Saturday, February 8.

SECOND DIVISION.

[Sheriff of Perthshire.

REIDS *v.* MILL.

Husband and Wife—Parent and Child—Proof of Paternity.

In an action for aliment at the instance of a married woman and her husband against a man who it was alleged was the father of a child born three months after marriage, it was held to be proved that for several years prior to the marriage great intimacy existed between the female pursuer and the defender, who was in the habit of visiting her alone; that for some time previous to the marriage, including the time at which the child must have been conceived, the pursuers also were on intimate and familiar terms with each other, which they had denied. The pursuer also averred—which was held to be untrue—that at the date of the marriage and up to the time of the birth of the child, the female pursuer's state, which she herself said she only suspected, was not revealed to the male pursuer—*Held* that the presumption raised by the marriage, together with the facts and circumstances proved, were sufficient to establish the paternity against the male pursuer.

Observed per the Lord Justice-Clerk, that the maxim *pater est quem nuptiæ demonstrant* is not conclusive as to the question of paternity when the child is not born *justo tempore*, but that it may be rebutted by evidence.

Observed per the Lord Justice-Clerk that great intimacy followed by marriage is almost as conclusive as to the paternity of a child as if it were born *justo tempore*.

In this action Mrs Jessie Forbes or Reid and her husband John Reid sued John Mill, for aliment, &c., for a child borne by the female pursuer. The pursuers were married on the 12th February 1878, and the child was born on the 21st May thereafter, little more than three months after the marriage. Mrs Reid averred that the defender had been in the practice of visiting her for several years prior to her marriage, during most of which time she was living alone, and that he had frequently had intercourse with her, which began as far back as 1875, and continued down to within a month of the date of her marriage, and especially on one occasion on the 24th of August 1877. The pursuers averred that they themselves had been on friendly terms at a former period, but that their intimacy had ceased some years before, and was not renewed till October of 1877; further, that no sexual intercourse took place between them till after their marriage. The male pursuer further stated that he did not know that his wife was with child till the child was born. Mrs Reid stated in examination that she feared she was with child at the time of the marriage, but was not sure. She further said that she told no one of the condition she suspected herself to be in till the child was born. The defender denied that he had ever had any connection with the pursuer Mrs Reid, but admitted that he was on friendly terms with her, and used to write to her; he farther averred that the pursuers had been in the habit of meeting and driving about the country together for a considerable period prior to October 1877.

When the child was born the fathers of both pursuers went to the defender and told him that Mrs Reid had named him as the father, and asked him to take the child away; this the defender refused to do, and also refused to pay for the nursing, &c., of the child. The present action was then brought, a proof was then led, and on 18th October 1878 the Sheriff-Substitute (BARCLAY) pronounced an interlocutor decerning against the defender. The defender appealed, and on 11th December 1878 the Sheriff (LEE) pronounced an interlocutor recalling the interlocutor appealed against, and decerning in favour of the defender. The Sheriff added a note, in which the following passages, *inter alia*, appear, which state the import of the proof upon the points which were held to be decisive of the case:—"According to the statement of the female pursuer, it was in the month of December 1877 that she engaged to marry her present husband. She had been on friendly terms with him (as the proof shows) for a period of years, but the allegation on record is that their intimacy had ceased for two or three years prior to October 1877, when it was resumed. The fact, however, is, that during the whole of 1877 the male and female pursuers met on friendly and familiar terms. He was at an evening party at her house in the month of January. She was at an evening party in his father's house in the month of March. They also met at another party in the early part of that year, at which some not inconsiderable, but possibly harmless, familiarities took place between them, which she does not recollect. They met at a pic-nic in July, and again at the Crieff Games on 25th August. He seems to have joined the party with which she was. In short, the suggestion of estrangement prior to October 1877 is not supported by satisfactory evidence.

"It appears that for three years prior to September 1877 she had been engaged to a young man of the name of Grieve, who was in America, but her correspondence with him then terminated. Her story is not necessarily untrue because it involves the admission that during that engagement she was receiving the embraces of another man. But the statements which she makes concerning her pregnancy and her non-disclosure of it are certainly extraordinary. She says that she was not aware at the time of her engagement to the male pursuer that she was in a state of pregnancy. She feared that she was in that way at the time of her marriage, but was not quite sure of it. The usual consequence of pregnancy had taken effect in the month of September. She understood that the state of matters referred to was a sign of pregnancy, but understood that there were other causes. She consulted no doctor. She did not tell her husband of her condition; she told nobody. She repeatedly saw the defender both before and after the marriage, and letters passed between them. But although the defender is now said to be the father of the child, and the only man with whom the female pursuer had connection prior to marriage, she never told the defender that she was with child. Not only was no communication, such as might have been expected, made to the defender, but even after the marriage the case of the pursuers is that no information was given by the female pursuer to her husband or to any one prior to the birth of the child. Probably this was a necessary part of the pursuers' case. Because if she had informed

anybody, she must have informed her husband, and as he and she together subsequent to the marriage destroyed the defender's letters, and have brought forward this allegation only after the child was born, it would have been destructive of their credit to admit that he knew anything about the child. In short, the pursuer's story is that she allowed the defender to have carnal intercourse with her during the period of her engagement to Mr Grieve, and also during the period subsequent to her engagement to her husband and prior to her marriage; that she was nearly six months gone with child at the date of her marriage; that she never mentioned the matter to the alleged father; and that she never told her husband of her condition or the cause of it. The case of the pursuers requires that it should be believed that they entered into the married state and continued therein till the birth of the child without any knowledge on the part of the husband that his wife was far advanced in pregnancy.

"It appears to the Sheriff that the story as told is scarcely credible. That a woman in such circumstances should go on with a marriage, and should persist so long in an attempt to conceal the truth as to her condition, is in the highest degree improbable. That she should succeed to such an extent in avoiding explanation (supposing she tried to do so) is almost beyond belief. Assuming the female pursuer's account of the matter to have been true, and supposing her to have been a truthful woman, who had merely fallen from virtue, it would have been natural to expect that she should have seized the first opportunity of making a confession. But she appears to have gone over with her husband, after her marriage, the letters of the defender, and to have allowed them to be destroyed without suggesting that there was reason why they should be preserved. As the spouses read them before burning them, it must be presumed that in themselves they contained nothing of any significancy against the defender. Nor was this, according to the male pursuer's statement, the only occasion when she had an opportunity of confession, if there was anything to confess. For he says that his mother drew his attention to his wife's appearance, and that he mentioned the matter to her, and that she 'said nothing, and made no answer.' Her statement that he 'never mentioned the circumstance to me' is not in agreement with this. But if the husband's statement be correct, it is scarcely conceivable that the allegation now made should not have come out before the child's birth, at least if that allegation contains the truth of the matter." [The Sheriff then proceeded to examine whether there was corroboration of the pursuer's testomony, and gave his reasons for finding that insufficient.]

The pursuers appealed.

Authorities—*Jobson* v. *Reid*, January 19, 1830, 8 S. 343, and May 31, 1832, 10 S. 594; *Brodie* v. *Dyce*, November 29, 1872, 11 M. 142; *Gardner* v. *Gardner*, May 30, 1876, 3 R. 695; H. of L. May 17, 1877, 4 R. 56.

At advising—

Lord Justice-Clerk—This is a somewhat remarkable case. The action is at the instance of a husband and wife, who allege in substance that a child born to them in May 1878 was not the child of the husband, but of another man, and the action is brought for the purpose of affiliating the child upon him, and recovering aliment for its support. Their statement is that they were married in February, and therefore that the child was not born *justo tempore;* that the pursuers had been previously on terms of intimacy; that that intimacy had been broken off, and only renewed in October previous to the marriage; but that, on the other hand, the defender was on intimate terms with the female pursuer, and had connection with her at a time suitable to the time of the birth of the child.

Now, the defence is that the defender is entirely innocent, and the question is one which must be decided on the evidence.

After the decision in the case of *Gardner* v. *Gardner*, and the full exposition of the law there, I do not think it necessary to enter at any length into the judicial aspect of the question. I hold it as fixed (1) that the maxim *pater est quem nuptiæ demonstrant* is not conclusive as to the question of paternity when the child is not born *justo tempore*, but that it may be rebutted by evidence, but it still remains a presumption that must be overcome, and therefore the evidence must be clear and distinct, and therefore I think that the dictum of Mr Bell in section 1626 of his Principles is not altogether complete. The case of *Jobson* v. *Reid*, 10 S. 594, does not quite come up to the point I had supposed during the debate. The Lord President there reserved his opinion on the effect of the judgment upon the status of the child. The case of *Brodie* v. *Dyce*, 11 Macph. 142, comes much nearer to the present, especially the opinion of Lord Ardmillan.

I need say no more as to the law except to quote the dictum of Sir Ilay Campbell in the case of *Lepper* v. *Watson*, Hume 488—"Case of a child produced five months and no more after the marriage took place. *Pater est*, &c., 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" —See Session Papers, vol. cvii. No. 72, Fac. Lib.

On the merits of the case, my opinion is that I did not believe the evidence of the husband or the wife, and that on clear and simple grounds. I have come to a very clear opinion that whatever was the reason why this case was raised it is not disclosed in the evidence.

It was said that it was different from that of *Gardner* in that the husband and wife did not know before marriage that the wife was with child. [His Lordship then proceeded to examine the evidence, coming to the conclusion that the husband and wife were both aware that the wife was with child.] I think that the testimony of the husband and wife is untrue in another particular, viz., as to their conduct towards each other and the amount of intimacy between them before marriage, and this is very important, for it is a fact that great intimacy followed by marriage is almost as conclusive as to the paternity of a child as if it were born *justo tempore*. Now, it is stated on record that these parties were not on intimate terms with each other for several years until the October before the marriage; if this is not true I apprehend that there is an end of the case, and it has clearly been proved to be untrue

from the evidence of several witnesses. Therefore, on the whole case, I do not think it necessary to go further than this, for surely if the husband and wife are untrustworthy there is an end of it. It is clearly possible, and even probable, that the child should be that of the husband, and taking along with this their untrustworthiness I think the defender must be assoilzied. As to the evidence against the defender, I saynothing about that; it might be sufficient in a simple case of paternity, and it might not. We have nothing to do with it in the view I have taken of the case. I think therefore that the interlocutor of the Sheriff should be affirmed.

LORD ORMIDALE—The case of *Gardner* v. *Gardner*, May 14, 1877, L.R. 2 H. of L. Apps. 723, was characterised by the Lord Chancellor as "one of the most remarkable that has ever come before a Court in Scotland;" and I rather think the same observation is in a great measure applicable to the present case. The present case may, indeed, be considered a more remarkable one than that of *Gardner*, in this respect, that while in the latter the conduct and motives of the spouses might be accounted for on intelligible grounds, it is scarcely possible to say as much for the pursuers in the present case.

The child whose paternity is in dispute having been born about three months after the marriage of the pursuers, the brocard *pater est quem nuptiæ demonstrant* is not strictly applicable. And if it could be taken as true that neither of the pursuers were aware of the pregnancy of the female pursuer prior to the birth of the child, the difficulty of establishing their case against the defender would be considerably diminished. But as ignorance of the pregnancy on the part of the pursuers depends exclusively upon their own statements, it comes to be of the greatest importance to ascertain what degree of credence is to be given to these statements; for although it may be possible that the pursuers were not aware of the condition of the mother of the child till it was born, it is, to say the least of it, highly improbable that such was the case; and if from proved facts and circumstances the pursuers are shown to have made false statements regarding other important matters, the truth of which could not fail to have been known to them, their statements to the effect that they did not know of the pregnancy till the birth of the child must be also disregarded, and if so, no case against the defender would remain.

Now, I think it is proved beyond all doubt that not only had the pursuers opportunities of intercourse for more than a year preceding the birth of the child, but also that during that time familiarities took place between them of such a character as would, I apprehend, have been quite sufficient in an action of filiation to have established the paternity of the child against the male pursuer—[His Lordship then examined the evidence]. I cannot, therefore, avoid the conclusion that the pursuers' statements to the effect that they had no sexual intercourse prior to their marriage and were not aware of the pregnancy of the female pursuer cannot be relied on. And if so, the spouses in the present case may be fairly held to be within the principles of decision in the case of *Gardner*, where it was ruled that the presumption of fact of the husband's paternity of the child was all but insuperable, that the *onus* of establishing his denial of the paternity lay on himself, and that he had wholly failed to discharge that *onus*. Without going into details, there are here, I think, as in *Gardner's* case, facts and circumstances proved sufficient to establish against the male pursuer the paternity of the child in question. And I am unable to see how this conclusion is met and avoided by the fact—assuming it to be one—that there are also circumstances which, along with the female pursuer's oath, might in an ordinary action of filiation be sufficient to establish the paternity against the defender. In the words of the Lord President in the case of *Jobson* v. *Reid, &c.* (19th January 1830, 8 S. 345)—"The presumption of the law is that the parents of a child that is born during wedlock are the married parties—a presumption not only supported by favour towards the child, but well founded also in that daily experience which proves that after parties, particularly among the lower classes, have had intercourse in consequence of which the woman becomes pregnant, a marriage, whether previously promised or not, is the common consequence, and the natural reparation by the father of the injury he has done to the mother of his child."

In the whole circumstances, and for the reasons stated, I am for dismissing the appeal, and affirming the interlocutor of the Sheriff Principal appealed against.

LORD GIFFORD concurred.

Appeal dismissed.

Counsel for Pursuers (Appellants)—Trayner—Young. Agents—Boyd, Macdonald, & Co., S.S.C. Counsel for Defender (Respondent)—Lord Advocate (Watson)—Rhind. Agents—Begg & Murray, W.S.

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*Saturday, February 8.**

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary in Teinds.

LOCALITY OF BORTHWICK—DUNDAS *v.* WADDELL.

(Before Seven Judges).

Teinds—Res judicata—*Process of Augmentation and Locality.*

In a process of augmentation and locality brought in 1795 the minister produced a rental of the whole lands in the parish, in which 81 acres belonging to one of the heritors were entered as teindable. The heritor in question subsequently lodged a minute stating that these subjects were held *cum decimis inclusis*, and craving that they might be struck out. The Court then pronounced an interlocutor, dated 2d December 1795, ordaining them to be so struck out. A stipend was then modified, and a locality prepared, to which the heritors lodged objections. The 81 acres were not inserted in any of the schemes which were prepared, but before that process was terminated a new process of augmentation and locality was brought, taking up the first where it had been left and going on to a final decree.

* Decided Friday, December 13, 1878.