The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute dated 5th May 1913, and remitted the cause to him to proceed as accords.

Counsel for Pursuers (Respondents)—Clyde, K.C.—Hon. W. Watson. Agents—Webster, Will & Co., W.S.

Counsel for Defenders (Appellants)—Sandeman, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Tuesday, June 17.

FIRST DIVISION.

(SINGLE BILLS.)

TAYLOR *v.* STEEL-MAITLAND.

(Reported *supra*, p. 395.)

Expenses — Taxation — Sheriff — Employment of Counsel—Sheriff in Interlocutor Disposing of Merits of Case Sanctioning Employment of Counsel — Interlocutor of Sheriff Recalled by Court of Session—Auditor Allowing Fees to Counsel.

Where a Sheriff-Substitute in an interlocutor disposing of the merits of a case had sanctioned the employment of counsel in the Sheriff Court, and that interlocutor had been recalled by the Court of Session, it was *held* that the Auditor was entitled to treat the certificate of employment of counsel as still in force.

The arbiter appointed by the Board of Agriculture and Fisheries in a reference under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII. cap. 64) between Mrs M. R. Steel-Maitland of Barnton, Midlothian (*respondent*), and James Taylor, farmer at Easter Drylaw, on the said estate (*claimant and appellant*), submitted a case, under section 9 of the Second Schedule of the Act, for the opinion of the Sheriff of the Lothians and Peebles at Edinburgh.

On 23rd August 1912 the Sheriff-Substitute (GUY) pronounced an interlocutor disposing of the merits of the case and sanctioning the employment of counsel in the Sheriff Court.

The claimant appealed to the Court of Session, and on 28th January 1913 the Court recalled the interlocutor of the Sheriff-Substitute.

The respondent having been found entitled to expenses, and the Auditor having lodged his report on the respondent's account of same, the appellant objected thereto in so far as he (the Auditor) had allowed, *inter alia*, fee to counsel in the Sheriff Court. The ground of objection was that the interlocutor in which the Sheriff-Substitute had sanctioned the employment of counsel had been recalled, and there was no longer in force any certificate of the Sheriff entitling the Auditor to allow that fee.

The Court repelled the objection.

Counsel for the Appellant—Guild. Agents—Guild & Guild, W.S.

Counsel for the Respondent—Mitchell. Agents—John C. Brodie & Sons, W.S.

Wednesday, June 18.

SECOND DIVISION.

[Sheriff Court at Dundee.

FLORENCE *v.* SMITH.

Parent and Child — Filiation — Proof — Intercourse Subsequent to Date of Conception—Denial by Defender of Intercourse.

In an action of filiation where the parties were living in the same neighbourhood at the date of the conception, but no meeting was proved to have occurred, *held* that proof of intercourse at a date subsequent thereto, together with the defender's denial of such intercourse, was sufficient corroboration of the pursuer's story.

Catherine Eleanor Florence, Warthill, Aberdeenshire, *pursuer*, brought an action of affiliation and aliment in the Sheriff Court at Dundee against George Smith, Dundee, *defender*.

Proof was allowed, the import of which sufficiently appears from the note (*infra*) of the Sheriff-Substitute (NEISH), who on 26th July 1912 assoilzied the defender.

Note.—"The parties to this case resided on neighbouring farms in Aberdeenshire, their fathers were related, they were at school together, and have known each other from childhood. The pursuer has always resided with her father at Knowley, except for a period from January 1909 to May 1909, when she was in Aberdeen attending cooking classes.

"The defender on leaving school in January 1906 went to a bank in Inverurie. In May 1908 he was transferred to Durno. He remained there till January 1910, and during this period resided at home. From Durno he was transferred to Huntly, and remained there till September 1911, when he was transferred to Lochee. While at Huntly he came home at times for the week-end.

"The pursuer says she was sweethearting with the defender, and this is the view taken of their relations by her father, her sister, her brother, Adam Addison, and John Addison. On the other hand, the defender's mother will not admit that her son was more friendly with the pursuer than with any other girl, although she admits that she knew that 'Eleanor was fond of George.' The defender's brother Robert did not look upon them as sweethearts. The defender admits that he was 'on pretty friendly terms' with the pursuer, and walked her home pretty often from church and choir practice. He has taken her arm and put his arm round her

waist, but he had not kissed her except when they were children. He was not courting the pursuer. 'I liked her; that was all. I had nothing against her.'

"There are two incidents to which I must refer in connection with the degree of intimacy between the parties.

"The first took place about the end of 1909 after choir practice. The defender drove his sister home to Tocher, then got on his bicycle and met the pursuer and her sister at the end of Tocher Road. He saw the girls home to Knowley, and at the gate he left his bicycle with the pursuer's sister Alice and went with the pursuer to the back of the house. The pursuer then says the defender tried to have connection with her, but that she resisted him. The defender denies that he attempted connection, and says his going away with the pursuer was by way of a joke to tease the younger sister. He says he expected Alice to lay down the bicycle and come and look for the truants. That part of the joke certainly did not come off. The idea of a joke never occurred to Alice, who says she was asked to hold the bicycle and light the lamp. Nor did it occur to the pursuer's father that it was a joke against Alice. He, finding Alice with the bicycle, took it inside the house, locked the door, and did not give the bicycle back to the defender till he had chaffed him, he does not say on what subject, but certainly not I fancy on playing hide-and-seek with Alice. The impression left on my mind is that the idea of a joke upon Alice is an afterthought, and that the defender desired to be alone with the pursuer.

"Again, I doubt the defender when he says that he merely went out to take a run on his bicycle. I believe he came just to meet the girls on their way back from choir practice. I also doubt his tale about the soft tyre. At anyrate this incident is not put to the girls.

"In my opinion, whether or not the defender attempted connection on this occasion, he left Alice and went round to the back of the house for the purpose of being alone with the pursuer, and not, as he says, to play a game of hide-and-seek with Alice.

"The next incident took place in the loft or barn at Knowley about six weeks before the Premnay expedition, which took place in September 1910. The description of this building is very confused in the evidence, but it seems to have had a door and a trap-door down to the cart-shed. It is admitted that the parties were in the loft together. The pursuer says the defender locked the door and again attempted connection, but without success. The defender denies both these statements. The pursuer's brother Douglas came to look for them, the defender jumped through the trap-door, and the pursuer came out at the door. Again the defender says he jumped through the trap-door for a joke.

"I do not say that the evidence with regard to these incidents necessarily leads to the conclusion that the defender did attempt connections on these occasions. After all, the parties had known each other since childhood, they were near neighbours, their families were on terms of intimacy, and their fathers were related. I should have thought these incidents trivial had it not been for the impression left on my mind that the defender is unduly anxious to avoid any imputation of intimacy with the pursuer. Whether or not they were sweethearts, I think it is not easy to read the evidence in the case without coming to the conclusion that they mutually evinced a decided preference for each other's company, and when the occasion served preferred that they should not be troubled with the presence of a third party.

"I ought to say a word about the post-cards which the pursuer has produced. Again, looking to childhood friendship of the parties, I do not know that they are unduly affectionate in their terms. The pursuer says she destroyed letters which she had, at the defender's request. The defender denies that he made any such request. It she did so, it is a little difficult to understand why she did not burn the post-cards also. She says herself that she did not burn the post-cards because she had the post-cards at Knowley and the letters in Aberdeen, but if, as the pursuer says, the bonfire took place in Aberdeen, she has preserved three of the post-cards which she received in Aberdeen, and presumably she had them there.

"*Premnay, September* 1910.—This is the first occasion upon which the pursuer speaks to connection. The defender and his brother were bicycling to Premnay. They were overtaken by the pursuer and her brother. The four visited a mutual friend in Premnay. On the way back the party divided at Old Rayne. The pursuer and defender took the long road, the other pair took the short road, and the four met again at Rayne School. The pursuer says connection took place on this occasion. Defender denies it. There is controversy as to how long James Smith and Douglas Florence had to wait at the school. Douglas says twenty minutes or half-an-hour. James says five minutes. The defender says he suggested a race; his brother corroborates him. I see no reason to doubt that a race was suggested, but I also suspect that the defender wanted to get away with the pursuer alone. Whether or not connection took place on this occasion is a very difficult question. I do not think it can be said that this public road during the daytime was a suspicious or secret place; no one saw any familiarity between the parties on this ride; and although I do think the parties may be fairly described as sweethearts by this time, I do not think I am prepared to say the connection on this occasion is proved.

"*September* 1910—*January* 1911.—The pursuer says she had connection with the defender several times between these dates. She gives neither day nor place, and there is no evidence as to the parties even having been seen together during this period.

"*The end of January or beginning of February* 1911.—The pursuer speaks to

connection at this time. This is the crucial date for the pursuer, because it corresponds with the ordinary date of conception. The child was born on 5th November 1911. The pursuer fixes the date because it was about the time the choir practices were resumed. According to Isobel Smith, the first choir practice for the session was on 14th February. The defender, according to his own account, was at home on Sundays 15th and 22nd January, and 5th and 12th February. The pursuer says—'He had connection with me on a Saturday or Sunday. I saw him at church on the Sunday and he walked home with me. He said he would be passing in the evening and to look out for him between seven and eight. I did so and he came. I went out with him and we went down the road between Tocher farm and our own farm. He had connection with me on the roadside. I was with him about a quarter of an hour. My father suspected we were out.' Now the father is not asked about this incident; no one saw the parties together at this time, and no one saw them walk home from the church. The meeting rests upon the pursuer's evidence alone. The defender says he was never at Knowley during this time between 1st January and 18th March, and he denies connection.

"11*th or* 12*th March.*—This is the next occasion to which the pursuer speaks. She is somewhat confused as to whether it was a Saturday or a Sunday (11th or 12th March). The defender says he was not at home that week-end, and he is corroborated by his mother, his sister, and his brother. His sister remembers that Sunday, because one of the candidates for the post of organist did not come forward and she had to play. Mr Ross for the pursuer objected to evidence being led as to the defender not having been home for this week-end, on the ground that it was an attempt to prove an alibi, of which no notice had been given on record. I did not think the evidence did amount to an attempt to prove an alibi in the strict sense of the word. Such an attempt would have been made had the defender adduced evidence to prove that he was in Huntley, but he led no such evidence. All he tries to prove is that he was not at home. Possibly he should have said so on record, but I do not think the question of whether or not the evidence should have been allowed is of much importance. I certainly did not think it right to compel the defender to amend with the penalty of paying expenses, but I expressly reserved the pursuer's right to lead her conjunct probation, and she did not avail herself of this reservation, I suppose because she could not produce any witness who did see the defender at home this week-end. If the evidence is bad, then again the alleged meeting rests solely on the pursuer's evidence. If the evidence is good, as in my opinion it is, I think it is quite clearly proved that the pursuer is mistaken as to this date.

"18*th March.*—It is admitted that on this date the parties walked home from choir practice, the defender leading his pony, and that they sat down on the brae. Adam Addison says he saw the couple lying at the roadside and that the defender had both his arms round the pursuer. The defender admits his 'arm was through hers.' 'Both my arms were not round her.' The pursuer says connection took place on this occasion; the defender denies connection.

"2*nd April.*—On this occasion the pursuer, defender, Mary Durno, and Watt walked home together from church in the evening. Pursuer and defender started in front, but afterwards allowed Mary Durno and Watt to pass them. Mary Durno says they had to wait for the other couple a quarter of an hour, and that defender had his arm round pursuer's waist. Watt thinks they waited ten minutes. This is the last occasion on which pursuer says connection took place. The defender again denies connection. The pursuer has consistently maintained from the first that the defender is the father of her child, and the defender has as consistently denied the imputation.

"I think the most serious part of the evidence for the defender as regards connection is the meeting on 18th March. If Adam Addison is to be believed, the defender's position was very compromising. The hour was late, about ten o'clock. Choir practice began that night at 7·30, and usually lasted an hour, so that the parties had taken some little time on their way home. Addison watched them for ten minutes, but it is fair to presume that he saw no further impropriety than both the defender's arms round the pursuer. I frankly confess, however, that in my opinion, looking to the intimacy between the parties as evidenced by other incidents in the case, there is enough evidence to corroborate the pursuer's story of connection on this occasion. But then I do not think connection, even if proved on this occasion, is sufficient to father the child upon the defender.

"The pursuer is quite indefinite in her condescendence as to the particular act of connection to which she attributes the conception of her child. She is equally indefinite in her evidence—indeed she is not examined on this point. Now the child was born on 5th November, and if conceived on 18th March the period of gestation would be 232 days in place of the usual 274 to 280 days. I do not, of course, suggest that 232 days is an impossible period of gestation, but it is an unusual period. There is no hint or suggestion on the whole case or in the pursuer's evidence that her baby was not a full time child, and I think that if the pursuer intended to rely upon this date as the occasion when her child was conceived some such evidence as I have indicated should have been forthcoming. In fact, of course, she maintains connection at the end of January or beginning of February, a date which would coincide with the ordinary period of gestation.

"It is right that I should say that I am

not prepared to hold that the pursuer has proved connection either on the road from Premnay or on 2nd April. Granted that on these occasions the defender showed a greater desire to be alone with the pursuer than he is ready to admit, I do not think the surrounding circumstances of these incidents necessarily or actually lead to the conclusion that connection took place on these occasions, but again neither occasion coincides with the usual period of gestation.

"The question remains whether, granted that connection is proved on 18th March, that, taken along with the other incidents in the case, such as the parties' partiality for each other's company and such familiarities as are spoken to, is sufficient to corroborate the pursuer and to prove that a meeting and connection took place at the end of January or beginning of February. I do not know what might have been the result if there had been some independent proof of the parties having met at this time, although I do not know that connection in January or February is to be presumed because it took place in March, but there is absolutely no direct evidence of their meeting except the pursuer's own statement. Opportunity for meeting there was in the sense that the defender was at his own home for the week-ends of 22nd January and 5th February, but there is no direct corroboration of the pursuer's statement that they did meet; of opportunity for connection in the proper sense there is no evidence beyond that of the pursuer. No one indeed speaks to having seen the parties together between the Premnay incident in 1910 and 18th March 1911. Suspicion there may be that the pursuer is fathering her child upon the proper person, but I do not think the issue in this case can be decided upon suspicion. In my opinion the pursuer cannot succeed unless her own evidence is supported by such corroboration as is reasonable to prove the issue of paternity which she maintains, and that issue is to my mind dependent upon her proving connection at the end of January or beginning of February. It is not to be left out of account that in my opinion the pursuer is mistaken as to the meeting on 11th or 12th March, and, giving all weight to her own evidence, she may be mistaken as to the crucial meeting.

"Cases of this kind are always difficult. I think there is perhaps more than the usual difficulty in this case, but I have found myself unable to hold that there is sufficient corroboration of the pursuer's evidence with regard to the alleged meeting at the end of January or beginning of February to enable me to give a verdict in her favour.

"I therefore assoilzie the defender."

The pursuer appealed, and argued—The Sheriff-Substitute had held it proved that connection took place between the pursuer and the defender on 18th March. That fact, taken along with proof of opportunity at the time of conception, the prior intimacy of the parties, and their affectionate correspondence, was sufficient to establish the truth of the pursuer's story — *M'Donald* v. *Glass*, October 27, 1883, 11 R. 57, 21 S.L.R. 45; *Ross* v. *Fraser*, May 13, 1863, 1 Macph. 783; *Buchanan* v. *Finlayson*, December 8, 1900, 3 F. 245, 38 S.L.R. 152; *Costley* v. *Little*, November 18, 1892, 30 S.L.R. 87. Further, the defender's denial of the material incidents of 18th March discredited his evidence in regard to the prior events—*Macpherson* v. *Largue*, June 16, 1896, 23 R. 785, 33 S.L.R. 615; *Harper* v. *Paterson*, June 16, 1896, 33 S.L.R. 657. [LORD DUNDAS referred to *Dawson* v. *M'Kenzie*, 1908 S.C. 648, 45 S.L.R. 473, and *M'Whirter* v. *Lynch*, 1909 S.C. 112, 46 S.L.R. 83.]

Argued for the defender—*Esto* that connection on 18th March was held proved, that raised no presumption of connection at the time of conception unless there was proof of definite opportunity at that time—*Ross* v. *Fraser*, *cit. sup.*; *Macdonald* v. *Glass*, *cit. sup.* Here the only opportunity was that parties were living in the same neighbourhood, and that was not sufficient on the authorities — *Muir* v. *Tweedie*, December 19, 1883, 21 S.L.R. 241; *Havery* v. *Brownlee*, 1908 S.C. 424, 45 S.L.R. 312; *Buchanan* v. *Henderson*, *cit. sup.* Further, the defender's denial of connection on the 18th March did not discredit his account of what took place prior thereto. The present case was different from *Macpherson* v. *Largue*, *cit. sup.*, because what the defender denied was the inference to be drawn from the facts, but not the facts themselves—*Dawson* v. *M'Kenzie*, *cit. sup.*

LORD JUSTICE-CLERK—In this case I have come to the conclusion that, while the Sheriff-Substitute's summary of the facts is well stated and consistent with the evidence, he has erred in the conclusions in law which he has drawn from the facts. There is no doubt that the pursuer and the defender were on terms of familiarity and that they had frequent opportunities of meeting. The pursuer alleged, but was unable to bring direct corroboration of the fact, that the defender had connection with her about the time when her child must have been conceived. If she could produce no further evidence in corroboration of her story her case would certainly fail, but the case does not stand there. There is a further allegation that the parties had connection at a date some six weeks subsequent to the date of conception. Now as regards that incident I think it throws a strong light on the case. The pursuer said that she and the defender, having parted from their two companions on a Saturday evening, lay down on a bank by the side of the road, and there had connection. The defender denies that, but he does not deny that he was there, and he admits certain facts which tend very much against his defence. The pursuer is corroborated in her account of this incident by a witness, Adam Addison, whose evidence the Sheriff-Substitute found no reason to doubt, and who speaks to having seen on that occasion what was certainly an act of gross familiarity

between the parties. The defender had a pony with him, and the evidence of this witness is that the pony was left on the road, that the pursuer and the defender were lying at the roadside, that he had both his arms round her, and that she was heard laughing. If there is no reason for doubting this evidence it is of the greatest possible importance comparing it with the evidence of the defender. He knew that this evidence had been led, and he probably knew that an absolute denial would be fatal to his case if the pursuer and Addison were believed. What he did was to deny that intercourse had taken place and to try ingeniously to fritter away what was observed by Addison. He denies that he had both arms round her, and says that one arm was through hers; he denies that the pony was left loose on the road, and maintains that the rein was never out of his hand. If his story is untrue, and the Sheriff-Substitute holds so, that is a strong element in considering whether the pursuer has sufficient corroboration of her statement that connection took place a few weeks earlier. The case of *Macpherson* v. *Largue* (1896, 23 R. 785) and several other cases bear out that such facts may be taken into account in considering whether the pursuer has proved her case. I think that, taking the facts to which I have adverted into consideration, there is in the evidence before us sufficient corroboration of the pursuer's otherwise unsupported statement that the defender had connection with her about the time of conception of the child. I am therefore for recalling the interlocutor of the Sheriff-Substitute and finding for the pursuer.

LORD DUNDAS—I think this case, like many of its kind, is rather a narrow one. I need not say I should be slow to differ from the careful judgment of an experienced Sheriff-Substitute in a case like this upon any mere question of fact, and so far as his digest of the facts is concerned I am prepared to agree with the Sheriff-Substitute entirely. But I differ from his conclusion, because I think he has failed to deduce the right legal inferences from the facts, and especially from one salient incident to which I shall presently refer. That being so, I need not deal with the facts in any detail except with regard to that one incident. The general setting of the picture, so to speak, discloses that these two young people—the pursuer at the date of the proof was only twenty, and the defender twenty-two—were born and brought up in close intimacy with one another. Their fathers are relatives, and of similar stations in life—small farmers, living on farms close to each other; the children grew up together, and as they reached years of maturity were on terms of great intimacy, with an element of what may fairly be described as "sweethearting." All that, of course, is quite consistent with innocent intimacy and innocent affection. But a child was born to the pursuer on the 5th November 1911, and no other man than the defender can, upon the evidence, be pointed to as in the least degree a probable father of the child. Still it is for the pursuer to prove her case, and but for the one incident which I now come to consider I should have held, with the Sheriff-Substitute, that she had failed to prove it. As to that incident, the pursuer depones that on the late evening of the 18th of March 1911 she and the defender were alone together on the roadside, between the smithy and the smith's house, and that connection took place on that occasion. In this she is materially corroborated by Adam Addison, an independent witness, against whose credibility nothing has been suggested. He says he saw the two lying together on the roadside and that both the defender's arms were round the pursuer, who was laughing. The defender does not deny that he was with the pursuer at the time and place spoken to, but he says that they were not lying down but only sitting or leaning back on the bank; he denies that his arms were round her, though one of his arms was through her arm, and he denies that he had connection with her. Now there is a series of recent decisions to the effect that where a defender falsely denies some fact bearing materially upon the crucial issue in dispute, that denial may turn the scale against him, in an otherwise doubtful case, by giving a complexion to the case different from that which the Court might but for such denial have put upon it. I do not know whether the Sheriff-Substitute had his attention called to these cases. I am inclined to believe that they were not cited in the discussion before him, because otherwise I think he would probably have referred to them in the course of his carefully expressed opinion. If the cases were not cited, that would readily account for the Sheriff-Substitute having fallen into error, as I think he has fallen, in regard to the legal aspect of the matter. However that may be, it is sufficient to remind your Lordships of the case of *Macpherson* v. *Largue*, since followed and approved at least twice by the First Division, during the presidency of Lord Dunedin, in *Dawson* v. *Mackenzie* and *M'Whirter* v. *Lynch*. In the last case the Lord President said—"I have nothing more to add to what I said in *Dawson* v. *Mackenzie* as to the scope of this doctrine of corroboration by contradiction, but as I do not wish to quote myself, I will quote a sentence of Lord M'Laren's opinion in that case—'There must be corroboration of the pursuer's evidence; yet when the effect of the defender's false evidence, *i.e.*, his denial of circumstances which are otherwise proved, is to show that there is something of which he is ashamed, or something the admission of which he conceived would throw suspicion on himself, this will put a different complexion on what the Court might otherwise be disposed to regard as innocent intimacy between the parties.'" I think that is very apposite to the present case. It is true that, assuming that connection took place on the 18th of March, that would probably not account

for the conception of the child, because there is nothing in the evidence to show that the child was born before the expiry of the usual and normal period of gestation. But that does not effect the material bearing on the case of the evidence to which I have alluded. It seems to me that Addison's evidence and the defender's denial of the material facts of it go far to corroborate the general truth of the pursuer's story, though there is no specific truth of any connection at an earlier date corresponding to the period of conception. The parties were not far off from one another at and about that period. That being so, I think that there is sufficient ground for altering the judgment of the Sheriff-Substitute. We have nothing to do with the question which would have arisen if the defender had frankly admitted connection on the 18th of March while maintaining his defence in all other respects. But it seems to me there is the greatest possible difference between an admission by a defender of connection at a date subsequent to that of conception of the child, and a denial by him of such connection proved to be false. And as cases on that point have been referred to, I should like to add that, as at present advised, I respectfully differ from some of the views which have been expressed in previous cases. I think there is a great difference between an admission of intercourse prior, and an admission of intercourse subsequent, to the date when the child must have been conceived. I respectfully differ from the observation on this matter by Lord Young in *M'Donald* v. *Glass*, and prefer such opinions as those of Lord Neaves in *Ross* v. *Fraser* and of the Lord Justice-Clerk and Lord Trayner in *Buchanan* v. *Finlayson*. But in the circumstances of this case it is unnecessary, and would indeed be inappropriate, to consider what might have been the position if the defender had admitted intercourse with the pursuer on the 18th of March. I agree with your Lordship in thinking that we ought to sustain this appeal, recal the interlocutor appealed against, and find that the pursuer has proved her case against the defender.

LORD SALVESEN—I entirely agree with the result at which your Lordships have arrived. For my part I do not think it is a difficult case, and I should have had no hesitation in reaching an opposite conclusion from the Sheriff-Substitute upon the facts as he has stated them. The parties were of the same social rank, had been intimate for years, and had corresponded on friendly and even affectionate terms. In the letters from the pursuer there are hints of clandestine meetings, and in the defender's post-cards there are expressions only consistent with affectionate regard. They sought each other's company and took many occasions to be alone together. There are two incidents prior to the crucial date of 18th March, namely, the bicycle incident and the incident in the loft, to which I think the Sheriff-Substitute has not attached sufficient importance. On both these occasions the defender attempted to explain his behaviour as a "joke." I must say that I do not appreciate the joke in locking yourself into a hayloft with a girl whom you are courting, and then when disturbed leaving the premises by a trap-door, while she goes out by the door by which they had entered. It is very easy to explain the defender's conduct on the footing that he felt himself in a compromising position, and took what he thought was a way of avoiding detection, and very difficult to explain it as a joke. As to the bicycle incident, it was a very extraordinary joke that the little girl should be left to hold the bicycle, while the pursuer and defender went behind the house in the dark for ten or fifteen minutes. It appears to me to be easily explained by the desire of the parties to be alone. The pursuer does not say that connection took place on these occasions, though she says it was attempted. But they are significant as leading up to subsequent events, and are made the more significant by the way in which the defender tries to explain them.

As to the actual date of conception, there is no direct evidence of connection except that of the pursuer herself. But it is proved that about that time the defender was visiting his own home, about ten minutes distance from the pursuer's house, and that they were in the habit of frequently walking out together. The pursuer says there was connection at a date which corresponds with one or more of the visits made by the defender to his parents. I think, therefore, that there was ample opportunity for meeting in the way the pursuer says that they did, and I do not understand what the Sheriff means when he says there was no proof of "opportunity for connection in the proper sense."

At the same time, if the case had stopped here, I agree that the pursuer would not have proved her case, although there might have been little moral doubt that the defender was the father of the child. But the subsequent incident on 18th March leaves no doubt in my mind that the pursuer's story is sufficiently corroborated to warrant our proceeding upon it. In many cases mere proof of gross familiarity denied by the defender is sufficient to corroborate a pursuer who is otherwise a credible witness; and there can be no grosser act of familiarity than an act of connection. If, as the Sheriff holds, connection took place within six weeks of the date of conception, and there is nothing to suggest that it took place then for the first time, it would be extraordinary not to hold that sufficient corroboration. Of course cases can be figured in which it might not be sufficient, but in the special circumstances of this case I think that an admission of connection on 18th March would have been sufficient corroboration of the pursuer. But the case is made much stronger when we find that the defender denies the fact which the Sheriff finds proved. That gives a different complexion to the whole case, for it deprives the defender's evidence of

credibility, and we are left in the position of having the pursuer's evidence amply corroborated while no regard falls to be paid to the counter-evidence of the defender.

I have therefore no doubt that the pursuer has proved her case, and indeed there are few occasions in which I have felt more confidence that the legal result at which we have arrived corresponds with the truth and justice of the case.

LORD GUTHRIE was absent.

The Court recalled the interlocutor of the Sheriff-Substitute and granted decree in terms of the conclusions of the initial writ.

Counsel for the Pursuer and Appellant —A. A. Fraser. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender and Respondent —Lippe. Agents—Douglas & Miller, W.S.

Thursday, June 19.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

HENDERSON'S TRUSTEES *v.* INLAND REVENUE.

Revenue—Stamp Duty—"Deed"—Minute of Acceptance of Office of Trustee—Stamp Act 1891 (54 and 55 *Vict. cap.* 39), *First Schedule*

The First Schedule of the Stamp Act 1891 specifies amongst the several duties to be charged the following:—"Deed of any kind whatsoever not described in this Schedule. . . . 10s."

Held that a minute of acceptance by trustees of the office of trustee conferred upon them by a trust-disposition and settlement, engrossed at the end of the trust-disposition and settlement and signed by the trustees before witnesses subscribing, was not liable to be assessed with 10s. or any other duty.

George Duke M'Nicoll, solicitor, Kirriemuir, and others, the trustees acting under the trust-disposition and settlement of the late Mrs Eliza Lennox Fraser or Henderson, who resided at 10 Queen's Gate, Dowanhill, Glasgow, *appellants*, and the Inland Revenue, *respondents*, brought a Stated Case.

The appellants had presented a minute of acceptance by themselves of the office of trustee, conferred upon them under the trust-disposition and settlement, to the Commissioners of Inland Revenue, and had required them in terms of section 12 of the Stamp Act 1891 (54 and 55 Vict. c. 39) to express their opinion as to whether the minute was chargeable with any duty. The *minute*, which was engrossed at the end of the trust-disposition and settlement, was in the following terms:—"We, George Duke M'Nicoll, solicitor, Kirriemuir, . . . do hereby accept the offices of trustee and executor conferred upon us by the foregoing trust-disposition and settlement. In witness whereof this minute written by William Nicol, clerk to Baird Smiths, Muirhead & Guthrie Smith, writers in Glasgow, is subscribed by us all at Glasgow on the fourth day of August Nineteen hundred and ten, before these witnesses, the said William Nicol and William John Wilson, commissionaire to the said Baird Smiths, Muirhead & Guthrie Smith. (Signed) George D. M'Nicoll. . . . William Nicol, *witness*; W. J. Wilson, *witness*." The Commissioners were of opinion that the minute was chargeable under heading "Deed of any kind whatsoever not described in this schedule" in the First Schedule to the Stamp Act 1891, and assessed it to the duty of 10s., and required payment of that duty. The trustees thereupon paid the duty, but being dissatisfied with the assessment, required the Commissioners to state a Case.

The *question of law* for the opinion of the Court was—"Whether the said instrument is liable to be assessed and charged with the said duty of 10s.; or, if not liable to be assessed with that duty, with what other stamp duty, if any, is it liable to be assessed and charged."

Argued for the appellants—The word "deed" in the Stamp Act 1891 was "deed" in the English sense of the word. It was a term of art and did not apply to a writing such as the present. The present writing lacked all the requirements necessary to make it a deed—Stroud's Judicial Dictionary *sub voce* "Deed"; Bell's Lectures on Conveyancing (3rd ed.) p. 205; *Fleming* v. *Robertson*, June 17, 1859, 21 D. 982; *Regina* v. *Newton*, April 26, 1873, L.R. 2 Crown Cases Reserved, 22; *Smyth* v. *Latham*, April 23, 1833, 9 Bingham 692, *per* Tindal C.J., at p. 709; *Routledge* v. *Thornton*, November 28, 1812, 4 Taunton 704; *Commissioners of Inland Revenue* v. *Angus*, 1889, L.R., 23 Q.B.D. 579. "Deed" as a term of art was a writing by which some obligation was set up or under which rights passed. Here the acceptance in itself established no rights or obligations, it was merely a record of something that had been done.

Argued for the respondents—Any instrument executed with certain formalities which established a relationship in law, creating, altering, or terminating rights, was a deed in the sense of the Act and liable to duty. The acceptance by the trustees was such an instrument. It established a jural relationship, or at least completed one partly established by the trust-disposition and settlement.

At advising—

LORD PRESIDENT—This is an appeal as to an assessment of stamp duty of 10s. which was made in respect that upon a trust-disposition and settlement there was engrossed an acceptance of trust by two of the trustees who had been named in the trust-disposition and settlement, which acceptance was signed and tested. The