BELL
v.
BELL.

DUMFRIES.

PRESENT,
LORD PITMILLY.

BELL *v.* BELL.

1819.
April 14.

Illegitimacy found not proven.

REDUCTION of the service of a daughter as heiress to her father, on the ground that the inquest had not sufficient evidence of the marriage of the father, or the legitimacy of the daughter.

ISSUE.

"Whether the defender, Janet or Jessie "Bell, is the legitimate daughter of the de- "ceased William Bell, of the island of St "Kitts?"

An objection was stated to the competency of a witness, that he was married to the niece of the pursuer; but the objection was not insisted on.

The niece of a pursuer received as a witness.

When the next witness was called,

Jeffrey objected.—She is the niece of the pursuer. In the case of secret facts, relations are admissible; but this is an attempt to prove general repute, where relations are not even the best witnesses.

Cockburn.—We may ask these near relations whether the defender was not introduced to them as an illegitimate child; and if so, it is of no consequence though all the world believed her legitimate.

Jeffrey.—If a person is in possession of a *status*, the declaration of one parent will not deprive him of it, especially when that declaration is attempted to be proved by those who are disputing the right to the property.

LORD PITMILLY suggested, that the other evidence should be first called. After several other witnesses were examined, the niece was again called, to prove the general repute and declarations among the connections of the family.

LORD PITMILLY.—This is a very delicate question; but of late, there has been a relaxation of the rule as to calling near relations. So far as the evidence relates to what took place in the family, I think it ought to be received; but I hope the examination

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will be confined to what took place in the family, otherwise I must stop it.

To this decision a Bill of Exceptions was tendered, which Lord Pitmilly stated to be proper, as the question ought to be decided by the Court.'

The sister of a pursuer received as a witness.

The sister to the pursuer was next called. Mr Jeffrey again took the objection.

LORD PITMILLY.—This falls under the same rule. I can make no distinction between a niece and a sister.

A person who merely resided in the West Indies, an incompetent witness to prove the law of a particular colony.

It was alleged that the mother of the defender was a mulatto; and a witness who had been 14 years in the West Indies, and had been for a few days at St Kitts, being asked, whether, in that island, an European could legally marry a woman of colour; an objection was taken to the question.

LORD PITMILLY.—You cannot prove the law by this witness.

A deposition formerly taken on the same facts, ought to be read to a witness before he is examined.

The first witness for the defender having stated, that he gave evidence before the inquest at the service of the defender, and that what he then swore was true, it was proposed to read his evidence.

Cockburn objects.

LORD PITMILLY.—So far from thinking it incompetent, it appears to me, that this deposition ought to have been read to him before his examination.

Maitland, for the pursuer.—We shall prove that the defender was brought home by her father, and introduced to his relations as a natural child;—that her mother was a woman of colour;—and that there cannot be a legal marriage between a European and a woman of colour.

Jeffrey, for the defender.—Her father brought the defender home, and she was received and treated as his daughter, till lately. The pursuer has not proved his case; but I shall strengthen the case of the defender, by proving the general repute that she was legitimate.

The prejudice may be strong against marrying a woman of colour, but there is no law against it.

Cockburn.—This is a simple question of evidence; and as there was no opposition at the service, you must decide as if you were the original Jury. Here there is conflicting evidence, but the preponderance is for the pursuer.

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LORD PITMILLY.—The defender is in possession of the *status* of legitimacy. The pursuer brings a reduction of her service, and the averment is, that she is not legitimate.

There is no doubt that the pursuer must make out his case by full, complete, and satisfactory evidence, and that, if he fails, he cannot get a verdict. The defender has nothing to do, unless a *prima facie* case is made out against her.

It is erroneous to suppose that you are in the situation of the original inquest; for the defender having a verdict in her favour, and the pursuer undertaking to prove that she, the defender, is not the lawful child, he must distinctly prove this point, or there must be a verdict for her. If the proof had been laid on her, then she must have been prepared with the best evidence to support her legitimacy. The testimony of near relations in that case would have been good evidence for her. And in the present circumstantial case, their evidence, although adduced against her, is not to be thrown out of view.

This is the general view of the evidence. You are not, however, to decide by mere sus-

picion, but must ask yourselves, has the pursuer proved his case to complete satisfaction?

[His Lordship then commented on the evidence, and remarked on the absence of any proof by medical gentlemen, that the defender was the daughter of a mulatto.]

You heard it doubted if the near relations are competent witnesses. I think they are; but I now tell you, that you are to take their evidence with considerable allowance, and that it is to be weighed with care and scrupulosity.

With respect to her father's marriage to a mulatto, there is no law against such marriages, but merely a strong prejudice, as against an improper connection.

Verdict—"For the defender, in respect the "illegitimacy of the defender is not proved."

Cockburn and *Maitland* for the Pursuer.
Jeffrey for the Defender.

(Agents, *Johnston* & *Little*, and *Wm. Martin.*)

An application was made to the Court of Session for a new trial, on the ground of a *res noviter*, &c. The pursuer was appointed

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to give in a special condescendence of the circumstances, and the names of the witnesses.

The Court afterwards refused the new trial; on the ground, that if the pursuer did not know the facts to which he referred before the trial, he might have done so.

PRESENT,
LORD GILLIES.

1819. May 31.

EDINBURGH, LEITH, and HULL SHIPPING COMPANY, *v.* OGILVIE.

Finding as to delivery of a cask of paint, and that, by the usage in Leith, delivery of goods to carters there, is not equivalent to delivery to the consignee in Edinburgh.

SUSPENSION of a charge by the defender for the price of a cask of paint.

DEFENCE.—The cask was delivered to a Leith carter, with proper directions.

ISSUES.

"1*st*, Whether the suspenders, on or "about the 17th May 1814, delivered the "goods referred to in the lybel, to Widow "Wilson and to George Stedman, members "of the Society of Carters in Leith, with