

COURT OF SESSION.

Thursday, January 28.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

M'DONALD v. MAIN.

Parent and Child—Affiliation—Sufficiency of Proof.

In an action of affiliation the pursuer deponed that the intercourse upon which conception followed had taken place at Inverness in the end of July or beginning of August 1894, the child being born on 30th April 1895. Upon the evidence it was held to be proved that the defender was not at Inverness at the period in question, but he admitted that he had been in the pursuer's company there on 30th August 1894 (thus reducing the period of gestation, if he were the father of the child, to 244 days), and also that in the previous year he had had connection with her. *Held* that the proof of paternity was sufficient.

Lizzie M'Donald, Inverness, raised in the Sheriff Court at Glasgow an action of filiation and aliment against Robert Main, tailor's cutter, Glasgow.

Proof was led. The pursuer averred, and the defender admitted, that between the end of September and the beginning of November 1893 various acts of connection took place between them at Inverness. In November 1893 the defender went to Glasgow. Three letters were produced which were written by the defender to the pursuer in November and December 1893. In one of these, dated 10th December, he wrote—"I wish I was in Inverness first week, we would have some fine times of it again, wouldn't we, Lizzie?" The pursuer deponed that the defender returned to Inverness for his holidays in the end of July or beginning of August 1894; that he came into the shop at which she was employed and went with her to her mother's house; that thereafter he went a walk with her on the canal banks, where the connection took place that led to the birth of the child. The pursuer's mother and a friend Jessie MacRae also deponed that it was about the end of July or beginning of August 1894 that the defender was in Inverness. It was, however, conclusively proved by the defender that he was not in Inverness in the end of July or beginning of August 1894. He admitted, however that he was in Inverness on 29th and 30th August, that on the latter date he went for a walk with the pursuer down by the canal banks, but he denied connection with her on that occasion. The child was born on 30th April 1895.

On 18th January 1896 the Sheriff-Substitute (GUTHRIE) found that the defender was the father of the pursuer's child, and decerned against him as craved.

Note.—"The pursuer gave the impression of truthfulness, and there is nothing to take exception to in her evidence, unless the

mistake as to the defender's visit to Inverness in 1894, when conception must have occurred if her story is true. It does not seem necessary, however, to discredit such a witness for a mistake as to date even in a matter of such importance. If this be so, the proof is sufficient, and there would be no question, were it not that the time of gestation is reduced to 243 or 244 days. There is no medical evidence on either side bearing on this, and after referring to the decisions and writers I am of opinion that the premature birth is not a sufficient reason for doubting the other evidence in the case.

"I may say that the question as to date was brought before the pursuer in the leading of evidence on commission, and that it would therefore be difficult to allow her now to adduce further evidence."

The defender appealed to the Sheriff (BERRY), who on defender's motion, not opposed by the pursuer, allowed the doctor and sick nurse present at the birth of the child to be examined. The doctor deponed that the child appeared fully grown at the time of birth, and that there was nothing to indicate that it was prematurely born. The nurse's evidence was unimportant.

On 26th November 1896 the Sheriff adhered to the interlocutor appealed against.

Note.—"I have had considerable difficulty in disposing of this case, and the difficulty I had at the previous hearing has not been removed by a consideration of the evidence taken under the commission granted on 5th July. I am constrained to hold on the proof that the date of the defender's visit to Inverness in 1894 was the end of August and not the end of July or beginning of August, as the pursuer and her witnesses Jessie MacRae and Mrs M'Donald would make out. It is not favourable to the pursuer's case that although her attention had been pointedly called to the question of date by the evidence taken on the first commission, she still insisted on the end of July as the true date, adducing subsequently Mrs M'Donald to support it, and again adhering to it herself when she was examined at the proof in Glasgow. She and Jessie MacRae express themselves as fixing the date by that of a particular dance. The suggestion is open that she put forward a date for the defender's visit which would best correspond with a full pregnancy of nine months up to the date of the child's birth on 30th April following.

"With regard to the maturity of the child at birth, I have considered with care the evidence of the doctor and the sick nurse taken under the last commission. That evidence certainly goes to strengthen the conclusion that the child was mature when born, but I am unable to regard it as of so convincing a character as to exclude the possibility of the pregnancy having been one of eight months only.

"In support of the pursuer's case we have the admitted fact of connection having taken place several times in the course of the preceding autumn, and the probability that the connection would be renewed when opportunity offered on the occa-

sion of defender's visit to Inverness next year. Defender admits, indeed, a walk with the pursuer on the canal bank at that time, although he denies that connection then took place. The case, as I have said, I have felt to be attended with difficulty, and as it is one depending on the credibility of the evidence, I cannot but give weight to what the Sheriff-Substitute says as to the impression of truthfulness which the pursuer gave to him when she was examined in his presence. I have come, therefore, to the conclusion, although with considerable hesitation, that the Sheriff-Substitute's interlocutor should be adhered to."

The defender appealed, and argued—The date alleged and relied upon by the pursuer as the date of conception had been absolutely disproved. The actual date was essential in order to prove the defender's guilt. The date averred by the pursuer had been disproved, and in order to make out her case she could not now take advantage of the defender's admission that he had walked with her on a date a month later. That it was an innocent mistake was out of the question. The pursuer not only definitely alleged the false date, but brought her mother and a friend to support her evidence. She must therefore be held to have told a deliberate falsehood in order to improve her case against the defender, and screen her misbehaviour with some other man in July. The medical evidence showed that the child was not prematurely born. It must therefore have been conceived in July, and as the defender had proved that he could not have been in the pursuer's company at that time he ought to be assoltized.

Argued for the pursuer—The pursuer's case would be unassailable if it was not for the mistake as to the date. Having regard to the time which had elapsed since the occurrence, it was quite clear that the mistake was an innocent one on the part of the pursuer. The Sheriff-Substitute, who saw her in the witness-box, and heard her testimony, believed her. The pursuer's letter of 10th December 1894 made it plain that he intended to renew his improper intimacy with the pursuer whenever he returned to Inverness. The medical evidence was of little value, for it was impossible for a doctor to assert definitely, from the appearance of a child newly born, whether it had been conceived eight months or nine months before birth—Taylor's Medical Jurisprudence (3rd ed.) ii., pp. 251-255.

LORD JUSTICE-CLERK—In this case the Sheriff-Substitute has decided against the defender, and the Sheriff, who allowed additional evidence, has decided the question in the same way.

There is no difficulty as to the facts. The defender admits that in a previous year he had carried on an illicit intercourse with the pursuer till he left for Glasgow; that he visited her on 30th August of 1894, and was out walking with her on that date. In ordinary circumstances the pursuer's declaration that the defender was the father

of the child, taken in conjunction with the admitted prior connection between the parties, would be held to be sufficient to prove the defender's guilt

Here the only difficulty arises from the fact that the pursuer fixed upon a date as the time of conception which is about a month before the defender returned to Inverness. It is now admitted that she was mistaken, and it is submitted that the true date must be held to be about a month later than that to which she deponed. That might very well be fatal to the pursuer's case, for it might be shown that the date deponed to had been fixed upon from a corrupt motive, and that would be sufficient to taint her whole evidence as untrustworthy. But this is not a case of that kind. Neither the Sheriff-Substitute nor the Sheriff suggest any corrupt motive on the part of the pursuer. Both are of opinion that the mistake in the date was an innocent blunder on the part of the pursuer. Now, if we hold with the Sheriffs that on the evidence as it stands, it is made out that the pursuer's mistake was an innocent one, one or other of two results must follow; we must either accept the actual date as proved or allow further proof so as to save the defender from being prejudiced by having been misled by the erroneous statement of the pursuer. As the defender is satisfied to take the proof as it stands, I think we must hold that the actual date of conception was the 30th of August.

As to the evidence of the doctor, are we to hold that anything has been proved regarding the condition of the child at birth which makes necessary for us to decide that it was a nine months' child and not an eight months' child? I see no ground for arriving at that conclusion. This child, for anything that appears in the evidence, might have been an eight months' child. To base conclusions upon evidence such as that of the doctor in this case would not be safe.

I come to the conclusion that there is no ground for interfering with the judgment of the Sheriffs.

LORD YOUNG—I think it sufficient to say that the judgment of the Sheriffs is reasonably supported by the evidence, and that I see no ground for disturbing the judgment.

LORD MONCREIFF concurred,

LORD TRAYNER was absent.

The Court adhered.

Counsel for the Pursuer—Anderson.
Agent—Frank M. H. Young, Solicitor.

Counsel for the Defender—Cullen. Agent
—Henry Wakelin, Solicitor.