The result is, that in my opinion the Lord Ordinary's interlocutor should be recalled, and the action dismissed.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Counsel for the Pursuer — Scott and Rhind. Agent—William Officer, S.S.C.

Counsel for the Defender—Shand and M'Lean. Agent—Alex. Morison, S.S.C.

Friday, November 29.

FIRST DIVISION.

[Sheriff Court of Forfar.

BRODIE *v.* DYCE.

(*Ante*, vol. ix. p. 628.)

Filiation—Presumption pater est quem nuptiæ demonstrant—*Proof—Competency.*

A husband and wife separated soon after marriage, and did not again live together. After the lapse of nearly five years, the wife gave birth to a child. She alleged that A, a farmer who lived near, was the father of the child, and raised an action of filiation and aliment against him. A proof having been led, it was established that at or about the time when the child must have been procreated, the husband and wife, although living only about 16 miles apart, did not meet, and could not have had conjugal intercourse. It was also established that A had access to the wife, who was a woman of loose character, under suspicious circumstances. *Held* that the presumption *Pater est quem nuptiæ demonstrant* had been rebutted, and that the wife had instructed sufficiently that A was the father of the child.

Held that clear evidence to the satisfaction of the Court that *de facto* a husband has not had intercourse with his wife, and cannot therefore be the father of his wife's child, is sufficient to rebut the presumption *Pater est quem nuptiæ demonstrant.*

Opinions—that if it had been required it would have been competent to have adduced the evidence of the mother and her husband.

This was an action of filiation and aliment raised in the Sheriff-court of Forfar by Betsy Paterson or Brodie, Forfar, against James Dyce, farmer near Forfar. The Sheriff found for the defender, and the pursuer appealed to the Court of Session. The Court allowed the pursuer to lead additional proof by witnesses other than the pursuer and her husband, for the purpose of showing that the husband had no access to the pursuer, so as to have connection with her at such time as would account for the conception and birth of the child born on 9th May 1871. The circumstances under which the Court pronounced this interlocutor, as well as the proceedings in the Sheriff-court, are reported *ante*, vol. ix. p. 628.

The circumstances of the case before the Court when they ordered the additional proof were shortly these. The pursuer was a married woman, but had lived separate from her husband, James Brodie, since a few weeks after her marriage, which occurred on 12th November 1866. She was, on her own showing, a woman of notoriously immoral character, having had an illegitimate child before her marriage to Brodie, and another subsequent to that event. The child concerning whom this action was raised was born on 9th May 1871, and the pursuer swore that Dyce was the father of the child. It was also proved that he (Dyce) had been with the pursuer under the most suspicious circumstances at or about the time when the child must have been procreated.

The additional proof allowed by the Court was taken on commission by the Sheriff-Substitute of Forfar, and the evidence which was led accounted fully for the time of the pursuer and her husband at the period when the child must have been procreated, and went to show that they could not have had intercourse.

It was argued for the pursuer that upon the whole evidence the presumption of law that the husband of the mother was the father of the child had been rebutted, and that the pursuer had sufficiently instructed that the defender was the father of her child.

It was farther argued that, if the Court were of opinion that the evidence was not sufficient to rebut the presumption *Pater est quem nuptiæ demonstrant,* it was competent to examine the pursuer and her husband to prove that there had been no access.

Gurney v. *Gurney*, 8 Law Times, 380; *Morris* v. *Davies*; 5 *Clark* v. *Fenelly*, 163; *Atchly* v. *Sprigg*, 33 L.J. (Chan. Rep.) 345; *Sibbet* v. *Ainslie*, 3 Law Times, 583; *Sandy* v. *Sandy*, July 4, 1823, 2 S. 453; *Mackay* v. *Mackay*, Feb. 14, 1855, 17 D. 494; *Beattie* v. *Baird*, 1 Macph. 273; *Jobson* v. *Robertson*, 10 S. 594.

It was argued for the defender that the proof was not sufficient to establish that there had been no intercourse between the pursuer and her husband. It was proved that they were living only a few miles apart, and the proof had not so fully accounted for their time, and could not, from the nature of the case, so fully account for their time, as to make it certain that they had not met, and had not had conjugal intercourse with each other. Such evidence, it was maintained, was not sufficient to elide the presumption *Pater est quem nuptiæ demonstrant.* It was further argued that, if the proof already allowed were insufficient to rebut the presumption of paternity, it was incompetent to supplement that evidence by the examination of the pursuer and his husband.

Ridcout's Trusts, 10 Law Rep. 41; Taylor on Evidence, 838; *Ridcout's Trusts*, 39 L.J. (Chan. Rep.) 192; *Legge* v. *Edmonds*, 25 L.J. (Chan. Rep.) 125; *Rex* v. *Rook*, 1 Wilson 340.

At advising—

Lord Ardmillan—On the first question raised here, and the only question decided by the Sheriff-Substitute, I have come to the same conclusion as the Sheriff-Substitute. Apart from the question of presumed legitimacy, arising from the fact that the pursuer is a married woman, I cannot say that I think the case attended with much difficulty. If this had been one of the ordinary cases of filiation, I could not have avoided the conclusion that the case is sufficiently proved against the defender. The pursuer's character is very bad. That fact does, on the one hand, detract considerably from her credibility, and render corroboration necessary; but, on the other hand, her notoriously bad character makes a visit to her at night by a married man, a most suspicious fact, from which scarcely any inference can be drawn except one unfavour-

able to the defender's moral propriety in the matter, and that is the inference contended for by the pursuer. The defender is a married man, and his visits to the pursuer, under the circumstances appearing on the proof, are only susceptible of one construction. No other reasonable explanation has been given. She was willing and ready for illicit intercourse, and he, knowing her character, visited her under suspicious circumstances, when she was sure to tempt, and he, excited by liquor, was most likely to yield. The testimony of the pursuer, if believed, is direct and clear, and I am compelled to come to the conclusion that in the evidence of the other witnesses there is sufficient corroboration of that testimony. The Sheriff-Substitute is of that opinion, and I think he gives good reasons for it.

But the peculiarity of this case arises from the fact that the pursuer is a married woman. She is the wife of a James Brodie, a labourer, who has for about three years been working in or near Dundee. The pursuer, when examined as a witness in the filiation process, gives a very bad account of herself, for she says—"I have been twice married. I have three illegitimate children by different men, one before I was married and two after. I was married to my present husband (that is James Brodie) four years ago. We never lived together except the first night."

Now, the question is—Whether, by force of the maxim *Pater est quem nuptiæ demonstrant*, this child, born on 9th May 1871, is the legitimate son of James Brodie? If he is, then of course the pursuer, notwithstanding the evidence led in this cause, can have no claim against the defender. The maxim that the husband of the mother shall be presumed the father of the child is well settled and most reasonable. It is generally enough for a child alleging legitimacy to prove that he has been born during the marriage. The law will draw for him the inference of legitimacy. But it is now quite settled that the presumption of legitimacy thus created is not absolute. It may be rebutted. The proof of impossibility of access has long been held sufficient to destroy the presumption. At one time it was supposed that access could not be considered impossible unless the sea rolled between the two spouses. But that idea has now passed away. The great changes which have taken place, and the extraordinary increase in the facility of locomotion, have rendered the limitation of impossible access to the case of separation by the sea, quite absurd. Crossing the sea is by no means impossible or difficult. It is now much easier to pass from Calais to Dover than to travel from Wick to Edinburgh or from Kirkcudbright to Aberdeen. The admission of other evidence of impossibility of access than that of separation by the sea is now settled. There are many cases both in England and in Scotland, which were very judiciously presented to us by Mr Jameson, leaving no room to doubt on this point.

But it is necessary to go farther than this, and I do not hesitate to do so. I think it is now recognised as sound law that the fact that access or intercourse was physically possible, is not, of itself, sufficient to fix the status of legitimacy. The cases must be very rare indeed where access or intercourse is proved to have been physically impossible. I do not think that necessary. I do not think it reasonable to expect it. If the result of a careful consideration of all the facts and circumstance proved be, that the Court is satisfied that there actually was not access or intercourse at or about the period when the child must have been procreated, and if the Court are also satisfied that another man had access and had intercourse with the wife at that time, then the presumption from the maxim *Pater est quem nuptiæ demonstrant* cannot receive effect in the face of such evidence. The presumption is rebutted by such evidence as is sufficient to satisfy the judicial mind that the husband could not be the father of the child. If there be clear evidence to the satisfaction of the Court that *de facto* a husband had not intercourse with his wife, and could not be the father of his wife's child, that child will be held illegitimate; though the utter impossibility of access be not established by the evidence. It may be physically possible, and yet in the circumstances, and according to the evidence, the possibility may be excluded. Nothing less than complete satisfactory evidence can be sufficient, but if there be such evidence, then, in the face of it, the presumption cannot receive effect. There is plenty of authority for this in the more recent decisions, both in Scotland and in England. It is the opinion of Lord Curriehill, as Lord Ordinary in the case of *Mackay* v. *Mackay*, Feb. 24, 1855, 17 D. 494, and that opinion is accepted as correct, and authoritatively approved by Lord President Colonsay, who expressly states it to be "sound law." Lord Ivory and Lord Deas expressed in that case the same opinion. I could, if it were necessary, quote other authorities to the same effect. It is enough to remind your Lordships of the opinion of Lord Stair (Stair, iii, 3, 42), that "with us absence is not necessarily beyond sea;" and he adds—"with us it will be sufficient that his (the husband's) absence be special and circumstantiate, that there remaineth no doubt that he could not have been present." Professor Bell (Prin. 1626) states the question as one of general evidence.

Taking this view of the weight and nature of the presumption, I think that in this particular case there is really no doubt that James Brodie, the husband of this pursuer, had, in point of fact, no intercourse with her at or about the time when this child must have been procreated. Her own statement on oath to that effect is quite distinct. If there were any opposing evidence on the subject, then her conduct and her bad character would greatly impair the force of her testimony. But there is no opposing evidence, and the proof subsequently led is entirely to the same effect as her own statement.

I think it would not be incompetent, if it had been necessary, to examine the husband as a witness in this matter. But the evidence which we already have appears to me sufficient, and it is desirable to avoid further expense. The husband's time is accounted for, and the wife's time is accounted for, and, although the space which divided them did not exceed 15 or 16 miles, I think it is satisfactorily proved that they did not meet, and could not have had conjugal intercourse. The presumptions of fact in this case, as well as the testimony of the witnesses, and the uncontradicted oath of the wife herself, are all opposed to the presumption of law that the husband of the mother is the father of the child. I need not enter into the details of the evidence which has satisfied me that the husband and wife had no intercourse at or about the time when a child, born on 9th May

1871, must have been procreated. I think that the time of both the husband and the wife during that period is as well accounted for as could be expected. I can see no reason why they should have desired to meet during that period, or at all. They had parted long before that. There had been no reconciliation. There was no love. There was no interest. There was no motive—not even the stimulant of animal passion, for he was living with another woman, and she was abandoning herself to a loose life without scruple. That they did not wish to meet is very obvious. That they should have met is most improbable. That they did not meet is proved to my satisfaction by the evidence before us, and by the oath of the woman herself.

On the whole matter, I am of opinion that, without requiring the additional evidence which the testimony of the husband would furnish, we have enough in the proof before us to lead to the conclusion, on sound and safe grounds, that at and about the period when the pursuer's child must have been procreated, her husband James Brodie had no access to her, and no intercourse with her; and that the case of filiation must be disposed of without reference to James Brodie, and just as if the pursuer had been an unmarried woman.

So viewing the case, I concur in the opinion of the Sheriff-Substitute, that the pursuer has instructed sufficiently that the defender is the father of her child.

Lord Deas—The only doubt which I have in regard to this case is, whether it would not have been better to have examined the husband, and re-examined the wife, for, in my opinion, there would have been no incompetency in examining one or both of them. Looking, however, to the whole circumstances of the case as established by the evidence, such a course, although it would have been satisfactory, is not necessary, and I entirely concur in the opinion delivered by Lord Ardmillan.

The Lord President concurred.

The Court pronounced the following interlocutor:—

> "Recall all the interlocutors in the Sheriff-court subsequent to the interlocutor of 2d November 1871; find that the defender (respondent) is the father of the pursuer's (appellant's) child, born on the 9th May 1871; therefore decern against him in terms of the conclusions of the summons; find the defender liable in expenses, both in this Court and the Inferior Court; allows accounts thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for the Pursuer—Jamieson. Agents—Macrae & Flett, W.S.

Counsel for the Defender—Fraser. Agent—John Gallatly, S.S.C.

Friday, November 29.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GARDINER AND OTHERS (SILLARS' TRUSTEES) *v.* W. J STEUART AND OTHERS.

Settlement—Construction.

> A directs her trustees to pay over the residue of her estate "to my heir-at-law, whom failing, to my next kin."—*Held* that heir-at-law meant heir in heritage.

By trust-disposition and settlement, dated 15th May 1852, Mrs Grant, afterwards Mrs Sillars, "gave, granted, assigned, and disponed to the Reverend Peter Gardiner, chaplain in the prison, Ayr, John C Haldane, surgeon, Ayr, and William Pollock, writer, Ayr, and to the survivors or survivor of them, all and whole her *pro indiviso* half of certain subjects in St Enoch's Wynd, and others, in the burgh of Glasgow; as also, her *pro indiviso* half of the lands of Davidston, in the county of Ayr, all therein specially described; as also, her whole estate and effects, heritable and moveable, pertaining to her at her death. She also thereby appointed her said trustees to be her executors, but in trust always for the ends, uses, and purposes therein mentioned; and she directed them, immediately after her decease, to sell and dispose of her whole means and estate, and after paying her debts, deathbed and funeral expenses, and the legacies and annuities therein named (all of which have been paid and settled), to pay over the residue of her estate to her heir-at-law, whom failing, to her next kin, and that at the first term of Whitsunday or Martinmas that should occur six months after her death, as the said trust-disposition and settlement in itself more fully bears." On 5th June 1852, Mrs Grant executed an antenuptial contract of marriage with Thomas Sillars, whereby, under certain burden and sreservations she disponed to herself, whom failing, the children of her intended marriage, whom failing, to herself and her heirs and assignees whomsoever, the subjects therein described, (being the same as those specially described in and conveyed by her said trust-disposition and settlement), but excluding her said husband's *jus mariti*, right of courtesy, and right of administration in relation to the said subjects, and the rents and proceeds thereof, which the said Thomas Sillars thereby renounced. It was, however, thereby provided and declared that, in the event of Mrs Jean Oswald Calder Glen or Grant's predeceasing the said Thomas Sillars, he should have the liferent enjoyment of the whole rents and profits of her means and estate thereby conveyed, and the foregoing conveyance was burdened with the said liferent accordingly." The testatrix died in June 1853 without issue, and in 1859 the lands left by her were sold, the debts, legacies, and annuities paid, and her husband received a sum equivalent for his liferent until 25th March 1872, when he died. The residue of the said trust-estate, amounting to £2300, constitutes the fund *in medio* in this action. The claimant, William Steuart, as heir-at-law served to the testatrix, claimed the whole fund, which was also claimed by the Rev. John Glen, Miss Margaret Glen, and Mr Wilson, as next kin of the testatrix at the time of her death.