No 333.

But, *queritur*, What if there be no circumstances to discover the intention by presumption, or what if the circumstances in either scale weigh equally, must the presumption lie in favours of the defender and for his innocence? I think not. It is sufficient for the pursuer insisting upon a spuilzie, to show that the action was unlawful by the law of the land, for this founds an action at common law. If the defender plead the act of indemnity, it is incumbent on him to show that his case comes under the act.

Sel. Dic. No 5. p. 7.

*** The report of this case as in Fac. Col. is No 57. p. 4726. *voce* FORFEITURE.

1774. *August* 6. JEAN STEWART, in Wigton, *against* SAMUEL M'KEAND.

No 334.
Whether the oath of a person sued for the aliment of a bastard child, acknowledging that he had carnal knowledge of the mother eleven kalendar months preceding the day fixed on in the libel as the child's birthday, but not posterior to that period, affords a proof of his being the father of that child?

AN action was brought against the defender, at the instance of Jean Stewart, before the Sheriff of Wigton, for payment of a certain sum, as the maintenance of a bastard child of which she was delivered on the 3d January 1772, with the expense of inlying, and of process.

The defender having denied that he was the father of the child, the pursuer authorised her procurator to refer to his oath, if, or not, he had carnal knowledge of her within twelve months prior to the birth of the child?

It was *argued* for the defender, That he was not obliged to depone in terms of this reference, as no law could father a child upon a man because he could not purge himself of guilt with a woman for twelve months prior to the birth. The Sheriff, however, ordained the defender to depone, leaving the merits of the objection to after consideration. Accordingly the defender deponed as follows: 'Depones and acknowledges to have had carnal knowledge of the 'pursuer eleven kalendar months preceding the 3d January last, being the 'time condescended on in the libel for the birth of the child, but not posterior 'to that time.' Upon advising this oath, the Sheriff assoilzied.

The pursuer then brought her cause, by advocation, before this Court, upon the following grounds; 1*mo*, That the defender had expressly acknowledged his having carnal dealings with the pursuer, and no regard could be had to his quality as to the time, because it was not to be supposed that his memory could be exact in that particular; 2*do*, That it was possible a woman might go for eleven months with child, particularly with the first child.—Upon a motion of the pursuer's, the defender was also re-examined, upon special interrogatories, by authority from the Lord Ordinary, who afterwards reported the case to the Court.

The pursuer admitted, that, upon this last examination, nothing very material had occurred: It only appears, that the eleven months, the defender had formerly deposed to, were as scrimp as possible. But the question between the

parties resolved into this short one, Whether, when a woman produces a bastard child, averring that a particular person is the father of the child, and that person acknowledges that he has had carnal intercourse with the woman, but that eleven months intervened between such intercourse and the birth, is that person to be considered in law as the father of the child, so far as to subject him to the maintenance thereof?

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Upon this point, so far as the defender had founded upon the Roman law, particularly L. 3. § 11. *D. De suis et legit. hæred.* the pursuer *pleaded*, 1*mo*, That the rules of the Roman law, concerning the duration of pregnancy, could by no means be admitted in this country, where the climate, and the habit and constitution of the bodies of the inhabitants was so extremely different from what prevailed in those countries, for which the Roman law was calculated: That questions of this kind depended not upon the opinion of lawyers, nor upon any positive institusion, but upon inquiries into the operations of nature, which were different in different countries; and in the colder climates, in those matters particularly which respect procreation, much more slow than in warm climates.

Now, in this climate, it was by no means a very extraordinary thing for women to remain pregnant for a longer term than ten months. In the course of this question, the cases of four other women have been condescended on, which had fallen under the immediate observation of those in and about the town of Wigton; and if so narrow a corner of the country produced so many instances of this sort, it was not to be doubted that a more general inquiry through the country of Scotland would show, that it is no uncommon thing in this climate for the duration of pregnancy to run out to a much longer period than ten months.

2*do*, A question concerning the maintenance of a bastard child was of a very different nature from a question concerning the right of succession to an estate. In the former case, it is by no means the interest of the public that any particular period should be fixed as the complete term of pregnancy. The interest of the public requires, that if there can be shown, from the course of nature, a simple possibility of the pregnancy being owing to the acknowledged intercourse, the person who has had the intercourse, and in so far has infringed the laws of society, should be subjected to the expense of maintaining the child rather than the public, who is only to be subjected *ex necessitate*, when no other person on whom an obligation lies can be pointed out. And, on this head, the pursuer referred to the authority of *Paulus Zachius*, in his *Quæstiones Medico-legales*, who, though himself a Roman physician, admits the possibility of women continuing pregnant for the space even of twelve months, or upwards; yet, in his title *De Partu Legitimo*, says, that, in questions of legitimacy, such cases are not attended to on account of their unfrequency: Lib. 1. tit. 2. quæst. 6. No 4. But, though this has appeared to be a reasonable rule for determining questions of legitimacy in more southern climates, the same

No 334. rule has not by more northern nations, of which there is a strong instance in Sandes *Decisiones Frisicæ*, lib. 4. tit. 8. defin. 10.

Answered, upon the *first* point: It is clear that the time of the defender's connection with the pursuer is precisely ascertained from his oath before the Sheriff, and what he says expressly in the subsequent oath, 'that the last time 'he had carnal knowledge of her was upon the 3d or 4th of February 1771, new style; that it was at his own house, and that he had no acquaintance with her since;' which stands corroborated by collateral circumstances referred to in his oath. And the pursuer herself did plainly betray her consciousness of the fact, by making her reference in the above terms, going back to the distance of no less than twelve months.

The cause, therefore, comes entirely to the *second* point, Whether the defender can be held to be the father, because he lay with the mother at the distance of eleven months prior to the birth of the child? or, in other words, Whether it can be presumed that this child lay eleven months in the mother's womb, from the time of conception to its birth?

Such a presumption would be most unnatural and violent. That mistakes sometimes happen, with regard to a woman's going with child, may be true. Nothing can be more uncertain than the opinions and conjectures of women on this head. But the present question is entirely of a different nature; for that the periods are fixed and ascertained, so that either the pursuer must have gone eleven months, or it is impossible that the defender can be the father.

That nine months are the natural period of duration of a woman's pregnancy, is a proposition which cannot well be disputed, because it is consistent with the knowledge of the whole world; and it is laid down, by writers on this subject, that every birth which happens before or after that period is preternatural. *Vide* Dr Johnston's System of Midwifery, published in 1769, p. 186—And the defender has been informed, by gentlemen of knowledge and practice in midwifery, that there is not one well-vouched instance to be found of a woman being delivered of a living child after ten months from the time of conception: A birth cannot be protracted so long, unless either the woman or the fœtus is diseased.

In questions concerning bastardy, the law has been so far favourable to the state of legitimacy, as to presume for the child being lawful if born at any time within ten months after the husband's death; because naturally the ninth month ought to be elapsed before the child is produced; and if the birth happens at any time within the currency of that month in which it ought to happen, the law considers it to be no great stretch in favour of legitimacy, to hold this birth to be lawful; but still the rule is limited to the currency of the tenth month, and no lawyer ever carried it farther. *Vide* Bankton, B. I. tit. 2. § 3. Erskine, B. 1. T. 6. § 50.

It requires no argument to evince what must be consistent with daily experience and observation, that the usual term of pregnancy in this country is nine

months, and that the climate of Scotland has by no means the effect, which the pursuer would ascribe to it, of protracting the time of child-bearing to eleven months from the time of conception, or at all beyond the time of nine months. The rule laid down by our lawyers is founded upon nature itself, and it would be absurd to suppose it derived its only authority from the civil law.

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Neither will the Court enter into the fanciful distinctions which the pursuer endeavours to make between questions of succession and questions concerning the maintenance of bastard children. The defender can observe no ground, either in reason or law, for supposing that a pregnancy may last eleven months in the one case, and not in the other.

The case quoted from Sandes is nothing to the purpose. This foreign decision, attended with so many particular circumstances, and so clearly against every principle, can have no weight with this Court in the present case.

Lastly, The pursuer's character is a circumstance which ought to have some degree of weight in the cause. It was averred, in the inferior court, that she was a woman of loose character, and was well known to have connections with others. The defender is ready to prove this, if necessary; and that, even since this cause came into Court, she has had a bastard child, of which she will not pretend to say the defender is the father.

Nota. The last-mentioned circumstance was admitted to be true at advising, of which a minute was ordered to be taken down.

The Lords 'assoilzied the defender.'

Act. *Crosbie.* Alt. *Ilay Campbell.* Clerk, *Tait.*

Fol. Dic. v. 4. *p.* 135. *Fac. Col. No* 132. *p.* 349.

1753. *January* 2.

Mary Burns *against* Alexander Ogilvie, Merchant in Dundee, and his Children.

No 335.
A person pursuing as executor, for payment of a sum due to one said to be dead, must prove the death. The decree-dative is not sufficient evidence.

A legacy of 4000 merks was left to John, James, Alexander, Mary, and Jean Burns, children of John Burns of Middle-mill. John, the eldest of the legatees, uplifted the legacy for himself, and as factor for his brothers and sisters. James and Alexander went to sea; and James, before he went abroad, executed a testament, nominating John his executor and universal legatar.

John made a will in favour of his sister Jean, and died in 1734; Jean was married to Alexander Ogilvie, and died in 1743, leaving children.

In 1744, Mary Burns was decerned executrix to her two brothers James and Alexander. She had set forth in the edict, that James died at Bombay in April 1743, and that Alexander died upon the coast of Spain in July said year. Upon this title she brought an action against Alexander Ogilvie and his children, as representing the deceased Jean Burns, to make payment to her of