argued to us by the defenders that if we agreed with the judgment which was quoted to us of the Court of Appeal in England we were bound to find the pursuer's statements here irrelevant; and it is only because of the great respect I have for the learned Judges who composed that tribunal that I say anything about it. I would first remark that in the case which was quoted to us there had been a full inquiry into the facts, and accordingly anything which their Lordships said must be taken as having reference to the facts which in that case had already been proved. I say, secondly, that although they pronounced certain opinions as to the nature of the company's contract, I do not think the Court of Appeal laid down any such doctrine as this—that it is possible for any company or any person by a general declaration *ab ante* to say that they will not be liable for the misstatements of agents, and yet be able to keep the contract which, *ex hypothesi*, the misstatements of the agents procured. I am far from saying that is the case here; I do not know whether it is the case or not. But even if it were the case I do not think there is any doctrine laid down by the English Court to that effect.

LORD M'LAREN—I concur in the opinion of Lord Kinnear, and I only add, in a single sentence, that I think it is plain on the admitted facts of the transaction that this lady entered into an improvident bargain—not the bargain that she intended when she went to the company's agents. She only wanted to get a certificate that would entitle her to borrow £200, but was persuaded to get one which would enable her to borrow the amount of £400, for which she had no need; and therefore the obligation to pay interest and instalments was greater than she had intended. In such a case, where it is plain enough that a mistake has been made, I should be unwilling to determine any question relating to a wrong for which one of the contracting parties is said to be responsible, without having the facts before us. I think it is much better that the facts should be investigated, and then we should be in a position to decide whether this agent acted within his powers, or whether he acted in excess of his powers and so as not to bind the company, or again, whether the lady was really imposed upon. I say nothing more, except that I agree with Lord Kinnear's reasoning, which leads to the conclusion that the pursuer is entitled to prove her case.

LORD PEARSON—I also agree with Lord Kinnear's opinion.

The Court pronounced this interlocutor—

"Recal said interlocutor and remit the cause to the Lord Ordinary to allow the pursuer an issue as to whether in entering into the contract embodied in the proposal form and the certificate, the female pursuer was under essential error as to its import and effect induced by Alexander Kinsman acting as agent for the defenders in Cupar," &c.

Counsel for Pursuers (Respondents — Watt, K.C.—F. C. Thomson. Agents—Hutton & Jack, Solicitors.

Counsel for Defenders (Reclaimers) — M'Lennan, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Thursday, March 18.

SECOND DIVISION.

[Sheriff Court at Perth.

BUTTER *v.* M'LAREN.

Parent and Child—Evidence—Bastard—Filiation—Intercourse with Man other than Defender about Time of Conception.

In an action of filiation, where intercourse with the defender about the time of conception was proved, but, in spite of the pursuer's denial, intercourse with another man about the same time was also proved, *held* (Lord Ardwall *dissenting*) that the pursuer, not being a credible and reliable witness, had failed to establish her case.

Per Lord Low—"Although the fact that the pursuer in an action of filiation has been proved to have had connection with two or more men about the time when the child must have been procreated will not necessarily bar her from obtaining decree against him whom she alleges to have been the father, it is a relevant and material circumstance to which due weight must be given in determining whether or not the pursuer has proved her case."

Per Lord Dundas—*Question* "whether or not the result would have been different if the pursuer had admitted connection with M. contemporaneously with the defender, and had been otherwise a credible and consistent witness?"

Bell's Principles, sec. 2061, and Fraser's Parent and Child, p. 166, *commented on* and *disapproved*—Authorities *reviewed*.

In 1907 Catherine Butter, residing at Countlich, by Ballinluig, Perthshire, raised an action of affiliation and aliment in the Sheriff Court at Perth against Archibald M'Laren, farmer, Ballintuim, Guay, by Ballinluig.

The pursuer averred that in or about the months of March, April, May, and August 1906, and particularly on or about 10th March, 1st April, 18th May, and 10th August 1906, the defender had sexual connection with her, with the result that she gave birth to an illegitimate child on 2nd December 1906. The defender denied the pursuer's averments and averred that during the months from January to May 1906 the pursuer had frequent carnal connection with one Roderick Mann.

On 19th October 1907 the Sheriff-Substitute (SYM), after a proof (for a review of the evidence *v.* the opinions *infra* of Lord Low and Lord Ardwall), granted decree as craved.

On 20th December 1907 the Sheriff (JOHNSTON), on appeal, affirmed. In his *Note* the Sheriff, *inter alia*, said—"In affirming the Sheriff-Substitute's interlocutor I find the defender to be the father in the eye of the law. If intercourse which could account for the pregnancy be proved it is a rule of law, binding in this Court at all events, that proof of intercourse with another man does not obviate a finding of paternity against the party to whom the pursuer attributes paternity. It may possibly be open in another place for consideration how far this rule is consistent with the principle that paternity must be established by evidence which carries conviction in fact to the mind of the Court. On the assumption that the pursuer was intimate both with the defender and with Mann, her statement that the defender is the father would not in the circumstances of this case carry any conviction to my mind. Should that question, however, be raised, its determination may be complicated by considerations of public policy."

The defender appealed, and argued—That the pursuer had failed to prove that the defender ever had connection with her, and that, in any event, as intercourse between the pursuer and Mann at the probable time of conception had been proved the pursuer had failed to prove her case—Taylor, Medical Jurisprudence, ii, 110, was referred to.

The pursuer argued—That if, as was the case, connection with the defender had been proved about the probable time of conception, the pursuer was entitled to decree even though it were proved that about the same time the pursuer also had connection with Mann. Counsel referred to Fraser, Parent and Child, 3rd ed. pp. 17, 166; Taylor, Medical Jurisprudence, ii, pp. 53, 111; *Caldwall* v. *Stewart*, 1773, 5 Br. Sup. 390; *Lawson* v. *Eddie*, May 18, 1861, 23 D. 876; *Pitcairn* v. *Smith*, July 10, 1872, 9 S.L.R. 608.

At advising—

LORD LOW—I am of opinion that it is proved that the pursuer was in the habit of going to the railway station at Guay to see Roderick Mann, who was a porter there, and that carnal connection frequently took place between them. Therefore in denying that any such relations existed between her and Mann the pursuer was guilty of deliberate falsehood. I agree, however, with the learned Sheriff that her evidence is not on that account to be altogether disregarded, but at the same time it is so discredited that nothing which she says can be accepted unless there is ample corroboration.

Now it appears to me that the pursuer's evidence is sufficiently corroborated in regard to two occasions upon which she says that the defender had connection with her. I refer to the occasions on 1st April and 10th August 1906.

In regard to the first of these occasions, the evidence stands thus. The pursuer at that time spent the day, or part of it, at Countlich, her father's farm, but slept at Kindallachan, where her brother Donald resided. Donald Butter is a widower, and the pursuer looked after his children and household. Countlich and Kindallachan are about three-quarters of a mile distant from each other, and the path between them leads through a wood.

On the evening of Sunday the 1st April 1906, the pursuer left Countlich to go to Kindallachan about 7·30 in the evening, it being her practice to milk the cow at the latter place about eight o'clock. She did not, however, arrive at Kindallachan until about half-past nine o'clock. Meantime it was found that there was no milk at Countlich, and the pursuer's sister, Bessie Butter, walked to Kindallachan to see if there was any milk to spare there. She reached Kindallachan about 8·30 and found that the pursuer had not arrived. She accordingly milked the cow and then returned to Countlich without seeing anything of the pursuer. After Bessie Butter left Kindallachan Donald Butter went out to look for the pursuer, and he says that he saw her coming out of the wood with a man whom he recognised as the defender. The main question on this branch of the case is whether Donald Butter's alleged identification of the defender can be accepted as reliable. Of course, being the pursuer's brother, his evidence must be accepted with caution, but there seems to be no reason for doubting his honesty as a witness. It was argued, however, that he could not with any certainty have identified the man who was with the pursuer, because it was dark, and he did not see the man's face, but only his back at a distance of some twenty yards. Now, of course, it was dark at the time in the sense that it was long after sunset, and there does not seem to have been moonlight, but if the night was clear (and there is no evidence to the contrary) I apprehend that a figure at a distance of twenty yards or thereby might be seen distinctly enough. Then in regard to the fact that Donald Butter did not see the man's face, his evidence as to how he identified him is this—"I know his figure. I also know his walk. He has had the training of the Scottish Horse. He has square shoulders." That seems to me to be a sufficient ground for identification, because it consists with experience that there may be distinctive peculiarities of figure, carriage, and gait whereby the identity of a person may be recognised with certainty although the face is not seen. Further, the defender admits that he met the pursuer that night and walked with her part of the way between Countlich and Kindallachan. His evidence is somewhat suggestive. He was asked—"Did you see the pursuer upon the evening of Communion Sunday the 1st of April 1906?—(A) I may have seen the pursuer that night. (Q) Where did you meet her?—(A) On the road between Kindallachan and Countlich farm." It is to be observed that the defender at first only says that he may have seen the pursuer, but immediately accepts the position that he did in fact see her. The examination then goes on—"(Q) Was anyone with her?—(A) Not

during the time I saw her. . . . (Q) About what hour was the meeting?—(A) About eight o'clock or between half-past seven and eight o'clock. . . . (Q) When did you part with her that night?—(A) About a quarter to eight I should say. (Q) After how long a meeting?—(A) About ten minutes or a quarter of an hour."

There is also the evidence of Bessie Butter, who says that the following morning she observed that the pursuer's arms were bruised as if they had been gripped, and that her underclothing was torn.

Therefore, although I do not attach much weight to the evidence of Bessie Butter, there seems to me to be strong corroboration of the pursuer's statement that upon the evening in question the defender had connection with her.

Perhaps before leaving this branch of the case I should notice the evidence which was given by a brother of the defender and another witness to the effect that upon the evening of Sunday the 1st April they and the defender were walking together. In any view, I could not attach much importance to that evidence, because the mere recollection of a person after a long interval as to the precise date upon which an entirely unimportant incident occurred is always unreliable. In this case, however, the evidence is worthless for another reason. Its object evidently was to show that the defender could not have been in the wood at Countlich with the pursuer on the evening in question, but that cannot be maintained in face of the defender's admission that he was in fact there.

Coming now to the occasion upon 10th August, the pursuer says that she and her sister were walking from Kindallachan to Countlich about ten o'clock at night, and that they met the defender, who accompanied them to the gate leading to Countlich farm; that the three of them stopped there talking for a short time; that Bessie Butter then went on towards the farm; and that the defender pulled her (the pursuer) into the wood and had connection with her, as she says, forcibly and against her will.

The defender admits that he met the pursuer and her sister upon the night in question, and accompanied them to the Countlich gate; that the sister then went on alone; and that he remained for a short time talking to the pursuer. He denies that he had connection with her.

Bessie Butter also says that the defender met the pursuer and her and accompanied them to the gate, and that she went on towards the house, leaving the pursuer and defender together. What occurred then she describes in the following words—"I heard my sister screaming. I went away back to the gate. I saw my sister and the defender away in the wood. They were about fifteen yards from the gate into the wood. I saw my sister and the defender struggling. My sister fell on the ground and the defender also fell. (Q) Above her?—(A) Yes. (Q) Did you call to her to come away?—(A) Yes. She took no notice. Probably she did not hear me. She is a little deaf. The defender was lying above her. (Q) What did you do?—(A) I just waited till she came up." Then in cross-examination she was asked—"You did not think that they were having connection, did you?" and she answered "Yes."

Now that evidence is complete corroboration of the pursuer's story, if it is to be believed. I should not be disposed to place complete reliance upon Bessie Butter's evidence, although I do not think it is proved that she gave false testimony upon any point. Her evidence, however, cannot be disregarded; and although the story which she tells is very strange, it is one which I find it impossible to believe that she invented. Accordingly I think that as regards this occasion also the pursuer is sufficiently corroborated.

In these circumstances, if it had not been for the complication introduced by the pursuer's relations with Mann, I should have been of opinion that she had made out her case. The connection which the defender had with her on the 1st of April might account for the child, which was born exactly eight months afterwards; and besides, if it had not been for her relations with Mann, the pursuer's evidence that earlier intercourse with the defender had taken place might have been accepted without further corroboration than that there was opportunity.

But it is, in my opinion, proved that the pursuer and Mann were meeting and having intercourse during the period within which the child must have been procreated, if it was not born prematurely, of which there is no suggestion. That being so, I cannot infer against the defender, nor accept without corroboration the statement of the pursuer, that intercourse took place between them prior to the 1st of April. She says that there was intercourse between them on the 10th of March, but so far from that statement being corroborated the evidence seems to me to be rather in the other direction. The result of the evidence therefore is that either the defender or Mann may be the father of the child, and the natural conclusion from that state of the evidence would be that the pursuer had failed to prove her case. It is said, however, that there is a rule of law according to which if a woman has had connection with two or more men about the time at which her child must have been procreated she can choose her victim, and that the Court will hold him to be the father whom the woman selects.

I am of opinion that that is not a correct statement of the law. I have had the advantage of reading the opinion of Lord Dundas, and I concur substantially in the view which he takes of the law, and I have only a few sentences to add. The authorities upon which the pursuer chiefly relied were Professor George Joseph Bell and Lord Fraser. Professor Bell (Prin., section 2061) says—"What is called a *semiplena probatio* gives admission to the mother's oath in supplement. To this *semiplena probatio* it is necessary either that intercourse shall be proved with the mother of

the bastard child at the time corresponding with the gestation, and to such proof in this respect it is no relevant answer that others also have had intercourse, or previous intercourse with opportunity of further intercourse corresponding to the time of gestation . . . . or gross familiarity and indecency with actual or possible opportunity."

Now as I read that passage Professor Bell was dealing only with what was necessary to establish a *semiplena probatio*, so as to admit the women's oath in supplement, and there is ample authority (for example, *Haggart* v. *Croll*, 1836, 14 S. 852, and *Greig* v. *Morice*, 1838, 16 S. 338) for the proposition that if it was proved that the defender had had intercourse with the pursuer at the time corresponding to gestation that would be *semiplena probatio*, even although there was also evidence that there had been intercourse with another man. It did not, however, follow that the oath of the pursuer to the effect that the defender was the father of the child would be conclusive of the matter. No doubt the admission of the woman's oath in supplement gave her great power, if she had the wit to use it. She was not, however, in the position of a party to whose oath the matter had been referred, but she was allowed to give evidence on oath in supplement of the half proof already led, and her evidence was liable to be tested and weighed like the evidence of any other witness, and might be found to be unreliable (*M'Naughton* v. *Glass*, 1838, 16 S. 614, and *Greig* v. *Morice*, *supra*). The latter case is instructive. In it Ann Greig brought an action of filiation against Morice, and established a complete *semiplena probatio*. It was brought out in the proof, however, that she had on three occasions declared before the kirk session that one Gill was the father of her child. Gill denied ever having had connection with her. The Court, with great difficulty, allowed to the pursuer her oath in supplement, Lord Corehouse remarking that in emitting the oath the pursuer "is liable to full cross-examination and the truth may be thereby elicited. I therefore think we should allow the oath to be taken, reserving to judge of the effect of it." The result is reported in the same volume of Shaw, p. 1132. It appears that the pursuer swore the defender had had connection with her and was the father of the child, but the Court, regarding her evidence as being unreliable, nevertheless assoilzied the defender.

Lord Fraser (Parent and Child, p. 166,) states the rule thus—"It is enough for the woman's plea that she prove that the man had carnal connection with her about the time the child was conceived; and it would not bar her claim though at the same time she had connection with other men."

Now that passage occurs in the part of Lord Fraser's work in which he deals with *semiplena probatio*, and if the words which I have quoted mean no more than that evidence that the pursuer had had connection with another man as well as with the defender would not prevent the *probatio* being *semiplena*, then Lord Fraser's statement of the law goes no further than that of Mr Bell, and only means that evidence of connection with another man will not necessarily exclude the woman's oath in supplement. If, however, as the language rather suggests, Lord Fraser meant to say that evidence of connection with another man created no impediment to the pursuer obtaining decree against the defender, the authorities upon which he relies do not, as Lord Dundas has very clearly shown, support that proposition.

The result at which I have arrived upon a careful consideration of all the authorities is that although the fact, that the pursuer in an action of filiation has been proved to have had connection with two or more men about the time when the child must have been procreated, will not necessarily bar her from obtaining decree against him whom she alleges to have been the father, it is a relevant and material circumstance to which due weight must be given in determining whether or not the pursuer has proved her case. At the same time my impression is (although I can find no direct authority) that the general rule has been understood to be that the Court will accept the sworn testimony of the woman that it was the defender by whom the child was procreated, if in other respects she has shown herself to be a truthful and reliable witness. I do not know that there is any definite principle upon which such a rule could be justified, and I imagine that it originated in the sentiment embodied by Professor Bell in the statement (Prin., section 2060) that "to detect the skulking paramour, in justice to the unhappy mother, the rule of evidence is stretched beyond the common extent."

The rule, however, if rule it can be called, has no application to a case where the woman is so discredited as a witness that no statement which she makes can be accepted without ample corroboration. That is the case here, and accordingly I am of opinion that the pursuer has not proved her case, and that the defender should be assoilzied.

Lord Ardwall—I am of opinion that the interlocutors of the Sheriff and of the Sheriff-Substitute ought to be affirmed.

I have found this case to be one of great difficulty on the evidence.

With regard to the pursuer's case taken by itself, I think there can be no doubt that she has proved that connection took place between her and the defender on the 1st of April 1906 and 10th August 1906. There is a good deal of contradiction about what happened on the night of the dance on 10th March 1906, but I am inclined to think on the whole that the pursuer's story is sufficiently corroborated on that point also.

The difficulty of the case arises, however, on the alleged intrigue between the pursuer and Roderick Mann, for if the evidence of Mann himself and John Kennedy, William Campbell, Donald MacLaren, and William Kennedy is to be believed, a question arises

whether the pursuer can be regarded as a credible witness, as she is contradicted in material points by what they say.

Now, with regard to this part of the defender's case, it seems to me to be open to very grave suspicion. The first attempt to father the child on Roderick Mann was contained in a forged letter, supposed to be written by the pursuer's mother to Roderick Mann, but which seems, so far as the evidence goes, to be the production of John Kennedy—at least that seems to have been Mann's own opinion on the matter—and I consider that the surmise is well founded.

In reply to the letter, however, it is important to notice that Mann at once wrote to Mrs Butter saying that it was a great surprise to him; it was the first time he knew that anything was the matter with her daughter, and that he had nothing to do with the child, and so on. I may observe that he makes a very lame appearance in cross-examination regarding this letter, and to my mind he does not satisfactorily account for now telling a totally different story.

With regard to the other witnesses on this point, they were all friends, some of them very intimate friends, of the defender, and it seems pretty certain that the forged letter I have referred to was the work of one or more of them. While they speak to familiarities on the part of Mann towards the pursuer, the only time on which they say there was connection between them was when they say they saw them together at the end of the goods shed; and if what they say with regard to that incident is true, it is possible that connection may have taken place then. At the same time it does seem strange, if it be true, as Mann said, that he had before this been accustomed to have connection with the pursuer in the office, that on this particular night they should have left the office and gone to such an unlikely place for anything of the kind as the end of the goods shed, against which it is said they stood during the act in an upright position. It is remarkable also that Campbell and his companion say they managed to get within five or four yards of the couple without being in any way noticed or observed. Altogether the story is a strange one, and it is worthy of notice that Mann himself says it was a week before the ball, and the others place the date a week after the Guay ball, which of course by the time they came into the box they would be well aware was a time that might correspond with the conception of the child whose aliment is sued for. If, as Mann would have us believe, this intercourse had been going on during the months of January and February, it is worthy of notice that the only important occasion spoken to by the other witnesses is further on in the year, and apparently just about the time when the pursuer's intrigue with Mann, if it ever existed, was about to come to an end, for there is no evidence that Mann and the pursuer had any intercourse after that except a general statement by Mann.

The result of all the prying and watching of the defender's friends was most satisfactory if their object was to father the child on Mann and relieve the defender, for while they only succeeded once they say in catching Mann and the pursuer in the act of connection, that act was at a date which suited their purpose admirably. I must say my opinion is that the story is more or less a fabrication, and got up to fit the date of the child's probable conception.

I may observe that it is very easy to get up a tale of this sort with regard to a place like a railway station, where it is proved that the pursuer had to go with and for parcels. It must be noticed also that the Sheriff-Substitute who saw the witnesses—a most important matter in considering evidence in a case like this—holds it "not proven that the pursuer had an intrigue with Roderick Mann, although he says so."

Taking all these circumstances together, I am not prepared to hold that the pursuer is discredited as a witness because she denies the story that is told by the four witnesses I have named and by Mann himself. As the Sheriff, however, remarks, even supposing the pursuer not to be telling the truth in denying having had intercourse with Mann, that can scarcely be taken as making her evidence incredible upon other points in the case if in a sufficient number of these she is strongly corroborated, as I think she is. I also must say that I concur in the remarks of the learned Sheriff with regard to the evidence of the defender as being neither candid nor satisfactory; and I think it is very well worthy of notice that the defender was not examined on his own behalf when called for the pursuer, or recalled to give evidence in his own case. My experience coincides with that of the Sheriff, as I have never known that course taken before in a case of this sort, and along with him I draw the same unfavourable inference from the fact that such a course should be deemed expedient. The defender was not even called on to support the *alibi* which was attempted to be made in the course of his own case. The defender admits that Donald Butter, the pursuer's brother, spoke to him on the subject of the pursuer's condition. Donald Butter says he then admitted he "had to do with her." This, however, the defender denies. I prefer the evidence of Donald Butter, who seems to be a most respectable man.

On the facts of the case, therefore, I am of opinion that the pursuer has made out her case, she being sufficiently corroborated, and her evidence with regard to her connection with the defender not being invalidated by her denial of an intrigue with Mann, which, along with the Sheriff-Substitute, I do not hold to be proved.

An important point of law, however, has been raised in the discussion. On the assumption that it is established by the evidence, first, that the pursuer has proved that the defender had connection with her at such times as make it possible that he may have been the father of the child in question, and that the defender has proved that Roderick Mann had connection with

the pursuer at such times that it is possible that he may be the father of the child, it is maintained for the defender that the pursuer has failed to prove her case, for the reason that the pursuer's own evidence is insufficient to establish that the defender is the father of the child, and that accordingly it is impossible for the Court to determine whether the conception of the child is to be attributed to the intercourse with the defender or with Mann. In my opinion this contention is not well founded, and is contrary to the well recognised law and practice of Scotland.

The law on the subject is thus stated by Lord Fraser in his work upon Parent and Child, 3rd ed. p. 166—"It is enough for the woman's plea that she prove that the man had carnal connection with her about the time when the child was conceived, and it would not bar her claim though at the same period she had connection with other men;" and the same law is laid down in Bell's Prin. (sec. 2061). In speaking of the old manner of taking evidence, Professor Bell says—"To this *semiplena probatio* it is necessary either that intercourse shall be proved with the mother of the bastard child at the time corresponding with the gestation, and to such proof in this respect it is no relevant answer that others also have had intercourse."

In addition to the authority of these institutional writers I may be allowed to refer to the late Sheriff Barclay's Digest of the Law of Scotland, 3rd ed. (1865), *sub voce* "Bastard," p. 59. It is matter of ordinary knowledge that affiliation cases at one time were frequently brought in the Justice of Peace Court, but now for a great number of years almost entirely in the Sheriff Courts of the country. Sheriff Barclay held the office of Sheriff-Substitute of Perthshire for over fifty years, and was recognised as a sound judge and an able lawyer. I therefore think that his opinion on this matter is well worthy of attention. He says this—"It is not sufficient to prove that the woman had intercourse with other men within the period applicable to the birth if there be sufficient proof against the defender. The actual paternity can alone be solved by the mother's oath, if she be credible and consistent. There is the traditionary case where connection with two men occurred on the same night, and the election of the parentage was nevertheless left to the woman's oath. It is relevant, however, to show familiarities with other persons, but who must be named on record, because in weighing circumstances against the defender those of greater weight against another ought to be considered."

From reported cases and from my own experience I may say that this law has been recognised and given effect to in every Sheriff Court in Scotland for at least the last fifty years.

I may refer also to the first edition of Dickson on the Law of Evidence (1855), vol. ii, pp. 772-3, where this passage occurs —"The fact that she (the pursuer) stated that other men had connection with her about the time of conception will not render her oath incompetent, since either the defender or any one of them might have been the father, and the pursuer is likely to know which of them was so. Such a statement, however, will be an important circumstance against her case."

Lord Bankton in a passage in his Institutions (i. 6, 19) expresses an opinion to the effect that where a defender in an action of aliment proves that others had the same correspondence with a woman, or that she is a whore, he is not liable for the child's aliment; and he adds—"For the woman by her own viciousness has rendered the father uncertain, and therefore she alone is subjected to the maintenance of the children, who in that case are termed *vulgo quæsiti*, and as to legal effects have no father."

It humbly appears to me that this reasoning, founded as it is on the idea of punishing the mother of a bastard, is unsound, for, as has been frequently observed both in the English and Scottish authorities, an action for aliment is virtually an action at the instance of and for the benefit of the child. Indeed, Lord Justice-Clerk Hope in *Hill* v. *Fletcher* (10 D. 9), speaking of the oath in supplement, says—"The oath of the mother was admitted because the suit was in contemplation of law instituted for the benefit of the child." I may further remark that Lord Bankton refers to no authority for the passage above referred to except the Roman law, which itself does not seem to be distinct on this point.

The decided cases do not throw very much light upon the question as now presented, probably for the reason that comparatively few actions for aliment have been raised in the Court of Session.

The cases referred to in Lord Fraser's work may be referred to.

In *Caldwall* v. *Stewart* (5 B. S. 390) the Lord Ordinary, Lord Auchinleck, found a man of the name of Stewart to be the father of a child and liable in the aliment thereof "as having had correspondence with the mother, . . . reserving relief to him against his *correi*." This decision, if it shows anything, shows that the Lord Ordinary would not allow a bastard to go without a father merely because it was apparently possible in his view that more than one man had had connection with the mother about the time of conception; but the idea of making more than one man liable for the aliment as being the father of the same child (which is a physical impossibility) does not seem a satisfactory solution of the difficulty.

The next case, *Haggart* v. *Croll* (1836, 14 S. 852), hardly seems to be an authority in point.

Scrimgeour v. *Stewart* (1864, 2 Macph. 667) is more to the purpose, for there it was unanimously held by the Second Division, altering the judgment of Lord Kinloch, that it is not incumbent on the pursuer in an action of affiliation to prove that no other man than the defender had intercourse with her at the time corresponding to the birth of the child. I may state in this connection that I have more than once in the Sheriff Court heard it pleaded

for the pursuer in such cases that the defender had adduced no evidence to show that the pursuer had had connection with or opportunities of connection with any other men than himself, and I invariably objected to such pleading on the ground that there was no obligation whatever on the defender to show anything of the sort, and the fact that he had not done so did not in the slightest degree strengthen the pursuer's case, the matter being entirely irrelevant.

In the case of *Lawson* v. *Eddie* (23 D. 876) the rubric bears that it was proved that the pursuer frequently had had connection with another man about the time that conception might have taken place. It is true that the majority of the Judges did not specially say that they held this proved, but I think the decision amounts to this, that they considered it irrelevant to inquire into that matter at all, as the case against the defender had been established by proof such as usually is held sufficient in cases of affiliation; and Lord Benholme says in the close of his opinion that it appeared to him that the case made against the defender "is such that consistently with our practice in former cases the Court cannot interfere with the decision at which the Sheriff has arrived." If in that case the Court had considered it to be a relevant defence that a man other than the defender had had connection with the pursuer about the time of the possible conception of the child, I think they would have considered the evidence as to Robert Mackie, the second alleged paramour, much more carefully than they seem to have done, but their attitude to the case seems to have been that the case against the defender had been established by proof such as is held sufficient in affiliation cases, and that it did not matter whether Mackie might after all be the father of the pursuer's child or not. In that case it appears from the report that two men of the names of Smith and Milne proved that Mackie had connection with the pursuer, and Mackie himself admits such familiarities with her as would have been sufficient if the case had been brought against him to have proved that he was the father of the child.

Most of the reported cases deal with the question what constituted or did not constitute *semiplena probatio*, and it is noticeable that the pursuer was allowed her oath in supplement even where she had previously accused another man than the defender of being the father of the child. This was done in the case of *Greig* v. *Morice* (16 Shaw, 338), where the pursuer had solemnly before a kirk session charged another man than the defender with the paternity three several times, and yet her oath in supplement was allowed, reserving the consideration of the whole proof when once completed.

In the case of *M'Laren* v. *M'Culloch* (6 D. 1133), where there was a question whether the master of a servant in a farmhouse or a male fellow servant was the father of the child, Lord Cuninghame in admitting the oath of the pursuer (which judgment was affirmed by the Court), said this:—"In the circumstances the defender was instantly condemned by his own wife; and the Lord Ordinary on reviewing the case, probably more coolly than her jealousy would permit, cannot take a different view of the case. Even if there were any circumstances to afford matter of crimination against both master and servant, the lady would have a right by law and by the prerogative of her sex to declare to which of her paramours the child belonged" (see this passage reported on p. 64 of Barclay's Digest of the Law of Scotland, 3rd edition).

I cannot find in the authorities any express reason given for what is here recognised by Lord Cuninghame as a rule in such cases, namely, that a woman has a right to say which of two or more paramours is the father of a child whose aliment she sues for, and that her evidence on oath must be accepted as conclusive on that matter, assuming connection about the period of conception to be proved against both paramours. Of course in some circumstances a woman has means of knowledge not possessed by anyone else. If, for instance, she had connection with "A" a fortnight before one of her menstrual periods and connection with "B" a week after such period, it is evident that if things went on in their usual course at the monthly period, it would be clear that "B" and not "A" would be the father of the child; whereas if there was no menstrual discharge at the period, then it would be equally certain that "A" was the father of a child which was subsequently born. I have been informed by an eminent accoucheur to whom I put the point under discussion, that women constantly assert that they can tell to what particular act of connection conception is due, and they do profess to tell this when endeavouring to fix the probable period of a child's birth so as to secure beforehand the necessary medical and other attendance; but the gentleman I have referred to, at the same time said, that although this was so, he did not, speaking scientifically, understand how they could be certain of anything of the kind, and that apparently they selected out of two or more acts of connection that which, according to their recollection, had given them the greatest carnal satisfaction. Be this as it may, the rule has come to be recognised, probably because in some cases such as I have figured the woman really has means of knowing who is the father which no one else possesses, while in regard to other cases no other person can know better than she. Courts of law accordingly have been accustomed to accept the mother's evidence as the best available and indeed the best possible evidence of the fact of paternity where the circumstances are such that it is necessary to determine which out of two or more men is the father of a bastard.

In one or two of the English text-books, such as Taylor on Evidence, and Taylor's Medical Jurisprudence (5th edition), there are *dicta* which seem to show that in bastardy proceedings in that country it is

not a good defence for a person charged with the paternity of a child to show that another man may have been the father equally well with himself. It is thus stated in the Encyclopædia of English Law, published by Mr Green, *voce* Affiliation, p. 181—"Here it may be said, however, that the defendant cannot escape his responsibility by trying to show that another man equally well with himself may have been the father."

But whatever may be the law of England on the subject, I am of opinion that with the exception of a passage from Bankton the authorities quoted all show that up to the present time the law and practice of Scotland in such cases has been to the effect that it is no defence in an action of affiliation to aver or prove that another man equally well with the defender may have been the father of the child whose aliment is in question, and I must also observe that I do not see that on this matter the change in the mode of proof in affiliation cases made any real difference in principle, although the older practice may have been the means of giving greater weight to the mother's evidence in the arbitrament of the question as to which of two or more men was the father of the child.

It is, of course, quite settled law, as Lord Justice-Clerk Inglis says in the case of *M'Bayne* v. *Davidson* (22 D. 738), that in affiliation cases the evidence is to be dealt with as in other cases, and that the defender is entitled to say that the pursuer must prove her case. But it is necessary to attend to this question, What is the nature and the amount of proof which the Court does require in such cases? Absolute proof, apart from the evidence of the parties, is in the vast majority of affiliation cases impossible, and that on two points—in the first place, it is practically impossible in most cases to obtain evidence apart from that of the woman that the act of connection ever took place between the parties at all, and when that is proved it is equally impossible to have absolute proof that the woman may not, unknown to the defender, have had connection with other men, and that the child is the fruit of such connection. Accordingly, in cases of such an obscure nature the Courts have necessarily required to be satisfied with evidence far short of anything like absolute proof, and by a long series of decisions it has been determined that connection may be inferred from such circumstances as familiarities, frequent opportunities of connection, and generally the whole course of conduct of both parties as observed by witnesses before, at, and after the time when conception must have taken place; and the Court also takes into consideration the evidence of both the parties with the view of seeing whose evidence is most in accordance with credibility and with the other evidence in the case. Of course, it is a sad fact that in every such case one or other of the parties must be guilty of wilful perjury, and the Court must determine which of the two is the guilty party in that respect, and if they are satisfied that the evidence as a whole points to the fact of the defender having had connection with the pursuer at or about the time of conception, or even previous to that period, with opportunities down to that period, then they will hold that the pursuer has proved her case.

This, then, being the nature of the proof with which *ex necessitate rerum* the Court have to be satisfied in affiliation cases, it seems to me that it would be taking a step entirely outside of the present practice to hold that in cases such as I have assumed the present to be the pursuer must not only prove the case against the defender, but must also be put to prove what it is really impossible for her to do, that the child whose aliment is sued for may not be the fruit of connection proved to have been had by her with another man at or about the date of its conception. It is, of course, in most cases impossible that she should do so, and the result of a pursuer being required to adduce such proof would be that in every case where a defender, by conspiracy or otherwise, can get another man who had opportunities of meeting the pursuer to admit that he had had connection with her about the time of conception, he will be able to escape liability.

If it be laid down by the Court that it is a good defence to an action of affiliation for the defender to prove that another man had connection with the pursuer as well as himself, it will, I fear, become a favourite device of village Lotharios to hunt girls in couples, or at all events, when a man has committed fornication with a woman, to bring in some unscrupulous associate and leave him in such situations as will enable both paramours to prove that they had connection with the woman, and as she is unable, according to the law now contended for, to prove which of them is the father of the child, thus to escape liability altogether. Such results, which I am confident would frequently happen, knowing as I do from some 19 years' experience as a Sheriff the unscrupulous nature of the men who defend actions of affiliation, would, I think, be most deplorable, and would have an evil effect on the morals of the community, and especially on those of flighty young women, and would also, in my opinion, lead to more perjury than presently exists in connection with such cases. Further, I think that to introduce this entirely novel rule into the law and practice of Scotland is against public policy. A bastard is not without rights. He is entitled to have a putative father declared to whom he may look for aliment, and the course of recent legislation, especially in the sister country of England, has been to recognise these rights. Now, it appears to me that the introduction of the doctrine that where two men have had to do with a woman about the time of the conception of a child both of them are to escape because it cannot be shown which was the father, will open a very wide door to admit of the defeat of bastards' rights to have a putative father, and will also lead to illegitimate children being thrown to a still greater

extent than at present as a burden upon the ratepayers. On the other hand, I cannot see that it is contrary either to law and equity that if a man is proved to have had connection with a woman by the ordinary evidence by which such an act has hitherto been held to be proved in law, and a child has followed such connection within the ordinary period of gestation, that he should be held, if sued as a defender, to be the father of the child, notwithstanding it may be the case that another man might equally well be held to have been the father of the child. By his own act he has put himself in the position of being charged by the law with the paternity of the child, and if he has to pay for his carnal indulgence, I do not think he has any reason whatever for complaint.

I am accordingly of opinion that in the present case the pursuer having established her case against the defender in the usual way, he is not entitled to escape the liability thus fastened on him, even assuming it to be proved that the pursuer also had connection with the witness Roderick Mann.

On the whole case I am of opinion that the judgments of the Sheriffs ought to be affirmed.

LORD DUNDAS—I agree with the opinion of my brother Lord Low, and regret that I must differ from my brother Lord Ardwall. I am prepared to hold—though with considerable difficulty, for the evidence seems to be very narrow—that it is proved that the defender had intercourse with the pursuer on or about 1st April 1906, *i.e.*, just eight months before the birth of her child; and also on or about 10th August in the same year. I further hold it clearly proved (as I understand the majority of your Lordships do), in spite of the pursuer's denial, that Roderick Mann had intercourse with her on various occasions during the earlier months of that year. The question sharply raised is whether or not in these circumstances decree of paternity ought to be pronounced against the defender.

The pursuer's counsel urged that even if the Court should hold her connection with Mann to be proved, his client was entitled to decree of paternity against the defender, because by our law, if intercourse with him at an appropriate date is established, proof of the pursuer's contemporaneous intercourse with another man is irrelevant to bar her claim. This broad and unqualified proposition appeared to me to be startling, and contrary to good sense and justice. It is, of course, impossible that both the defender and Mann can in fact be the father of the child; and upon the assumption that they both had connection with the mother about the possible date of its conception, it is at least as likely (if not more so) that Mann was the father as that the defender was.

But the pursuer's counsel cited, as supporting his contention, such high authorities as Professor George Joseph Bell and Lord Fraser, and the passages relied upon require careful attention. Professor Bell (Principles, section 2061) says, *inter alia*—"To this *semiplena probatio* it is necessary . . . . that intercourse shall be proved with the mother of the bastard child at the time corresponding with the gestation; and to such proof in this respect it is no relevant answer that others also have had intercourse." The doctrine thus propounded appears in substantially the same form in the first edition (1829) of the Principles, and in the subsequent editions. Lord Fraser (Parent and Child, 3rd edition, 1906 p. 166) states that "it is enough for the woman's plea that she prove that the man had carnal connection with her about the time when the child was conceived, and it would not bar her claim though at the same period she had connection with other men." These words occur in the first edition of Lord Fraser's work (Domestic and Personal Relations, 1846, vol. ii, p. 55) under the heading, "*Semiplena probatio*," in his exposition of the then existing law and practice in filiation cases, and are repeated under the same heading in the second edition (Parent and Child, 1866, p. 134), as well as in the third. It seems probable that Lord Fraser adopted the statement of Professor Bell.

I need not say that any proposition laid down by these eminent writers must be received with the greatest respect; but I have come to be satisfied that the cases they cite do not, when examined, support the doctrine thus broadly stated in their texts. Before referring to these cases I pause to point out that while Stair and Erskine do not, so far as I can find, anywhere deal with the point under consideration, it is expressly dealt with by Bankton (Inst., i, 6, 19), who says—"If the man proves . . . that others had the like correspondence with her, or that she is a whore, he is not liable for the child's aliment, for the woman by her own viciousness has rendered the father uncertain, and therefore she alone is justly subjected to the maintenance of the children, who in that case are termed *vulgo quæsiti*, and as to legal effects have no father." Professor Bell does not, I think, anywhere allude to Bankton's view. Lord Fraser (3rd ed., p. 166, note 3) curtly dismisses it in three words—"Bankton thought otherwise." Turning now to the decisions, I observe that both Bell and Fraser (and their respective commentators) support the statements I have quoted by reference to the same cases, four in number, two of which were decided before the Evidence Act 1853, and two after it. I shall deal with these four cases in their chronological order. The first is *Caldwall* v. *Stewart* (1773, 5 B.S. 390 and 555). It appears (p. 555) that though Stewart "did not directly own his having had criminal correspondence with Caldwall, yet, when called before the kirk-session of Beith he made a declaration and offer to submit to discipline provided the woman would swear before the congregation that she had not within a twelvemonth had criminal correspondence with any other but him." This explains the language of the report on p. 390, which narrates that "in a process . . . for aliment

of a child, a son, of which Stewart was found to be the father—at least was bound to aliment, as having had correspondence with the mother—Lord Auchenleck found (25th January 1773) that he was so bound, reserving relief to him against his *correi* . . . Upon petition and answers the Lords adhered." The "correi" were, of course, not parties to the case; nor do I gather from the report that any of them were examined as witnesses, or that they in fact existed at all. There may be something to say in support of this quaint old decision from the standpoint of general equity, or rough and ready justice, though (if paternity be the legal ground of liability for aliment) it seems indefensible when one considers the physical facts of fatherhood. But it stands alone, so far as I am aware, and is not, I apprehend, likely to be repeated. The second case (*Haggart*, 1836, 14 S. 852) throws little or no light on the matter. It deals merely with evidence which the Court thought amounted to *semiplena probatio*, so as to entitle the pursuer to her oath in supplement. The Court apparently considered that the defender's own declaration impliedly admitted paternity; that there was some corroborative evidence; that the testimony of a man Brand, who asserted that he had himself had connection with the pursuer (which she, by somehow lodging a "certificate," denied), was "liable to suspicion"; and that upon the whole matter "there was sufficient ground for allowing the oath in supplement." One knows nothing of the ultimate result of the case; but I think it certainly affords no support for the view that if Brand had been proved to have had intercourse with the pursuer about the time of conception, the defender must nevertheless have been held to be the father of the child. The third case is *Lawson* v. *Eddie* (1861, 23 D. 876). The pursuer's child was born on 3rd July 1859; the defender admitted an act of connection with her on 4th December 1858, but denied any previous or other intercourse; but on 18th June 1859 he appeared with her before the kirk-session and admitted his paternity of her coming child. It was also, *inter alia*, proved that in 1857 the defender had been courting the pursuer with a view to marriage. The Court (*diss.* Lord Justice-Clerk Inglis) held that the connection in December being admitted, and there being previous opportunity, the pursuer's evidence was sufficient to establish her case against the defender. The rubric of the report further bears that "it was proved (although she denied it) that previous to November the pursuer frequently had connection with another man." If this part of the rubric were correct, the case would certainly be an authority, by necessary implication, for the present pursuer's proposition that proof of her intercourse with Mann would not (though she denied it) bar decree of paternity going out against the defender. But I am satisfied that the rubric is incorrect, so far as the words quoted are concerned, though I am at a loss to conjecture how the error may have arisen. A perusal of the session papers discloses that the alleged intercourse between the pursuer and this third party (Mackie), which he and she both denied, was spoken to by two lads of about fourteen years of age. The Sheriff-Substitute believed their evidence, and disbelieved that of the pursuer and Mackie; and he indicated in his note a strong impression that the two latter persons had "combined together to father the child on the defender, and to accomplish that object have sworn contrary to the truth." He accordingly assoilzied the defender. The Sheriff recalled the interlocutor, and "finds in point of fact that it is sufficiently proved that the defender is the father of the pursuer's child." The ground of his judgment, as I gather from his note, was that the defender's admission of connection in December 1858, his declaration before the kirk-session in June 1859, and other facts and circumstances, coupled with proof of opportunity, in and about October 1858, conclusively established the pursuer's case against the defender independently of her own oath. He added, that if these facts had been less material, the evidence of the two lads about the pursuer's connection with Mackie, "and several other circumstances in the case, would have deserved more weight. But as it is they do not appear sufficiently to undermine the case of the pursuer." I do not pause to criticise the Sheriff's grounds of judgment, though they seem to me to be open to criticism. This Division, by a majority, affirmed his interlocutor, but it seems plain from the report that the learned Judges did not hold it proved that Mackie had had intercourse with the pursuer. Lord Benholme, who pronounced the opinion of the majority, thus stated the basis of their judgment—"Although it is true that in cases of filiation no one case can form a decisive precedent for another, yet I think our practice has proceeded upon this general rule, that if the defender admits connection within the period of gestation, and if, in addition to this, it is proved that he had opportunity of connection at or about the time of conception, the pursuer's oath as to connection at that time will require little or no additional corroboration." After referring to a decision in support of this view, his Lordship said—"The only doubts that hang over this case arose from the evidence of the pursuer's connection with Robert Mackie, and her denial of that intercourse. The suggestion has been made that Mackie may after all be the father of the pursuer's child. I am not prepared to say that this is impossible." Lord Benholme went on to point out that Mackie was not there on his defence to "disprove the suspicion of his being the father," and the Court could not know what defence he might have been able to make if an action had been brought against him. The Lord Justice-Clerk (Inglis) dissented, holding that the pursuer's evidence was wholly discredited, and that without her evidence her case was not made out. I gather that his Lordship was disposed to believe that

the pursuer's intercourse with Mackie was proved, as the Sheriff-Substitute had held. But the majority of the Court, as I read the case, thought otherwise. Upon this summary of *Lawson's* case it seems clear that the rubric is wrong in stating that it was proved that the pursuer frequently had connection with Mackie. I think that *Lawson* v. *Eddie* affords no authority for the proposition that proof of a woman's contemporaneous intercourse with other men is irrelevant to bar decree of paternity being pronounced against the defender. The fourth and last case, *Scrimgeour*, 1864, is very briefly reported in 2 Macph. 667, and with equal brevity but more distinctness in 36 Sc. Jur. 334. The session papers disclose that a man named M'Lean asserted that he had had intercourse with the pursuer about the time of conception. The pursuer denied any intercourse with him, and the Sheriff-Substitute (Barclay) and the Sheriff (Gordon) utterly disbelieved his story, as apparently the Second Division did also. But the only point of interest in the case was that this Court held the Lord Ordinary (Kinloch) to be wrong in laying upon the pursuer the *onus* of proving that no man except the defender had had connection with her at a period corresponding with the birth of her child. No one will doubt the soundness of this judgment, but it decided nothing as to the legal position where the defender succeeds in proving the contrary proposition.

So far, then, the matter seems to stand upon the opinion of Bankton on the one hand, and those of Bell and Fraser on the other hand, the latter opinions being, as I have endeavoured to show, based upon cases which do not support them. But the late Sheriff Barclay, whose long judicial experience entitles his words to respectful consideration, has a passage (which appears in the first four editions of his Digest, *s.v.* "Bastard," though it is omitted in the fifth (Mr Chisholm's 1894 edition) to the following effect—"It is not sufficient to prove that the woman had intercourse with other men within the period applicable to the birth, if there be sufficient proof against the defender. The actual paternity can alone be solved by the mother's oath, if she be credible and consistent." The learned author, as I understand him, means that a woman knows which of two or more men, having access to her person about the same time, is the actual father of her child; but that the Court is not bound to accept her assertion on this point if it holds her evidence to be otherwise false or unreliable. The latter branch of this proposition, taken by itself, seems to afford a safe and sufficient ground for the decision of this case; and it is possible that Professor Bell and Lord Fraser did not mean to put the matter higher, though, upon that assumption, their language is, I think, too broad and unqualified. As regards the first branch of the proposition (to which I shall revert at a later period, and the soundness of which I venture to doubt), I may say that I have not been able to discover any express judicial recognition in the Court of Session of a woman's supposed power to know which one of several contemporaneous lovers was actually the father of her child, except a *dictum*, purely *obiter*, by the Lord Ordinary (Cuninghame) in *M'Laren* v. *M'Culloch*, 12th June 1844. Lord Cuninghame's opinion is omitted from the only report of the case (6 D. 1133); but from the session papers one discovers that, in holding the evidence to amount to a *semiplena probatio*, his Lordship observed that "the lady would have a right by law, and by the prerogative of her sex, to declare to which of her paramours the child belonged." This *dictum* does not, I confess, commend itself to my mind either as good sense or sound law. But even if the doctrine laid down by Sheriff Barclay be applied in its entirety to the present case, it seems to me that the pursuer must fail, because the Court holds that her oath is not "credible and consistent," looking to her denial of intercourse with Mann, as well as other falsehoods and exaggerations to which the learned Sheriffs allude in their notes. If the case had arisen under the old practice (prior to the Evidence Act 1853), I think that if the Court had held there was *semiplena probatio*, and the pursuer, upon her oath in supplement, had denied connection with Mann, the Court, disbelieving her denial, and considering the other inconsistencies in her evidence above referred to, would have assoilzied the defender. The old procedure is very well described in an interesting article by Sheriff Barclay (1857, Journal of Jurisprudence, vol. *i*, p. 445, and 6 P.L.M. p. 342), where he points out the great tactical advantages it gave the woman, because her oath was taken only after the defender's declaration had been made and the whole evidence led. She had merely to confirm and corroborate the testimony, and swear that the defender was the father; and it was only when she overshot the mark, and contradicted the witnesses, that she could ultimately fail. Striking instances of such ultimate failure are found in cases like *M'Naughton* (1838, 16 S. 614 and 1103), *Greig* (1838, 16 S. 338 and 1132), and *Folley* (1848, 10 D. 1424). It is, I think, quite as clear that the pursuer's case must fail under our existing practice and procedure. In *Scott* (1856, 19 D. 119) the Court had for the first time to consider how they should regard a pursuer's evidence in a case of filiation in view of the Evidence Act 1853. Lord Cowan (at p. 121) said that "the whole proof must be taken together, and the deposition of the pursuer be judged of along with the other evidence. The question must be whether she has satisfactorily proved her case. There can be no room for considering whether the rest of the evidence amounts to *semiplena probatio*, laying aside her oath, so as to permit of her deposition being taken as completing the proof of paternity. Her oath emitted in the cause as a witness is to be judged of and tested, like the deposition of any other witness, upon the evidence generally led by both parties." A few years later, Lord Justice-Clerk Inglis in *M'Bayne's* case (1860, 22 D. 738) said—"Filiation cases have no

longer the peculiarity that the evidence of one of the parties is received as conclusive after a *semiplena probatio* has been made out. The evidence is to be dealt with as in other cases; the parties are the principal witnesses; they know the facts which lie at the bottom of the case, and what the Court has to consider is, on the whole evidence, on which side is the balance of credibility. Where the parties distinctly contradict each other, the Court are just in the position of a jury, to decide on which side is the preponderance of credibility. Still, however, the defender is entitled to say that the pursuer must prove her case." This statement of the law was criticised in some later cases (*e.g.*, *M'Kinven*, 1892, 19 R. 369; *Costley*, 1892, 30 S.L.R. 87), but I think it may be taken as correct. In *Young* (1893, 20 R. 768) Lord Trayner expressly said that "the rule laid down by the late Lord President in *M'Bayne* v. *Davidson* . . . . is, in my opinion, the sound rule, and I have never said anything to the contrary, nor has any judge in recent times to my knowledge. That rule, stated in a sentence, is that in cases of filiation 'the evidence is to be dealt with as in other cases . . . the pursuer must prove her case.'" If one views the evidence in the light of the "rule" thus laid down, I think the pursuer has clearly failed to prove her case. There is here no question of any "prerogative" or choice of lovers (even assuming that a woman has such knowledge as enables her to designate the actual father)—for she denies (falsely, as we hold) any intercourse with Mann. It is a mere question of evidence and credibility. For these reasons, which have been in substance enunciated by Lord Low, though with greater brevity, I think that the defender is entitled to be assoilzied.

It is not *hujus loci* to decide (or even to consider) whether or not the result would have been different if the pursuer had admitted connection with Mann contemporaneously with the defender, and had been otherwise a credible and consistent witness. But I think that if and when a suitable case arises the matter would be worthy of serious consideration. I confess, for my own part, I do not admire, nor indeed fully understand, the doctrine of a woman's absolute "prerogative" to declare to which of her paramours her child belongs. It can hardly, I apprehend, be a rule of law unless it rests upon a sound medico-physiological basis; and of this I find no trace in our books or decisions, while such research as I have been able to make in works on medical jurisprudence seems adverse to the theory. It was suggested in the argument that it might be hard that a women who has had intercourse with several men about the same time should have no remedy against any of them (and this view derives some support from Professor Bell's *dictum* in 2060 of the Principles); and again, that a man who puts himself in the position of possibly becoming a father is not entitled to complain if the paternity of the child is fixed upon him. But the legal question is not truly as to hardship to the woman on the one hand,—though I do not see much hardship in holding that a woman who entertains two or more lovers contemporaneously may be in a worse position to recover aliment for her child than if she had been content with one at a time—or of penalty or punishment upon masculine immorality on the other hand. The legal claim for aliment is really a claim for the child, whose primary debtors are, of course, its parents jointly—or, at the most, a claim at the mother's instance for relief against the father—but if the father cannot be discovered, or cannot pay, then the mother must support her child, or, if she is unable to do so, then the parish of her settlement is liable. I confess that, as at present advised, I see more good sense in Bankton's view that, if the mother "by her own viciousness has rendered the father uncertain," the result should simply be that she fails to prove her case against any one of the possible fathers. The contrary view seems to me illogical, and might, I think, involve unfair and mischievous results. The Court's duty is not, in my judgment, to find a father, at all hazards, for every bastard child, but to decide filiation cases, like all others, according to the just result of the evidence. It was suggested that there may have been some course of practice in Sheriff Courts in accordance with the pursuer's theory of the law. I should think that cases are not common in which the pursuer admits that two or more men have had connection with her about the date of conception; but even if some degree of practice has obtained, it ought, I apprehend, to be checked if it is erroneous. I do not know how English law and practice on this matter stand, but I notice that the case of *Garbutt* (1863, 32 L.J. Mag. Cas. 186) seems to support the view which at present commends itself to my mind. These latter observations, however, are purely by the way. For the reasons already stated, I am clearly of opinion that this case ought to be decided in favour of the defender.

LORD JUSTICE-CLERK—After considering the proof I have such doubt as to the evidence on which the case is founded, in view of what my opinion is as to the credibility of the pursuer, that I would be prepared to hold that the pursuer had failed to prove her case. But as your Lordships are all of a different opinion, I add nothing on that matter, except to express the doubt from which I am unable to free myself, in which I am in the exact position of my predecessor in this chair in the case of *Lawson* v. *Eddie*. But I am satisfied that the proof establishes that there was intercourse with Mann. I see no ground for holding the evidence to be the result of a conspiracy to support the defender's case by perjury.

A point is made against Mann's evidence when he was led by a fabricated letter to understand that he was accused of being the father. His letter denying it was just the ordinary one which is written by a

man guilty of having connection with a woman, in order to repudiate the paternity, expressing surprise and declaring that he had nothing to do with the child. That incident of the letter does not affect my mind at all on the question whether the evidence given on oath is to be believed.

I consider that the pursuer is discredited as a witness, and I am unable to see that the other evidence is sufficient to justify one in holding that the specific facts which she alleges are proved satisfactorily. It requires a very clean and complete case to set up the case of a pursuer when credence cannot be given to the evidence of the principal witness.

As regards the question of law relating to the effect of evidence in cases of affiliation, I have considered it anxiously, and feel compelled to agree with the views expressed by Lord Dundas. It appears to me that the law has been often tacitly assumed to be as laid down by Lord Fraser, but I confess I have never been able to see how it can be held consistently with reason that if a woman is proved to have had intercourse with different men about the time of conception, her assertion that a particular man is the father must be held to establish the fact, so that a Court must find in fact that he is the father. I dissent altogether from the doctrine laid down in Barclay's Digest, that where such promiscuous intercourse is proved, that "the actual paternity can alone be solved by the mother's oath if she be credible and consistent." I agree with and therefore do not repeat the very cogent criticism of my brother Lord Dundas on Sheriff Barclay's statement of the case. I freely admit that some such view of the law as to the effect of the woman's evidence is to be found in some cases, but when these are looked into, the views stated seem to me to be so extraordinary as to approach the irrational, and to be actuated by a desire to find a father for every child, which it is not the duty of a judicial tribunal to do. When Dickson in his work on evidence says that when more than one man might be the father, the woman's oath is to be accepted, as "the pursuer is likely to know which of them was so," I can see no ground in reason for any such view being held to be sound. Such a doctrine is not intelligible, and it seems to me to be an attempt to evade the law that a pursuer must prove her case. Another view, much more frank and cynical, is that the woman is free to take her choice, and that a Court must declare the person to be the father whom she selects. That is to say, that if she indulges her passions with several men she can choose the most satisfactory one from the aliment paying point of view. That idea is intelligible, but it is not justice.

The opposite doctrine is expressed distinctly by Bankton when he says that "the woman by her own viciousness has rendered the father uncertain." That seems to me to be sound common sense. I do not agree with my brother Lord Ardwall that Bankton's reasoning is unsound because the action of affiliation is in the interest of the child. I cannot understand how the fact that it is the child's aliment that is the question can affect the rules of evidence upon a question of fact. If the evidence would be insufficient to prove the necessary fact, I am unable to see why the same evidence should be held to prove the fact because some one other than the pursuer is interested in obtaining the money demanded from a defender.

The authorities in decisions which are reported on this question seem to me to indicate how there has been a straining of reasoning to reach a result which may be convenient but is not logically defensible. When Lord Auchinleck held a defender to be the father of a child, "reserving relief to him against his *correi*," it seems to me that there was a departure from those rules of common sense which must be followed in considering the legal value of evidence. I agree with Lord Ardwall that the idea of making more than one man liable for aliment as being the fathers of the same child whether directly or by a process of relief by one fornicator against another (which is holding a physical impossibility to be proved) does not seem a satisfactory solution of a legal difficulty. Such a view and such a decision when dissected into its component parts comes to this—"I find you are the father, but if you can prove that others were the 'father' as well as you, I reserve your right to get relief from the other fathers." To call such a view unsatisfactory is a very mild term of repudiation of a doctrine so plainly irrational. I think it is not less unsatisfactory, not to say irrational, than getting rid of a difficulty by holding a case to be proved when the evidence cannot prove the case, for I know of no ground for saying that a woman who has intercourse with two or more men about the same time can establish it as a proved fact that one she selects is the father of a child which is born at a time which suits the period of gestation counting from the promiscuous acts of connection, one of which must have caused conception.

The case of *Scrimgeour* v. *Stewart* established only that if a pursuer proves her case she is not required to prove a negative by establishing that no other man than the person she accuses had intercourse with her at such a time as might have led to the birth at the time when the child was born. She is not called on to prove a negative.

The case of *Lawson* v. *Eddie* is one which certainly proceeds upon what is called "practice in former cases." But this was not any practice in regard to holding that the woman, if proved to have had connection with two men, could by her own evidence prove which of them was the father. As Lord Dundas has pointed out, that question did not truly arise. The practice Lord Benholme spoke of was the practice of holding that if a defender admitted connection at a date too far down to correspond with the period of conception, a case might be held proved if on a previous occasion the parties were in suspicious circumstances and the pursuer deponed that on the occasion there was

intercourse. That was a practice based entirely on ordinary rules of evidence, and had nothing to do with the question whether another had had connection with the pursuer about the same time. Lord Benholme indicates that the Court were not by the evidence put in the position of saying whether intercourse with another man took place at the appropriate time. The man who was alleged to have connection with the pursuer denied it upon oath although he admitted familiarities. And from the report one cannot gather that there was evidence that if the other man had connection with the pursuer, it was at or even near the time when the conception could be attributed to him. The only times mentioned in the report were in the summer and harvest time, whereas the child must have been begotten in November. It is significant that, as I have already mentioned, the Lord Justice-Clerk Inglis dissented on the ground of the evidence of the pursuer being unworthy of credit.

The view of the law contended for by the pursuer is certainly expressed very distinctly by Lord Cuninghame in the case of *M'Laren* v. *M'Culloch*, where he says, rather quaintly—"the lady would have a right by law and by the prerogative of her sex to declare to which of her paramours the child belonged." The expression "the prerogative of her sex" is "good," but one would like to know under what stateable legal principle of law one sex has a prerogative to decide its own case by its own assertion upon a matter on which there is no ground for saying that assertion can be based upon certain facts even in the mind of the party exercising the prerogative. I am in the same position as my brother Lord Ardwall when he says—"I cannot find in the authorities any reason for what is here recognised by Lord Cuninghame as a rule in such cases." And I will add that I am not surprised that no reason is given. But my brother Lord Ardwall thinks that a rule to this effect has been established, not only as regards cases where the woman can know as matter of fact from the cessation of her periods, but as he says as regards other cases, because "no other person can know better than she. The Court is accordingly entitled to accept her evidence as the best available, and indeed the best possible evidence of the fact." I cannot assent to that. It is, in my opinion, not evidence of the fact at all, and therefore cannot be the best available. For that which is non-existent cannot be the best, and there being "no other evidence possible" cannot justify the holding of nothing that it is something. I cannot assent to the idea that any doctrine based, as Lord Ardwall says, on an *ex necessitate rerum* principle can be a sound basis for a rule of law which cannot be defended on, as I think, any rational ground. Nor can I hold that this Court has any right or duty to consider whether its view of the law would lead to more bastard children being thrown as a burden on the rates.

It is possible that the practice may have crept in from the old form of procedure, in which after a *semiplena probatio* the woman's oath was received in supplement, and there may have been an idea that when the case reached that stage the woman was in a sense the arbiter of her own case. But, however it arose, it seems to me to have been not based on sound reason, and that this is plainly indicated by the fantastic deliverances uttered in giving effect to it.

At the present day, as the decided cases make certain, it is the rule of law that the pursuer must prove her case, as any other pursuer must do, by facts leading unambiguously to her right of decree, and I cannot accept the idea that any laxity is to be permitted in enforcing the rules of evidence because the interests of the child are involved. Whether the demand is in the interests of child or mother or both has nothing to do with the sufficiency or insufficiency of evidence. It is a question of evidence to prove a fact, and not "a question of public policy" as seems to be suggested. A bastard can have no right to have a putative father declared unless the evidence justifies the declaration according to sound sense as applied to evidence, as in any other case. A pursuer in such a case has no exemption from the rule that unless she proves her case by competent evidence she must fail.

Nor can I accede to the view that the rules of evidence are to be relaxed because if not relaxed it may lead to conspiracies to commit perjury. A judicatory in administering the law is not entitled to consider consequences which may arise from the viciousness of persons in endeavouring to escape its operation. That would to my mind be a most dangerous doctrine. In these cases of affiliation there is often wilful perjury on one side or the other. The danger of temptation to perjury is one which exists on both sides, not merely on the man's. For the woman is often tempted to secure the man who can pay best, and if she has been having intercourse with several, the temptation is strong to select such a man, or she may select a man against whom she thinks she has best chance of convincing a court where the case against the true offender might be difficult to prove in consequence of the secrecy attending the liaison. Accordingly, if she is to be held entitled by her own statement to have proved which man was the father, the evil may be just as bad as in the converse case.

Lastly, I cannot accept the view that it is equity that because a man has put himself in the position of being charged by the law with the paternity of a child, that, as Lord Ardwall puts it, "if he has to pay for his carnal indulgence," he has "no reason whatever for complaint.' In my opinion he has reason to complain of the law if he is held to be the father of a child when the fact has not been proved.

It seems to me to be begging the question to say that he has no ground of complaint for being declared as matter of fact to be the father, when the circumstances are, as assumed by Lord Ardwall, "that another

man may equally well have been the father of the child." If the result of the evidence is that another may equally well have been the father, then it is plain that the defender has not been proved to be the father—in short, that the evidence is not such as to justify the finding in fact that he is the father.

On these grounds I concur in the opinions of Lords Low and Dundas that the judgments appealed against must be recalled and the defender assoilzied.

The Court recalled the interlocutors of the Sheriff and the Sheriff-Substitute and assoilzied the defender.

Counsel for the Pursuer (Respondent)—Jameson. Agents—Carmichael & Miller, W.S.

Counsel for the Defender (Appellant)—Anderson, K.C.—Dallas. Agents—Balfour & Manson, W.S.

HOUSE OF LORDS.

Friday, March 26.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord James of Hereford, Lord Dunedin, and Lord Shaw of Dunfermline.)

LOWS *v.* GUTHRIE AND ANOTHER (LOW'S TRUSTEES).

(*Ante*, 44 S.L.R. 925, 1907 S.C. 1240.)

Writ — Attestation — Denial by Attesting Witness that Signature was Adhibited or Acknowledged in his Presence.

Observations per Lord Dunedin and Lord Shaw, the point having been abandoned by counsel, to the effect that "it is not enough to set aside a probative deed in Scotland that one instrumentary witness simply says that he did not hear the signature acknowledged."

Smith v. *Bank of Scotland*, June 4, 1824, 2 S. App. 265, *followed*, and Lord Mackenzie in *Cleland* v. *Cleland*, December 15, 1838, 1 D. 254, *approved*.

Will — Reduction — Agent and Client — Undue Influence—Person in Fiduciary Relationship Preparing and Benefitting under Will—Onus.

Observations upon the *onus* placed upon an agent or person in a fiduciary relationship who has prepared a will under which he benefits.

This case is reported *ante ut supra*.

The pursuers (respondents in the Inner House) appealed to the House of Lords.

At the conclusion of the appellants' argument, the respondents not being called upon—

Lord Chancellor — I should be very sorry if the rule adopted by Lord Cairns in *Fulton* v. *Andrew* (1875, L.R., 7 E. & I. App. 448) were used as a screen behind which one man was to be at liberty to charge another with fraud or dishonesty without assuming the responsibility of making that charge in plain terms.

This case is a very peculiar one. A man named Low was living in Brechin. He had been separated from his wife and family for upwards of 40 years. He made a disposition of his property with the assistance of Mr Guthrie. I am quite persuaded that Mr Guthrie was perfectly honest; he has been so found by the Lord Ordinary, and the Inner House has accepted that view, as I do. This gentleman made no profit for himself; he distributed the property according to the private trusts which had been orally conveyed to him, and after ten or eleven years the appellants, who were the sons of the testator, and who had never seen him or did not even know him, come back and commence this litigation against Mr Guthrie, bringing him up on veiled charges of dishonesty even to your Lordships' House. I think it is an unprincipled proceeding. In my opinion the case entirely fails. I will say nothing as to the claim to be made in regard to legitim, but I think that this appeal ought never to have been brought, and being brought, ought to be dismissed with all the costs here and below which your Lordships are empowered to give.

Lord Macnaghten—I quite agree.

Lord James of Hereford—It is really unnecessary to say anything more than that I entirely concur with the judgment of the noble Lord on the Woolsack, but I think it is perhaps satisfactory to the defender and those who represent him in this case to know that there is no dissent whatever from the judgment given by the Court of Session.

The judgment of your Lordships' House will in no way weaken that which is the basis of our law upon the subject of the making of a will by a person interested. That was laid down by Baron Parke in the case in the Privy Council, which has been referred to, and upon which judgment I think all other decisions have been based. That only requires that where a person is interested, vigilance shall be exercised in seeing that the case, if he has to meet one, of undue influence or the knowledge of the testator is fully proved. It does not go further than that. There is no disqualification in the making of a will through a person who takes an interest having made it. Therefore all you have to do in this case is to vigilantly look and see whether there is any evidence that can shake the fact that the will was made. I have nothing more to say upon the subject. I entirely agree with what was said by Lord Kinnear on that point—"Upon the whole evidence in the case I may say I am unable to see any shadow of evidence for charging Mr Guthrie with undue influence or, in other words, with fraud." I entirely agree with that view, that there is no shadow of evidence, and I am sure that your Lordships