Counsel for Pursuers—Dean of Faculty (Watson)—Trayner—Darling. Agents—Rhind & Lindsay, W.S.

Counsel for Defenders—Balfour—J. P. B. Robertson. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, May 24.

FIRST DIVISION.

[Lord Craighill, Ordinary.

C. *v.* C.

Husband and Wife—Marriage—Impotency—Nullity.

Impotency on the part of the woman, whether congenital or not, is a ground for declarator of nullity of marriage.

The pursuer in this action sought a declarator of nullity of marriage against his wife on account of her impotency. The action was not defended. The Lord Ordinary assoilzied the defender, on the ground that whereas it was alleged in the libel that this impotency was congenital, the import of the evidence was that it was rather the result of age, the woman being 54 years old at the date of the pretended marriage, and that therefore the ground of action had not been established.

The pursuer reclaimed.

Authorities—*Liber officialis sancti Andreæ*, published by the Abbotsford Club, Nos. 138, 137; *Williams* v. *Humphrey*, 30 L. J. (Mat. Cases) 73, 2 Swabey and Trisham, 240; *H.* v. *P.*, July 15, 3 L. R. 126; *G.* v. *G.*, June, 22 1871, 2 L. R. (Prob. and Mat.) 287.

At advising—

Lord President—That marriage may be declared null by reason of the impotency of one of the spouses, at the suit of the other, cannot be doubted. To state the rule of law in the form of a definition of impotency would be dangerous, and is unnecessary.

But it may, I think, be safely affirmed as the result of all the authorities that inability to copulate arising from such a physical obstruction in the woman as cannot be removed or remedied without danger to her life or the infliction of bodily pain, *plus quam tolerabile*, constitutes impotency on her part.

Persons beyond the age when procreation of children may be expected, may marry without hope of issue, but with the expectation of real *commixtio corporum*, which is the proper consummation of marriage, and the disappointment of that expectation by impotency arising from irremediable physical obstruction in the woman may entitle the man to a decree of declarator of nullity.

I am of opinion that such an irremediable physical obstruction to copulation has been proved to exist in the defender in this case, and that the pursuer is therefore entitled to judgment declaring the marriage null.

I cannot concur in the technical ground of judgment adopted by the Lord Ordinary, which in my opinion proceeds on too strict a reading of the summons.

Lords Deas, Ardmillan, and Mure concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer—no appearance being made for the defender—on the reclaiming note for the pursuer, against Lord Craighill's interlocutor, dated 9th December 1875, Recal the said interlocutor: Find and declare the pretended marriage betwixt the pursuer and defender to have been from the beginning, to be now, and in all time coming, null and of no avail, force, strength, nor effect, with all that has followed thereupon; and divorce and separate the defender from the pursuer's society, fellowship, and company; and find and declare the pursuer to be in such case and condition as he was before the said pretended marriage, or as if he had never been contracted or married to the defender, and decern."

Counsel for Pursuer—Fraser—Mair. Agent—William Officer, S.S.C.

Tuesday, May 30.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GARDNER *v.* GARDNER.

Parent and Child—Legitimacy—Proof—Presumption.

An action of putting to silence was raised against one who averred that she was the legitimate daughter of the pursuer. The defender was admittedly the child of the pursuer's wife, and was born two months after their marriage, which took place nearly twenty-five years prior to the date of the action. It appeared, on the one hand, that the man whom the pursuer alleged to be the real father of the defender had connection with the mother prior to her marriage, and that the pursuer did not treat the defender as his daughter, but sent her away immediately after her birth, and although he all along maintained her, had no communication with her whatever. On the other hand, it did not appear whether the intercourse with the alleged father corresponded in time with the birth of the defender, and it remained doubtful whether the pursuer had not had illicit intercourse with his wife prior to marriage. It further appeared (1) that the mother's pregnancy took place during the pursuer's courtship; (2) that on his own admission the pursuer was aware of her condition when he married her; (3) that the pursuer did not openly disclaim the defender, but on the contrary assumed the burden of her maintenance and education; and (4) that he never said to any one that he was not the father, or put the paternity on any one else for four-and-twenty years.—*Held* that although the presumption of law *pater est quem nuptiæ demonstrant* did not apply—conception not having taken place during marriage—there was a strong presumption of fact that

the pursuer was the defender's father, arising from the fact that the defender was born in wedlock—that therefore the obligation of unquestionable proof to the contrary lay on the pursuer, and that he had not discharged that obligation.

This was an action of declarator and putting to silence at the instance of Robert Gardner against Mary Gardner; and the summons concluded for declarator that the defender was not the child of the pursuer, and for decree putting her to silence in asserting or representing directly or indirectly that she was so. The pursuer in his condescendence set forth that in August 1850 he was married to Miss Brodie, with whom he had never previously had any intercourse. The second article of the condescendence was as follows:—"About a month previous to the said marriage Mrs Gardner, then Miss Brodie, informed the pursuer that she feared she was with child, but did not declare at that time to whom. As she was not quite certain as to her condition, it was arranged between the pursuer and her that she should consult the late Dr Thatcher of Edinburgh. This she did in the course of a few days afterwards, and Dr Thatcher confirmed her suspicions. Notwithstanding of this state of matters, it was arranged that the marriage between the pursuer and her should go on, and accordingly it took place, of the date before mentioned, at Cademuir." On 16th October 1850 Mrs Gardner was delivered of a female child (the defender), and the pursuer arranged with Dr Thatcher, now dead, for the child's removal, and its maintenance at the pursuer's expense. The pursuer averred that about a year after the birth of the defender, Mrs Gardner, when very ill, told him that John Laidlaw was the father of the child, a man who was shepherd to her brother in 1849 and 1850; and further, that "in or about the winter previous to her marriage he had illicit connection with her on two or more occasions, and the defender is the fruit of that intercourse. On one of these occasions the intercourse took place on Cademuir Hill, near Peebles, and on another occasion at the farm of Cademuir." Finally, the pursuer stated that he had maintained Mary Gardner to avoid scandal and save his wife's character, but that recently the girl's demands had become so extravagant that he had been, in self-defence, obliged to raise this action.

The defender averred that she was the child of Mr and Mrs Gardner, and denied the truth of the confession said to have been made by Mrs Gardner.

The Lord Ordinary appointed a proof, and the following are the more important parts of the evidence:—

The following letters between Mrs Gardner and Laidlaw were put in evidence:—

"Letter, Mrs Gardner to Mr Laidlaw.

"*Gattonside, Friday night.*

"Dear Sir,—Mr Gardner has got a threatening letter to-day, and I send you a copy of what I think you should write out, and sign and send it by return of post. The sooner that things are settled—for I think I cannot stand it much longer. —Yours truly, E. GARDNER.

"*P.S.*—By doing this it will be the only thing that will bring it to a settlement soon."

"Copy letter referred to.

"*Peebles, March* /74.

"Mrs Gardner,—I acknowledge myself to be the father of the child you had, born in the year Eighteen hundred and fifty."

"Letter, Mr Laidlaw to Mrs Gardner.

"*Peebles, March 12th,* /74.

"Mrs Gardner,—You desired me to write by return of post, but I have got such an astonishment that I scarcely know what I am doing. But I would have thought if you were that way to me you would have told me before you left Cademuir; at least you ought to have done so, for the truth saves one from much trouble afterwards. I cannot deny that we met that day on the hill. But I did not waylay you, for we met by appointment when you were going to Peebles. It was a cold day like this, and we sat down with the plaid about us, but we had better kept walking. So if you sware the child was mine, I will not deny it, tho' I mind neither the month nor year.—I am, your obt. st. J. L.

"*P.S.*—If my wife hears of it I may take the road; but I did not know, or I would never have had one."

Mrs Gardner, *inter alia*, deponed—"Within a short time of the marriage I found it necessary to make a communication to my husband. I thought it my duty to make that communication to him. I don't think it was more than a fortnight from our marriage when I made the communication, but I cannot exactly state the time. The communication was that I had reason to believe that I was in the family way. I was afraid of that, and was in great distress at it. I was in the family way, and this came about through my having met a man—John Laidlaw—who had come to my brother's house on Cademuir Hill seven or eight months before my marriage took place. Improper familiarity took place between him and me once, and another attempt was made in the barn at Cademuir. That attempt was not successful. The first occasion was at Cademuir Hill, where I had connection with him. Previous to my marriage I never had at any time any undue familiarity or connection with my present husband. From the time when Laidlaw had connection with me at Cademuir Hill my usual courses did not come on at all. After I had told Gardner that I was afraid I was in the family way, he agreed to go on with the marriage, which took place as appointed. My family did not come to know anything of the matter. With the exception of Laidlaw, no one had ever connection with me before my marriage."

The pursuer, *inter alia*, deponed—"About four or five weeks before I was married she made a communication to me. (Q) What was it?—(A) That she was afraid she was in the family way. . . . . That fact caused me great distress. She was also very much distressed; and after considering a little time we agreed that the marriage should take place, and that we should try to smother up the thing as much as possible. Up to the date of our marriage I had had no improper intimacy with her. I did not meet her in any clandestine way at all. I never met her in my life at Cademuir Hill. During that winter, when I stopped at Crookston along with Mr

Middlemas, I walked along the road with her in company with others. That was when she had been at a party at Crookston in the winter of 1846-47, three years before we were married. I never had carnal intercourse with her previous to our marriage. I took no improper liberties with her, nor did I attempt anything of the kind. . . . . At the time of our marriage my wife had not informed me who was the father of the child. (Q) When did she inform you?—(A) Fully a year after our marriage. (Q) How did she come to inform you?—(A) She was very unwell, and thought she was dying at the time. She gave me the name of the father then—John Laidlaw. (Q) Had you and she spoken on the subject until this time, when she thought she was dying?—(A) We may have spoken on the subject, but she never mentioned the name of the father. She said that she had been waylaid by a blackguard on the hill and abused. . . . . When John Laidlaw was at Cademuir I knew him to speak to. (Q) Was he on intimate terms—I don't mean improper terms—with Mrs Gardner when he and she were there?—(A) As a shepherd living in the house in which she was the farmer's sister, they were just on ordinary terms, but not on intimate terms by any means so far as I am aware. Mrs Gardner, although the sister of the farmer, did a good deal of housework, and was a good deal thrown amongst the servants in the course of her work."

John Laidlaw, *inter alia*, deponed—"I am a flesher in Peebles. I am fifty-eight years of age. I was a shepherd at Cademuir for ten years, from 1846—Mr Brodie being my employer. He was Mrs Gardner's brother. Mrs Gardner was at that time residing with her brother. (Q) Had you ever carnal connection with Mrs Gardner?—(A) No. (Q) Had you carnal connection with Mrs Gardner before she was married—as Miss Brodie?—(A) No; never. I never had anything like connection with her. I never tried to have such connection. I have often spoken to Mrs Gardner. I have often met her and walked with her alone about the house. I have been in the barn with her alone. (Q) What passed on that occasion?—(A) Nothing but just cracking. I have been on Cademuir Hill with her alone—more than once—may be eight or ten times. There has been snow on the ground when I have been with her there. I have sat down with her on the hill. It is likely I would have a plaid with me on some of these occasions. I generally had one. I have received four or five letters from Mrs Gardner within the last few years. I have preserved two of them. I have also written letters to Mrs Gardner, but I cannot say how many. (Shown second letter printed above)—This is written by me. (Letter is read to witness by counsel for pursuer)—It is true that I met Mrs Gardner on Cademuir Hill, and that we met by appointment. (Q) What do you mean by saying to Mrs Gardner that she ought to have told you before, for the truth saves one from much trouble afterwards?—(A) I had no meaning in it at all. (Q) Had you no meaning in the letter generally?—(A) No; none further than that she could not give her oath that it was mine. (Q) What was your purpose in writing the letter?—(A) She sent one before. (Q) What was your purpose in writing this letter?—(A) Oh, just writing it. I had no purpose for it further than denying the child. (Q) Is there a word of truth in the letter from beginning to end?—(A) None but meeting by appointment. It is true that on the occasion to which the letter refers I sat down with Mrs Gardner and the plaid about me. (Q) What do you mean by saying you had better had kept walking?—(A) Better never had conversation with her; because she gave me the slip in the hinder end, and set off. (Q) How was it better that you should have kept walking?—what harm was done by your sitting down?—(A) No harm. (Q) Then what do you mean by saying you had better kept walking?—(A) I had no meaning in it at all. (Q) Then what do you mean by saying immediately after that, 'If you swear the child is mine I will not deny it'?—(A) I knew she could not swear it was mine. (Q) Do you mean that if she did swear it was yours you would deny it or not?—(A) I would deny it. (Q) Did you intend to deny it by this letter?—(A) I could do no other thing but deny it. (Q) When you wrote this letter was it or was it not a lie to say that you would not deny the paternity of the child if she swore it was yours?—(A) I knew she could not swear it. (Question repeated) — (A) I knew she could not swear it. . . . . (Q) Did you say to Mr Blackwood that you did not think you had had connection beyond twice or thrice?—(A) No, I did not use those words; I said I never had had anything to do with her—no connection with her. (Q) Did you tell him that on one occasion you had had your will of Mrs Gardner? — (A) I said that I might have had if I had "likit." (Q) What led you to say that?—(A) I cannot put it into right words. (Question repeated.)—(A) I don't mind of saying that to Mr Blackwood. I told him to write what he liked. *By the Court*—(Q) Then why did you say that you had used those words to Mr Blackwood?—(A) I don't recollect saying it. (Q) Did you or did you not say that you might have had your will of her if you "likit?"—(A) I thought so. (Question repeated,)—(A) I am not certain. *Examination continued.*—(Q) Did you say any words like those?—(A) May be something to the same import. (Q) Is it true that you might have had your will of her if you had liked?—(A) I never tried, but I think one might have had. I just thought that; but if a woman puts her arm round your neck and kisses you, would you not think it? (Q) When did that happen?—(A) Several times about the fireside in the kitchen at Cademuir; it also sometimes happened outbye on the hill. I have kissed her. (Q) Did you often kiss her?—(A) Oh, gey often, I daresay; I cannot tell how often. I have put my arms round her. (Q) Were you sitting together on any of those occasions?—(A) No. (Q) Were you standing, or what?—(A) Yes, standing or sitting either. I have seen us lying, too, on the hill. (Q) Had you a plaid about you when you were lying on the hill?—(A) Yes. (Q) Was the plaid round both of you?—(A) Yes. (Q) Did you kiss her more than once in that situation, with the plaid round both of you, lying on the hill?—(A) Yes, but I cannot say how often—three or four times, I daresay. . . . . I was courting her for a while. I expected at one time that she would become my wife. She received my advances quite pleasantly. There was no mistake

about my courting her. . . . . We met one day on the hill—it was the last time we met on the hill. It is true, as the letter says, that we met by appointment. Her purpose in making an appointment was to get a private crack there. The private crack was to be about marriage. The day was a cold one. It is quite true that we sat down. (Q) Did you have the plaid about you?—(A) Yes. We might be sitting together an hour, during which we cracked about different things which I cannot now specify. I had my arms round her neck. (Q) Did you kiss her?—(A) Oh, certainly. No other endearments took place."

The defender, *inter alia*, deponed—"On that occasion my mother told me how long she and Mr Gardner had been courting—for between two and three years before they were married. She told me that she had an appointment with him at one time, and that he had tried to take advantage of her at that appointment. (Q) You mean to take improper familiarities with her? (A) Yes; and she told him if he was a man at all he would let her alone, as she had been unwell. He did let her alone, and she got away from him and went away. She said that no correspondence took place between them for some time after that, but that they drew up again. She also told me that Mr Gardner had met her again by appointment. She had an appointment to meet him one night, and went to the appointed place at the appointed time, the place being Cademuir Hill. When she went there she met a man with a plaid on. She said that the man had never spoken to her, and that he had got the better of her; and that after that he went away, and that she went along the moor a 'bittie,' and met Mr Gardner, who asked her what she thought of herself now. Her reply to him was, 'As much as ever,' because she said that he (Mr Gardner) was the man, and no other. (Q) The man who had connection with her?—(A) Yes. She also said that he had often said it was not him. I said to her, 'Do you believe it was Mr Gardner?' She said 'Yes.' . . . . . (Q) You told us about the meeting between Mr and Mrs Gardner by appointment on Cademuir Hill, and you told us that Mrs Gardner said she would write and tell you about that?—(A) Yes. She did write me, for I received a letter three weeks afterwards. I burned that letter. It stated the same things that I have told you to-day. (Q) Did Mrs Gardner ever say to you in the presence of anybody else that Mr Gardner was your father?—(A) No. (Q) Did you ever tax her in the presence of anybody else with having admitted that to you?—(A) No; I was anxious to ascertain whether Mr Gardner was my father or not, without having to come into a court of law about it.

Mr Kay, who had been Free Church minister at Loanhead for six or eight years, and had been acquainted with the defender during that period, *inter alia*, deponed—"I first heard about her parentage about the year 1872. From that time until now I have taken an interest in the inquiry. I have had several meetings with Mr Gardner on the subject, and one or two with Mrs Gardner. I have also seen Laidlaw. . . . . Mrs Gardner began to tell the story that she was met on the moor by a gentleman, gentlemanly dressed, and with a plaid about him; that this man muffled up in a plaid came up and forced her; that she had struggled; then rose and went away. That was the substance of what she told me. I at once said—'There is a contradiction here between Mr Gardner and you, for he said he was a poor man not to be found in this part of the country, and you say he was a gentlemanly man.' She wished to back out of it, and I appealed to Mary by saying, 'Mary, were not these your mother's words?' Then she acquiesced in it. (Q) Did Mr Gardner say anything about his having said he was a poor labouring man?—(A) He did. . . . . I told Mr Gardner what Mary had said, and amongst other things that Mrs Gardner had said that he had attempted to force her once, and also a second time. To which he returned answer and said, 'Well, I confess having tried it once.' (Q) That was that he had endeavoured before marriage once to have connection?—(A) To force her. (Q) To have connection?—(A) Yes. (Q) What was it you understood he had tried to do—to commit a rape, or to have connection with her?—(A) The position I put is this—'I am told that you had courted Mrs Gardner, and had frequent meetings with her, and that on one occasion you tried to force her, when she said she was unwell, and you did'nt succeed. On a second occasion you had forced her, having trysted her to a different place on the moor, and that you had succeeded only too well the second time.' He immediately added—'Well, I confess to having tried it once.' He didn't confess to having been successful. . . . . I had gone down and seen Laidlaw, to satisfy my own mind as to whether he was the father or not. That meeting with Laidlaw was also prior to the meeting with Gardner when £1000 was offered. My conversation with Laidlaw took place in a bedroom in his own house. We had a good deal of conversation about the matter, and I remember distinctly that, after talking about a number of things, he looked me broadly in the face, and said, 'If he took the child home to Traquair Knowe at first, there would be nought of this now.' He also said he could not take with the paternity of it; that he could not say he was the father. (Q) Did he admit having connection with her?—(A) No; he never admitted having carnal connection with her. That was the kind of way in which he put it. He said he had had nothing more than 'toozling.' (Q) Did he deny the paternity?—(A) Yes; I am perfectly certain of that. (Q) In what way did he put the denial?—(A) I put the question to him—'Do you take with this child and say it is yours?' He said, 'No, he he could not say that.' I then said, 'Do you repudiate the paternity?' He said he did repudiate the paternity. I think that is the substance of what was said, and the words."

The Lord Ordinary pronounced this interlocutor:—

"Finds, as matters of fact, (1) that the pursuer was married to Mrs Eliza Brodie or Gardner in August 1850; that about six weeks after the marriage Mrs Gardner gave birth to a child, and that the child to which she then gave birth is the defender in the present action; and (2) that the defender never had carnal intercourse with his wife prior to their marriage, and consequently that the defender is not, and could not be, the child of the pursuer: . . . . . Finds, as

matter of law, that the facts being as above set forth, the defender is not entitled to assert or otherwise represent that she is the child of the pursuer: Therefore repels the defences, and finds, declares, and decerns in terms of the conclusions of the summons: Finds in the circumstances no expenses due, and decerns.

"*Note.*—This is a remarkable case, and affords a new illustration of the old saying, that 'truth is sometimes stranger than fiction.'

"The pursuer here seeks for a decree finding and declaring 'that the defender is not the child of the pursuer,' and decerning and ordaining the defender 'to desist and cease in all time to come from asserting or otherwise representing, directly or indirectly, that she is the child of the pursuer.' The defender resists such a decree upon the ground that she is, or at least in the circumstances must be held to be, the child of the pursuer.

"In the outset it may be premised that there is no doubt whatever that the defender was born after the pursuer's marriage, and that she is the child of the wife of the pursuer. The defender was taken away the day, or the next day but one, after her birth; and for more than twenty years the child was not seen by the mother, nor the mother by the defender. But the identity of the defender with the infant to which Mrs Gardner gave birth, in the circumstances to be immediately explained, is abundantly proved, and indeed has never been disputed. The question, and the only question, on which issue has been joined is—'Whether that child is not also the child of the pursuer, the husband of Mrs Gardner.'

"Similar questions have often been raised, and almost as often decided. There is authority touching such cases as old as any that can be adduced in any department of the law; and whatever may be said of individual decisions, or the *dicta* of individual judges, it is the fact that the law upon this subject has remained unchanged. The birth of a child in wedlock has always been presumed to be a lawful child—in other words, to be a child of the husband of the mother. But in Scotland there never was a time when this presumption might not be overcome, provided the proof was sufficient. Each case, therefore, as it arose was a case of circumstances; and the result depended on the strength or weakness of the facts which were established.

"The strength of the presumption, it may be added, is itself affected by circumstances. There are expressions in some of the authorities which seem to imply that the presumption of paternity resulting from marriage with the mother previous to the birth of the child arises only when the marriage existed at the date when the child must have been begotten. But this, the Lord Ordinary thinks, is an erroneous view of the matter. Presumption there is when the child is born in wedlock, however soon the birth may have supervened. And, obviously, there is reason in this rule. Take the present case by way of illustration. The pursuer was married in August 1850. The defender was born in the ensuing October; the pursuer knew before the marriage that his wife was pregnant; and the fact that he married the mother of the defender, knowing at the time that she was with child, seems, according to every reasonable consideration, to suggest a presumption almost, if not altogether, as strong as would have existed if the pursuer had happened to be the husband of the defender's mother at the time of the defender's conception. No doubt the reasons for the presumption are not the same in the two cases. In the present case a moral element is the source from which the presumption is elicited. Can it be otherwise than presumed that a man who marries a woman knowing that she is pregnant, is the father of the child? We are so constituted that we cannot help concluding that he is, unless the contrary be indubitably established. In the other case the presumption results from that which is taken for granted, the intercourse following upon marriage. But it is really almost, if not altogether, as conceivable that the intercourse to which the conception is to be ascribed is not intercourse with the husband, as that a man who knew his wife was pregnant when he married her should not have had intercourse with her before marriage. The Lord Ordinary, therefore, regards the present case as one within the operation of the ordinary rule, that a child born in wedlock is to be presumed the child of the husband of its mother. The defender was born in wedlock; and so she must be held to be the child of the pursuer, unless the contrary shall be proved to the satisfaction of the Court. Has the contrary been so established?

"In dealing with this question the Lord Ordinary observes in the outset that there is the oath of the pursuer, and there is also the oath of his wife, the mother of the defender, that there never was sexual intercourse between them until after their marriage. Mrs Gardner further swears that a man named Laidlaw, who is now a flesher in Peebles, but who, at the time when the defender was begotten, was a shepherd in Cademuir, in her brother's family, where she resided, is the father of the defender; and she describes the place where, and the date at which, the one act of copulation which produced her pregnancy occurred. Laidlaw was called as a witness for the pursuer; and if he, upon oath, had corroborated Mrs Gardner's testimony, there would have been in the present case all the proof which, even in the days when the rule *pater est*, &c., was most stringently applied, seemingly was required. But Laidlaw denied that there had been sexual intercourse between him and the mother of the defender; and consequently what has in the circumstances to be considered is, Whether, without his evidence, or to put the thing more strongly, despite of his evidence, the case of the pursuer has been established? Laidlaw's denial, the Lord Ordinary thinks, cannot be regarded as conclusive. Indeed, nothing said by Laidlaw can, in the opinion of the Lord Ordinary, be taken as true, because he so swears. His deposition abounds with contradictions as well as with palpable falsehoods, and is in most important particulars a flagrant example of wilful prevarication. His letters to Mrs Gardner, which were put before him, and upon which he was examined, are not of themselves evidence that the statements they contain, and the inevitable inferences these statements suggest, are true; but they prove—and in this way they are by the general tenor of his deposition amply corroborated—that he is a witness whose sworn testimony is not to be believed. The consequence is, as the Lord Ordinary conceives, that Laidlaw's evidence must in effect be disregarded.

Corroboration of Mrs Gardner's testimony it certainly is not, and as a contradiction, which probably it was intended to be, it is self-condemned. All this, however, is subject to the observation that Laidlaw's conduct when first informed of the defender's claim to be recognised as the child of the pursuer, and appealed to for an acknowledgment that he was the father, is something like real evidence of at least the probability of the story told by Mrs Gardner. She and Laidlaw had not met since her marriage to the pursuer in 1850, and there had, neither directly nor indirectly, been any communication between them till the first of Mrs Gardner's letters relative to the defender's pretensions was sent to him, less than two years ago. That the appeal which was then made should have been ventured upon if he could not have been the father of the defender is very unlikely, and it is far more unlikely that on such a supposition he could or would have answered that appeal in the way he did. He in effect admitted—for his letters will bear no other interpretation—that there had been intercourse; but he refused, without further assurance, to admit that the defender was his child. The position he took up was simply this—'Intercourse there was, but it does not follow that the defender was my child. Satisfy me that she is, and the paternity will be admitted.' Strange it would be—very strange indeed—that a man should be selected, and a man, too, who on his own showing had been in former days a lover—who, when asked to declare that the defender was his child, should meet in such a way such a request—if, at the time the defender must have been begotten, that had not occurred between him and Mrs Gardner to which conception might be ascribed. Therefore—though the words of Laidlaw upon oath are not—the real evidence of his conduct is, the Lord Ordinary thinks, a corroboration, at least to some extent, of what has been sworn to by Mrs Gardner.

"Nevertheless, there is not his oath in corroboration, and so the consequence of the want of that must next be considered. The want is not necessarily a defect fatal to the case of the pursuer. Every such case, as has already been observed, is a case of circumstances; and if the evidence presented to the Court satisfactorily proves that the defender is not the child of the pursuer, judgment to that effect not only may, but must, be pronounced. Bearing in mind, then, that there are the oaths of the pursuer and of Mrs Gardner, it remains to be seen whether, in addition to the element of corroboration afforded by Laidlaw's conduct which has already been mentioned, there is not something more, and that something of the most conclusive kind, by which the case of the pursuer is supported.

"The pursuer was married to Mrs Gardner in August 1850. His home was then at Traquair Knowe, but the defender, who was born six weeks after the marriage, was not born there. Nor was this an accident. It was prearranged. Mrs Gardner came to Milne's Temperance Hotel in Edinburgh, and there she gave birth to her child. The day after, or the next day but one, the infant was taken away. Everything connected with the event was, to use the words of Mr Milne, the hotel-keeper, 'shrouded in mystery.' And so well was this mystery maintained, that for more than twenty years neither the defender, nor the nurse who took her away, knew or suspected where either parent was to be found. Mother, indeed, as well as father, remained to the defender, to her nurse, to those among whom she lived, to every one who took an interest in her, utterly unknown. Board for the defender was paid quarterly by Dr Thatcher, the money being provided by the pursuer till the defender was fourteen years old. Then she was left to provide for herself, which she did for more than six years by working in one of the mills near Loanhead. Such is the defender's history. On the question whether this treatment was right or wrong, opinions may differ; but the Lord Ordinary thinks opinions cannot differ as to the difficulty, if not the impossibility, of reconciling it with the idea that the defender is the child of the pursuer, or that there had been intercourse between the pursuer and the mother of the child in which its conception might have originated. Acts are often as strong evidence as words; and, in the opinion of the Lord Ordinary, the conduct of the pursuer testifies as strongly as his oath that the defender is not, and could not be, his child.

"If the pursuer and Mrs Gardner are to be believed, the case of the pursuer is complete; but there are circumstances, on the strength of which the counsel for the defender contended, in the course of an argument remarkable for its ability, that even allowing for such elements of real or supposed corroboration as exist, the testimony of the pursuer and Mrs Gardner on the cardinal point is not to be trusted. As regards the pursuer, it was said that the idea of his marriage in the knowledge that Mrs Gardner was with child is so inherently incredible that, whatever be the confirmatory evidence, it must be rejected. Improbable it is, certainly, but not necessarily incredible. In affairs of love it has often been said—and the saying has often been verified—'there is nothing too strange to be true.' The pursuer had long courted the woman who is now his wife; he was deeply in love; and though he was shocked by the announcement that she was with child to another man, his attachment remained unbroken; and this proved stronger than his self-respect. He acted under a double impulse. His affections could not be extinguished; and, moreover, he both desired and hoped that if he married his sweetheart things could be so arranged that her shame, which otherwise must inevitably have been divulged, and his own weakness, would remain concealed. The fact is, that for twenty years both were concealed. Not a relative, not a neighbour, not one interested in the pursuer or in Mrs Gardner, knew or imagined what has now been revealed to the world. This expectation, therefore, was not unreasonable; and, consequently, it cannot be unreasonable to conclude that it might be entertained.

"The payments made by the pursuer for the support of the defender during the first fourteen years of her life, and the offer of a large sum provided her claim to be considered his child were withdrawn, were also, in the argument of the defender's counsel, alleged to be virtual confessions of paternity. The Lord Ordinary, however, cannot so regard them. If the birth was to be concealed, plain it is that the cost of the child's living must, at least in its early years, be

provided; and the end to be served was held so important that the pecuniary cost was held as of comparatively no consideration. Besides, a refusal to pay aliment would not have secured immunity from liability. Mrs Gardner, at any rate, would have been liable for the support of her child; and from her husband, it might have turned out, her debt could be exacted. With reference, again, to the sum offered by the pursuers for an abandonment of the defender's claim, the view of the Lord Ordinary is that it is not a confession, but a protest against the reality of the defender's pretension. What he was willing to give for her disavowal was far more than she could now or afterwards extort as his child; and the knowledge that she is not and could not be his affords the only reasonable explanation of this part of the pursuer's conduct.

"With reference to Mrs Gardner, the strongest observation made upon her evidence was, that it was not consistent with what she said in childbed when the infant was about to be taken away by the nurse. 'Wrap it up in its father's plaid,' are the words imputed to Mrs Gardner; and assuming that she used them, the argument is that they overthrow everything which subsequently was said or done inconsistent with the idea that the defender is the child of the pursuer. Upon this point the Lord Ordinary has to say, first, that the evidence as to the use of the words in question is not all one way. Mrs Gardner repudiated the expression imputed to her; and in some things the evidence of Mrs Hutchison, on whom the defender so much relies, is open to unfavourable criticism. But, secondly, even if the Lord Ordinary were to take for truth all that has been said by Mrs Hutchison, he would not think the use of the words in question such a circumstance as overcomes all the other facts in the case. There is an explanation which seems satisfactory. Mrs Gardner, in the hotel where the child was born, was not spoken of by any one or regarded by any one as anything but a married woman; but everything, excepting the name she bore, was a mystery. Neither the people in the hotel, nor the monthly nurse, nor the nurse who took away the child, were told or otherwise knew or had the slightest suspicion of who or what Mr Gardner was, or where he lived; and so Mrs Gardner may have thought that the words in question contained no revelation. Looking at them in the light in which they may now be read, the Lord Ordinary's opinion is that they leave unshaken the proof by which the cardinal point in the case is, he thinks, established.

"Unfavourable comments were made upon other parts of the evidence given by Mr and Mrs Gardner. Their statements in particular points were contrasted with those of the defender, and the defender's friend and adviser, the Rev. Mr Kay. Well, there is a discrepancy. Everything said by all four cannot be reconciled. But it does not follow from this that Mr and Mrs Gardner are the witnesses who, in this conflict of testimony, are on the points in question to be disbelieved. The evidence of the defender is, in many particulars, weakened by contradictions, not merely of others, but of her own; and the least that can be said is, that it would be a strong thing to hold her in the right, and Mr and Mrs Gardner in the wrong, upon all or even upon any of the matters as to which there is contrariety of testimony. Mr Kay, again, has made himself as much a party in the case as if he were personally interested in the result; and on the question of comparative credibility the Lord Ordinary sees nothing in the evidence, and he saw nothing in the demeanour, of Mr and Mrs Gardner calculated to suggest, or warranting, upon a dispassionate view, the suggestion that they in anything they said were consciously giving what they knew was testimony inconsistent with the truth.

"As to the law of the case, parties may be said to be agreed, and therefore the Lord Ordinary thinks it unnecessary to comment upon, or even to mention, all the authorities which were cited for his information. All, and more than all, which have been brought forward on this occasion will be found collected in *Brodie* v. *Dyce*, Nov. 29, 1872, 11 Macph. 142, the latest of the cases in which a question any way analogous to the present was decided by the Court.

"The Lord Ordinary has now explained his views of the case. These have been formed after anxious consideration. He is sensible of its importance, but he has no misgivings as to the way in which it ought to be decided. He hopes that in coming to this conclusion he has not been unconsciously biassed by a circumstance to which he has not hitherto alluded, and indeed to which no allusion was made by counsel upon either side of the bar. That circumstance is the resemblance existing, as the Lord Ordinary thinks, between the defender and the witness Laidlaw. Of the reality of this likeness the Lord Ordinary is persuaded, but whether it can be regarded by others as more than a fancy, seeing that it was not even hinted at directly or indirectly by the counsel for the pursuer, is a question more easily asked than answered. Be this as it may, the Lord Ordinary has not made his impression a ground of judgment; and he has explained what he has set forth in this paragraph of his note because it is possible, though he regards it as improbable, that his views of the case may to some extent have been unconsciously influenced by a consideration for which, as things are, the only warrant is his own observation.

"The Lord Ordinary has only to add in conclusion, though he considers the case unfounded, he thinks it was only natural and reasonable in the circumstances that it should be submitted for judgment of the Court. This is the reason for which expenses have not been awarded."

The defender reclaimed.

Authorities cited—Lothian's Consistorial Law, p. 236; Stair, iii. 3, 42, and iv. 45, 20; Erskine Instit., i. 6, 47, Pr. i. 7, 36; Fraser on the Domestic Relations, vol. ii. pp. 16, 18; *Webster*, 24 Feb. 1855, 17 D. 494, and Lord Deas there, at p. 506; *Brodie* v. *Dyce*, 29 Nov. 1872, 11 Macph. 142; *King* v. *Luffe*, 8 East. 207, and Lord Ellenborough there; *Carruthers*, May 1812, F.C.; Dickson on Evidence, vol. ii.; Craig, ii. 18, 17, 20.

At advising—

Lord Justice-Clerk—The question we have to decide in this case is whether the pursuer has established that the defender is not his child, and according as that question is decided the remainder of the conclusions of the summons will fall to be determined. The action is one of putting to silence at the instance of an alleged

parent against one who asserts that she is his legitimate child. It is an unusual action, as generally the assertion of legitimacy comes from the child, and the father is content to deny the rights of legitimacy until they are established and enforced. I do not see, however, that the action is incompetent, although I do not recollect to have met with an instance of it before. But the pursuer of it undertakes a more weighty burden of proof than if he stood on the defensive.

The case in its detail is a very singular one, and raises questions of importance to the parties and of some novelty in the law. The undisputed facts are shortly these. The pursuer, who seems to be in a respectable position in life, had offered marriage to his present wife, who was then Miss Brodie, several years before 1846. She refused him at that time. He went to Australia, and returned in 1847, and after some years' courtship he again proposed and was accepted, and they were married in August 1850. At that time Mrs Gardner was pregnant, and it appears that prior to the marriage she had consulted Dr Thatcher of Edinburgh as to her condition, with the knowledge of her intended husband. The marriage took place, and six weeks or two months afterwards the pursuer brought her to Milne's Hotel in Edinburgh, privately, where she was confined of a daughter, who is the defender in the present action. The infant was immediately consigned to the care of a nurse, by whom she was carried away and consigned to the charge of a Mrs Hutchinson, with whom she resided until very recently. The pursuer made remittances through Dr Thatcher for many years, and apparently the girl was maintained in comfort, but from the time of her birth until 1872, a period of twenty-two years, she had never had any personal communication with her mother or the pursuer, although she had previously become aware of her supposed parentage, and had latterly communicated by letter with the pursuer, chiefly in the way of demands for money. In the end she asserted her right to be recognised as his daughter, and through the Rev. Mr Kay, the Free Church minister at Loanhead, near Lasswade, some communication passed on that subject. In 1874, for the first time, the pursuer alleged that her real father was a man of the name of Laidlaw at Peebles, with whom her mother had been intimate before his marriage, and in consequence of continued assertions the present action of putting to silence has been raised. The Lord Ordinary has decerned in terms of the conclusions of the summons, after considering a concluded proof, and has found that the pursuer was not, and could not have been, the father of the defender, and we are now to review his judgment.

There are two opposing theories to account for the conduct of the pursuer and Mrs Gardner in this matter. One is that of the pursuer himself. He says that his intended wife communicated to him some weeks before the marriage that she was in the family way, but without mentioning the name of her seducer,—that she had been taken advantage of on one occasion on the hill, and that her condition was the result. He states that, seeing no other way to save her reputation, he hastened the marriage and adopted the other steps which I have described, but that the child was not his daughter, although any farther proceeding on his part could only have frustrated his object, and given notoriety to what he was anxious to conceal. The other theory is, that the pursuer, being the son of a minister, and the brother of a minister, and himself an elder of the church, adopted these proceedings for the purpose, not of screening his wife, but of screening himself—that he was himself the father of the child, and kept its birth secret to avoid the personal and family scandal which it would have occasioned.

It is impossible not to see that what he did might have proceeded from either of these motives. If in reality he was not the father of the child, and resolved to proceed with the marriage notwithstanding—a course not very reconcileable with the ordinary motives of human nature—the steps which he adopted were those by which alone his object could be attained. As a single woman, it was impossible for Mrs Gardner to have been confined without inquiry and detection, and to expect him, after the sacrifice which he says he made, forthwith to proclaim his wife's frailty, and to make a charge against another which he probably felt he might not be able to prove, would be entirely inconsistent with any view of the fact,—and the prolonged cross-examination on this head seems to me entirely without point. In that view, however ill-judged his conduct was, it was not destitute of humanity even to the object of it, for the disclosure of the paternity which he alleges, while it would have disgraced his wife, could have been of no benefit to her. On the other alternative, his conduct would be without defence, for on that assumption he sacrificed the status of his legitimate daughter to his own reputation and position in the world.

In cases of this kind relative to status and legitimacy, especially where the interval of time has been great, more light is to be derived from the presumptions of law and fact raised by the conduct of the parties than can be gained from direct evidence. But before I deal with the presumptions which arise in this case, I shall very shortly state the impression which the direct testimony has made on my mind.

The contention of the pursuer is that he is not and could not have been the father of the defender, but that the father is the witness Laidlaw, who at that time was a shepherd in the employment of Mrs Gardner's brother at Cademuir, where he was for ten years from 1846. As far as his own evidence is concerned, he knew of his wife's intimacy with this man only from her own statement, she having disclosed his name a year after the marriage, when she thought herself dying. Beyond this his testimony only amounts to a denial of any improper intimacy with his wife before marriage. But Mrs Gardner is examined and tells the story in detail. She says in substance that on one occasion several months before her marriage she met Laidlaw on the hill by appointment, and that the intercourse then took place which resulted in the birth of the child. It is impossible to deny that the coincident testimony of the husband and wife is an important element in the case, and has always been so considered in questions of this kind—so much so that both Craig and Stair lean to the doctrine that the concurrent testimony on oath of the father and

mother will be sufficient to overcome the presumption arising from a child being both conceived and born in wedlock. Though I cannot hold this to be law, it is still a very important element in this case, that not the husband only, but the wife also, the mother of the child, encounters the disgrace which the confession implies, and states on oath that not he but Laidlaw was the father. I am very far, however, from saying that the mere statement of the husband and wife is necessarily sufficient to decide the legitimacy of the defender. It would be hazardous to make any such assumption.

The case, however, does not rest there, for Laidlaw, the shepherd, is examined, and he admits that he did meet Mrs Gardner on the hill by appointment. Indeed he says that they often so met, that he sat for an hour with her under the same plaid, that endearments passed between them, and although he denies that they resulted in intercourse, it is quite clear from the expressions in the letters written shortly before his examination, and from his answers when examined upon them, that these equivocal denials truly amount to an affirmative of the fact which he was intended to prove. I may observe in passing that of the competency of admitting his testimony and importing into it the letters, the writing of which he acknowledged on oath, I have not the slightest doubt; nor does it signify to the substantial result of his testimony, that though an interested and reluctant witness he was called for the pursuer.

I am of opinion, therefore, that as far as that fact is material in the case, it has been proved that Mrs Gardner had improper intercourse with this man Laidlaw before her marriage. But assuming this to be so, there is one very serious defect in the evidence in establishing the proposition contained in the summons. Laidlaw does not, and cannot, fix the time of this event. Indeed his letters indicate this very plainly. Notwithstanding his futile attempts to explain away the expressions contained in them, they truly mean nothing but this,—what you say as to our intimacy is quite true, but before I can say I am the father of your child you must satisfy me as to when this took place, for I do not recollect it, and if you meant to make this charge you should have made it four and twenty years ago.

Such, shortly, is the case of the pursuer on the direct evidence, and the Lord Ordinary, who saw the witnesses, takes the same view of its import. But it is manifest that the intimacy with Laidlaw, even were the time proved, is only half the pursuer's case. He has still to prove, and he undertakes the negative, that he had no intercourse with Mrs Gardner before marriage. Now, on this point there is one consideration, and one only, which is material in the direct evidence for the defender. I attach no importance whatever to the account given by the defender of her conversation with her mother. I think it bears improbability on the face of it. It is impossible to suppose that the mother, who had gone to Loanhead for the purpose of satisfying Mr Kay that Laidlaw was the father of her child, should immediately after she had made that statement have told her daughter a story exactly the reverse, knowing, as she must have known, that it would be immediately repeated. The story is itself absurd, for she represents her mother as saying that the man she met on the hill was the pursuer, it being quite certain, on the one hand, that she met Laidlaw on the hill, and equally certain, on the other, that the pursuer would never have chosen such a place for an assignation with his promised wife. The defender, a few minutes afterwards, heard the reverse stated by the pursuer in Mr Kay's presence without remark, because, as she now says, she was pledged not to tell, and she straightway proceeded to put Mr Kay in possion of this alleged communication. Looking to the statement which she makes about the letter which she says her mother wrote to her, which, if it had been preserved, would have been conclusive of this case, I am not disposed to attach weight to her unsupported testimony.

But Mr Kay's evidence stands in a very different position. He distinctly speaks to the pursuer having confessed to him that he had taken liberties with his wife before marriage. I cannot discard this evidence as worthless. It is exceedingly material, although not in itself conclusive. I may add on this point of the case that the communications with Dr Thatcher seem all to have proceeded on the footing that the pursuer was the father of the child, although that also is not irreconcilable with the design which the pursuer professes to have been anxious to accomplish.

If the evidence rested there I should have found it to be distressingly perplexing, and I should have doubted whether, although the balance might incline to the affirmative of the summons, the proposition contained in it was proved. I do not regard as of any consequence the alleged inconsistencies on the part of some of this testimony. They are almost inseparable from an investigation of this nature. But if it remained doubtful, as I think it does, first, whether the intimacy with Laidlaw corresponded in point of time with the birth of the child; and secondly, whether the pursuer had taken liberties with Mrs Gardner before marriage, the pursuer cannot prevail. But I pass from the direct testimony to what I consider of far more importance in this case, the presumptions derivable from the conduct of the parties.

We must assume that in our own law, which in this respect differs from that of England, the application of the maxim *pater est quem nuptiæ demonstrant* depends not on the time of the birth, but on the time of conception. That has long been a controversy among Continental jurists, and there will be found in the 17th vol. of the French Causes Celebres a case before the Senate of Turin having features in some respects analogous to the present—very full and learned arguments on both sides of this question. But with us, all our Institutional writers are agreed that such is our law. But it by no means follows that the fact that the child is born in wedlock may not raise a presumption of fact of the greatest possible moment, and even in those systems which, like our own, reject the maxim as a presumption *de jure* where the birth is not in what is called *justo tempore*, that fact has often been accorded the greatest possible importance. I cannot better express the view which I take of the Scottish law on this matter than in the words of Sir Islay Campbell, as noted in his Session Papers in the case of *Leper*, Hume 488:—"Case of a child produced 5 months, and no more, after

the marriage took place. *Pater est quem nuptiæ demonstrant* does not seem to apply. It may perhaps *in dubio* be presumed that the husband had antenuptial dealings with the woman, but this is a much weaker presumption, depending on circumstances, and not *presumptio juris et de jure*. All that can be said is that the favour is for legitimacy, *i.e.*, legitimation *per subsequens matrimonium*, which our law allows; and therefore will presume this rather than bastardy if no circumstances to the contrary appear. But here the circumstances are almost conclusive that Brown is the father." See Session Papers, vol. 107, No. 72 (Fac. Lib.).

We must look, therefore, to what the presumptions are deducible from the conduct of the parties. One thing the pursuer has in his favour—He did not treat the defender as his legitimate daughter. He sent her away and kept her out of sight, and therefore she had no reputation of the status of legitimacy. But, on the other hand, there are these four considerations which tend very strongly in an opposite direction. They are first,—That Mrs Gardner's pregnancy took place during the pursuer's courtship, and was followed by marriage. Secondly, that the pursuer admits that he was aware of her condition when he married her. Thirdly, that the pursuer did not openly disclaim the child, or charge any one else with being her father, but on the contrary assumed the burden of her maintenance and education as incumbent on himself. And lastly, that he never said to any one that he was not the father, or put the paternity on Laidlaw for four-and-twenty years.

As to the first—the presumption arising from courtship and subsequent marriage—I may refer to an opinion of the celebrated Chancellor D'Aguesseau, recounted by Merlin in his Repertoire, a work which, under the head of *Legitimité*, contains the fullest dissertation on this subject of which I am aware. It will be found at page 230. The French law coincided with ours in regard to the maxim *pater est quem nuptiæ demonstrant*, and D'Aguesseau, speaking of the presumption which may arise when the child is born in wedlock, but not *justo tempore*, puts the two cases of the marriage being anterior to the time of conception, and the intercourse not being followed by marriage at all; and then he proceeds—"But if there be found at the same time both an intimacy (*frequentation*) at the time of conception and also a marriage at the time of the birth, can one not say that these two facts united form a presumption, less strong, it is true, than the first, because it is absolutely founded on marriage, but much stronger than the second, because it is not founded solely on the previous intimacy, and that the marriage which followed gives it a degree of force of evidence and of authority which it is almost impossible to resist." This *dictum* from so high an authority is followed by a detail of several cases, one of which—that of *L'Heritier*—bears a very singular resemblance to the present, and in which the legitimacy of the child was sustained. I cannot but regard as a very important circumstance that the conception took place during the period of the pursuer's courtship, and that it was followed by marriage. But the second consideration which I mentioned adds infinite force to the first, for it is not only a presumption of fact, but it is a conclusion founded on the ordinary laws of social action, that if a man marries a woman in that condition it is because it is the only reparation he can make her. It may not be so in point of fact, but he who follows this course must expect to have the ordinary convictions of society applied to him. I do not say that the presumption may not be overcome, although that has been the law of England for centuries; and even Craig in his treatise sneers at this peculiarity of the law of England, which he thinks inconsistent with their rejection of legitimation by subsequent marriage. But the force attributed to such an act by great lawyers receives a strong testimony from the fact that the Code Napoleon, while following the civilians, who hold the right of a husband to disclaim a child not born *justo tempore*, provides in the 314th article—"A child born within 180 days from the marriage shall not be disavowed by the husband in the following cases; and the first of the cases is—"If he had knowledge of the pregnancy before marriage." We do not, and cannot, follow this as authority, nor should I lay down the rule in these terms, but I think that, coupled with the previous courtship, it lays upon the pursuer an obligation of unquestionable proof, which he has not been able to sustain.

As regards the third—that the husband never publicly disavowed the child, but continued to aliment and support it—while it does imply that he was ashamed of its birth, implies also an admission of his parental obligation, or even if it did not necessarily support that inference, it is inconsistent with that of prompt, distinct, and unequivocal assertion, which is essential to prevent the legitimate construction which the public and the law will put upon his acts. Here again the Code Napoleon furnishes an illustration; for it goes so far as to provide (sec. 316)—"In the different cases where the husband is authorised to disavow, he must do so within a month if he be on the spot where the infant is born." Lastly, the lapse of time, for which the pursuer is entirely responsible, raises the strongest presumption against his attempt, after the lapse of twenty-four years, when many of the witnesses who could have given testimony must be dead, and the events passed from memory, and most of the details unknown, to deny the paternity which he has practically assumed during the whole period, and to fix that paternity on another who never heard of the charge during the whole of that interval. I think that would in many cases, and would in this, be of the most dangerous results to the public. The status of legitimacy is matter of public policy, and depends more, as I have said, on presumptions arising from conduct than on direct evidence of a fact on which certainty never can be attained. The story of the pursuer may be true, but his conduct, in my opinion, has precluded him from proving it.

Lord Neaves—I am of the same opinion as your Lordship in the chair, and I consider this to be an important case, as its effects upon the rights of the parties concerned are very material. I may also add that I have arrived at this conclusion upon grounds in every important particular similar to those taken by your Lordship.

As general principles, I may state the following to be my views:—*Firstly*, The presumption is always in favour of legitimacy, and that in favour

also of every one, even though the paternity be unknown. It is necessary for the Crown or the other party who is claiming to get over this presumption, and to establish a case against the legitimacy of the person in question. *Secondly*, There is a presumption founded on the legal maxim *pater est quem nuptiæ demonstrant*. Now, in this case I think the Lord Ordinary has put matters even a little higher than the law does. Nevertheless, this presumption is not so strong, even though the child be born in wedlock, that it cannot be rebutted on clear proof that it could not have been begotten by the husband. The presumption, where the birth occurs within a short time after the marriage, is not quite the same. A child born within two or three months after marriage might almost, under certain circumstances, be presumed to be the child of another man. Thus, for instance, if a widow marry again within a short time of her husband's death, and bear a child within a month or two of such second marriage, the offspring may be reasonably presumed to be the issue of the deceased husband. But there are circumstances, on the contrary, by which the very fact of the shortness of the period between the marriage of the parties and the birth of a child may be converted into a strong presumption in law and fact in favour of the husband being the father of the child.

The general rule in adjudicating questions of legitimacy has not in view the inquiry (indeed, I doubt whether such inquiry is relevant) whether some other man than the husband might be the father of the child. We have therefore, keeping in mind these principles, to consider the circumstances of the present case, and whether they strengthen or weaken the position of the defender. Now, if a man marries a woman who is visibly pregnant, that, apart from anything else, will give a strong presumption in favour of his paternity. No man would act in this way if the child were another's unless he was very devoid of proper feeling. That the pursuer knew of Miss Brodie's pregnancy before their marriage is certain; indeed, he admits it himself. I cannot for a moment suppose that Dr Thatcher advised Miss Brodie, after her first visit to him, to go and entrap a man who was not the father of the child into a marriage in consequence of her pregnant state, and to conceal it. It was held out to Dr Thatcher, so far as we can learn, that the child was legitimate, and the issue of Mr and Mrs Gardner. No doubt we can only infer that as Dr Thatcher is dead, but we have his books, so far as they throw light on the matter. Then Mr Gardner did marry Miss Brodie knowing her state, the child was born, and he took it up and kept it at his own expense. All this raises a very strong presumption of facts and circumstances. It is no wonder that the child was sent away at once, it was born much too soon for the unblemished reputation of Mr Gardner and of Mrs Gardner. Then, the child once away, it is easy to understand what happened. Mr and Mrs Gardner had other children, were held in esteem in the eyes of the world, and might not wish the world to know what had happened. If Mr Gardner found himself in the position of his wife's being in wedlock delivered of a child, he was bound to make up his mind definitely either to acknowledge it as his own or at once to repudiate. He cannot take benefit from doing one thing at the time and another afterwards; from first admitting, as by his actions I think he did, that it was his child, and afterwards denying it and saying it was another man's.

If both Laidlaw and Mr Gardner had connection with Miss Brodie before her marriage to the latter, there could be no doubt that in law Mr Gardner would be held to be the father of the child; and the possibility of Mr Gardner having had such connection not being excluded, I am unable to arrive at the Lord Ordinary's conclusion, and think that Mr Gardner must be deemed the defender's father, and that she must consequently be assoilzied from the conclusions of the summons.

Lord Ormidale—As observed by the Lord Ordinary, this is a remarkable case, and I may add, one as well in its form as in its circumstances of a very unusual description. No objection, however, has been taken to its competency, and I do not say that it is incompetent. But there can be no doubt that the pursuer in such a case, having regard to all its circumstances and the decree of declarator he concluded for, to the effect that the defender is not his child, and that she "ought and should be decerned and ordained to desist and cease in all time to come from asserting or otherwise representing, directly or indirectly, that she is the child of the pursuer, and that she ought to be put to perpetual silence thereanent," undertakes a very onerous burden, and one of which he cannot, I think, be relieved except on the clearest and most conclusive evidence.

I am not, however, to be understood to mean that the pursuer is confronted with the maxim *pater est quem nuptiæ demonstrant* in the sense that he must be held to be the father of the defender in respect she was born, although not conceived, in wedlock, unless he proves the impossibility of his being so from impotency or want of opportunity of intercourse owing to absence from the country or other circumstances. On the contrary, the proved and undisputed fact that the defender was born within two months after the pursuer's marriage to her mother must be held, on the authorities cited in the course of the argument, to render inapplicable the maxim referred to. It rather appears to me, therefore, that the Lord Ordinary, while he has decided against the defender, has extended and applied the maxim *pater est quem nuptiæ demonstrant* too favourably for her, keeping in view the short time which elapsed between the date of the marriage of the pursuer with her mother and her birth.

But, although the defender can in the circumstances take little or no benefit from the presumption embodied in the maxim referred to, there are other presumptions arising from the circumstances of the case which the pursuer has to contend with, and to overcome, before he can succeed.

There is the presumption arising from the circumstance that for some time—according to the pursuers four or five weeks — before his marriage with the defender's mother, he became fully aware that his wife was with child. That he should, notwithstanding this, have married

the defender's mother, assuming that he was the father of her child, is quite intelligible and not surprising. By doing so he only made her the reparation which was due from him, and to which she was entitled. And besides, by marrying the mother at the time he did he would not only legitimate his offspring, but also make it certain that his child would be born in wedlock. It is to be presumed that a person not insane, but in the full possession of his faculties as the pursuer was, intended what his acts and conduct were calculated fairly and reasonably, if not necessarily and unavoidably, to lead to. On the other hand, it is all but incredible that the pursuer, an educated man of mature years (about 45), and occupying a respectable position, should have voluntarily and deliberately married the defender's mother in the knowledge that she was far gone with child—a child which could not possibly be his, but the fruit of her connection with some other man, and that too while, if he is to be believed, he was paying his addresses to her in honourable courtship. The presumption is to my mind almost irresistible, that neither the pursuer nor any individual circumstanced as he was would have so acted. To suppose the contrary would be to disregard all the ordinary motives and springs of human action. Nor do I think it improves the position of the pursuer, but on the contrary renders his conduct all the more unaccountable, that on his ascertaining before the marriage the condition in which his wife was, she refused to disclose to him the name of the individual with whom she must have had illicit intercourse, notwithstanding that he desired and pressed her to do so.

And what is the reason given for such extraordinary, and I think I may say unnatural, conduct on the part of the pursuer. None, positively none, that is worthy of serious consideration. He says, no doubt, that if he did not go on with the marriage he was afraid the defender's mother might do injury to herself, but I can see nothing in the proof to support the pursuer in this statement. His wife does not do so, and she is not even asked a question on the subject.

Without, therefore, going the length of saying, in accordance with the opinion referred to in a foot-note at p. 403 of Phillip's Treatise on Evidence, vol. i. 8th ed., "that if a man married a woman visibly pregnant it is a conclusive inference of law that the child is legitimate," I must repeat what I have already said, that the pursuer is at least met at the outset by a very strong and weighty presumption adverse to his contention in this case, which it is incumbent on him to get over by very satisfactory evidence.

Another adverse presumption, scarcely less formidable, which the pursuer has to encounter, is that arising from his own as well as his wife's silence for so long a period as about twenty years, during which he kept the defender in ignorance of her paternity, and abstained from intimating to Laidlaw, whom he now says is her father, or mentioning to any one else that he was not himself her father. I must own my inability to reconcile such conduct with what I must hold to have been his duty to the defender, whether he was her father or not. If he was not her father, or at least was not to be held as adopting that position, what right had he to treat her as he did? What right had he to send her away almost immediately after her birth with Mrs Hutchison, and leave her for many years in the keeping and charge of that person without disclosing who her father was? I find it difficult to answer these questions, and when I keep in view that for twenty years or more he supplied the requisite funds for the defender's upbringing, acting so far towards her as if he were her father, I feel myself almost driven to the conclusion that he was either in very truth her father, or must be held to have adopted her as his child, and is now barred from maintaining that she is not.

In support of this same view, the consequences to the defender in the loss of evidence bearing on the question of her legitimacy is not to be overlooked. Take, for example, Dr Thatcher senior, who was consulted by the pursuer some time before the marriage as to Mrs Gardner's condition, and who acted as accoucheur at the birth of the defender, and Mrs Robertson, the sick nurse, who attended the defender's mother at the birth and for some time afterwards, both of whom have long since died. It cannot be doubted that Dr Thatcher senior and Mrs Robertson might, and most probably would, have been able, if alive, to throw a great deal of light on the present subject of inquiry. Dr Thatcher could have explained what he meant, on ascertaining the condition of Mrs Gardner a short time before her marriage, by telling the pursuer the sooner she was married the better. He could not well have advised the pursuer to marry her if he was not satisfied that he was the cause of her condition. And Dr Thatcher could also have given explanation not only of the particulars noted in his visit book, as shewn in the excerpt therefrom, No. 62 of process, but stated, what would have been most material, who were "the child's parents" referred to in his memorandum, No. 63 of process. As to Mrs Robertson, again, the serious nature of the loss to the defender sustained by her death appears from the evidence of Mrs Hutchison, the person with whom the defender was after her birth sent away, and with whom she resided for many years. Mrs Hutchison says, among other things—"I called the child Mary Gardner. I got the mother's name from Mrs Robertson." And again, in a subsequent part of her evidence Mrs Hutchison says, on being asked whether Mrs Robertson told her about the father of the child—"No, she never said anything but that Mr Gardner was the father, but she said that. (Q) Did she say that Mrs Gardner told her so when on childbed?—(A) Yes. (Q) Did she tell you that Mrs Gardner had told her so frequently afterwards?—(A) Yes." It is true that from other answers given by Mrs Hutchison the real import and effect of what she says she heard from Mrs Robertson is attended with some doubt, and cannot now be cleared up in consequence of the death of Mrs Robertson—another striking example of the great disadvantage to which the defender is subjected by the ignorance in which the pursuer managed to keep her for such a length of time in regard to everything connected with her parentage. It is hard, however, that the defender should suffer more than is unavoidable from the loss of evidence not arising from any remissness on her part, but solely from the conduct, purposely per-

sisted in for such a length of time, of the pursuer. To some extent, therefore, I think it only just and conformable to legal principle that the evidence now lost to the defender must be presumed, if it had been available, to have told against him.

At the same time, and giving all due effect to the presumptions to which I have now referred, I cannot say that the pursuer is to be held as precluded from rebutting them and shewing, if he can, that he is entitled to the decree for which he concludes, and which the Lord Ordinary has pronounced in his favour. The question is—Has he done so?

Although a considerable number of witnesses have been examined in the case, it rather appears to me that the determination of the disputed question depends substantially upon the presumptions I have noticed, and the view that may be taken of the testimony of the pursuer himself, his wife, and John Laidlaw, on the one hand, and the defender, the Rev. Mr Kay, and Mrs Hutchison on the other.

The great object of the pursuer in the proof was to make out that prior to his marriage with the defender's mother she had carnal connection with John Laidlaw, and that he and not the pursuer is the defender's father. It would no doubt be very important for the pursuer, although not conclusive, if it had been established that before his marriage sexual intercourse had taken place between his wife and Laidlaw. But I must own I am not quite satisfied that the proof warrants such a conclusion. The only evidence bearing on the matter is that of the pursuer's wife and Laidlaw himself. Now, in regard to the pursuer's wife, I feel myself unable, looking at her conduct from first to last, to give any effect to her testimony, except in so far as it is otherwise distinctly and unequivocally supported and corroborated. But not only are her statements uncorroborated, but they are also far from consistent or credible in themselves, and in many particulars of more or less importance, directly contradicted and shown to be incorrect by the other evidence in the case. Thus, while she says in one part of her evidence, when examined as a witness, that Laidlaw had connection with her only once, she, according to the pursuer's statement in the record (Cond. IV.) told him that she had connection with Laidlaw "on two or more occasions;" and when pressed at her examination she says, "I only remember of two times"—explaining, however, that on one of them he succeeded, but on the other made the attempt merely. Again, while in one part of her evidence she says that she was waylaid and violated by Laidlaw, notwithstanding all the resistance she could oppose to him, she in another part admits that she had met him on the hillside, where the alleged violation took place, by appointment, and that she always thought a great deal of him. And certain it is that there is nothing whatever to show that she complained to any one, or otherwise acted at the time, as it must be presumed a virtuous female would have done had she been waylaid and violated by her brother's shepherd. On the contrary, she expressly says that "there was no difference in my conduct towards him after the occurrence of what I have described." Over and above all this, there are the inconsistent and contradictory statements regarding the matter made by the pursuer's wife to the defender and Mr Kay. The defender says that her mother told her she had been waylaid by a man with a plaid, who, without ever speaking to her, got the better of her and then went away, evidently meaning to convey the impression that the man was a stranger to her. Then, on Mr Kay coming in and asking her who the man was, she said she could not tell, but he was a gentleman and had a plaid on. She no doubt denies that she made this statement, but Mr Kay distinctly corroborates the defender in regard to it; and for my own part I can see nothing in his evidence, or otherwise in the case, to lead me to discredit the statements of Mr Kay, especially in so far as they coincide with those of the defender.

Nor is the matter regarding the account given by the pursuer's wife of the meeting she had with Laidlaw, or some other man, on the hill side of Cademuir, improved by the statements of the pursuer himself, for not only are they in themselves inconsistent and contradictory in many essential particulars, but they are also inconsistent with and contradictory of the statements made by his wife, and the communications made by him to the defender and Mr Kay. Thus, while the pursuer says that when, prior to his marriage, his wife told him of her being in the family way, he got no further information from her except that she had "been forced by a blackguard on the hill," and that although he certainly pressed her on the subject, she would tell him nothing except that she had been "waylaid by a blackguard and abused," and that she gave him to understand it was a man she had never seen before, and whom she knew nothing about. But the pursuer's wife says that although the pursuer asked her who the man was, "he did not press me to tell him." And the matter does not rest there, for, according to the defender and Mr Kay, the pursuer, at one of his interviews with them, expressly stated that he did not know who the defender's father was farther than that he was a dissipated man and out of the country, although long before this, according to his own and his wife's testimony, he was told by her that Laidlaw was the father. Not only is this flagrant contradiction established by the evidence of the defender and Mr Kay, but by the testimony of the pursuer himself, for he expressly says that "when my wife first told me of the circumstances connected with her getting into the family way, she spoke of a blackguard having waylaid her on the hill, and when she thought she was dying, a year after we were married, she revealed the name of the man—John Laidlaw." And Mr Kay says that, in answer to some questions of his, the pursuer stated "that Mrs Gardner had been met by a man on the moor, and that he had forced her, and that having forced her, she was in this condition. I put the question to him, Where is that man? He said he did not know. I asked, Is he in the neighbourhood of your place, or in the neighbourhood just now? He said, Not just now. Could he be found, I asked. No, he said. Where was he, I asked. He said he thought he was not in the country at all; and that owing to his conduct with Mrs Gardner he had become a dissipated man. I have a distinct recollection of Mr Gardner telling me these things."

But further still, and what perhaps is of more importance than anything that has been yet noticed, it is clear, unless the defender and Mr Kay are to be held as perjured witnesses, that the pursuer had confessed to him that he had at least attempted, if he did not succeed, to have sexual intercourse with Mrs Gardner before their marriage. The defender states that at one of the pursuer's meetings with Mr Kay, when she was present she heard him say that he had once tried to take advantage of Mrs Gardner. "I heard him say that. Mr Kay had asked him about the hill meeting, and Mr Gardner said he had once tried to take advantage of her." Mr Kay is even more full and explicit. He says, "Mr Gardner and I had a meeting in March 1874. Mrs Gardner and Mary were present. (Q) Was anything said on the occasion by Mr Gardner as to anything taking place between him and Mrs Gardner prior to their marriage?—(A) Yes. By that time Mary had told me her mother's story to her, and I told Mr Gardner what Mary had said, and among other things, that Mr Gardner had said that he had attempted to force her once, and also a second time. To which he returned answer and said, Well, I confess I tried it once. (Q) That was, that he had endeavoured before marriage once to have connection?—(A) To force her. (Q) To have connection?—(A) Yes. (Q) What was it you understood he had tried to do—to commit a rape or to have connection with her?—(A) The position I put is this—I am told that you courted Mrs Gardner, and had frequent meetings with her, and on one occasion you tried to force her when she was unwell, and you didn't succeed. On a second occasion you forced her, having trysted her to a different place on the moor, and that you had succeeded only too well the second time. He immediately added, Well, I confess to having tried it once. He did not confess to having been successful. It was at that meeting, immediately after the confession, that he made an offer of £1000. He just said, I am here to make a settlement."

Bearing in mind these portions of the evidence, together with the whole proof, so far as it is of any materiality, I must own my inability to come to the conclusion that the pursuer has established his case. On the contrary, I am disposed to think, when I keep in view the evidence of Mrs Hutchison, of the defender Mary Gardner, and of Mr Kay, that the paternity of the defender has been made out against the pursuer rather than Laidlaw. I am not to dispute, however, that the testimony of the defender, especially as regards the letter she says she received from her mother, but destroyed, acknowledging that the pursuer was her father, is open to much unfavourable remark. In regard, therefore, to the defender's own testimony, I have given effect to it only in so far as it is distinctly supported and corroborated by Mr Kay, whose evidence I cannot see is exposed to any well-founded objection. He has no disqualifying interest in the controversy; and it is only fair to presume that an educated man, and a clergyman as he is, would tell the truth, and nothing but the truth, as I believe he has done. The testimony of Laidlaw stands differently, and is certainly in many respects very equivocal and unsatisfactory. But he is the pursuer's witness. Now, according to the pursuer's contention—and the exigencies of his case require it—Laidlaw must be held as stating what is false in all the more important points at issue between the parties, especially as stating what is false when he says that he never at any time had sexual intercourse with the defender's mother. In the words of the Lord Ordinary, "his deposition abounds with contradictions as well as with palpable falsehoods, and is in most important particulars a flagrant example of wilful prevarication. His letters to Mrs Gardner, which were put before him, and in which he was examined, are not of themselves evidence that the statements they contain are true; but they prove—and in this way they are by the general tenor of his deposition amply corroborated—that he is a witness whose sworn testimony is not to be believed." All I can do with evidence so characterised by the Lord Ordinary, I think correctly, is to refuse any weight to it as against the defender.

In this view, the pursuer's case is left on the evidence of himself and his wife. Now, although the pursuer denies that he had actual connection with the defender's mother before their marriage, it is proved, I think, by testimony which cannot be disregarded, that he on one occasion at least, before the marriage, endeavoured to have connection with her. And the proved, and indeed admitted, levity and looseness of conduct —not to use any stronger language—of Mrs Gardner prior to her marriage, renders it not unlikely that the pursuer may have gone further than he has admitted, and might have been the defender's father. As previously observed by me, it is all but impossible to suppose he would have married her mother at all in the condition he knew her to be in, except in the knowledge that he himself was, or might have been, the cause of that condition. Neither is it unaccountable that the pursuer, the son of a clergymen, the brother of another, and himself an ordained elder of the Presbyterian Church, should have been anxious to conceal the birth of the defender and the circumstances in which it occurred.

But, whatever may have been the motives of parties, and whatever may be the truth of the case, the pursuer cannot prevail without establishing by clear and unmistakeable evidence that he is not the father of the defender. And although unwilling to interfere with the judgment of the Lord Ordinary, who, it is evident from the able note to his interlocutor, has bestowed great pains on the case, I am unable, having regard to all the circumstances, and the presumptions against the pursuer arising from his own actings and conduct, to come to the conclusion that he has relieved himself from the burden he has undertaken. On the contrary, the only conclusion I can come to is, that the pursuer has failed to establish his case, and therefore, that the interlocutor of the Lord Ordinary ought to be recalled, and the defender assoilzied from the conclusions of the summons.

Lord Gifford—This is a very interesting and important and a very difficult case, and it is only with great hesitation and after very anxious consideration that I have come to concur in the opinion now expressed by all your Lordships, that the interlocutor of the Lord Ordinary ought to be recalled and the defender assoilzied from the conclusions of the action.

In one point of view the question is entirely one of fact dependent upon the evidence, and the Court are called upon to decide, in point of fact, upon that evidence whether or not the pursuer is the father of the defender Mary Gardner. In another, and perhaps a more accurate, point of view, however, the question is one as to the effect and force of certain legal presumptions from which paternity is to be inferred; and the difficulty of the case consists in rightly estimating the force and effect of the presumptions which arise from the circumstances proved in evidence, and in determining whether these presumptions have or have not been sufficiently overcome by the contrary evidence relied on by the pursuer. "The birth" of a child, said Lord President Blair in *Routledge* v. *Carruthers*, May 19, 1812, "is a fact which may be proved by witnesses, but the conception is a fact that can never be proved," but can only be inferred from the position and relation of the supposed father. Paternity in this view is always a matter of inference or presumption, never of direct proof, and according to the special circumstances of each case the presumption or inference of paternity will be more or less strong, in some cases being so strong as to be almost irrefragable, and in other cases being so weak as to be easily overcome.

The best known, and in general the strongest, of these presumptions is expressed by the rule *pater est quem nuptiæ demonstrant*. A child conceived and born in marriage is presumed to be the child of the married spouses. In strictness this maxim only applies to cases where the child may have been conceived during the marriage, and I think it is the result of all the authorities that the maxim does not apply where the child is born ten months after a marriage is dissolved or within six months after its celebration. In such cases, however, other presumptions may arise from the special circumstances, which may raise an inference almost as strong as that which arises in the proper cases to which the maxim is strictly applicable. In the present case I agree with your Lordships that the brocard does not in strictness apply. Mary Gardner, the defender in this action, was born only six weeks after the marriage of Mr and Mrs Gardner. It is therefore impossible that she could have been conceived in wedlock, and so the *nuptiæ* cannot of themselves demonstrate who the father was.

The presumption arising from conception, or possible conception, during marriage is a mere presumption, which may be rebutted and overcome by clear and satisfactory contrary evidence. The law of Scotland has never made or treated this strong presumption as a *presumptio juris et de jure*. It must yield to evidence, and I think the law of Scotland has always been that the presumption may be overcome, not only by evidence that it was physically impossible that the husband of the mother could be the father of the child, but by every species of moral evidence sufficient to satisfy a reasonable mind that the child was begotten by some one else than the husband. From the authorities which have been cited to us this seems also to be the rule in England—at least since the decisions in the *Banbury* peerage case, and in the subsequent case of *Morris* v. *Davis*, 1837, 5 Clark and Finnelly, 463.

Now, I am of opinion that the rule of law is exactly the same in regard to all other presumptions of paternity which may arise from the special circumstances of each particular case. They are all mere presumptions, which may be overcome, and not fixed rules which must be accepted as conclusive, and the two questions which will arise in every case, and which arise in the case before us, are, first, what is the strength of the presumptions which the circumstances create? and second, Is the contrary evidence sufficient to overcome and to set aside these presumptions.

In the present case I shall confine myself to indicating very shortly the grounds of my opinion that the presumptions which arise in favour of Mary Gardner's legitimacy—that is, the presumptions that the pursuer is her father— are so cogent that they have not been overcome even by the very considerable body of contrary evidence relied upon by the pursuer.

In the first place, a certain presumption of paternity arises from the bare fact that a man knowingly marries the mother of an illegitimate child previously born. But this is a very weak presumption. In the absence of all other evidence, all that can be said is probably that it is more likely than not that he is the father. Such presumption would be greatly strengthened if previous to the marriage the mother of the illegitimate child had been the mistress or concubine of the man who afterwards married her, and had cohabited with him at or about the time of conception; and the adoption or acknowledgment of the child as his by the husband would probably make the presumption almost conclusive, though still capable of being rebutted by contrary proof.

Where, as in the present case, a man marries a woman who at the time of marriage is in a state of pregnancy, the presumption of paternity from that mere fact is very strong, and is perhaps in almost all such cases in entire accordance with the actual truth. Still farther, where the pregnancy is far advanced—obvious to the eye, or actually confessed or announced, as in the present case, to the intended husband—a presumption is reared up which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome. The man who marries a woman in the condition in which Mrs Gardner was on 29th August 1850, the date of their marriage, when she was seven or eight months gone with child, says almost as emphatically as he could do by the most express words, "I am the cause of the pregnancy and the father of the expected child."

No doubt, if Mr Gardner could shew that he could not be the father, the presumption must yield. If at the date of the marriage he had newly returned from Australia,—if he had landed from the ship only a day or two before the marriage, the impossibility of his being the father would have met and overcome all presumptions. But his position was very different. He had been an old suitor of Miss Eliza Brodie (now Mrs Gardner) before his emigration, she had originally refused his proposals, but he returned to this country four or five years previous to his marriage, and he renewed his addresses, which were ultimately accepted, although the precise date of the acceptance does not appear. There seems to have been a courtship of considerable

duration. There were very frequent meetings between Mr Gardner and Miss Brodie, and there was abundant opportunity for intercourse if the parties were so disposed. In such circumstances it is unfortunately true, as we are otherwise aware, that in certain districts and in certain ranks of life improper intercourse does sometimes take place before marriage, and the fact is undoubted that a very considerable number of births are registered where the conception must have taken place before any formal marriage was celebrated. Now, wherever an avowed and open courtship has taken place, and there have been opportunities of access, and thereafter the man marries the woman in an advanced state of pregnancy, knowing that she is so, and hurrying on the marriage, as happened here, for that very reason—I do not say that the presumption of paternity is absolutely conclusive, but I do say it is almost as strong as such a presumption can be. No words—no express declaration on the part of both the man and the woman—could be stronger than the mere fact of marriage under such circumstances. It is as if both the man and the woman had expressly confessed their premature indulgence, and hastened to do what they could to repair their fault. To my mind in such a case the presumption is quite as strong as the mere presumption which arises when a child is conceived during marriage that the husband is the father. Indeed, in some aspects, it seems to be even stronger, for it has in it the element of express or actual confession or avowal, which does not always arise, or arises with less force, from the mere subsistence of a nuptial tie.

Suppose what sometimes used to happen, and used to happen in former times much more frequently than now, that parties who marry as Mr and Mrs Gardner did, submit to Church discipline, and are reproved or temporarily suspended from Church ordinances for antenuptial fornication, and such proceedings used to be very common in some of the Churches in Scotland—would not the presumption of paternity be quite as strong as if the child had been conceived after the marriage ceremony. I think it would, and in an extended sense of the maxim it would apply with peculiar emphasis, *pater est quem nuptiæ demonstrant.*

Still, it is conceiveable that even in such a case the husband who marries his pregnant bride may not be the father of her child. His marriage and his conduct may be explained in some other way. We have heard at least of childless men with large possessions thus attempting to secure an heir and exclude distant or hated relatives. At least such cases may be figured, and proof might be brought so cogent as to illegitimise the child so fraudulently and surreptitiously adopted. But nothing of this kind arises here. The pursuer might have been the father of Mary Gardner—every likelihood—every probability—his own implied avowal asserts that he was; and at the very least there is laid upon him, by these circumstances, going no further in the history than I have already done, an *onus* as weighty almost as it is possible to conceive of removing the presumption of some preponderant proof.

Now, the pursuer's case is that he married Miss Brodie in an advanced state of pregnancy, not because he was the father of her child, not because he had antedated the rights of privilege of marriage, but in order to screen his wife from the disgrace of having an illegitimate child with which he had nothing to do, but which she said was the consequence of a criminal assault of which she was the innocent victim. He says it was an act of generosity on his part to cover Miss Brodie's grievous calamity, and to hide for ever the knowledge of an event which she said was to her a miserable misfortune, but which certainly others would hold to have been her fault and her crime. The pursuer says that Miss Brodie told him that she was pregnant, in consequence of her having been forced and violated on Cademuir Hill.

Now, I do not say that it is impossible that this can have been the pursuer's motive in marrying Miss Brodie in the state of pregnancy in which she then was. It is possible, just as the strangest and most unexpected events are often shown to be within the range of possibility; but while I admit the abstract possibility of the statement which the pursuer now makes, I think I may say that it is a statement which the law will not take off the pursuer's hands without the most pregnant, undoubted, and unimpeached evidence of its truth. Now, unfortunately for the pursuer, of such evidence the pursuer has really none, for when analysed the whole rests upon the single uncorroborated and utterly unsupported assertion of Mrs Gardner alone.

It is said that Miss Brodie told her intended husband that she had been forcibly violated without her consent. There is no evidence whatever of this, and her statement to her promised spouse is admitted to have been false in many particulars and details. She said to him that "she had been waylaid by a blackguard on the hill and abused," and she led him to believe that she did not know who the man was; but in her own examination she was forced to admit that she had not been waylaid, but had met with Laidlaw on the hill by assignation and appointment. I do not believe that any rape took place, but it is enough to say that there is not the slightest evidence at which the law for a moment could look as instructing such an occurrence. There was no complaint at the time—no information given to her friends—no exhibition of marks of violence—no such marks to exhibit. There were subsequent meetings between Miss Brodie and Laidlaw without complaint, and without her making any difference in her treatment of him. Mrs Gardner herself says that Laidlaw afterwards attempted liberties with her which were unsuccessful, but of which still she made no complaint. Can such an extraordinary story be credited now, as told by Mrs Gardner after the lapse of four-and-twenty years, she having given a different account of it to her intended husband at the time when she first mentioned it. No doubt it was urged that Miss Brodie was entitled to deceive her promised husband, so as to get him to marry her, and I do not dispute that some excuse may be stated for her, but what is this but to say that under a strong motive she told lies to her husband at first, and the result is that she cannot now be trusted as a witness, and as the sole witness on whom we are now asked to rely. The whole case at this point of it is made to turn upon her statement alone, and to discredit Mrs Gardner is to destroy the whole structure which the pursuer sets up.

If the question had arisen immediately upon the birth of the child, or before its birth but after the marriage, I cannot but feel that the presumption of that child's paternity would not have been overcome by all the evidence which is now laid before us.

But the case does not stop at the birth of the child, and it is not in the same position as if the pursuer had then repudiated the child, or declared it his wife's bastard. The circumstances attending the birth are important. Mr Gardner placed his wife in a temperance hotel in Edinburgh, to be confined there. No doubt he did so secretly, and without giving his name or address, but can it be doubted that he did so avowedly as the father of the child of which she was pregnant? I do not go into the details of the evidence, but his every act was a confession and avowal to Dr Thatcher, to the hotel-keeper, to the hotel-keeper's wife, to the waiters, to the midwife, to the sicknurse, and to everybody else, that he was the father of the child. His sending Miss Brodie to Dr Thatcher before the marriage, and his own visit to Dr Thatcher to learn the result of the examination, will admit of no other interpretation, and constitute proofs, or evidence, or avowals of paternity, which in an action of filiation would be absolutely conclusive.

The pursuer says that he did all this in order to "smother up the thing as much as possible." But what does this mean? It means that he avowed the child as his in order to conceal the fact that it was not his. He led or allowed others to assume that he was the father of his wife's child in order to conceal what she said was the fact, that she had been violated. But he could only "smother up the thing" by adopting the child as his, and after having once done so, and continued to do so, I think he is now barred from maintaining that the whole was a pretence and a falsehood.

Suppose Mrs Gardner had died in childbed, and the pursuer had then repudiated the child, what defence could he have had to an action of aliment by the parish authorities, or to a subsequent action by the child itself?

I give full weight to the repudiation of a child by both the married spouses even when the child was conceived during the subsistence of the marriage; and I quite admit that moral evidence, without physical impossibility, may sometimes be sufficient to bastardize a child, even though both conceived and born while a marriage subsisted. But there is high authority for holding that not the slightest regard is to be paid to such disclamation by the spouses after they have once in any way whatever acknowledged the child. Now it seems to me that all through Mrs Gardner's residence in Milne's Temperance Hotel both spouses treated and virtually acknowledged the child as theirs; that all through the pursuer's communications with the late Dr Thatcher he virtually confessed to Dr Thatcher that he, the pursuer, was the father of the child. I cannot doubt that when Dr Thatcher, after having examined Miss Brodie, told the pursuer that the marriage should go on at once—that he meant the pursuer, as the father, should at once marry the pregnant mother. I will not take from the pursuer his ambiguous description of Dr Thatcher's words, that without referring to any person he only said, Let the marriage go on. I take it to be clear that what he said to the pursuer was virtually—Marry her at once, for the pursuer's conduct was too explicit an acknowledgment of paternity to need any further words.

And then the history still confirms the confession with which it began. For years the pursuer goes on paying the defender's aliment, first through old Dr Thatcher, and then through his son. Every payment was an acknowledgment by the pursuer that he was the girl's father. It is vain to say that the pursuer made these payments as for the support of his wife's bastard, and that he did so because he was liable for his wife's debts contracted before marriage. The plea is absurd, and absolutely inconsistent with the pursuer's whole actings throughout. Nobody ever dreamt such a thing, and the pursuer, after a lapse of five and twenty years, is not entitled now to put it forth with any expectation that it will be believed.

The lapse of time seems to me to be almost conclusive element against the pursuer. Without his evidence, and without the evidence of his wife, Mrs Gardner, admittedly the pursuer would have no case whatever. If Mr and Mrs Gardner had died any time during the course of the last four and twenty years,—nay, if even one of them had died before proceedings were instituted, it would have been hopeless to attempt to disprove the defender's legitimacy. No hearsay — no written declaration — no bequest of bastardy—would do. Now I altogether dispute the right of the pursuer, by himself or in conjunction with his wife, to hold the question of the defender's legitimacy in suspense at their pleasure, that they may make her, as they please, at any time of their lives, illegitimate, and declare her a bastard, but still retain in their own hands the arbitrary power of being silent, and by dying without proceedings thus bequeath to her a legitimacy which she could not claim as matter of right. When husband and wife resolve to repudiate a child of the wife's as a bastard, they must do so instantly, or at least timeously, when witnesses are alive who can speak to the material facts. Delay in such a case may become an absolute bar. I think the delay has become so in the present case, and this altogether apart from the implied acknowledgment of paternity which the pursuer's conduct inferred.

The continued and persistent conduct of both parents in excluding the defender from their family, and treating her so differently from Mrs Gardner's other children, is strongly founded on by the pursuer. It is impossible to justify such conduct, but I am not prepared to say that, in its commencement at least, it is not accounted for by the natural anxiety of the pursuer and of his wife to conceal the fact that a child was born six weeks after marriage. The pursuer was an elder of the Established Church. He could scarcely have retained his eldership if it was publicly known that he had a child born six weeks after marriage. His father and brother were ministers of the Established Church. Such a disclosure would have been extremely unpleasant to them. It is conceiveable that concealment, begun for such motives, should be continued from the awkwardness of afterwards introducing into the family a child of whom no one had previously been allowed to hear.

I have only a word to add on the credibility of

certain of the witnesses. I have already said that I cannot trust the evidence of Mrs Gardner. From whatever motives, and with whatever excuses, she has undoubtedly given different accounts of the matter at different times, and it is almost fatal to the whole case if she is not to be implicitly relied on. I cannot help thinking that the pursuer also has to some extent been seriously attacked as to his accuracy and credibility. If Mr Kay's evidence is to be trusted, and there is nothing to impugn it, the pursuer made admissions and confessions totally inconsistent with the case, which as a witness he maintained. Mr Kay could hardly be mistaken as to the pursuer's statements and admissions to which he depones, and no prepossession in favour of the defender would account for such statements as mere mistakes or misapprehensions. They very seriously tell against the pursuer's credibility. The evidence of Laidlaw I feel myself compelled almost altogether to lay out of view. It is plain he is a person upon whose testimony no reliance whatever can be placed, and although the statements and implications in his letters might well be held evidence against himself if he were the defendant in or a party to an action, I think it would be unsafe to read them when coupled with his oral testimony as evidence against the present defender. The evidence of the defender herself I am also unable implicitly to rely on, but the case stands quite clear of her testimony. Of course she cannot know anything of the material facts and circumstances on which the case depends, and although I lay out of view her account of her mother's statements, this does not materially affect the real issue.

The result is, that I have come to be of opinion, though with difficulty and not without hesitation, especially considering that the Lord Ordinary reached an opposite conclusion, that the pursuer has not adduced evidence strong enough or cogent enough to overcome the weighty and it appears to me the concurrent presumptions which arise from the whole history of the case, and which compel me to hold in law, whatever may be the state of the occult fact which I cannot reach, that the pursuer must be held to be the father of the defender. This leads to decree of absolvitor from the whole conclusions of the action.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Mary Gardner against Lord Craighill's interlocutor of 15th November 1875, Recal said interlocutor: Find that the pursuer (respondent) has failed to prove that he is not the father of the defender (reclaimer) Mary Gardner: Therefore assoilzie the defender from the conclusions of the summons, and decern: Find the defender entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for the Pursuer (Respondent)—Macdonald—Darling. Agents—Gillespie & Paterson, W.S.

Counsel for the Defender (Reclaimer)—Trayner—Jameson. Agents—Lindsay, Paterson, & Co., W.S.

Tuesday, May 30.

SECOND DIVISION.

[Lord Craighill, Ordinary.

JAMES KERR *v.* MRS EMILIA M'MILLAN KERR OR MOODY AND HUSBAND.

Bankruptcy — Discharge — Claim — Intimation to Creditors—Guardian and Ward.

A undertook the upbringing and education of his deceased brother's children till they attained majority, when they ceased to live in family with him. Thereafter he became bankrupt, and was sequestrated, but obtained his discharge on payment of a small composition.—*Held* that a claim made by the discharged bankrupt for sums expended on the said children could not be maintained by him, he having failed to include the same as an asset at his sequestration.

In this case James Kerr, residing at 48 Shellgate Road, Clapham Junction, sued Mrs Emilia M'Millan Kerr or Moody, and her husband James Moody, teacher at Dumfries, for payment of the sum of £154, 17s. 3½d. sterling, with interest from 6th March 1868 till payment.

The circumstances in which the claim was made were as follows:—The late Archibald Kerr, brother of the pursuer, who was a merchant in Lisbon, Portugal, died there on 9th October 1857. His wife also died there on 21st October of the same year. They were survived by six children, of whom the female defender was the eldest.

The pursuer went to Lisbon on his brother's death to look after and assist the children, and to attend to their interests. He was appointed by the courts at Lisbon their curator and guardian, with full powers to administer their father's estate, and a family council was appointed to consult and advise with him in that capacity. The deceased's estate was realised, and invested in securities in Lisbon. It did not exceed £1500 sterling, according to the pursuer's averment. The pursuer brought his brother's children home to Scotland with him, and they lived in family with him at Glasgow for several years. The pursuer averred that the income derived from his brother's estate was insufficient for the proper education and maintenance of the children. The amount sued for was the sums paid by the pursuer on behalf of the defender in excess of her share of the income of her father's estate received by him, and a sum of £60, 6s. advanced to her in 1868 to procure a marriage outfit. The pursuer further states that all the children, with the exception of the defender, had settled with him for his advances on their behalf.

The defenders denied that those sums were due. They averred that Mrs Brodie's share of income was sufficient to meet all the expenses incurred by the pursuer on her account, that it was never contemplated that a claim was afterwards to be made for alleged advances, and that no intimation of such a claim had been made till shortly before the raising of the action. In particular, they averred that a sum of £295 had