Counsel for the Reclaimers—D.-F. Sandeman, K.C.—Normand. Agents—J. & J. Ross, W.S.

Counsel for the Respondents--MacRobert, K.C.—Graham Robertson, K.C.—Duffes. Agents—Thomson, Dickson, & Shaw, W.S.

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*Friday, February* 9.

SECOND DIVISION.

[Sheriff Court at Ayr.

FADDES *v.* M'NEISH.

*Evidence—Parent and Child—Affiliation—Corroboration of Pursuer's Evidence—Effect of Defender Failing to Lead Evidence or Tender Himself as Witness.*

In an action of affiliation and aliment the defender was not adduced as a witness by the pursuer. At the conclusion of the pursuer's case the defender did not go into the witness-box and no evidence was led on his behalf. *Held* that the defender's conduct, not being equivalent to a contumacious refusal to go into the witness-box, did not afford corroboration of the pursuer's case.

Maggie Faddes, *pursuer*, brought an action of affiliation and aliment in the Sheriff Court of Ayrshire at Ayr against William M'Neish, *defender*, in which she craved decree for payment of (1) inlying expenses in connection with the birth of her illegitimate female child, of whom she averred the defender was the father, and (2) aliment for the child.

The Sheriff-Substitute (BROUN) allowed a proof.

The defender was not cited as a witness by the pursuer and was not asked by her to go into the witness-box. At the conclusion of the pursuer's case the defender did not go into the witness-box and no evidence was led on his behalf.

On 17th August 1922 the Sheriff-Substitute (BROUN) found in fact that the pursuer had failed to prove that the defender was the father of her illegitimate female child.

*Note.*—"This is an unsatisfactory case, as the defender has adopted the unusual procedure of neither going into the witness-box himself nor leading any evidence on his behalf. No doubt the defender's agent argues that it was unnecessary for him to lead any evidence if no case was put forward by the pursuer which he required to meet. Still I think it would have been more satisfactory if the defender had gone into the witness-box and maintained on oath his innocence of the charge made against him by the pursuer. After a careful reading of the record and the evidence led for the pursuer I have, however, come with some hesitation to the conclusion that the pursuer has not made out her case. . . .

"The pursuer's agent commented strongly on the fact that the defender had not gone into the witness-box, and he founded on a sentence in the opinion of Lord Moncreiff in *Harper* v. *Paterson* (16th June 1896, 33 S.L.R. 657, at p. 660) where his Lordship remarks—'If the defender in an action of this kind refused to go into the box, that fact would go a long way towards proving the truth of the pursuer's case.' I would be prepared to follow this dictum, but my difficulty is, Has the defender so refused? If the pursuer, as she was entitled to do, had asked him to go into the box before closing her proof and he had not done so, he would then have refused to go into the box. But if he is never asked to go into the box, can he be said to have refused to go? I do not think so. However, as I have already remarked, it would have been more satisfactory if he had given evidence, and it is not without hesitation that I have reached the conclusion that the defender's admissions on record and the evidence of the witnesses for the pursuer do not constitute sufficient corroboration of the pursuer's evidence to entitle her to decree against the defender."

The pursuer appealed to the Sheriff (LYON MACKENZIE, K.C.), who on 19th October 1922 sustained the appeal.

*Note.*—"The position of this action is undoubtedly, as the Sheriff-Substitute observes, left at the close of the proof in an unsatisfactory position owing to the defender having adopted the unusual course of neither tendering himself as a witness to deny on oath the pursuer's averments or to lead any independent evidence to rebut the evidence of the pursuer and her witnesses. The learned Sheriff-Substitute in the note to his interlocutor has very fully and accurately detailed the evidence of the pursuer and her witnesses. He has come to the conclusion that that evidence in itself is not sufficient to prove the pursuer's case, but apparently would have considered that the pursuer was entitled to succeed if any inference could be drawn from the defender's failure to tender himself as a witness in the cause, but that he was not satisfied that the defender had refused to go into the box as a witness.

"I am unable to agree with the conclusions arrived at by the learned Sheriff-Substitute.

"Prior to the Evidence Act the first step generally adopted in cases of this kind was for the judge, on the motion of the woman, to order the man to be judicially examined. The old law was considerably changed by the Evidence Act allowing the parties to be examined as witnesses, although it appears to be still competent to order the judicial examination of a defender, to hold him as confessed if he fails to appear, and thereupon with the oath in supplement of the puruser to hold the paternity proved—*M'Kellar* v. *Scott*, 1852, 24 D. 499, *per* Lord President M'Neill.

"The real question at issue is—Is it competent to hold the defender as confessed when he fails to appear as a witness?

"From the opinions expressed in *M'Kellar* v. *Scott* it appears immaterial whether a defender is cited to appear to be judicially examined or as a witness. The inference to be drawn from his failure to appear seems to be the same in either case.

"I am further of opinion that the failure of the pursuer to cite the defender as a witness does not relieve him of the implied obligation imposed on him to deny on oath the paternity of the child of which the pursuer on oath has deponed that he is the father.

"In my opinion this is the proper interpretation of the opinion of Lord Moncreiff in *Harper* v. *Paterson* (1896, 33 S.L.R. at p. 660), quoted by the learned Sheriff-Substitute in his note.

"The evidence led for pursuer appears to me to establish more than a *prima facie* case in her favour, and the inference to be drawn from the failure of the defender to attempt to disprove any of that evidence in my judgment is sufficient corroboration of the pursuer's case to entitle her to succeed. I have accordingly sustained the appeal and given decree in favour of the pursuer with expenses."

The defender appealed, and argued—The failure of the defender to go into the witness-box did not amount to corroboration of the pursuer's case. Lord Moncreiff in the case of *Harper* v. *Paterson*, 1896, 33 S.L.R. 657, at p. 660, meant contumacious refusal and not abstention. This was shown by his subsequent remarks in the case of *Darroch* v. *Kerr*, 1901, 4 F. 396, at p. 399, 39 S.L.R. 270. On the older practice under *semiplena probatio*, Fraser, Parent and Child, pp. 164 and 166, and *M'Kinven* v. *M'Millan*, 1892, 19 R. 369, 24 S.L.R. 308, were referred to.

Argued for the pursuer and respondent—The defender was bound to go into the box to deny on oath the charges made against him, otherwise he rendered himself liable to the inference that his abstention and silence were due to guilty motives—*M'Kellar* v. *Scott*, 1862, 24 D. 499; *Harper* v. *Paterson*, *cit.*

At advising—

LORD JUSTICE-CLERK — Two questions arise for decision in this action of affiliation and aliment—(1) Has the pursuer by her own evidence and that of her witnesses proved her case? (2) If not, does the fact that the defender elected not to go into the witness-box and abstained from leading any evidence afford the corroboration of the pursuer's case which *ex hypothesi* is lacking?

[*After dealing with the facts and arriving at the conclusion that the first question must be answered in the negative, his Lordship continued*]—

It remains to consider whether the defects in the pursuer's case are eked out by the defender's omission to tender himself as a witness or to lead any evidence Now silence by a person in face of a charge made against him must always be cautiously construed, for reasons which are discussed in Dickson on Evidence, section 372. As the learned author says—"In criminal cases, indeed, silence frequently proceeds from strong consciousness of innocence, while the most indignant and and solemn denials are every day heard from the lips of the guilty." It appears to me that even more than the usual degree of caution must be employed in construing the silence of a defender in the type of case where it is well recognised that whatever he or she may say or do the other party must prove his or her case to the satisfaction of the Court. That principle applies to crime, and in the civil law it applies to divorce as well as to filiation actions. Lord Moncreiff in *Darroch* v. *Kerr*, 4 F. 396, at p. 399, indeed attributes the practice of a pursuer in an affiliation action adducing the defender as a witness "partly to the fear (not unfounded) that if the corroboration of the pursuer's story seems insufficient the defender will not himself go into the box." Of that course his Lordship indicates no disapproval. I may add that the dictum of the same judge in the case of *Harper* v. *Paterson*, (1896) 33 S.L.R. 657, at p. 660, where he says, "if the defender in an action of this kind *refused* to go into the box that fact would go a long way towards proving the truth of the pursuer's case," seems to me quite consistent with the passage which I have just quoted, in which his Lordship appears to contemplate as a likely contingency the omission of the defender to give evidence. For in *Harper's* case Lord Moncreiff was, I think, obviously dealing with the contumacious refusal of a defender who had been cited to go into the witness-box. Such a refusal might well give rise to a significant inference. In the class of case to which I have referred, considerations other than a sense of guilt may obviously induce the defender to refrain from giving evidence. Indeed it is not so much his failure to go into the box that is urged against him here as the motive of that failure which is attributed to him. It is suggested that his conduct can only be accounted for on the assumption that it was dictated by a sense of guilt. I cannot assent to that view. I think his conduct is equally consistent with the view that his agent thought it good strategy, inasmuch as nothing material had been proved by the pursuer against him, to advise his client not to go into the box. That appears to have been the agent's contention before the Sheriff-Substitute. For myself I think that the defender's agent's view of the pursuer's case was correct, and that his advice to his client was in the circumstances sound. In any event I am not prepared to affirm that that theory of the defender's conduct is necessarily excluded, and that the course which under advice he adopted is tantamount to an admission of guilt. To assimilate in any way the silence of a defender, in circumstances such as I have discussed, to his speech in the box in cases where his contradictions of the pursuer and her witnesses have been held to corroborate her case seems to me without warrant. Entirely different considerations come into play in these cases. The incidents cannot for a moment be regarded in my judgment as yielding the same inference.

I am of opinion that inasmuch as the conduct of the defender does not afford the corroboration of the pursuer's case which is lacking, her case fails, that the judgment of the Sheriff should be recalled, and the judgment of the Sheriff-Substitute restored.

LORD ORMIDALE—[*After dealing with the facts of the case*]—In these circumstances the Sheriff-Substitute, in my opinion, reached a right conclusion, for I am unable to agree with the Sheriff that the failure of the defender to enter the witness-box and deny on oath the allegations of the pursuer is tantamount to an admission by him that what she said was true. I see no reason for assuming that the defender in following the course he did was necessarily actuated by an oblique motive. I should infer rather that he was acting not of his own motive but on the advice of the agent who was conducting his case. It may have been—if I may use the expression in this connection—far from a sporting thing to do. We are not, however, concerned with that aspect of his conduct. It certainly was novel and, so far as I know the reports, unprecedented, although Lord Moncreiff had the possibility of such an incident in mind in noticing the practice by a pursuer in affiliation cases of calling the defender as her first witness (*Darroch* v. *Kerr*, 4 F. 396, at p. 399).

It was open, however, to the pursuer to cite the defender, and avoiding the practice to which I have referred, and which has been strongly disapproved in this Court (*M'Whirter* v. *Lynch*, 1909 S.C. 112, at p. 114), to have examined him as a witness before closing her proof. Such a course was not only competent but unobjectionable. Had he then refused to enter the witness-box, the situation contemplated by Lord Moncreiff in *Harper* v. *Paterson*, 33 S.L.R. 657, at p. 660, would have arisen, and the weight to be given to his Lordship's dictum would have been considered. But as the defender did not in any sense refuse to go into the witness-box in this case, there is no ground in law for holding him as confessed. The case cited by the learned Sheriff (*M'Kellar* v. *Scott*, 1862, 24 D. 499) is not an authority for such a course. It was common enough in our old practice in cases in which *semiplena probatio* was allowed, for a party who had failed to obtemper an order to compear for judicial examination to be held as confessed as to any *facta propria* on which he might have been examined. The procedure followed in *M'Kellar* v. *Scott* was analogous to the older practice. In that case, however, the question was mooted whether "a party failing to appear as a witness can be held as confessed." From the context it is clear that that meant "failing to appear" after being appointed or cited to appear. Lord Curriehill expressed no opinion on the question. Lord Deas did. He said (at p. 504) that "it does not appear to me to be very material whether the" defender "was appointed to appear for examination as a party or as a witness." Now the defender in *M'Kellar's* case had been five times guilty of contumacy in failing to obtemper the order of the Court — three times to appear for judicial examination and twice as a witness—and Lord Deas goes on to say—"Now what is the inference in law and in common sense for his obstinate and repeated failure to appear? Plainly that he knew the allegation" of the pursuer as to intercourse "to be true." I respectfully assent to that. But as I have already pointed out, the defender here did not fail to obtemper any order of the Court when he abstained from entering the witness-box. He was guilty of no contumacy. I see no ground therefore for holding that his not having tendered himself as a witness must be taken as tantamount to an admission by him that the allegations of the pursuer were true in fact.

LORD ANDERSON—I concur.

LORD JUSTICE-CLERK—I am authorised by LORD HUNTER to say that he also concurs.

The Court recalled the Sheriff's interlocutor and restored the interlocutor of the Sheriff-Substitute.

Counsel for Pursuer and Respondent—Berry. Agent—Sterling Craig, S.S.C.

Counsel for Defender and Appellant—Patrick. Agents — Croft Gray & Gibb, W.S.

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# VALUATION APPEAL COURT.

*Thursday, February* 8.

(Before Lord Hunter, Lord Sands, and Lord Ashmore.)

## MERRY & CUNINGHAME, LIMITED, AND OTHERS *v.* ASSESSOR FOR LANARKSHIRE.

*Valuation — Value—Iron-works—Revaluation—Contractor's Principle—Conditions Prevailing in Iron as Contrasted with Steel Industry — Percentage on Capital Value — Over-all Abatement in view of Prolonged Trade Depression.*

Iron-works which had been valued for the purpose of assessment in 1901 were first completely revalued in 1922 on the contractor's principle, the ground, railways, buildings, furnaces, and machinery being taken at what the assessor considered to be their capital value at the time, taking into account their actual condition and capability for present use, the cost of erection being taken as it would have been in 1914. The percentages ultimately fixed by the Valuation Committee in order to the annual valuation included 7 per cent. for buildings and 7½ per cent. for furnaces, together with an abatement of 25 per cent. on the whole on account of the abnormal depression in the iron trade, which in the Committee's opinion was likely to continue for a considerable time to come. The owners claimed that they were entitled to more liberal allowances both as to percentages and abatement in respect that their industry was in a worse position than steel-works where greater allowances had been made, and they led evidence to support their contention. *Held* that the Valuation Committee in fixing the percentages and abatement was exercising a discretion, that the Court would