1900.—Dear John, —How I am to begin this letter I'm sure I do not know, but I thought it best for both of us. I've kept the truth from you till I could do it no longer, but, John, if I did deny it at the time it was for your sake, and believe me I did it for the best. I have always wanted a chance this last fortnight to explain everything to you, but you never looked near hand me. So I came away on Saturday, and never said where I was going, so I don't know what they are thinking, but believe me, dear John, I never will tell them; but you must know, John, as well as I can tell you, I never took up with any other one, and I blame the Fair night for it, because it was just after that I was afraid what was going to be. I know you will be in a state, but how do you think I am? for I think I will lose my senses. I am staying with my cousin just now, and she is very kind to me, as she was placed the same way herself not long since, and it is such a quiet place, so she wants me to go to some woman she knows and stay with her, but then that means money, but I will not go home for certain till everything is over, but if I had seen you yourself I could have explained things better, for I'm sure I hardly know what to write, but, John, if you would only write me a few lines and say you forgive me. It will always help to cheer me on a bit. I will stay here for a few days longer; and about them at home I'm sure I don't know what to do unless I write and let Helen know. I can trust her, if I could only keep it dark from the rest of them, and I will try and do my best, though it is not very easy, but perhaps she will make some excuse to them. I'm vexed for father and Willie; its them that's perplexing me, as I don't know how they'll get on. Oh, John, if this had never happened, but it can't be helped now, more's the pity; but John you might write me a few lines, you don't know what they would be to me, and I don't think I need write any more, for I'm sure I don't know what to write, but surely, John, you think more of me than cast me off when it has come to this, for I'm sure nobody will ever be what you are to me.—From your sincere friend, JESSIE BUCHANAN."

The following letter from the defender to the pursuer was also produced:—"*February 16th*, 1900.—*Dear Madam*, —I was very much surprised to hear that a child was born on Thursday, the 13th of this month. I am extremely sorry for you, for by the laws of nature the child in order to be mine should not have been born for three months yet. I admit that I was with you on the Fair night, which was the first and only time that I had connection with you, as you also state in the letter which I received from you last month, which I have in my possession. You will see from the above it is useless for you to try and make me the father of it, as I now know of others whom you have been in company with, and I therefore deny all liability.—Yours truly, J. FINLAYSON."

Proof was allowed and led.

The defender in evidence admitted that he had given the pursuer a ticket for a dance in December 1898, and had on that occasion walked home with her. He denied that he ever had connection with her except on one occasion—the Fair night in August. He admitted that he was in the habit of calling at the pursuer's father's house with his van about twice a-week for orders. He also admitted that when he received the pursuer's letter of 8th January he made arrangements for her confinement away from home on the understanding that the child had been conceived as the result of what took place on the Fair night in August.

John Campbell, one of the men mentioned by the defender on record, denied that he ever had connection with the pursuer, and the other, Robert M'Nee, admitted intercourse with her, but stated that it had occurred two years previously.

The Sheriff-Substitute (GILLESPIE) on 4th June 1900 assoilzied the defender.

*Note*—"The child was born on 13th February 1900. The pursuer avers a course of connection from December 1898 to August 1899, and among other occasions 'on or about the 22nd May 1899.'

"The defender admits having had connection with the pursuer on the night of Kincardine Fair, 11th August 1899, but he explains that this was the first and only time.

"Now, it is settled in actions of filiation that when the man admits connection, but at a time too near the birth to result in the birth of a full-grown child, the admission may be sufficient confirmation of the woman's statement that connection took place at a time corresponding with the ordinary period of gestation, if similar opportunities existed at that time. But the admission is not necessarily sufficient confirmation.

"In the present case there is nothing in the parole evidence to make it improbable that connection took place in May, though there is no direct evidence in support of it.

The parties had the same opportunities which they admittedly took advantage of on 11th August.

"There was nothing in the manner of either party to lead me to give a decided preference to one over the other as regards credibility. Each gave evidence in a fairly consistent way, and neither is materially contradicted except by the other. The defender is not discredited because there is evidence that he danced somewhat oftener with the pursuer than he admits. On the other hand, I attach no importance to the mistake of a few days which the pursuer seems to have made as to the occasion when she was assisting her sister in her preparations for removing, by which she dates the alleged act of connection on or about 22nd May. The true date appears to have been about a week before, but nothing turns on the exact date.

"The decision of the case largely depends on the pursuer's letter to the defender, in which she says—'You must know, John, as well as I can tell you, I never took up with any other one, and I blame the Fair night for it, because it was just after that I was afraid what was going to be.' While it is a fair observation that the letter indicates terms of closer intimacy and affection than the defender admits, it contains nothing which to my mind suggests that there had been a course of illicit connection previous to the 'Fair day,' though with the explanations which the pursuer has given there is nothing necessarily inconsistent with there having been such a course of connection.

"On the whole, I cannot but regard the letter as raising some difficulty in the way of accepting the pursuer's statements as to previous connection without more corroboration than she has been able to bring.

"It is in the defender's favour so far that on the understanding that the pursuer's pregnancy was due to connection on the 'Fair' night he accepted the legal responsibility. But he has not improved his case by putting on record an averment that two other men named had connection with her in or about the month of May 1899, which has completely broken down.

"It is with hesitation that I have arrived at my decision. As the case will probably go further, it is some satisfaction that this is a case in which a Court of Appeal will have, in the letters and recorded evidence, as complete materials for decision as if the parole evidence had been led before it."

The pursuer appealed to the interim Sheriff (CHISHOLM), who on 14th July 1900 adhered to the interlocutor of the Sheriff-Substitute.

*Note.*—"I think that the pursuer has failed to establish by the evidence that the defender is the father of the child to which she gave birth on 13th February 1900.

"The defender admits that he had connection with the pursuer on the 'Fair night,' *i.e.*, on 11th August 1899, but he states that the 11th August was the first and only occasion on which he had such connection. It may, I think, be said fairly to be made out by the proof that practically similar opportunities of connection existed at the time of conception (in May 1899), and pursuer states that connection with defender occurred in May. In the absence of anything, other than defender's evidence, impugning pursuer's statements, I should have been disposed to apply what Lord Justice-Clerk Inglis in *Ross* v. *Fraser*, (1 Macph. 783) called 'a general rule in judging of evidence in such cases, founded on ordinary experience and common sense,' and to hold that (1) defender's admission of connection within the period of gestation, (2) proof of similar opportunity at the time of conception, and (3) pursuer's deposition on oath that connection took place at that time, are together sufficient to make out that the defender is the father of the child. But it seems to me that the letter written by pursuer to defender in the beginning of January 1900, contradicts the pursuer's evidence as to connection having occurred before the 'Fair night,' 11th August 1900. The question of construction is a narrow one. But, on the whole, I think that the most reasonable interpretation of the passage quoted in the Sheriff-Substitute's note is that the pursuer there admits that connection between her and the defender took place for the first time on 11th August 1899."

The pursuer appealed to the Court of Session, and argued—The pursuer had proved her case. The rule of evidence established before the Evidence Act 1853 still obtained, viz., that where the defender admitted connection during the period of gestation, and opportunity at or about the time of conception was proved, the pursuer's oath was sufficient without further corroboration—Fraser, Parent and Child, 135; *Robertson* v. *Petrie*, December 22, 1825, 4 S. 333; *Burns* v. *Cumming*, June 27, 1846, 8 D. 916; *Lawson* v. *Eddie*, May 24, 1861, 23 D. 876; *Ross* v. *Fraser*, May 13, 1863, 1 Macph. 783; *M'Donald* v. *Glass*, October 27, 1883, 11 R. 57. Both the Sheriff-Substitute and Sheriff would have held the pursuer's case proved but for the passage in her letter to the defender that she "blamed the Fair night for it," which they had misinterpreted. The natural meaning of that passage was, that intercourse had taken place prior to that night, but that she did not till then apprehend the consequences.

Argued for the defender—The Sheriffs' judgment was right. There was no rule of law that where a certain state of facts was proved a certain result must follow. The decisions prior to the Evidence Act 1853 were no longer of authority, and the evidence in affiliation cases was now treated in the same way as in others—*M'Bayne* v. *Davidson*, February 10, 1860, 22 D. 739; *M'Kinven* v. *M'Millan*, January 13, 1892, 19 R. 369. That merely meant that the pursuer must prove her case, and there was here no corroboration of her evidence, either as to connection prior to the admitted occasion in August or as to familiarities or opportunity.

At advising—

LORD JUSTICE-CLERK — This case is in some respects a peculiar one. There is no evidence whatever except the evidence of the defender himself, from which anything suggestive of corroboration of the pursuer's testimony can be drawn. The circumstances spoken to as regards the social intercourse between the pursuer and the defender are all of the most ordinary character, having regard to their rank in life, and nothing of the nature of intimacy, familiarity, or clandestinity is proved to have taken place at or near the time of conception.

But it is maintained that as the defender admits, and all along has admitted, that he had connection with the pursuer on the Fair night in August, and by his conduct indicated his intention to meet his honourable obligations on the birth of the child, on the assumption that it was then conceived, which was the pursuer's own statement in her letter to him, that if the pursuer can prove that there was opportunity at the period corresponding to the birth, she has proved her case. This is maintained on the authority of two cases cited, in which some observations tending to support it are to be found. I confess that I find myself unable to hold that a confession of carnal intercourse at a period months after the actual time of conception constitutes in any sense a corroboration of a pursuer's statement of previous connection, requiring only that there be proof of previous opportunity about the time of gestation to complete the chain of evidence, so that a defender cannot escape from it. I am far from saying that such a confession, if it fixes a date near the date of possible conception, may not be considered. If it is only a question whether the connection was in one month, when it probably was in the next month, then any inference deducible from a statement made by the defender may be strong. I also do not say that even where the date to which the confession relates may be many months from that of conception, the confession may not be an element for consideration along with other evidence, such as evidence of familiarity or clandestinity at the earlier period; but I cannot assent to the doctrine that it is sufficient of itself, coupled with mere proof of opportunity, to justify a decision that a pursuer's case has been proved.

I do not enter upon the question whether the pursuer's letter to the defender indicates a suggestion that there had been—according to the position she was then taking up—more acts of connection than one, for that letter cannot be looked upon as anything more than part of her own statement, which, whatever it may have meant, cannot be accepted as decisive if there is no corroboration. In my opinion the cases of an acknowledgment of connection by a defender before the time when conception could have taken place, and the case of connection at a period beyond the time when it must have taken place, are very different as regards their cogency. If a man has admittedly had connection with a woman, and is afterwards having meetings with her in circumstances in which connection could take place again, there is a considerable presumption, from the fact of his continuing to meet with the same woman in such circumstances, that the opportunity will be again taken advantage of. But I can see no sound reason for drawing back a presumption from one admitted act to there having been acts of a similar kind at an earlier period unless there be evidence inferring improper familiarity of conduct. In the former case it is quite reasonable to answer the question *quo animo* were there subsequent meetings, by saying there is strong presumption that intercourse would continue; in the latter the act confessed cannot be founded on to judge of the *animus* of what occurred months before. The distinction is to my mind very obvious, and it has a very important bearing in this case. I think the difference may be illustrated in the case of certain crimes, where the law allows previous convictions to be founded on as corroborative proof—such as reset. Where a person has been proved by his own confession, or by other evidence, to have been guilty of reset, that affords presumptive evidence in aid of proof that he has on a subsequent occasion committed the same offence. But it would be a totally different thing, and in no way just, to hold that evidence of a present act of reset afforded presumptive evidence in favour of an accusation of reset said to have occurred a long time before. It is principally because of the probability of one lapse from proper conduct leading to others when opportunity arises that any presumption is derived from previous lapses having been established.

There is, further, certain evidence in this case which tends to throw doubt on the pursuer's testimony—evidence that she had previously had connection with another man. She denies this, but it is difficult to throw it out of view, that there is this sharp contradiction of her evidence in considering whether it is safe to proceed upon it to give decree unless it is substantially corroborated. Also in her evidence there are some very vile suggestions made in regard to the defender's conduct otherwise, which were in no way followed up, and about which no questions were put to the defender.

In the whole circumstances I hold that the pursuer has failed to bring any corroboration of her statement that there was connection with the defender at the time of conception, and that the Sheriffs were right in refusing to grant decree.

LORD TRAYNER—After considering the arguments addressed to us, and reading the proof more than once, I have come to the conclusion that the interlocutors appealed against are well founded and ought to be affirmed.

If it were not for the defender's admission that he had connection with the pursuer in the month of August 1889, I think there could have been no hesitation in holding that the pursuer had failed to prove her case. The pursuer avers that she and the defender began to keep company

in December 1898; that in that month the defender had carnal intercourse with her; that after this the intercourse was frequently repeated, and "was kept up during the months of May, June, July, and August 1899." It is somewhat remarkable that if the parties were "keeping company" all that time there should not be a single witness to speak to this fact except the pursuer herself. None of her relatives, acquaintances, or neighbours prove the "keeping company," of which they could scarcely have been ignorant had it been going on. It is also important to notice that while the pursuer speaks to an intercourse which for months had been frequent and continuous, yet there is no proof whatever of the slightest familiarity passing between the parties, nor of their ever having been seen in any place or in any position suggestive of the intimacy which is said to have existed. I repeat that but for the defender's admission the pursuer's case could not have been maintained.

Now, that admission is, that in the month of August 1899 the parties had intercourse. But the child in question, born in February 1900, could not be the result of that connection, and the only way in which the pursuer renders the defender's admission available as evidence of his paternity of the child in question is by adding to the admission given what she represents as a presumption, that from intercourse admittedly had in August, there may be inferred intercourse at an earlier date, if at that earlier date there was opportunity. For the position which the pursuer thus takes up there is some show of authority in the opinions expressed in the cases of *Lawson* and *Ross* which were cited to us. But in the latter case the Lord Justice-Clerk (while stating his concurrence with what Lord Benholme had said in *Lawson's* case) said that the presumption was not a rule of law but "merely a general rule of judging evidence in such cases founded on ordinary experience and common sense." To this, as a general rule, I must say that I cannot assent. Ordinary experience has no doubt shown that intercourse once commenced will most probably be repeated if opportunity for it is afforded, but ordinary experience does not show that intercourse in one month has probably been had six months before. Everything must have a beginning, and there is nothing in the commission of an offence or impropriety admitted to have taken place at one date, to suggest that such impropriety had been committed at any previous date. I take no exception to the judgment in either of the cases cited, because in each of them there were facts proved from which intercourse might have been inferred apart from the admission which the defender made. That admission of subsequent intercourse threw light upon and gave significance to facts established by evidence to have occurred at an earlier date. But in this case no anterior facts are proved which have any bearing upon the question at issue. Still if we apply to this case what has been termed the "general rule," as I have given it from the case of *Ross*, one of the conditions of its application is that at the earlier (that is the inferred) date there should be opportunity for illicit intercourse. I take that to mean such opportunity as was peculiar to the parties—not opportunity such as was common to every man and woman in the same town or village. There was no such opportunity here so far as the proof shows. Every young man in the town had as much opportunity as the defender of meeting with the pursuer and receiving her favours if she was disposed to bestow them.

But there is a point in the case which goes far, in my opinion, to corroborate the defender's story. When the pursuer in January 1900 communicated her condition to the defender, and said that she blamed "the Fair night for it" (that being the occasion of the admitted connection) he made arrangements for acknowledging the pursuer's expected child as his, and providing for it and the pursuer's accouchement. If he had been disposed to deny all connection with the pursuer, I see nothing to have hindered him doing so, but he admitted the "Fair night," and was prepared to meet any obligation or duty which the proceedings of that night might impose upon him. When, however, he learned that the child was born in February, and could not be the result of what took place on the Fair night, he quite naturally declined an obligation which he was sure was not his. That accounts for the tone of his letter of 16th February 1900. He was resenting what he considered as an injustice—blaming him for a child which was not his, and a child which could not be the result of what took place in August—which could not, in the pursuer's own language, be "blamed" on the Fair night. I think the defender's readiness to be responsible for anything that could be "blamed on the Fair night" goes a good way to support his statement that that was the only occasion on which anything took place which might account, so far as he was concerned, for the pursuer's pregnancy.

There is just one other point to notice. The Sheriff-Substitute says that the defender has not improved his case by putting on record a statement that two men whom he blamed had had connection with the pursuer in or about May 1899, which had "completely broken down." I agree that the defender has not proved that either of the persons named had connection with the pursuer in May 1899. But the statement was not so reckless as many of the same kind which we have seen. M'Nee admits having had connection with the pursuer two years before. The pursuer denies this, but M'Nee had no interest to say what was false. The pursuer had an interest to deny the statement. I believe M'Nee, for there is no reason suggested why he should not be believed. As to Campbell, he admits having said that he might get blame for the pursuer's child. The defender hearing this might very well suppose that Campbell had some reason for saying so. Campbell

now says he spoke in joke, but I accept that explanation given in the witness-box with some hesitation. All, however, that I infer from the evidence of M'Nee and Campbell is that the defender had some foundation for what he said—that it was not a mere invention of his own. That he has failed to prove a statement made by him does not prove any statements made by the pursuer.

LORD MONCREIFF—I have come to a different conclusion. This case, besides raising questions of some difficulty upon the proof, also raises a question of general importance, viz., as to the kind and amount of evidence that is required to establish previous opportunity where the defender admits connection with the pursuer during the period of gestation, but at a date which will not account for the birth of the child. And as the judgment proposed seems to run counter to previous decisions I shall state my views in some detail.

Before considering the facts of the present case I think it will be convenient to state what is my understanding of the law and practice as to this matter. Lord Fraser in his work on Parent and Child (2nd ed.) p. 138, after giving the rules relative to the older law of *semiplena probatio* and oath in supplement, says—"The Act allowing parties to a suit to be examined as witnesses has superseded though not abolished the rules." Both the pursuer and defender may be examined and cross-examined as witnesses in the cause, and each case must be determined on the evidence as a whole, but from the very nature of such cases the evidence available and the conclusion to be drawn from it remain very much the same.

Lord Benholme thus states the effect of the alteration in practice effected by the Evidence Act 1853 in *Ross* v. *Fraser*, 1 Macph. 783-786—"It appears to me that the rule of law, or rather the view of the evidence, on which the decision of this case ought to rest, is one which we have adopted from our former practice. The rule is in substance the same, although it is exemplified under different circumstances, the difference being this—that formerly the pursuer's deposition was not competent at all until after a *semiplena probatio*, which she was allowed to supplement. And then if her oath was given without inconsistencies or contradictions, that was held sufficient to make out the case. We still adhere to the same rule substantially, viz., that where intercourse is admitted by the defender, though denied at the period of conception, an unsuspicious deposition of the pursuer will be sufficient to make out the case. I think that is the same rule in substance, although in practice we adopt it in somewhat different circumstances. There may be circumstances in which the pursuer's evidence is not worthy of credit, in which case her case will fail."

I may observe in this place that this statement of the law is not complete, because Lord Benholme does not make any mention of proof of opportunity at the date of conception, but this, I think, is through inadvertence; because in the earlier case of *Lawson* v. *Eddie*, 23 D. 880, the same Judge said—"Although it is true that in cases of filiation no one case can form a decisive precedent for another, yet I think our practice has proceeded on this general rule, that if the defender admits connection within the period of gestation, and if in addition to this it is proved that he had opportunity of connection at or about the time of conception, the pursuer's oath as to connection at that time will require little or no additional corroboration."

Reverting again to the case of *Ross* v. *Fraser*, 1 Macph. 785, Lord Justice-Clerk Inglis says—"I am not disposed to represent that presumption as a rule of law. . . . It is merely a general rule in judging of evidence in such cases founded on ordinary experience and common sense; and I think that view of the law could not be better stated than it is by Lord Benholme in the case of *Lawson*"—that is, in the passage I have just quoted. The Lord Justice-Clerk proceeds thus—"I go fully that length, and quite agree that if in such case the statement of the pursuer on oath be worthy of credit, and not liable to be impugned on ground of contradictions on serious points, then the fact of connection having taken place between the parties within the period of gestation may be sufficient corroboration of such evidence." It is to be observed that here the Lord Justice-Clerk also does not make any mention of opportunity; but this omission I think is also inadvertent, because his Lordship approved of Lord Benholme's statement in *Lawson* v. *Eddie*, which expressly mentions opportunity of connection at or about the time of conception.

The opinions thus expressed are endorsed in the opinions of other learned Judges in cases which have occurred since the Act of 1853. Therefore as to the weight to be attached to an admission by a defender in such an action of connection at a time which will not account for the birth of the child, the decisions prior to 1853 may be referred to with advantage, and differ little in weight from subsequent decisions.

Of the cases prior to 1853, by far the most apposite are the three cases reported in Hume's Dec., pp. 32 and 33. In the first case, *Brown* v. *Smith*, decided 12th December 1799, the facts were that there was proof of great familiarity between the pursuer and defender in the end of harvest 1795. The child was not born sooner than 12th October 1796; and apparently there was no direct evidence of familiarity between the parties in the interval. But the pursuer was the defender's domestic servant, and remained in his service till Whitsunday 1796, and the Court, holding that there was opportunity, admitted the woman to her oath in supplement.

In the next case, *Leckie* v. *Lindsay*, decided February 1810, the defender admitted intercourse with his father's servant down to but not later than a year before her delivery. But they both continued to live

in the same house till within nine months of the birth of the child; and without any other evidence the pursuer was allowed her oath in supplement.

The third case, *Wightman* v. *Tomlinson*, 17th November 1807, is still more closely in point. The defender admitted connection nearly twelve months before the birth of the child. The only evidence of subsequent opportunity was that the parties lived in the same village. The case was fully debated. The Commissary admitted the woman to the benefit of her oath in supplement. The Lord Ordinary altered, but the Court confirmed the Commissary's interlocutor.

I may also refer to the case of *Petrie* v. *Robertson*, F.C., 22nd December 1825.

As to the cases after the Act of 1853, I may refer to *Lawson* v. *Eddie*, 23 D. 776. There the defender admitted connection six months before the birth of the child, but denied prior connection; but the Court held that, there being previous opportunity, the pursuer's case was proved by her oath as a witness.

Then came the case of *Ross* v. *Fraser*. The evidence of familiarities at the time of conception was stronger, no doubt, than here, but the law laid down did not turn on that.

In *M'Donald* v. *Glass*, 27th October 1883, 11 R. p. 57, the child was born on 28th November 1882. The defender, who was a son of the pursuer's master, swore that he never had connection with the pursuer before April 1882, but admitted connection on several occasions from that time onward. There was no proof of previous opportunity except the fact that they lived in the same house, but it was held that the pursuer's case was made out.

The decisions prior to 1853, and those since that date, establish this — that if connection is admitted within the period of gestation, and the woman swears to acts which would account for the birth of the child, proof of opportunity about the date of conception will in general be sufficient to complete the pursuer's proof. The proof of opportunity need not, although it often does, include proof of familiarities; otherwise the defender's admission would be unnecessary. It is enough if it is shown that at the time of conception the parties had the same opportunity of meeting as that which was admittedly taken advantage of.

Such evidence is at least as strong as that which is constantly accepted as sufficient in cases in which the defender denies connection altogether, and the only evidence against him, except that of the pursuer, is circumstantial—usually evidence, and sometimes very slight evidence, of familiarities or suspicious circumstances. In such cases there is no certainty that the defender ever had connection with the pursuer; while the same cannot be said when he admits connection, although he ante-dates or post-dates it to suit his defence.

To come now to the facts of the present case. The Sheriffs have decided against the pursuer solely on account of a passage in a letter which she wrote to the defender in January 1900, which they construe as an admission by her that she only had connection with the defender on one occasion—viz., the Fair night of 11th August 1899. I think they are mistaken in this, and right in what was evidently their view of the evidence apart from the letter.

The letter (to which the defender returned no answer, because the letter of 16th February was no answer) strikes me as creditable to the pursuer; it is genuine and sincere, and indicates a much greater degree of intimacy than the defender is willing to admit. The pursuer when she wrote it must have honestly believed that her condition was due to the occurrence on 11th August, otherwise she would not have given herself away by fixing an impossible date.

The passage in dispute is this—"But you must know, John, as well as I can tell you. I never took up with any other one, and I blame the Fair night for it, because it was just after that I was afraid what was going to be."

Now, if there had been only one act of connection with the defender, and (as the pursuer states in the letter) none with any other man, there was no need to give or hint at reasons for selecting the Fair night as the date of conception. The pursuer might have referred to the Fair night, but it would only have been to remind the defender of what he had done to her then. The pursuer states more particularly in her evidence what those reasons were. I need not read them. They could not safely be put into a letter; but the passage, however elliptical, must have been quite intelligible to the person to whom it was addressed, if the pursuer is right. In the least favourable view for the pursuer the letter will bear her construction equally well. I regard the letter, not as telling against the pursuer, but in her favour.

It is said, as against the pursuer's credibility, that she denied being in the family way in November 1899. Strangely enough the defender denies that he ever asked the pursuer as to her condition, or that she denied it. The denial which the pursuer admits tells so far against her. At the same time I do not attach much importance to it, because it is a curious feature in these cases that the first intimation the man often gets of the woman's condition—especially when it is a first child, is after or shortly before the birth.

To turn now to the defender's own evidence. It has been stated as to his credit that when he thought the child was begotten on 11th August he was willing to admit paternity. At first I was disposed to attach a good deal of importance to this fact. But I find in the defender's evidence a statement as to the occurrences of that night which indicates pretty clearly that it would have been useless for him to deny the occurrence, because his companion and the witness Bessie Sneddon could have proved that he left the Fair in company with the pursuer at a late hour.

It is not to the credit of the defender that he has attempted, unsuccessfully, to blacken the pursuer's character by alleging that at or about the time of conception she had connection with two other men—Robert M'Nee and John Campbell. He endeavoured to get these men to swear that they had connection with the pursuer about that time. The pursuer's procurator boldly put them both in the box, with the result that Campbell denied ever having had connection with the pursuer; and M'Nee, while he alleged that he had had connection with her, said it occurred two years before. This is emphatically denied by the pursuer. Thus the defender's attempt failed, and this necessarily affects the weight to be given to his evidence.

Thus so far, if I am right, we have the pursuer's evidence not shaken in any material respect, and the defender's admission of connection in August 1899; and it only remains to consider whether there is sufficient proof of opportunity at the time when the child must have been conceived. I have already indicated my views formed upon the authorities as to the kind of evidence that is required. If it is necessary that there should be evidence of familiarities, the pursuer must fail, because no such familiarities are proved prior to August. But I am of opinion that such evidence is not necessary. The Sheriff-Substitute thus states his view of the evidence on this point —"In the present case there is nothing in the parole evidence to make it improbable that connection took place in May, though there is no direct evidence in support of it. The parties had the same opportunities which they admittedly took advantage of on 11th August." These words concisely express my view of the evidence. It is proved that the defender knew the pursuer intimately—indeed he says himself that he has known her all his life. In the end of 1898 and beginning of 1899 he was in the habit of meeting her at dances, and walking home with her from them; he frequently called at her father's house, to which he went with his van on business, or ostensibly to call upon her brother. Moreover, it is plain that the pursuer, unfortunately for herself, was allowed to go about unattended, and to be out later at night than was perhaps safe for her. Now, all this, taken by itself, was quite consistent with innocence. But the question is not whether it is proved that anything improper occurred on those occasions, but whether the pursuer and the defender had opportunities of connection if they chose to avail themselves of them. Although the case is narrow, I think it is proved that they had. Considerable reflected light is thrown by the evidence of what took place on the Fair night. There is no trace whatever in the evidence either of the pursuer or the defender of that being the first occasion. There would be nothing in this if the pursuer were proved to be the abandoned woman that the defender has unsuccessfully tried to prove her to be. But holding that not to be her character, it is a reasonable conclusion that that was not the first time that connection took place between the pursuer and the defender.

The defender would have us believe that this girl, with whom he says that he was not on intimate or affectionate terms, yielded herself to him without any previous courtship or course of seduction. I do not believe him. I believe that what took place on 11th August 1899 was merely a continuation of an improper intimacy of some duration.

I am therefore of opinion that judgment should be for the pursuer.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer and Appellant—W. C. Smith—W. Thomson. Agent—Geo. Byres Ross, S.S.C.

Counsel for the Defender and Respondent—Salvesen, Q.C.—Hunter. Agents—Macdonald & Stewart, S.S.C.

---

# HIGH COURT OF JUSTICIARY.

*Thursday, December* 6.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren).

## NEILSON *v.* DUNSMORE.

*Justiciary Cases — Hawking Excisable Liquor — Public-Houses Acts Amendment (Scotland) Act* 1862 (25 *and* 26 *Vict. cap.* 35), *secs.* 16 *and* 37.

On a Sunday a member of a club, in which excisable liquors were supplied to members on Sundays, loitered in the streets in the neighbourhood of the club for nearly two hours, and on three occasions, having received money from passers-by, who were not members of the club, and with one, at least, of whom he had no previous acquaintance, went into the club, and on returning to the street handed whisky to the man who had last given him money, making a profit of threepence on each occasion. He was charged in the Police Court with hawking excisable liquors by trafficking therein contrary to the Public-Houses Acts Amendment (Scotland) Act 1862, sec. 16. The Magistrate, in respect of the decision of the High Court of Justiciary in *Dewart* v. *Neilson*, 37 S.L.R. 922, found the charge not proven.

In an appeal, *held* that these facts were sufficient to constitute a contravention of the statute, and to warrant a conviction of hawking excisable liquor, and appeal *sustained.*

*Dewart* v. *Neilson*, July 18, 1900, 37 S.L.R., 922, *distinguished.*

On 15th September 1900 William Dunsmore, 16 Church Place, Glasgow, was charged in the Police Court (Northern District), Glasgow, on a complaint under the Glasgow Police Acts and the Summary