Friday, May 28.

FIRST DIVISION.

[Lord Anderson, Ordinary.

GILMOUR *v.* HANSEN.

Proof — Evidence — Admissibility — Credibility — Hearsay — Materiality — Court of Session (Scotland) Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 45—*Evidence (Scotland) Act* 1852 (15 *Vict. cap.* 27), *sec.* 3.

In an action of damages for slander the pursuer alleged that the defender had on various occasions falsely accused him of having had connection with her. The defender pleaded *veritas*, specifying five occasions on which she alleged intercourse had taken place, and obtained counter-issues relative to those occasions. She had given birth to a child, the conception of which might have been on one of the specified occasions. (*a*) The defender leading at the trial, one of her witnesses who had attended at her confinement was asked if the defender had then stated who was the father of her child. An objection was taken by the pursuer to that question. The presiding judge allowed the question and the pursuer excepted. The witness then deponed that the defender had stated that the pursuer was the father of her child. The defender herself had already deponed, no objection being taken thereto, that she had made that statement to the witness in question and to another person who was not adduced as a witness. (*b*) Later in the trial a police inspector, who, in connection with a criminal charge made against the pursuer by the defender and her father, had interviewed the defender's employer, gave evidence. The employer had in giving evidence stated that he had not been asked by the inspector to give the names of people who had seen the pursuer and defender together, and that he had not declined to do so. The police inspector stated that he had asked the employer to give the names of any persons who had seen the parties together, and he was then asked what answer he got. That question was objected to, and having been disallowed the pursuer again excepted. The jury found for the defender with regard to one only of the dates specified in the counter-issues, a date which did not correspond with the birth of the child. *Quoad ultra* upon the counter-issues they found for the pursuer, and on the issues found for the defender. *Held* (*a*) as regarded the evidence of what was stated at the confinement, (1) (*dub.* Lord Anderson) that, upon the evidence as recorded, it could not be inferred that the pursuer had waived objection to that question, merely because other evidence to the like effect had previously, without demur, been given; (2) (*dis.* Lord Anderson) that though the verdict as to the particular occasion in question was against the defender, the evidence also bore upon the general credibility of the defender, which was of great importance in the case, and consequently the evidence could not be regarded as having no effect upon the verdict in the sense of section 45 of the Court of Session (Scotland) Act 1850; and (3) that being neither a statement made *de recenti* nor being part of the *res gestæ*, the evidence as hearsay was inadmissible; and (*b*) as regarded the question put to the police inspector (*dis.* Lord Anderson) that the evidence should have been allowed as being competent in terms of section 3 of the Evidence (Scotland) Act 1852.

The competency as evidence in affiliation cases of statements made by a mother at confinement as to paternity *doubted per* the Lord President, with concurrence *per* Lord Mackenzie, Lord Skerrington, and Lord Cullen.

Alexander Gilmour, accountant, Alloa, *pursuer*, brought an action against Mary Hansen, millworker, Alloa, *defender*, concluding for £100 damages for slander.

On 26th June 1919 the Lord Ordinary (ANDERSON) approved of *issues* for the trial of the cause, which as subsequently amended were as follows:—"1. Whether on or about 29th November 1917, in the shop of the British and Argentine Meat Company, Mill Street, Alloa, the defender in the presence of John Arnott, meat salesman in the said shop, falsely and calumniously stated that the pursuer had had carnal intercourse with her, or did use words of a like import and effect, to the pursuer's loss, injury, and damage? 2. Whether on or about 3rd December 1917, in the office of Norval & Roxburgh, solicitors, Alloa, the defender falsely and calumniously stated to Alexander Lees Roxburgh, a partner of the said firm, that the pursuer had had carnal intercourse with her, or did use words of the like import and effect, to the pursuer's loss, injury, and damage? 3. Whether on or about 4th December 1917, within the said office, the defender falsely and calumniously stated to the said Alexander Lees Roxburgh that the pursuer had had carnal intercourse with her, or did use words of the like import and effect, to the pursuer's loss, injury, and damage? Damages laid at £100."

On the same date the Lord Ordinary (the defender having pled *veritas*) approved of *counter-issues*, which as subsequently amended were:—"1. Whether in the months of November or December 1916, June 1917, and November 1917, or one or more of said occasions, in a wood near Alloa, the pursuer had sexual intercourse with the defender? 2. Whether on Monday, 6th August 1917, and Wednesday, 15th August 1917, or either of them, the pursuer within his house at 96 Tullibody Road, Alloa, had sexual intercourse with the defender."

On 29th January 1920 the jury returned the following *verdict*—"Say upon their oath that in respect of the matters proved before them yesterday and to-day they unanimously find on the first of the counter-issues (as amended) for the defender that in November 1917 the pursuer had sexual inter-

course with the defender, and find for her accordingly; *quoad ultra* on said counter-issues (as amended) they unanimously find for the pursuer; and on the issues (as amended) for the pursuer they unanimously find for the defender."

The pursuer brought a *bill of exceptions* and moved for a new trial. The bill of exceptions set forth—"By arrangement of counsel for the parties and with approval of Lord Anderson, the defender in the action led in the proof and adduced evidence in support of the counter-issues. One of the witnesses adduced by the defender was Mary Hansen, aunt of the defender, who deponed that she stayed with the defender's father, and that on the night of 21st March 1918, when the defender's child was born, she helped the defender, who was very ill and was thought to be dying, in her confinement. The following question was then put to the witness by counsel for the defender—'At that time did she say to you who was the cause of her condition?' Whereupon counsel for the pursuer objected to the question on the ground that any statement made by the defender at the said time was incompetent and not admissible as evidence against the pursuer in this case. Lord Anderson repelled the said objection, whereupon counsel for the pursuer did then and there except to the said ruling of Lord Anderson. The defender having closed her case counsel for the pursuer addressed the jury and thereafter proceeded to lead evidence in the cause. One of the witnesses for the pursuer was Inspector Walter Campbell, of the Alloa Burgh Police Force, Alloa, who deponed in the course of his examination-in-chief that he was present with the Chief-Constable on 6th December 1917 when the defender Mary Hansen and her father lodged a charge against the pursuer; that he made investigations in connection with the said charge, and in the course of such investigations had an interview with John Arnott, one of the witnesses for the defender, and that he asked Arnott if he could tell him (the inspector) the names of any persons who had seen Hansen and Gilmour walking about together. The witness was then asked by counsel for the pursuer—'What did he' (Arnott) 'answer?' Whereupon counsel for the defender objected to the said question on the ground that the statements would be hearsay and were not evidence in this case against the defender. Lord Anderson sustained the said objection, whereupon counsel for the pursuer did then and there except to the said ruling of Lord Anderson."

Argued for the pursuer — On the first exception the pursuer was right, and the evidence should not have been allowed. It was a statement made by the defender, not *de recenti* but *ex intervallo* — Dickson on Evidence, section 262; *Hill* v. *Fletcher*, 1847, 10 D. 7; *A B* v. *C D*, 1848, 11 D. 289. The evidence to which the second exception related should have been allowed. No question of hearsay arose, for the object of the question was directed solely to show that information had been refused and therefore prejudice shown, not to prove by the statement of the witness anything relating directly to the point at issue—Dickson on Evidence, section 249; *King* v. *King*, 1841, 4 D. 124. Further, the question was competent as testing the credibility of one of the witnesses for the defender who had stated that he had not refused to give information to the police—Evidence (Scotland) Act 1852 (15 and 16 Vict. cap. 27), section 3.

Argued for the defender—The questions dealt with by the first exception were rightly allowed. In affiliation cases the evidence of the doctor or midwife as to such statements was regularly allowed in practice. Further, evidence to the same effect by the defender and the doctor had been allowed without any objection by the pursuer. In any event the evidence in question was not material, and if it had been disallowed the verdict would have been the same, for the jury had decided against the defender on the only act of connection which could have related to the birth of the child. That exception should on that ground therefore be disallowed—Court of Session Act 1850 (13 and 14 Vict. cap. 36), section 45. On the second exception the bill was not in order, because it should have shown how the pursuer was entitled to get the evidence which had been rejected — *Wilson* v. *Dick's Co-operative Institutions*, 1916 S.C. 578, 53 S.L.R. 415; *Glass* v. *Paisley Race Committee*, 1902, 5 F. 14, 40 S.L.R. 17. The defender's witness had been already contradicted by the evidence which had been led prior to the question disallowed. Further, any statement of the witness in question to the police was by way of precognition, and was therefore incompetent. In any event the evidence of the witness in question had no bearing on the issues or counter-issues.

At advising—

LORD PRESIDENT (CLYDE)—This is one of two actions of damages for slander, tried before a jury, in which the pursuer complains that he has been falsely accused of improper relations with a young girl, Mary Hansen, who is herself the defender in this action, and whose employer John Arnott is the defender in the other action.

In this action the defender pleaded *veritas* and founded in counter-issues on five occasions on which she alleged intercourse. Of these five occasions three are said to have happened (in November 1916, June 1917, and November 1917) in a wood adjoining a public road, and two (on 6th and 15th August 1917) in pursuer's own house. The case at the trial turned on the defender's counter-issues, and on these the jury found in favour of the pursuer with regard to all the alleged occasions except that of November 1917. With regard to it they found in favour of the defender and they consequently found against the pursuer on all his issues. On all the occasions libelled by the defender except that in November 1917 she was under sixteen years of age.

In March 1918 the defender gave birth to a child, which died soon after. The date of the birth corresponds with the date of one of the three acts of intercourse alleged by the defender to have occurred in the wood

—that, namely, to which a date in June 1917 is assigned. The birth is therefore a piece of evidence which supports the defender's counter-issue—directly as regards the occasion in June 1917, indirectly as regards the other occasions. In the course of the proof on the defender's case—which by agreement of counsel was taken first—her aunt, who attended her at her confinement, was asked in examination-in-chief, the following question—"At that time did she say to you who was the cause of her condition?" This question was objected to by the pursuer, but was allowed, and the witness deponed that the defender said the pursuer was the father of the child. The admission of this evidence is the first point on which the bill of exceptions now before us is founded.

Where, as here, primary evidence is available, a statement made to a third party, to the effect that or implying that a particular event has occurred, is not competent evidence of the occurrence of the event. In cases of crime and of delict, and also where the facts are of an intimate personal character, statements more or less similar in their circumstances to that now in question are admitted in evidence if made *de recenti*. But it is a condition attached to their admissibility that the time elapsing between the alleged occurrence and the making of the statement must be so exiguous as to exclude the risk of concoction, consequent on reflection, or at least to reduce such risk to a minimum. In the present case the statement is made many months after the latest of the dates assigned to the alleged acts of intercourse, and in connection with the new situation created not merely by the established fact of pregnancy but by the birth of illegitimate offspring. It is said that it is usual to receive similar evidence in affiliation cases, but no decision sanctioning any general practice to that effect—if such there be—was quoted to us. The birth of the child in March 1918 was properly adduced in evidence *in modum probationis* of improper relations between the parties (particularly—but not necessarily exclusively—in June 1917). The *de quo quæritur*, however, in the present case, is not the paternity of the child, but the existence of improper relations between the parties on the occasions libelled. It is accordingly impossible to treat the defender's statement to her aunt as part of the circumstances of the alleged improper relations between the parties, and it does not come within the rule which admits such statements when forming part of the *res gestæ*.

The defender argued that evidence adduced by herself in examination-in-chief, of the statement made to her aunt had been allowed to pass without challenge, and that therefore the objection to her aunt's evidence came too late. The passage founded on is as follows—"My aunt and Mrs Wylie attended me at my confinement; I stated to them who the father of my child was, viz., the pursuer." Mrs Wylie was not examined. But it is impossible to infer from the passage I have quoted what was the form of the question which elicited the answer, or whether the pursuer had any effective opportunity for objection. I am unable to regard this as justifying the otherwise inadmissible evidence of the defender's aunt. It was further argued for the defender that as the birth of the child was directly relevant only to the alleged act of intercourse to which it corresponds in date—viz., that of June 1917—and as the jury did not find for the defender in regard to that particular occasion, the admission of evidence regarding the defender's statement to her aunt "could not have led to a different verdict from that which was pronounced"—Court of Session Act 1850, section 45. This argument is plausible, but I cannot assent to it. It is not only possible, but appears highly probable from the way in which—as was most fairly explained by defender's counsel—the defender's case was put to the jury, that the jury, while persuaded of the general credibility of the defender, only refrained from giving her their verdict in regard to the occasion in June 1917 because no such corroboration of her sole testimony was forthcoming with regard to it, as was provided (by the evidence of the wife and son of the defender of the second action) in reference to the occasion in November 1917. The case, in any view of it, is very narrow, and so much turns on the impression formed of the general credibility of the defender that it appears to me impossible to affirm that the aunt's evidence could not have affected the verdict.

My opinion therefore is that even if this ground of exception stood alone, it is sufficient to require the verdict to be set aside.

The second point founded on in the bill of exceptions arises on the proof led in the pursuer's case. In December 1917 (shortly after the defender's doctor had found her to be in the mid-term of her pregnancy) the defender and her father charged the pursuer at the local police office with seducing her when under the age of sixteen. Now John Arnott (the defender's employer), when put into the box as a witness on her behalf, had deponed in examination-in-chief that in the preceding November he had heard from his wife (who along with their young boy had already appeared as a witness and given the evidence referred to in the earlier portion of my opinion) that she had seen the pursuer and the defender in company together. He had further deponed in cross-examination as follows—"Police-Inspector Campbell did not ask me if I could tell the name of any person who had seen the pursuer and defender together. I never told the Inspector that the pursuer and defender had been seen together by several people. He did not ask me to give the names of some of the people, and I did not decline; he never asked me anything about it." In the course of the proof in the pursuer's case, Inspector Campbell deponed in reference to the charge of seduction as follows—"I had a talk with Arnott about this question. I asked Arnott if he could tell me the names of any persons who had seen the defender and the pursuer walking about together." Thereupon he was asked—"What did he answer?" To this question objection was taken by the

defender "on the ground that the statements would be hearsay, and are not evidence in this case against the defender." The objection was sustained. In my opinion the competency of this question, and of the evidence which it was directed to elicit, is undoubted. It is precisely covered by the provisions of section 3 of the Evidence Act, 1852 (15 Vict. cap. 27). Moreover, having regard to the confidentiality naturally existing between the three Arnotts, and to the high importance attaching to the credibility of each and all of the three, I have no doubt that the rejection of Inspector Campbell's evidence is a sufficient and independent ground for setting aside the verdict.

In these circumstances it becomes unnecessary to hear parties further on, or proceed to dispose of, the rule to show cause why a new trial should not be granted.

LORD MACKENZIE—I concur in the opinion of the Lord President, which I have had an opportunity of reading.

LORD SKERRINGTON—I also concur.

LORD CULLEN—I concur.

LORD ANDERSON — When the jury returned their verdict in this extraordinary case I had the impression that it was contrary to the evidence. A perusal of the recorded evidence has strengthened that impression, and I have little doubt that had the case been debated on the evidence I should have voted for a new trial, on the ground that the verdict was against the evidence.

Your Lordships have reached the same conclusion on different grounds, with which I regret I am unable to agree.

As to the first exception, in which it is maintained that incompetent evidence was improperly admitted, I agree with your Lordships that the admission of the evidence objected to cannot be justified either on the ground that it was a statement made *de recenti* or that it formed part of the *res gestæ*. It follows that if objection had been timeously taken the evidence of the defender as to what took place at the birth of her child ought to have been excluded. But that evidence was not objected to, and later on Dr Leslie gave evidence in corroboration of the defender's statement, which also was admitted without cavil. My first difficulty in reference to this exception is in holding that the defender was debarred from adducing a second witness, in the person of her aunt, to complete the corroboration which had been partially allowed without demur. It seems to me that the pursuer's counsel looking to what had occurred, had waived the potential objection to competency, and that it was too late to state that objection for the first time in connection with the deposition of a third witness as to this topic. If I had sustained the objection, and the defender's counsel had excepted, it seems to me that a more formidable attack on that ruling could have been made than on the ruling which is the subject of the first exception. It could then have been maintained that I had improperly refused to allow the defender to complete her corroboration of testimony admitted without objection. I have, however, been impressed by your Lordship's view on this point, to the effect that the right to object to incompetent evidence always remains open and can never be waived or lost, and if this had been my only difficulty in connection with this exception, I should not have considered it sufficient justification of my dissent..

But a much more formidable difficulty seems to me to arise on the terms of the 45th section of the Court of Session Act 1850, which provides that a bill of exceptions shall not be allowed upon the ground of the undue admission of evidence if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced. It is suggested that the evidence said to have been improperly admitted tended to influence the jury in their estimate of the credibility of the defender. But any impression made had already been created by the statements of the defender and Dr Leslie. It would have been a different matter if it had been proposed to lead evidence to weaken this impression and that evidence had been excluded. The evidence of the aunt cannot be said to have *created* an impression; at the best it can only be assumed to have strengthened to some extent an impression already formed. But the leading consideration on this part of the case seems to be this—that the mischief was done when the question was put to the witness, and of course objection could not have been taken until the question was formulated. The jury must have known when the question objected to was put by the defender's counsel to one of the defender's witnesses what answer was expected and what answer would have been given. The verdict therefore, in my opinion, would have been the same whether the evidence admitted had been excluded.

As to the second exception, I have much less difficulty in holding that it is not well founded. Inspector Campbell admitted that he was appointed to investigate the criminal charge made against the pursuer. In the course of his investigation he interviewed John Arnott, a prospective witness in any criminal prosecution — that is, he precognosced Arnott. The pursuer's counsel, by the question objected to, endeavoured to get from Campbell what Arnott had said on precognition. The weight of judicial opinion seems to me to be against the competency of an attempt to contradict a witness by what he said on precognition. I therefore think that the second exception it not well founded.

The Court allowed the bill of exceptions.

Counsel for the Pursuer—Sandeman, K.C. —R. C. Henderson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Defender—Watt, K.C.—Maclaren. Agent—W. A. Farquharson. S.S.C.